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China-Africa Investment Treaties: Old Rules, New Challenges

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CHINA-AFRICA INVESTMENT TREATIES: OLD
RULES, NEW CHALLENGES

*Won Kidane & Weidong Zhu**

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INTRODUCTION

The extraordinary rise in the last decade of Chinese investment in Africa¹ continues to be a subject of profound curiosity.² That is largely because it defies the centuries-old norm on who invests where. Traditionally, the bulk of foreign investment had flowed North-South but rarely South-South.³ Whenever and wherever it occurred, the means of its protection ranged from direct military intervention⁴ to a bona fide and

1. Detailed information on 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. See, e.g., David Smith, *Hillary Clinton Launches African Tour with Veiled Attack on China*, *GUARDIAN* (London), Aug. 1, 2012, <http://www.guardian.co.uk/world/2012/aug/01/hillary-clinton-africa-china> (“Hillary Clinton, the US secretary of state, has started an 11-day tour of Africa by contrasting America’s commitment to democracy and human rights with rival powers’ focus on exploiting resources. Although Clinton did not mention any country by name, her remarks will be widely interpreted as a swipe at China, which eclipsed the US as Africa’s biggest trading partner three years ago.”). A growing academic literature covers this subject. See generally DEBORAH BRAUTIGAM, *THE DRAGON’S GIFT: THE REAL STORY OF CHINA IN AFRICA* 308 (2009) (“Where the West regularly changes its development advice, programs, and approach in Africa . . . China does not claim to know what Africa must do to develop. China has argued that it was wrong to impose political and economic conditionality in exchange for aid, and that countries should be free to find their own pathway out of poverty.”); CHRIS ALDEN, *CHINA IN AFRICA* (2007); *CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE* (Robert I. Rotberg ed., 2008); *CHINA RETURNS TO AFRICA: A RISING POWER AND A CONTINENT EMBRACE* (Chris Alden et al. eds., 2008); SARAH RAINE, *CHINA’S AFRICAN CHALLENGES* (Tim Huxley ed., 2009); DAVID H. SHINN & JOSHUA EISENMAN, *CHINA AND AFRICA: A CENTURY OF ENGAGEMENT* (2012); IAN TAYLOR, *CHINA AND AFRICA: ENGAGEMENT AND COMPROMISE* (2006).

3. See U.N. CONFERENCE ON TRADE & DEV. [UNCTAD], *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 (Norbert Lebale et al. eds., June 18, 2010) [hereinafter UNCTAD, *ECONOMIC DEVELOPMENT IN AFRICA REPORT*], available at http://unctad.org/en/Docs/aldcafrica2010_en.pdf. In development discourses, the terms “North” and “South” are typically used to signify the level of development of countries. All African countries ordinarily fall under the South category. *Id.* at 1.

4. See, e.g., Louis T. Wells, *Preface* to *THE EVOLVING INTERNATIONAL INVESTMENT REGIME*, at xvi (José E. Alvarez et al. eds., 2011) (“In the rather distant past, the United States and other rich countries would occasionally act militarily or insist on state-state

equitable legal framework.⁵ China had experienced the full range of treatments in its long history of dealings with the West,⁶ as had Africa.⁷ Although they went through the spectrum of experiences independently, they seem to have been exposed to the same set of evolving principles at about the same time in varying degrees.⁸

In the Twenty-first Century, International Investment Agreements (“IIAs”), particularly Bilateral Investment Treaties (“BITs”), have become the principal means of protection of foreign investment.⁹ These investment treaties themselves lay along a spectrum representing the balance of power of their own era. For example, the recently announced 2012 US BIT Model, which is the fourth model, may be taken as an approximate representation of the most contemporary

arbitrations when their investors claimed mistreatment abroad. Later, the United States would threaten (and occasionally act) to cut off aid, vote against loans by multilateral financial institutions to offending countries, and cancel trade preferences . . .”).

5. The negotiated legal framework is dominated by Bilateral Investment Treaties (“BITs”) in recent times. See ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 554–55 (2d ed. 2008).

6. See JAMES M. ZIMMERMAN, *CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES* 41–54 (3d ed, 2010). Most notable are the “unequal treaties” signed between China and the major Western powers including the United States, Great Britain, and France, which gave these countries extraterritorial jurisdiction in China in matters involving their own citizens. *Id.* at 41–44. Currently, China has a web of at least 126 duly negotiated BITs with a wide range of countries, including many European countries. NORAH GALLAGHER & WENHUA SHAN, *CHINESE INVESTMENT TREATIES* 31 (2009).

7. See RICHARD ROBERTS & KRISTIN MANN, *Law in Colonial Africa*, in *LAW IN COLONIAL AFRICA* 10 (1991) (“In the first half of the nineteenth century, the balance of power between Europeans and Africans shifted decisively in favor of the Europeans. Industrialization had widened the material and technological gap between their cultures. Europeans began to feel confident for the first time that on the African coasts, if not in the interior, they could impose their will, by force if necessary.”). Currently, most African states order their investment relations through BITs.

8. See WON KIDANE, *CHINA-AFRICA DISPUTE SETTLEMENT: THE LAW, CULTURE AND ECONOMICS OF ARBITRATION* 173–76, 188–95 (2011). For a thorough discussion of the evolution of international investment law, see LOWENFELD, *supra* note 5, at 469–94.

9. LOWENFELD, *supra* note 5, at 554; 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.”).

compromises that the United States is willing to make.¹⁰ China's BITs have also gone through at least three generational modifications.¹¹ China has employed all three generations to protect its investment in Africa. Do China's BITs tell a story of a nation's rapid transformation from a recipient of Foreign Direct Investment ("FDI") to a sender of FDI? Or do they paint a more complicated picture?

China's approach to investment in Africa is said to be different from the approaches that Africa's traditional partners from Europe and North America have taken over the years. A 2010 UN Conference on Trade and Development ("UNCTAD") report describes such difference in the following terms:

[I]n contrast to Africa's relationship with traditional partners, the new partnerships often have established forums and dialogue platforms and are generally supported by frequent high-level official visits. Furthermore, they are based on the principle of non-interference in the internal affairs of partner countries. Consequently, they are not associated with policy conditionality as has been the case in relations with traditional partners.¹²

It states further that:

the big Southern partners [mainly China] generally use official flows to promote trade and investment activities in Africa. Furthermore, Southern partners do not consider their financial contributions to other developing countries as aid. Rather they describe them as 'expressions of solidarity and cooperation borne out of shared experiences and sympathies.'¹³

Although the role of China's involvement in Africa remains a subject of great controversy and heated debate,¹⁴ it is clear that

10. Office of the U.S. Trade Representative, 2012 United States Model Bilateral Investment Treaty [hereinafter U.S. 2012 Model BIT], available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

11. GALLAGHER & SHAN, *supra* note 6, at 35.

12. UNCTAD, ECONOMIC DEVELOPMENT IN AFRICA REPORT, *supra* note 3, at 24.

13. *Id.*

14. See, e.g., *The Chinese in Africa: Trying to Pull Together, Africans Are Asking Whether China Is Making Their Lunch or Eating It*, *ECONOMIST* (U.K.), Apr. 20, 2010, <http://www.economist.com/node/18586448/print> (evaluating the competing arguments). The *Economist* hosts an ongoing online scholarly debate on Chinese involvement in Africa. See *Africa and China*, *ECONOMIST* (U.K.), <http://www.economist.com/debate/overview/165> (last visited May 1, 2014). As of May 1, 2014, the score is 59% to 41% in

Africa's recent and unprecedented growth is not entirely unrelated to Chinese investment and trade.¹⁵ Be that as it may, China's economic interest in Africa is not all that different from Africa's traditional partners. Its means of pursuing its economic goals are also similar, although, as Ambassador David Shinn puts it, China employs different tactics which might make it more acceptable to Africa. In his own words:

[T]he United States and China use essentially the same political, economic, military and cultural tools for implementing their relations with Africa. The emphasis the two countries place on these tactics, however, and the way they implement policy varies considerably. China presents itself more humbly in its interaction with Africa. Having served as the leader of the Western world since the end of the Second World War and the only superpower since the end of the Cold War, the United States often comes across in Africa as insensitive¹⁶

favor of Chinese involvement in Africa. *See id.* A *New York Times* Op-Ed Piece has also discussed China's intentions in Africa:

Despite all the scaremongering, China's motives for investing in Africa are actually quite pure. To satisfy China's population and prevent a crisis of legitimacy for their rule, leaders in Beijing need to keep economic growth rates high and continue to bring hundreds of millions of people out of poverty. And to do so, China needs arable land, oil and minerals. Pursuing imperial or colonial ambitions with masses of impoverished people at home would be wholly irrational and out of sync with China's current strategic thinking.

Moreover, the evidence does not support a claim that Africans themselves feel exploited. To the contrary, China's role is broadly welcomed across the continent. A 2007 Pew Research Center survey of 10 sub-Saharan African countries found that Africans overwhelmingly viewed Chinese economic growth as beneficial. In virtually all countries surveyed, China's involvement was viewed in a much more positive light than America's; in Senegal, 86 percent said China's role in their country helped make things better, compared with 56 percent who felt that way about America's role. In Kenya, 91 percent of respondents said they believed China's influence was positive, versus only 74 percent for the United States.

Dambisa Moyo, Op-Ed., *Beijing, a Boon for Africa*, N.Y. TIMES, June 27, 2012, <http://www.nytimes.com/2012/06/28/opinion/beijing-a-boon-for-africa.html>.

15. KIDANE, *supra* note 8, at 3-4 & n.3.

16. *Id.* at 18 (quoting David H. Shinn, Adjunct Professor, George Wash. Univ., Comparing Engagement with Africa by China and the United States at the China in Africa Symposium (Mar. 6-7, 2009), available at <https://scholarworks.iu.edu/dspace/bitstream/handle/2022/3466/China%20in%20Africa%20Symposium%20-%20the%20good%20one.pdf?sequence=C2%BC1>).

The current China-Africa economic engagement is full of benefits and risks arguably to both sides.¹⁷ The legal infrastructure for the management of such risks is in a state of development. The principal legal instruments designed for this purpose are the BITs that China has already entered into with thirty-three African States.¹⁸ The principal objective of this Article is to analyze and contextualize these BITs in light of contemporary international investment law as represented by the 2012 US BIT Model as well as most current non-governmental models, mainly the International Institute for Sustainable Development (“IISD”) Model.¹⁹ By so doing, the Article presents a critical appraisal of the various Chinese BIT models and proposes certain important modifications that account for the unique circumstances of China-Africa investment relations.

This introduction is followed by a concise description of Chinese and African traditional conceptions of the ordering of economic affairs by law, in order to set the stage for a more detailed discussion of the evolution, doctrinal foundation, and contents of the existing legal framework in Part II. Part III juxtaposes the current China-Africa BITs against the most recent US and IISD BIT models and attempts to identify useful contemporary formulations and normative supplements. Part IV provides a summary of conclusions and recommendations.

17. UNCTAD, *ECONOMIC DEVELOPMENT IN AFRICA REPORT*, *supra* note 3, at 3 (“Despite the potential benefits to Africa from South–South cooperation, it should be noted that the new partnerships also present challenges for the region. For example, there are concerns that it could result in a deterioration of governance and environmental quality and also hamper efforts to achieve debt sustainability in the region. Given these concerns, it is clear that the ultimate impact of South–South cooperation in Africa will depend on the extent to which African countries are able to maximize the benefits while minimizing any potential risks.”).

18. For a list of China’s BITs with all countries as of June 1, 2013, see *Full List of Bilateral Investment Agreements*, UNCTAD (June 1, 2013) http://unctad.org/Sections/dite_pccb/docs/bits_china.pdf. Thirty-two out of the more than 120 Chinese BITs are with African states. Of the 32, 13 have come into effect. *Id.* But see *Bilateral Investment Treaty*, CHINESE MINISTRY COM. (Nov 15, 2011), <http://english.mofcom.gov.cn/article/bilateralchanges/201309/20130900300306.shtml> (listing fifteen China-Africa BITs having come into effect).

19. Int’l Inst. for Sustainable Dev., *IISD Model International Agreement on Investment* (Apr. 2005), http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf [hereinafter *IISD BIT Model*].

I. CHINESE AND AFRICAN CONCEPTIONS OF THE ORDERING
OF ECONOMIC AFFAIRS BY LAW

The widespread reception in the Eastern world and Africa of Western notions of law and legal institutions in the last century gives the appearance that, by now, such notions are deeply ingrained in the legal cultures of these societies. Although there is a grain of substance to the appearance, a closer look suggests that the respective societies' indigenous notions about the role of law and legal institutions in ordering human behavior in general and economic relations in particular remain significant.²⁰ As a background to the detailed discussion of the doctrinal foundations and contents of the various generations of China-Africa BITs in the next Part, this Part discusses the differences in legal cultures and puts the contemporary China-Africa efforts in ordering their investment relations by law in context.

A. *The Conception of Law and Legal Obligations in China*

An attempt to systematically unpack the various historical influences that have shaped the Chinese legal culture is a difficult and unnecessary exercise for purposes of this Article. It is important to note, however, that the current Chinese legal culture is a product of centuries of domestic and foreign philosophical influences. The most well-recognized of all influences is that of Confucian legal thought.²¹ The principal assumptions underlying this thought include: positive law encourages the evasion of rules and does not encourage proper behavior and fails to bring about harmony; good behavior cannot be imposed but must come from within the person; emphasis must be placed on the duties of the person rather than his rights; social hierarchy must be respected as it is the key to stability; inability to resolve disputes amicably is a sign of

20. See RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS OF THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 559–76 (3d ed. 1985); see also Philip J. McConaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA. J. INT'L L. 427, 431 (2001).

21. See generally JOHN W. HEAD & YANPING WANG, LAW CODES IN DYNASTIC CHINA: A SYNOPSIS OF CHINESE LEGAL HISTORY IN THE THIRTY CENTURIES FROM ZHOU TO QING 32–52 (2005).

weakness and law suits must be avoided as much as possible; and the application of positive law often leads to arbitrary justice.²²

As Professor James Nafziger writes:

[T]he Confucian ideal of harmony on earth, where no aberrant behavior will occur, led to an initially elitist etiquette of propriety (*li*) that increasingly influenced the entire Chinese legal system. On the other hand, for the common people, the Chinese Legalists offered the deterrent of positive law (*fa*). As time went on, the two concepts fused. This fusion has survived with alternating emphasis on *fa* and *li* through the dramatic history of the Middle Kingdom. Today, the Chinese continue to be concerned about propriety and attitudinal change just as they are intent on rapidly developing formal codes of law.²³

Chinese legal culture is also a product of years of foreign influences.²⁴ External influences came in many different forms, some welcome, others not. Most notable are the extraterritorial privileges, which exempted foreign nationals in China from Chinese legal process and subjected them to their home states' laws²⁵ and related Western demand for reform as well as Marxism-Leninism,²⁶ and investment-related legal reforms following China's opening up its economy for foreign investment in 1978.²⁷ Despite such foreign influences, the traditional notions still predominate. As Dean McConaughay

22. See generally ZIMMERMAN, *supra* note 6, at 36–38. For a more complete account, see HEAD & WANG, *supra* note 21.

23. James A. R. Nafziger & Ruan Jiafang, *Chinese Methods of Resolving International Trade, Investment, and Maritime Disputes*, 23 WILLAMETTE L. REV. 619, 624 (1987).

24. See generally GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 1–17 (1996); Weng Li, *Philosophical Influences on Contemporary Chinese Law*, 6 IND. INT'L & COMP. L. REV. 327, 327–35 (1996).

25. ZIMMERMAN, *supra* note 6, at 42. Citizens of Russia, Great Britain, the United States, France, Sweden, Norway, Germany, Denmark, the Netherlands, Spain, Belgium, Italy, Austria-Hungary, Peru, Brazil, Portugal, Japan, Mexico, and Switzerland had such privileges at different times. *Id.* at 42–43 n.17 (citing Harold Scott Quigley, *Extraterritoriality in China*, 20 AM. J. INT'L. L. 46, 51 n.21 (1926)). See Shih Shun Liu, *Extraterritoriality: Its Rise and Its Decline*, in *STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW* 840 (1925) for a discussion of the concept.

26. Following the takeover of the Chinese Communist Party (“CCP”) in 1949, the Chinese version of Marxism and Leninism became dominant. At its core, it disfavored the use of law and legal institutions for the ordering of any affairs. See ZIMMERMAN, *supra* note 6, at 51–53.

27. See *id.* at 41–54. For more discussion on the post-Mao reforms in China, see STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 3–4 (1999).

puts it, despite long-standing commercial relations with the West, “[t]he penetration in Asian societies of Western legal traditions and values is not deep.”²⁸ One of the reasons McConnaughay cites is that:

[N]ot only was law traditionally not a significant factor with respect to the ordering and performance of commercial relationships in Asia, its relatively recent enactment and application to this sphere of activity was essentially externally inspired as a condition of commerce with the West and, as such, unaccompanied by the fundamental change in *individual* attitudes and values essential to the determinative role of law and contracts in commercial affairs in the West.²⁹

It is with this important note that China’s attempt to use law to order its investment relations with Africa must be understood. In fact, as will be elaborated further in subsequent Parts, this might partly explain China’s approach to the signing and utilization, or the lack thereof, of investment treaties with African states.

B. *The Conceptions of Law and Legal Obligations in Africa*

As Judge Elias puts it, in pre-colonial African societies, customary law “strives consciously to reconcile the disputants in a lawsuit, [unlike] English law [which] often tends to limit itself to the bare resolution of the conflict by stopping at the mere apportionment of blame as between the disputants.”³⁰ With the advent of colonialism, however, as Roberts and Mann suggest, “material advancement and evangelical revival strengthened the belief of most Europeans in the moral superiority of their own civilization. Westerners equated standard of morality with standard of living, and they found both wanting in Africa.”³¹ They add further that:

The new faith of Europeans in the moral and material superiority of their own civilization convinced them that exporting their culture would be good for Africans. Trade

28. McConnaughay, *supra* note 20, at 431.

29. *Id.*

30. T. OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 268–89 (1956).

31. ROBERTS & MANN, *supra* note 7.

in agricultural commodities and conversion to Christian religion were, of course, to be the agents of change.

These fundamental shifts in the relationship between Africans and Europeans affected the character of legal interaction between them . . . Merchants, missionaries, and officials began to assume that the spread of Western legal arrangements was necessary to the growth of trade and civilization. They wanted new authorities and institutions to regulate their dealings with local people.³²

The colonial powers, of course, maintained dual systems of law for the natives and the Europeans throughout Africa. And in this dualism, as Professor Táíwò explains, “there was no interest on the part of those responsible for its introduction to plant the whole seed from which a fully grown plant might have been cultivated. Nor was there any chance that an organic system could have been [cultivated].”³³ The result was a total disorientation upon the arrival of independence. Professor René David describes it well when he says, “[t]he colonial powers did declare, as a matter of principle, their intention to respect customary law, but the actual measures implemented with a view to guaranteeing its application resulted in its complete deformation.”³⁴

Finally, as Judge Elias concludes, “it is at least doubtful whether complete uniformity will ever be achieved.”³⁵ However, the impact of Western legal cultures on existing legal cultures in Africa is evident.³⁶ But again, it is important to keep in mind that, similar to the Chinese legal culture, African legal culture emphasizes harmony: “[R]ather than . . . the strict enforcement

32. *Id.* at 11.

33. OLÚFÉMI TÁÍWÒ, *HOW COLONIALISM PREEMPTED MODERNITY IN AFRICA* 169 (2010). This is because the rule of law “originated as a . . . weapon in the arsenal of the colonial authorities for the singular purpose of keeping the colonies and protectorates safe for the colonizers and the natives in their place.” *Id.* For a similar argument, see Robert J. Gordon, *The White Man’s Burden: Ersatz Customary Law and Internal Pacification in South Africa*, in *FOLK LAW* 367, 387 (Alison Dundes Renteln & Alan Dundes eds., 1994) (“Power is at its most durable and intense when running silently through the repetition of institutionalized practices . . . [serving] as grids which officials can use to justify, sort, order and reorder the elements of power they have.”).

34. DAVID & BRIERLEY, *supra* note 20, at 561.

35. ELIAS, *supra* note 30, at 274.

36. For the specific aspects of the impact, see *id.* at 274–301.

of law, its purpose[] [is] to reconcile the parties and to restore harmonious relations within the community.”³⁷

*C. The Ordering of China-Africa Economic Relations by Law:
Contemporary Efforts*

In recent years, headline news around the world routinely announces multi-billion dollar deals between China and African partners.³⁸ With a tenfold increase in the last decade alone, the amount of trade between China and Africa stood at US\$166 billion by 2012,³⁹ surpassing Africa’s trade with the United States as of 2009.⁴⁰

Africa has become a preferred destination for Chinese investment as well. As of July 2012, about 2000 Chinese enterprises had collectively invested US\$15 billion in Africa, which is expected to grow exponentially in the coming years.⁴¹ For example, the first China-Africa forum for local government cooperation in 2012 welcomed 1700 delegates from forty African countries to China.⁴² As indicated above, the Fifth FOCAC Summit concluded by committing US\$20 billion in credit for Africa in three years. The most recent policy pronouncement with respect to investment is contained in the

37. DAVID & BRIERLEY, *supra* note 20, at 551.

38. *See, e.g., China Pledges \$20bn in Credit for Africa at Summit*, BBC NEWS (July 19, 2012, 2:03 AM), <http://www.bbc.co.uk/news/world-asia-china-18897451>.

39. *See* H.E. Hu Jintao, President of the People’s republic of China, Speech at the Opening Ceremony of the Fifth Ministerial Conference of the Forum on China-Africa Cooperation (July 19, 2012) [hereinafter FOCAC Speech], *available at* http://news.xinhuanet.com/english/china/2012-07/19/c_131725637.htm; Wang Xiaotian, *Trade between China, Africa Strengthening*, CHINA DAILY (July 19, 2012), http://www.chinadaily.com.cn/business/2012-07/19/content_15599626.htm (“Trade between China and Africa reached \$160 billion in 2011, up by 28 percent from the previous year, according to the most recent data released by the Ministry of Commerce. In the past 10 years, bilateral trade has been growing at an average pace of 33.6 percent per year.”). According to a report from the Ministry of Commerce, China, the trade volume between China and Africa in 2012 was US\$198.5 billion. *See* MINISTRY OF COMMERCE, *China-Africa Trade Volume Reached New Height* (Apr. 18, 2013, 11:31 AM), <http://finance.china.com.cn/news/gnjj/20130418/1397454.shtml>.

40. Moyo, *supra* note 14.

41. *See* FOCAC Speech, *supra* note 39.

42. Mu Xuequan, *Chinese Entrepreneurs Urged to Help Boost Sino-African Ties*, FOCAC (Aug. 28, 2012), <http://www.focac.org/eng/zfgx/jmhz/t964316.htm>.

latest Ministerial Action Plan for the years 2013–2015 issued at the conclusion of the Fifth Beijing Ministerial conference.⁴³

43. Forum on China-Africa Cooperation, The Fifth Ministerial Conference of the Forum on China-Africa Cooperation Beijing Action Plan, Beijing, China, July 23, 2012 [hereinafter Fifth FOCAC Action Plan], *available at* <http://www.focac.org/eng/zxxx/t954620.htm>. It reads in full:

4.2 Investment and Enterprise Cooperation

4.2.1 The two sides expressed satisfaction with the steady growth of two-way investment between China and Africa, especially the fast increase of China's investment in Africa in broader areas since the Fourth Ministerial Conference of FOCAC in 2009. They maintain that this helps intensify economic links between the two sides and boost local economic development and employment.

4.2.2 The two sides promised to continue to encourage and support mutual investment, and will actively explore new areas and ways to expand investment cooperation. The two sides will continue to push forward negotiations and implementation of bilateral agreements on promoting and protecting investment, foster an enabling investment environment and safeguard the legitimate rights and interests of investors of both sides.

4.2.3 The Chinese government will continue to encourage and support capable and reputable Chinese companies to invest in Africa, and guide Chinese companies to establish processing and manufacturing bases in Africa, help raise the added value of African exports, and increase investment in such service sectors as business services, transport, consulting and management to raise the level and quality of cooperation.

4.2.4 The Chinese side will continue to make good use of the China-Africa Development Fund and gradually scale it up to US\$5 billion to strengthen China-Africa cooperation.

4.2.5 The Chinese side will continue to support the development of overseas business cooperation zones established in Africa and, in addition to helping entry of Chinese and African enterprises into the zones, support them in fitting into the strategic focus of the zones to realize faster utilization of the zones so that they contribute towards rapid industrialization and economic restructuring in Africa. China will encourage enterprises joining the zones to increase links with local enterprises and communities, strengthen technology and experience sharing on the shop floor and enhance technology transfer and job creation.

4.2.6 The Chinese side will continue to strengthen cooperation with Africa on technology and management, step up technological support and experience sharing and help African countries enhance their capability for independent development.

4.2.7 The two sides noted the positive outcomes of the Fourth Conference of Chinese and African Entrepreneurs and will further encourage the business communities of the two sides to strengthen cooperation. The Chinese government will continue to guide Chinese enterprises to actively fulfill social responsibilities and give back to the local communities.

4.3 Infrastructure Construction

4.3.1 The two sides agreed to prioritize infrastructure in China-Africa cooperation and strengthen cooperation in transport, telecommunications,

The most important highlights are: the commitment to negotiate and implement bilateral investment agreements which are designed to promote and protect investment showing the increased importance that they have assigned to these treaties; the plan to raise the China-Africa investment fund to US\$5 billion; the continuation of the building of economic zones⁴⁴ to foster rapid economic growth; and the provision of preferential loans to Chinese companies for infrastructure development. These commitments show that Chinese investment in Africa will continue at a much higher rate and that the investment is supposed to be protected by law, specifically by bilateral investment treaties.

II. THE DOCTRINAL FOUNDATION AND EVOLUTION OF THE LEGAL FRAMEWORK IN CHINA-AFRICA INVESTMENT RELATIONS

Apart from the “soft law”⁴⁵ commitments enshrined in the FOCAC Declarations and Action Plans,⁴⁶ the most important

radio and television, water conservancy, electricity, energy and other areas of infrastructure development.

4.3.2 To support Africa in achieving connectivity and integration and developing more integrated infrastructure, China and the African Union will establish a cooperative partnership in the design, inspection, financing and management of projects under the Program for Infrastructure Development in Africa and the Presidential Infrastructure Championing Initiative, strengthen relevant dialogue and exchanges, and provide support for the project planning and feasibility study.

4.3.3 The Chinese government will continue to encourage capable Chinese enterprises and financial institutions to participate in transnational and trans-regional infrastructure construction in Africa and provide preferential loans to support infrastructure building in Africa.

Id.

44. Special Chinese Economic Zones (“SEZs”) are being built throughout Sub-Saharan Africa. Five such zones have already been approved and are under construction. See Deborah Brautigam et al., *China’s Investment in African Special Economic Zones: Prospects, Challenges, and Opportunities*, WORLD BANK ECON. PREMISE, Mar. 2010, at 1.

45. Black’s Law Dictionary defines “soft law” as “[c]ollectively, rules that are neither strictly binding nor completely lacking in legal significance.” BLACK’S LAW DICTIONARY 1193 (9th ed. 2009). For a detailed discussion of the “soft law”–“hard law” distinction and significance, see Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 707–08 (2010).

sources of law in China-Africa investment relations are the existing thirty-five BITs. At least sixteen of the thirty-three have already come into effect.⁴⁷ Before the provisions of these BITs are analyzed in detail in Part III below, it is important to consider the doctrinal foundation and the dilemma that continues to afflict them as China attempts to balance its role as a recipient of Western investment and as a sender of an increasing amount of investment to Africa.

A. *The Doctrinal Dilemma and Evolution of China-Africa BITs*

The greatest dilemma in foreign investment has always been the extent of protection that such investment must get. This Part looks at these issues vis-à-vis China-Africa investment relations.

1. The Doctrinal Dilemma

In 1938, writing to the then-Minister of Foreign Affairs of Mexico in relation to Mexico's expropriation of agrarian property owned by Americans, US Secretary of State Cordell Hull said:

The taking of property without compensation is not expropriation. It is confiscation We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law.⁴⁸

Mexico obviously rejected any notion that foreign nationals could have superior property rights,⁴⁹ endorsing what is

46. All of the declarations and Action Plans of the last ten years containing commitments on trade and investment are available on the FOCAC website at <http://www.focac.org/eng/>.

47. All the China-Africa BITs and their statuses are listed on the official website of the Chinese Ministry of Foreign Commerce at <http://english.mofcom.gov.cn/article/bilateralchanges/201309/20130900300306.shtml>.

48. Letter from U.S. Secretary of State to Mexican Ambassador to the United States (July 21, 1938), *excerpted in* LOWENFELD, *supra* note 5, at 476–77.

49. *Id.* at 477 (“My Government maintains [that] . . . there does not exist in international law any principle universally accepted by countries, not by the writers of treatises on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character. Nevertheless,

commonly called the Calvo Doctrine, which rejects any notion that foreign investors could have a better right to property than nationals.⁵⁰ As the US Supreme Court noted in *Banco Nacional de Cuba v. Sabbatino*,⁵¹ “[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state’s power to expropriate the property of aliens.”⁵² This question is rooted in the varying conceptions of the function of the right to private property itself. The conceptions range from the purely laissez-faire function of private property which gained its best articulation in a series of cases that the US Supreme Court passed in an era dubbed the Lochner era.⁵³ Highly influenced by Western enlightenment philosophers such as Hobbes,⁵⁴ Locke,⁵⁵ Montesquieu,⁵⁶ and

Mexico admits, in obedience to her own laws, that she is indeed under obligation to indemnify in an adequate manner, but the doctrine which she maintains on the subject, which is based on the most authoritative opinions of writers of treatises on international law, is that the time and manner of such payment must be determined by her own laws.” (alteration in original)).

50. A good expression of the Calvo Doctrine, named after its Argentine proponent, Carlos Calvo, is contained in the following passage:

It is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended. If they suffer any wrong, they ought to count on the government of the country prosecuting the delinquents, and not claim from the state to which the authors of the violence belong any pecuniary indemnity The rule that in more than one case it has been attempted to impose on American states is that foreigners merit regard and privilege more marked and extended than those accorded even to the nationals of the country where they reside. The principle is intrinsically contrary to the law of equality of nations.

DONALD R. SHEA, THE CALVO CLAUSE 17–19 (1955), *quoted in* LOWENFELD, *supra* note 5, at 473 n.13.

51. 376 U.S. 398 (1964).

52. *Id.* at 428.

53. This era covers roughly the time period between 1890 and 1937. The most important cases during this era include: *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a New York law prohibiting bakery work for more than sixty hours a week on grounds that it violates the rights of the contracting parties to freely enter into any type of contract regardless of the possible harm to the workers); *Smyth v. Ames*, 169 U.S. 466 (1898) (striking down a Nebraska law relating to a minimum railway fare); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (holding that a manufacturing monopoly of ninety-eight percent of the country’s sugar refining may not be prohibited).

54. Thomas Hobbes (1588–1679). His major work is typically considered to be *Leviathan* (1651).

55. John Locke (1632–1704). His major work included *Two Treatises of Government* (1690), which was instrumental in the drafting of the US Declaration of Independence.

Rousseau,⁵⁷ this notion emphasizes the inviolability of the right to property. On the opposite side of this spectrum lies the Marxist conception of property, which directly links the ownership of means of production to the “exploitation of man by man.”⁵⁸

Some variations of the latter conception seem to have had more acceptance in the traditional Chinese as well as African societies. Confucian emphasis on social obligations rather than individual rights, for example, and the pursuit of communal harmony is believed to have had an enduring influence on Chinese society down through the ages.⁵⁹ The customary African notions of property are similar. A Nigerian Chief once aptly described it as follows: “I conceive that land belongs to a vast family of which many are dead, few are living, and countless members are unborn.”⁶⁰ Judge Elias notes that these conceptions are common to many African societies.⁶¹

Although it is difficult to directly link traditional notions of property to developments that occurred in the post-colonial era in China and Africa, it is not surprising that the Marxist conception of property made more sense to the Chinese and African societies. Indeed, in the post-colonial period, no political ideology has had a more profound influence in the Chinese⁶² and African societies.⁶³ As China, still officially a

56. Charles Montesquieu (1689–1755). His major work was *The Spirit of Law* (1748).

57. Jean-Jacques Rousseau (1712–1778). His major work was *The Social Contract* (1762).

58. KARL MARX & FREDERICK ENGELS, *THE COMMUNIST MANIFESTO* 24 (D. Ryazanoff ed., Eden Paul & Cedar Paul trans., Atheneum Publishers 1963) (1848).

59. ZIMMERMAN, *supra* note 6, at 36–38. Recent modifications are sometimes called “Neo-Confucianism.” See, e.g., MACCORMACK, *supra* note 24, at 3. The basic conceptions seem to have endured.

60. ELIAS, *supra* note 30, at 162 (quoting a statement made by a Nigerian chief to the West African Lands Committee in 1912).

61. *Id.* at 162 & n.1.

62. See Pat K. Chew, *Political Risk and U.S. Investment in China: Chimera of Protection and Predictability?*, 34 VA. J. INT'L L. 615, 625 (1994) (“After the Communist regime took control of the government in 1949, it began a nationalization and expropriation process. While political circumstances are very different today, the fact that some of the current Chinese leaders were part of the early party power structure suggests that these events may be of more than mere historical interest. In 1936, there were over \$3.48 billion in foreign investments in China. Japan and Great Britain led in total investments, followed at some distance by the United States and France. After the Communist revolution, China began a “slow motion nationalization” program

communist state,⁶⁴ pursues a state-led, socio-capitalist economy, which started with its opening-up policy in 1978,⁶⁵ and many post-colonial Africa states attempt to do the same,⁶⁶ their respective existing economic systems are as complicated as their respective societies and defy easy classification. In addition to the ideological underpinnings, practical considerations also dictate the contents of investment treaties that China is entering into with its Western as well as African partners. But, how do these long-standing notions of ownership of private property and the novelty of the new South-South economic partnership get expression in the investment treaties? It is a difficult question because ordinarily investment treaties are negotiated in North-South economic partnerships, which almost invariably represent competing notions of the function of private ownership of property and the extent of its protection from government intervention. Regardless of their success rate, Southern partners, who are almost invariably the recipients of the investment, have traditionally focused on their right to regulate while the Northern partners aggressively negotiated BITs that provided the maximum possible protection to their investment. China and Africa share similar philosophical viewpoints, not only regarding the function of property, but also concerning negotiated investment treaties with their wealthier

resulting in the virtual termination of all direct foreign investment by 1957.” (citations omitted)).

63. Beverly I. Moran, *Homogenized Law: Can the United States Learn from African Mistakes?*, 25 *FORDHAM INT’L L.J.* 361, 367 (2001) (citing MICHAEL HODD, *THE ECONOMIES OF AFRICA* 34–35 (1991)).

64. See, e.g., CONST. COMMUNIST PARTY general program (2012) (China), available at http://www.china.org.cn/china/18th_cpc_congress/2012-11/16/content_27138030.htm (“The Communist Party of China takes Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, the important thought of Three Represents and the Scientific Outlook on Development as its guide to action.”).

65. That year, the new leaders of China adopted a policy called a “socialist system with Chinese characteristics.” At the time, the new leader, Deng Xiaoping, said: “It does not matter whether a cat is black or white, as long as it catches mice.” GALLAGHER & SHAN, *supra* note 6, at 5 (citing *China’s Communist Revolution*, BBC NEWS, http://news.bbc.co.uk/1/hi/english/static/special_report/1999/09/99/china_50/deng.htm (last visited May 1, 2014)).

66. Moran, *supra* note 63, at 367. For a comprehensive discussion of the nature and current state of the African economy and its pitfalls, see CHARLES ROXBURGH ET AL., MCKINSEY GLOBAL INST., *LIONS ON THE MOVE: THE PROGRESS AND POTENTIAL OF AFRICAN ECONOMIES* (June 2010), available at http://www.mckinsey.com/insights/africa/lions_on_the_move.

Northern partners from the standpoint of maintaining the broadest possible regulatory authority for decades. A related question looks at the extent that China and Africa have taken these factors into account in their direct BIT negotiations. In exploring the answers to these questions, Part II.A.2 below looks at the evolution of Chinese investment treaties, which sheds some light on the evolution of the Chinese economy itself and its role in the world economic order.

2. Generational Development of Chinese BITs

Professors Gallagher & Shan divide recent Chinese foreign investment history into four periods.⁶⁷ The first period extends from the establishment of the People's Republic of China in 1949 to the adoption of China's open-door policy in 1978. During this period, although the extent of it is disputed, China conducted the nationalization of private property and expelled foreign investors through what is sometimes called "retaliatory requisition."⁶⁸

During the second period, which followed its opening-up policy and lasted until 1991, China adopted remarkable policy changes to attract foreign investment and enacted many investment-friendly laws.⁶⁹ It also entered into many IIAs, most notably thirty BITs, the International Centre for the Settlement of Investment Disputes ("ICSID") Convention,⁷⁰ and the Multilateral Investment Guarantee Agency ("MIGA") Convention.⁷¹ Most of the BITs signed during this period were with European countries. During the same time, China signed an investment insurance agreement with the United States, but

67. GALLAGHER & SHAN, *supra* note 6, at 4.

68. *Id.* at 4–5.

69. *Id.* at 6. For a more detailed discussion of Chinese Investment laws, see generally Wenhua Shan, *The Legal Framework of China-EU Investment Relations – A Critical Appraisal*, 5 *CHINESE J. INT'L L* 507, 507–09 (2006).

70. GALLAGHER & SHAN, *supra* note 6, at 6.

71. *Id.* China was a member of Multilateral Investment Guarantee Agency ("MIGA") Convention since its entry into force in 1988. Although MIGA is not a typical investment treaty, it provides insurance against political risk. See MULTILATERAL INV. GUARANTEE AGENCY, <http://www.miga.org/> (last visited Feb. 28, 2014).

never a BIT.⁷² Interestingly, China did sign a BIT with one African country during this period, namely Ghana.⁷³

During the third period, which spanned from 1992 to 2000, China saw an exponential growth in foreign investment. Indeed, FDI rose tenfold, from US\$4.3 billion in 1991 to US\$45.2 billion in 1997.⁷⁴ During this period, China signed sixty-six BITs and modified the substantive and procedural contents of the previous generation of BITs. For example, it began adopting the principle of national treatment, to some degree.⁷⁵ During this time China signed BITs with fourteen African countries: Egypt, Morocco, Mauritius, Zimbabwe, Zambia, Algeria, Gabon, Cameroon, Nigeria,⁷⁶ Sudan, Congo (Dem. Rep.), South Africa, Cape Verde, and Ethiopia.⁷⁷

The fourth and latest period, which continues to this day, began in 2001—the year of China’s accession to the World Trade Organization (“WTO”).⁷⁸ This was a period that saw consistently high levels of economic growth and transformation.⁷⁹ By the end of 2009, China was the number one recipient of FDI for thirteen years in a row.⁸⁰ It was also during this period that China consolidated what it calls its “Going Abroad” policy.⁸¹ The predicate for this policy was the State Council’s July 2004 adoption of regulations simplifying Outward Direct Investment (“ODI”) approval procedures.⁸² China also set up a new sovereign wealth fund—the China Investment Corporation (“CIC”)—with a start-up capital of US\$200 billion

72. GALLAGHER & SHAN, *supra* note 6, at 6 n.21. For a discussion of the history and prospect of a China-US BIT, see Cai Congyan, *China-US BIT Negotiations and the Future of Investment Treat Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 J. ECON. L. 457, 457 (2009) (suggesting that Chinese approach to investment treaty has been “Americanized”).

73. GALLAGHER & SHAN, *supra* note 6, app. 1 at 419 (Africa).

74. *Id.* at 7.

75. *Id.* app. 1 at 419 (Africa).

76. *Id.* Note that the China-Nigeria BIT that was signed in 1997 was abolished and was resigned in 2001.

77. *Id.*

78. *Id.* at 8–9.

79. *Id.* at 8. In numerical terms, Foreign Direct Investment (“FDI”) in China rose at the rate of eighteen percent annually, reaching US\$92.4 billion in 2008. ZIMMERMAN, *supra* note 6, at 2.

80. *Id.*

81. GALLAGHER & SHAN, *supra* note 6, at 12.

82. *Id.* at 12.

to invest some of the large reserves that it had accumulated over the years.⁸³ By the end of 2009, that capital increased to US\$2.4 trillion.⁸⁴

Currently, China is not only the largest recipient of foreign investment, but also one of the largest investors of capital in foreign countries.⁸⁵ China has signed about forty-three more BITs since it acceded to the WTO in 2001, and has initiated a process to renegotiate the BITs that it has signed previously—understandably to account for its transformation from a recipient of FDI to an exporter of ODI.⁸⁶ Out of the forty-three BITs signed in the post-WTO accession period, at least sixteen were with African countries: Congo, Botswana, Sierra Leone, Mozambique, Kenya, Cote d’Ivoire, Djibouti, Benin, Uganda, Tunisia, Equatorial Guinea, Namibia, Madagascar, Guinea, and Seychelles.⁸⁷ China’s total number of BITs, as of this writing, are about 130, among which thirty-two are with African states.⁸⁸

Each one of the three generations of BITs has its own fundamental characteristics. One of each model signed with African states is selected for detailed analysis below. Before the detailed discussion is provided, it is important to briefly identify the salient features of each generation. The first generation of Chinese BITs were signed in the 1980s; the first of these BITs was with Sweden, and indeed most were with developed states of the West.⁸⁹ These BITs are often characterized as conservative. While they accorded Most Favored Nation (“MFN”) treatment to foreign investors, they did not extend national treatment.⁹⁰

83. See Trade Policy Review Body, *Trade Policy Review Report by the Secretariat: China* 39, WT/TPR/S/199 (Apr. 16, 2008).

84. ZIMMERMAN, *supra* note 6, at 2 n.4 (citing MOFCOM, <http://www.mofcom.gov.cn>).

85. Comprehensive data is available at UNCTAD, COUNTRY FACT SHEET: CHINA (2011), available at http://unctad.org/Sections/dite_dir/docs/wir11_fs_cn_en.pdf.

86. GALLAGHER & SHAN, *supra* note 6, at 8–9.

87. *Id.* app. 1 at 420.

88. *Full List of Bilateral Investment Agreements (China)*, UNCTAD (June 2013), http://unctad.org/Sections/dite_pccb/docs/bits_china.pdf (last visited Feb. 28, 2013).

89. GALLAGHER & SHAN, *supra* note 6, at 35. Including Germany, France, Belgium, Luxembourg, Finland and Norway. *Id.* It was also during the same period that the failed China-United States BIT negotiations were commenced. *Id.* Among the developing countries that signed BITs with China during this time were Ghana and Thailand. *Id.*

90. *Id.* at 37.

Whereas they promised compensation for expropriation, the determination of the legality of the expropriation was left for local courts while the possibility of the determination of the quantum of compensation by ad hoc international arbitration was recognized.⁹¹ As a result of China's accession to the ICSID Convention, the most important feature of the second generation BITs, adopted between 1990 and 1997, was the reference to ICSID arbitration.⁹² Investor access to ICSID arbitration was, however, limited to the quantum of compensation for expropriation.⁹³ The last and current model, adopted in 1998, made both substantive and procedural changes. Substantively, among other things, it added national treatment and procedurally it accorded investors unqualified access to international arbitration, including ICSID arbitration.⁹⁴

B. *China-Africa Investment Regime—A Closer Look at BITs*

As indicated above, China currently has thirty-two BITs with African states. Sixteen of them have already come into effect.⁹⁵ Again, they encompass three generations of Chinese BITs: the first generation signed from 1982 to 1989 (period of launching of the BIT program); the second generation from 1990 to 1997 (China's accession to ICSID); and the third generation from 1998 to the present.⁹⁶

One of each is selected for analysis. China's earliest Africa BIT was with Ghana, which was signed on October 12, 1989, and came into effect on November 22, 1991. The latest to come into effect was China's BIT with Madagascar, which was signed on November 21, 2005, and came into effect on July 1, 2007.

91. *Id.*

92. *Id.* It is important to note that not all BITs signed during this time referenced to the International Centre for Settlement of Investment Disputes ("ICSID"). *Id.*

93. *Id.* at 38. This was accomplished through the submission of reservations to the ICSID Convention on the class of disputes that China agreed to submit to ICSID arbitration. *See id.* at 38 n.182.

94. *Id.* at 39–40.

95. *Full List of Bilateral Investment Agreements (China)*, *supra* note 88. The UNCTAD database shows only twelve as having come into effect but the Chinese Ministry of Foreign Commerce lists sixteen. *See* MINISTRY OF COMMERCE, PEOPLE'S REPUBLIC OF CHINA, <http://english.mofcom.gov.cn>.

96. GALLAGHER & SHAN, *supra* note 6, at 35. For a detailed discussion, see Stephan W. Schill, *Tearing Down the Great Wall: The New Generation of Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73 (2007).

Finally, the China-Ethiopia BIT has been selected, which was signed on 11 May 1998, and came into effect on May 1, 2000.⁹⁷ These three BITs represent the three generations of Chinese BITs. This section takes a closer look at the important substantive and dispute settlement provisions of each and puts the existing China-Africa investment regime in perspective.

1. Scope and Admission

The first two generations of BITs represented by China-Ghana and China-Ethiopia BITs define “investment” and “investor” in almost identical language while the third generation, represented by China-Madagascar, expands the definition in some respects. The definition contained in the China-Ethiopia BIT, which is very similar to that in the China-Ghana BIT, includes:

- (a) movable, immovable property and other property rights such as mortgages and pledges; (b) shares, stock and any other kind of participation in company, (c) claims to money or to any other performance having an economic value; (d) copyright, industrial property, know-how and technological process; e) concessions conferred by law including concessions to search for or exploit natural resources.⁹⁸

The China-Madagascar BIT replaced copyright, industrial property, know-how and technological process” with “intellectual property, commercial property and industrial property.”⁹⁹ It also expanded the concessions provision by adding “by contract” to “by law.”¹⁰⁰ A look at China’s BIT with Sweden, signed during the first period, suggests that the

97. The texts of China-Ghana, China-Ethiopia, China-Madagascar are available on the UNCTAD website. Agreement on the Encouragement and Reciprocal Protection of Investments, China-Ghana, Oct. 12, 1989 [hereinafter China-Ghana BIT], *available at* http://unctad.org/sections/dite/iaa/docs/bits/china_ghana.pdf; Agreement on the Encouragement and Reciprocal Protection of Investments, China-Eth., May 11, 1998 [hereinafter China-Ethiopia BIT], *available at* http://unctad.org/sections/dite/iaa/docs/bits/china_ethiopia.pdf; Agreement on the Encouragement and Reciprocal Protection of Investments, China-Madag., Nov. 21, 2005 [hereinafter China-Madagascar BIT], *available at* http://unctad.org/sections/dite/iaa/docs/bits/madagascar_china_fr.pdf.

98. China-Ghana BIT, *supra* note 97, art. 1; China-Ethiopia BIT, *supra* note 97, art. 1.

99. China-Madagascar BIT, *supra* note 97, art. 1.

100. *Id.*

concessions provision is stated a little differently. It reads: “such business-concessions as under public law or under contract, including concessions regarding the prospecting for, or the extraction or winning of natural resources, as given to their holder a legal position of some duration.”¹⁰¹ The use of the less elaborate concession language in the China-Africa BITs is surprising given China’s interest in the exploration of natural resources in Africa.

The promotion and admission of investment provisions of all three BITs is almost identical. The Ethiopian BIT reads in pertinent part: “Each Contracting Party shall encourage investors of the other Contracting Party to make investment in its territory and admit such investment in accordance with its laws and regulations.”¹⁰² While the admission provisions of the China-Ghana and China-Ethiopia BITs contain a provision on the facilitation of the issuance of visas and work permits to investors in the contracting states, the China-Madagascar BIT, which is the latest, omits that provision.¹⁰³ Notably, the China-Sweden BIT does not contain an admission provision. It is exclusively focused on the treatment of investment that had already been admitted.¹⁰⁴

All three generations of Chinese BITs with the African states subject the admission of foreign investment exclusively to domestic laws.¹⁰⁵ Presumably, the substantive non-discrimination provisions equalize the opportunities to all foreign investors

101. Agreement on the Encouragement and Reciprocal Protection of Investments art. 1, China-Swed., Mar. 29, 1982 [hereinafter China-Sweden BIT], *available at* http://unctad.org/sections/dite/ia/docs/bits/china_sweden.pdf.

102. China-Ghana BIT, *supra* note 97, art. 2; China-Ethiopia BIT, *supra* note 97, art. 2; China-Madagascar BIT, *supra* note 97, art. 2.

103. *See* China-Madagascar BIT, *supra* note 97.

104. China-Sweden BIT, *supra* note 101, arts. 1–2.

105. Investment treaties usually employ one of three pre-establishment approaches: a top-down approach; a bottom-up approach; and a middle-ground approach. The top-down approach applies the non-discrimination provisions to all sectors of the economy except for those expressly excluded. The bottom-up approach is the reverse of that, i.e., it applies the non-discriminatory provisions to specifically identified sectors. The middle-ground approach applies the bottom-up principle to pre-establishment and the top-down principle to post-establishment. These approaches are discussed more fully in Stefan D. Amarasinha & Juliane Kokott, *Multilateral Investment Rules Revisited*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 119, 143–44 (Peter Muchlinski et al. eds, 2008).

barring special preferential treatments tolerated under these treaties.

2. Treatment

The provisions designed to provide the rules for the treatment of admitted investment are differently formulated. The earliest provision, which is contained in the China-Ghana BIT, is entitled “Protection of Investments and Most Favored State Treatment.” It reads under that title:

1. Investments and activities associated with investments of investors of either Contracting State shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting State.

2. The treatment and protection referred to in Paragraph 1 of this Article shall not be less favorable than that accorded to investments and activities associated with such investments of investors of a third State.

3. The treatment and protection mentioned in the Paragraphs 1 and 2 of this Article shall not include any preferential treatment accorded by the other Contracting State to investments of investors of a third State based on customs union, free trade zone, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade.¹⁰⁶

The second generation, which is the China-Ethiopia BIT, modifies this in only one way: It adds “fair” to “equitable” in the first paragraph to read “fair and equitable treatment.” Given the level of investment disputes involving MFN, particularly the principle of fair and equitable treatment over the years, the omission of “fair” cannot be completely without legal significance.

The most recent BIT—China-Madagascar—modifies the treatment provision in many respects. Not only does it add national treatment in express language,¹⁰⁷ it also elaborates the

106. China-Ghana BIT, *supra* note 97, art. 3.

107. See China-Madagascar BIT, *supra* note 97, art. 4(1) (“Without prejudice to its laws and regulations, each Contracting State shall accord to investments, and activities of investments of investors of the other Contracting Party treatment not less favorable than that accorded to the investment of its own investors or to investors of any third State, if the treatment is more favorable.”).

fair and equitable and MFN provisions in more ways than one. First, it identifies the standard by which the fair and equitable principle is judged, namely, “in accordance with the principles of international law.”¹⁰⁸ It also adds that such fair and equitable treatment “shall not be impeded in laws or in fact.”¹⁰⁹ Because it is difficult to ascertain the exact meaning of the last part, the parties have added guidance. The next provision reads:

Legal or de facto obstacles to the fair and equitable treatment mainly mean, but not limited to: non-equitable treatment of all kinds of restrictions on the means of production and management, non-equitable treatment of all kinds of restrictions on sale of products at home and broad, as well as other measures with similar effect. But measures for reasons of security, public order, health, ethical and environmental protection and other reasons, these measures shall not be regarded as obstacles.¹¹⁰

This provision is unusually detailed for a fair and equitable treatment provision because it attempts, perhaps unsuccessfully, to identify measures that are and are not considered denial of fair and equitable treatment.¹¹¹ It is clear that it is a specially

108. *Id.* art. 3(1).

109. *Id.*

110. *Id.* art. 3(3).

111. One of the most recent of the Chinese BITs on the UNCTAD Database (2006) is the one with Latvia. That BIT contains standard language of Fair and equitable, Most Favored Nation (“MFN”) and National Treatment. It is reproduced below for ease of reference:

Article 3 TREATMENT OF INVESTMENT

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

2. Without prejudice to its laws and regulations, each Contracting party shall accord to investments and activities with such investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors.

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

4. Each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment, which is the most favorable of those stipulated in paragraph 2 and paragraph 3 of this Article.

5. The provisions of Paragraphs 3 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other

negotiated provision because of specific concerns. Nonetheless, it does not fundamentally change the character of this BIT as an integral part of Chinese third generation BITs.

3. Expropriation

The expropriation provisions of all three BITs are formulated differently, although the substance is more or less the same. The China-Ghana BIT is formulated in permissive language: “Either Contracting Party may, for the national security and public interest, expropriate, nationalize or take similar measures”¹¹² The limitations are “(a) under domestic legal procedure; (b) without discrimination; (c) payment of compensation.” The compensation, which must be “paid without delay,” has to be equivalent to the value of the property at the taking.¹¹³ Further, if the investor contests the legality of the expropriation under the laws of the taking state, it may request a review by the authorities of that state.¹¹⁴ Moreover, if the loss occurs as a result of emergent circumstances such as war or other types of unrest, the investor would be treated no less favorably than “a third state.”¹¹⁵ Although this is not a complete rejection of the Hull Rule, it is certainly less protective. While it appears to be indicative of the then existing Chinese view on the right to property and the extent of tolerance for government intervention as well as its position as the recipient of foreign direct investment from the West, a look at some of the BITs that it signed with Western countries almost contradicts this

Contracting Party the benefit of any treatment, preference or privilege by virtue of:

- (a) any customs union, free trade zone, economic union, monetary union and any international agreement resulting in such unions, or similar institutions;
- (b) any international agreement or arrangement relating wholly or mainly to taxation;
- (c) any arrangements for facilitating small scale frontier trade in border areas.

Agreement on the Encouragement and Reciprocal Protection of Investments, China-Latvia, Apr. 15, 2004 [hereinafter China-Latvia BIT], *available at* http://unctad.org/sections/dite/ia/docs/bits/China_Latvia.pdf.

112. China-Ghana BIT, *supra* note 97, art. 4(1).

113. *Id.* art. 4(1)–(2).

114. *Id.* art. 4(3).

115. *Id.* art. 4(4).

conclusion. For example, the China-Sweden BIT contains language more protective of investment than the China-Ghana BIT. The relevant portion of the China-Sweden BIT reads:

Neither Contracting State shall expropriate or nationalize, or take any similar measure in regard to 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 the investor would have been in had the expropriation or nationalization not taken place.¹¹⁶

This rule, apparently the codification of the Chorzow Factory rule,¹¹⁷ which is sometimes said to be a rule of customary international law, is supplemented by a subsection, which accounts for lost current income and proceeds of liquidated assets.¹¹⁸ This is one of many indications that not only did China not strictly use a particular model in each corresponding era, but also that its BITs do not support the conclusion that it systematically pursued its North-South and South-South negotiations with discernible avaricious objectives. In the above example, at that time, it would have made perfect sense for China to use the China-Sweden expropriation language, which is arguably more protective of investment, in its BIT with Ghana. It is difficult to think that it was a function of Ghana's negotiating position at that time. The argument that China probably did not have a systematic, coherent, and purely self-interested BIT program similar to the United States will be developed further.

The China-Ethiopia BIT expropriation provision changes the "Either Contracting Party may expropriate" language of the China-Ghana BIT to

Neither Contracting Party shall expropriate, nationalize or take similar measures (hereinafter referred to as ('expropriate')) against investment of the investors of the other Contracting Party in its territory, unless the following conditions are met: (a) for the public interest; b) under

116. China-Sweden BIT, *supra* note 101, art. 3(1).

117. Factory at Chorzow (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13) (requiring full restitution).

118. China-Sweden BIT, *supra* note 101, art. 3(2).

domestic legal procedure; (c) without discrimination; (d) against compensation.¹¹⁹

The compensation, which must be paid without delay, would be equal to the value of the investment at the time of the expropriation.¹²⁰ This BIT omits the war or conflict compensation provision altogether.

The China-Madagascar BIT changed the language in many different ways. Most notably, it does not even begin with expropriation or nationalization. It begins with a general investment protection statement: “Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall enjoy the full and comprehensive protection and security.”¹²¹ It then uses the more common “Neither—shall” language but elaborates the exceptions: “(a) adopting measures for public interests under good legal framework; (b) without discrimination and not contrary to the commitments of the Contracting Parties; (c) against fair compensation when adopting the measures.”¹²² In terms of the determination of fair compensation, it adds that it has to be equivalent to the value of the expropriated investment “immediately before [its taking] became public knowledge.”¹²³ It further requires the payment of interest, which shall accrue from taking to actual payment.¹²⁴ This appears to be China’s latest formulation of the expropriation provision. The language is more or less consistent with other Chinese BITs signed during this period.¹²⁵

119. China-Ethiopia BIT, *supra* note 97, art. 4(1).

120. *Id.* art. 4(2).

121. China-Madagascar BIT, *supra* note 97, art. 5(1).

122. *Id.* art. 5(2).

123. *Id.* art. 5(3).

124. *Id.*

125. *See, e.g.*, China-Latvia BIT, *supra* note 111, art. 4. Article 4 reads:

1. Neither Contracting Party shall expropriate, nationalize or take other similar measures (hereinafter referred to as “expropriation”) against the investments of the investors of the other Contracting Party in its territory, unless all the following conditions are met:

- (a) for the public interests;
- (b) under domestic legal procedure;
- (c) without discrimination;
- (d) against compensation

2. The compensation mentioned in Paragraph 1 of this Article shall be equivalent to the value of the expropriated investments immediately before

4. Investor-State Dispute Settlement

The investor-state dispute settlement provisions of the earliest BIT, namely China-Ghana, do not contain a special rule on the settlement of disputes other than the quantum of compensation.¹²⁶ Presumably, any dispute other than the quantum of compensation would be settled through the domestic legal process of the respective state. The quantum may be submitted to arbitration. Although it could be ad hoc, the default rule grants the chairman of the Arbitration Institute of the Stockholm Chamber of Commerce appointment authority,¹²⁷ presumably because of Sweden's perceived political neutrality at the time. Once constituted, the tribunal is given the option to use the rules of procedure of the Stockholm center or ICSID.¹²⁸ It is interesting to note that ICSID is mentioned even in the earliest of Chinese BITs, albeit limited to the potential use of its procedural rules.

The China-Ethiopia BIT elaborated the investor-state dispute settlement mechanism in at least six ways. First, it explicitly stated that either party may submit a claim to the domestic court of the state receiving the investment. Second, it opened the option for either party to submit disputes relating to the quantum of compensation to either an ad hoc or ICSID arbitration once both have become members of ICSID. Third, it shifted the appointment authority from the chair of the Stockholm Arbitration Institute to the Secretary General of ICSID. Fourth, it limited the options that the arbitrators have in selecting the rules of procedure to ICSID—although it did not completely take away the arbitrators' discretion in selecting other rules. Fifth, it included a choice of law provision. The chosen laws include the domestic laws of the host state (including its conflict of laws), the BIT itself, and “recognized

the expropriation is taken or the impending expropriation becomes public knowledge, whichever is earlier. The value shall be determined in accordance with generally recognized principles of valuation. The compensation shall be in a freely convertible currency. 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.

126. China-Ghana BIT, *supra* note 97, art. 10(1).

127. *Id.* art. 10(2).

128. *Id.* art 10(3).

principles of international law accepted by both Contracting Parties.” Finally, it added a provision on the allocation of cost, specifically providing that the parties bear the cost in equal proportion.¹²⁹

The China-Madagascar BIT, while preserving the ICSID option, limited the choice to the investor by replacing the “either party” with the “at the request of the investor concerned” subject to the exhaustion of local administrative remedies.¹³⁰ It also expressly provided that the awards shall be enforced under the ICSID Convention i.e., as if it were the domestic court judgment of the Contracting State.¹³¹ It further provided that “[d]uring the arbitration process or enforcement of arbitral awards, the Contracting Party related to the dispute shall not hold that the investor has received partial or total insurance compensation as defense.”¹³²

From the above discussion, it seems clear that the latest one—China-Madagascar—contains the hallmarks of a North-South BIT, with greater protection given to the investor, which is almost exclusively Chinese; however, as the above discussion shows, it cannot be concluded that China-Africa BITs, as might be expected, are systematically or progressively acquiring a North-South character. If anything, unlike the United States, the analysis suggests that China has not pursued a strict and intentional model-based BIT negotiations which reflects its growing negotiating power. It is not clear whether this is because of benevolence, cultural preference, tactical approach, or sheer incoherence. There is almost no doubt, however, that the one way flow of investment and China’s ever growing influence and negotiating power would present temptations and challenges that could affect the durability of the investment relations. The remedy for such challenges would be duly negotiated investment treaties, which uniformly contain minimum standards that protect the environment and good order of the

129. China-Ethiopia BIT, *supra* note 97, art. 9(1)–(8). It is important to note that China almost never uses “customary international law” in its treaties, instead adopting the “principles of international law accepted by both parties.” See Congyan, *supra* note 72, at 461.

130. China-Madagascar BIT, *supra* note 97, art. 10(2).

131. *See id.* art. 10(3).

132. *Id.* art. 10(4).

host community while providing an attractive and conducive business atmosphere. The following Part identifies and discusses some contemporary and useful normative prescriptions that must guide the revitalization of China-Africa investment treaties.

III. MODELING THE CHINA-AFRICA INVESTMENT REGIME

Despite serious allegations of incoherence in the jurisprudence of international investment law¹³³ and the debate about whether it is purely *lex specialis*,¹³⁴ a system, a framework¹³⁵ or a regime,¹³⁶ it is clearly inherently North-South in its origin, formulation, and sustenance. In answering the frequently asked question of why a trade like multilateral arrangement eluded international investment, Professor Salacuse once said that there is a technical and political answer to the question. The technical one is simple: multilateral negotiations are difficult to bring to conclusion.¹³⁷ The political answer is more interesting: “[g]iven 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.”¹³⁸ Further noting that these divided negotiations would deprive the developing countries of the opportunity to negotiate in blocks, he adds a more interesting observation:

133. See, e.g., JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 241 (2005); Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT’L L. 471 (2009); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); Jacques Werner, *Making Investment Arbitration More Certain: A Modest Proposal*, 4 J. WORLD INV. 767 (2003) (all discussing the problem of coherence).

134. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 267 (2d ed. 2004).

135. David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32 SUFFOLK TRANSNAT’L L. REV. 513, 516 (2009) (arguing that it is a mistake to consider it a system; it is a framework and as such the expectation of jurisprudential coherence might be misguided).

136. See generally Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT’L L.J. 427, 467 (2010) (arguing that it is a regime).

137. *Id.* at 464.

138. *Id.*

[w]hereas developed countries would be willing to enter into bilateral treaties with developing countries for investment liberalization, knowing full well that few if any enterprises from the developing country would ever invest in the developed state, they have been unwilling to enter into treaties that would grant such liberalization to investors from other developed states, who could become strong competitors to the host countries' own enterprises.¹³⁹

Although South-South BITs have mushroomed in recent years,¹⁴⁰ their doctrinal foundations are by no means organic to those relations. Hence the adaptation is not without serious difficulty. This problem is particularly acute in the China-Africa context because of China's ambiguous position as theoretically South with all the hallmarks of the North in its stature and pursuit.¹⁴¹ Hence, for the ambitious investment relations to endure, grow, and bear more fruit, the substantive contents and the structure of dispute settlement need to be revisited in light of their own cultural backgrounds and contemporary developments. This Part identifies some of the most important contemporary notions that must inform normative and structural developments in China-Africa investment relations.

A. *Contemporary Models in International Investment Law and Their Impact on China-Africa Investment*

Following many years of consultations, the US Department of State and US Trade Representative ("USTR") jointly released the revised 2012 BIT Model on April 20, 2012. The press release noted that the "Administration made several important changes to the BIT text [2004 Model] so as to enhance transparency and public participation; sharpen the disciplines that address preferential treatment to state-owned enterprises, including the distortions created by certain indigenous innovation policies; and strengthen protections relating to labor and the

139. *Id.* at 465.

140. Currently, many of the about 3000 BITs are South-South. *Cf. Country-Specific Lists of Bilateral Investment Treaties*, UNCTAD, [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/Country-specific-Lists-of-BITs.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Country-specific-Lists-of-BITs.aspx) (last visited Feb. 28, 2014).

141. For example, it is suggested that Chinese investment approach is being "Americanized." Congyan, *supra* note 72, at 459.

environment.”¹⁴² The new Model addresses cutting-edge issues in ways that are acceptable to the United States. Another notable model is the IISD Model, which focuses on sustainable development and addresses some of the same cutting-edge topics. They both attempt to establish a balance that they deem appropriate between investment protection and the host government’s ability to regulate in the public interest. This Part examines these models to identify some of the important issues that China and Africa need to address as they recalibrate their existing investment regime. The discussion focuses on issues that are either ignored or inadequately addressed in the exiting China-Africa treaties including, labor and environment, corruption and transparency, corporate social responsibility, and dispute settlement.

1. Labor and Environment

The regulation of labor and the protection of the environment are two of the most serious contemporary challenges of the international investment regime. All three generations of Chinese BITs make no reference to labor and environment. These issues are increasingly becoming important in China-Africa investment relations.

a. Labor

Consider this typical scenario: For decades, the Zambian Copperbelt towns looked like “a shell of [their] lucrative past”¹⁴³ with “tennis courts and cricket fields once provided and maintained by Zambian parastatals now overgrown with weeds.”¹⁴⁴ In 1998, the China Non-Ferrous Metals Mining Corporation (“CNMC”) purchased one of the mines, invested US\$130 million and revitalized it. In 2003, it opened three more mines and hired more than 6000 Zambian workers with plans to

142. Media Note, Off. of Spokesperson, U.S. Dep’t of State, United States Concludes Review of Model Bilateral Investment Treaty (April 20, 2012), *available at* <http://www.state.gov/r/pa/prs/ps/2012/04/188198.htm>.

143. HUMAN RIGHTS WATCH, “YOU’LL BE FIRED IF YOU REFUSE”: LABOR ABUSES IN ZAMBIA’S CHINESE STATE-OWNED COPPER MINES 3 (Nov. 2011), *available at* <http://www.hrw.org/sites/default/files/reports/zambia1111ForWebUpload.pdf>.

144. *Id.*

hire several thousands more in subsequent years.¹⁴⁵ According to a comprehensive Human Rights Watch Report, after the Chinese company took over, “[m]ine shafts have been upgraded with modern equipment, the smelter is deemed state-of-the art, and computers have replaced pencils in planning.”¹⁴⁶ The Zambian workers there “expressed gratitude to the Chinese investors for their jobs and the enormous investment being made.”¹⁴⁷

That is not the whole story, however. The Zambian workers who expressed gratitude also added that “Chinese copper operations were the country’s worst when it comes to health and safety.”¹⁴⁸ The Human Rights Watch Report accuses the Chinese company of gross violations of national and international labor standards including low wages, long working hours without appropriate overtime pay or other forms of benefits.¹⁴⁹ It states in particular that “[a]t its most extreme, a 2005 explosion at a Chinese-owned explosives manufacturing plant in Chambishi killed 46 Zambian workers; the following year, riots in Chambishi over work conditions culminated in the shooting of at least five miners, allegedly by a Chinese manager.”¹⁵⁰ Significantly, the Report also notes that such labor practices are “strikingly similar to safety and labor problems that plague China’s domestic mining industry.”¹⁵¹ Although the Report takes an exclusively human rights perspective and its motives and some of its conclusions might be disputed, it is clear that some labor and employment problems exist. In fact, this might be taken as an example of what might be happening in other parts of Africa where Chinese companies invest. Interestingly, not even the Human Rights Watch Report accuses China of treating African workers worse than its own citizens who work in the same industries. This is an interesting fact because it suggests that whatever labor problems there are, it is probably because of factors other than discriminatory intent or purpose which makes the solution that much easier. Although there might be

145. *See id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *See id.* at 4.

150. *Id.*

151. *Id.* at 2.

unexplored domestic legal remedies, they are often insufficient and labor provisions in BITs could play a significant role in addressing this problem.

As indicated above, none of the Chinese BITs address labor issues. Labor issues are sensitive anywhere, and unfortunately, labor standards have not yet found meaningful express in existing investment treaties anywhere. Some most contemporary expressions are contained in US 2012 BIT Model and the IISD Model.¹⁵²

152. US 2012 Model BIT, *supra* note 10, art. 13. Article 13 reads:

Article 13: Investment and Labor

1. The Parties reaffirm their respective obligations as members of the International Labor Organization (“ILO”) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. For purposes of this Article, “labor laws” means each Party’s statutes or regulations, or provisions thereof, that are directly related to the following:

- (a) freedom of association;
- (b) the effective recognition of the right to collective bargaining;
- (c) the elimination of all forms of forced or compulsory labor;
- (d) the effective abolition of child labor and a prohibition on the worst forms of child labor;
- (e) the elimination of discrimination in respect of employment and occupation; and
- (f) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

4. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

5. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

Although the 2012 Model made significant progress to the 2004 Model by adding paragraphs 1, 4 and 5,¹⁵³ critics note that it does not go far enough. The dilemma is obvious: while on the one hand, states desire to encourage foreign investment, on the other hand, they want to provide appropriate protection to their workforce. The dilemma is greater for states who are both recipients and exporters of capital like the United States and China. Within the United States, such balance is a serious political issue. The 2012 Model, released by a democratic administration, is considered relatively pro labor as compared to the prior one released under a republican leadership. Be that as it may, this is an acceptable expression of labor standards. Even the IISD Model is limited to directly incorporating the International Labour Organization (“ILO”) standards by reference.¹⁵⁴ The US Model might be a good guide for future China-Africa BITs as it is evidently a function of significant

153. Office of the U.S. Trade Representative, 2004 United States Model BIT art. 13, [hereinafter US 2004 Model BIT] *available at* http://www.ustr.gov/archive/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf. Article 13 reads:

Article 13: Investment and Labor

The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in paragraph 2 as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

2. For purposes of this Article, “labor laws” means each Party’s statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor

rights:

- (a) the right of association;
- (b) the right to organize and bargain collectively;
- (c) a prohibition on the use of any form of forced or compulsory labor;
- (d) labor protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and
- (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

154. IISD BIT Model, *supra* note 19, art. 21(D). (“All Parties shall ensure that their domestic law and policies are consistent with the core labor requirements of the ILO Declaration on Fundamental Principles and Rights of Work, 1998.”).

compromises on all sides. The impact of more stringent labor standards on the flow of FDI is obvious but one improvement to the US Model expression that might be considered is the replacement of the more permissive “it is inappropriate” with “it is impermissible” or some such stronger standard.

b. Environment

A recent *Financial Times* article captured the dilemma between development and the environment very well when it touted “Chinese Investment: The money is welcome but more controls are needed.”¹⁵⁵ The article quotes Xiao Yuhua, a research associate at the Zhejiang Normal University’s Institute of African Studies as saying: “it’s good for Africa to have Chinese companies investing. But it’s important to monitor and regulate them in order to avoid trouble and to create more opportunities.”¹⁵⁶

Environmental issues present a profound dilemma. A case in point is the controversy surrounding the building of the Gibe III dam on the Omo River in Southern Ethiopia. When completed, this US\$1.75 billion dam is expected to generate 1870 MW of power. As of 2009, this country of 80 million produced less than 1000 MW of power.¹⁵⁷ While this dam would literally more than double its capacity, almost all international financial institutions refused to provide financing, concerned about the environmental impact on indigenous populations living downstream and on Lake Turkana in neighboring Kenya.¹⁵⁸ The Ethiopian government insisted that the benefits of the dam will more than offset the drawbacks and continued to build the dam with financial help from the Industrial and Commercial Bank of China (“ICBC”) and expertise from the Italian construction firm, Salini.¹⁵⁹

155. Xan Rice, *Chinese Investment: The Money Is Welcome But More Controls Are Needed*, FIN. TIMES (London) (June 19, 2012, 10:02 PM), <http://www.ft.com/intl/cms/s/0/d8f41dd6-b4a6-11e1-bb2e-00144feabdc0.html#axzz2BZkdDfHe>.

156. *Id.* at 2.

157. *See id.* at 1.

158. *See id.* The financial institutions that refused financing include the African Development Bank (“ADB”), the World Bank, and the European Investment Bank.

159. *See id.*

The concern appears to be that Chinese companies are much more willing to compromise on environmental standards than their Western counterparts because the latter faces closer scrutiny at home.¹⁶⁰ Professor Ian Taylor of the University of St. Andrews in Scotland, after indicating the level of hypocrisy on the part of some Western investors such as oil companies, suggests that the environmental concerns in China's Africa investment are real. But he also points out that the Chinese companies and government are increasingly becoming sensitive to their international reputation with this regard.¹⁶¹ Indeed, for the first time ever, during the November 2012 18th Congress of the Central Committee of the Communist Party, President Hu Jintao announced "ecological progress" as being one of five cornerstones of China's overall modernization drive alongside economic, political, social and cultural progress.¹⁶² He said in particular: "We must give high priority to making ecological progress and incorporate it into all aspects and the whole process of advancing economic, political, cultural, and social progress, work hard to build a beautiful country, and achieve lasting and sustainable development of the Chinese nation."¹⁶³

Such high level political recognition and calls for incorporating environmental standards in all aspects of development clearly require the development and application of legal standards domestically and internationally. Legal standards enshrined in investment treaties are immensely helpful in resolving environmental issues because at the very least, they would define the rights and responsibilities of the host state and the investor and delineate expectations on both sides. Given the serious environmental concerns in the many areas of Chinese investment in Africa,¹⁶⁴ defining the environmental standards in investment treaties is not only critical but also feasible and politically expedient given China's increasing concern over environmental issues at home. None of the existing BITs do so.

160. *See id.*

161. *See id.*

162. *Hu Outlines "Overall Approach" for China's Modernization Drive, Stresses Scientific Development*, XINHUA NEWS (Nov. 8, 2012), http://news.xinhuanet.com/english/special/18cpcnc/2012-11/08/c_131959824.htm

163. *Id.*

164. *See Rice, supra* note 155 (addressing concerns such as mining, hydroelectric power projects, illegal logging, and smuggling of ivory and rhino horns).

A look at the contemporary standards would be very important in crafting the acceptable levels of compromise. The new 2012 US BIT Model's environmental provision is elaborate—as such could be instructive.¹⁶⁵

Although it is still considered inadequate by many, this provision made significant changes to the previous BIT Model by adding paragraphs 3 to 7.¹⁶⁶ Given the increasing seriousness

165. U.S. 2012 Model BIT, *supra* note 10, art. 12. Article 12 of the 2012 Model reads:

Article 12: Investment and Environment

1. The Parties recognize that their respective environmental laws and policies, and multilateral environmental agreements to which they are both party, play an important role in protecting the environment.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with paragraph 2 where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.

....

5. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

6. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.”).

7. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

Id.

166. Compare *id.*, with U.S. 2004 Model BIT, *supra* note 153, art. 12. Article 12 of the 2004 Model reads:

Article 12: Investment and Environment

1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental

of environmental concerns, its inadequacy appears clear when compared with the IISD Model, which contains a more robust environmental provision.¹⁶⁷

The IISD Model has many features that make it more suitable for China-Africa relations. First, unlike many other models, including the latest US Model, it links investment with sustainable development of the host state. Although this is not a strange notion in international investment law,¹⁶⁸ its expression here is very instructive. Sustainability is vitally important to

laws.¹² Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

2. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”

167. IISD BIT Model, *supra* note 19, art. 21. It reads in pertinent part:

Article 21: Minimum standards for environmental, labour and human rights protection

(A) Recognizing the right of each Party to establish its own level of domestic environmental protection and its own sustainable development policies and priorities, and to adopt or modify its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations.

(B) Each Party shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social situation, and shall strive to continue to improve these laws and regulations.

(C) All Parties shall have, as a soon as practicable, a domestic environmental impact assessment law and social impact assessment law that meets the minimum standards adopted by the Conference of the Parties on these matters.

....

(E) All parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party and, at a minimum, as soon as practicable with the list of human rights obligations and agreements to be adopted by the first meeting of the Parties.”

Id.

168. *See, e.g.*, *Salini Construttori S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 42 I.L.M. 609, 622 (2003).

Africa. As indicated above, Chinese companies have large scale investments in the extractive industries where environmental issues are likely to lead to serious contentions. A clear expression of expectations is essential. Second, it requires the parties to improve their environmental laws and regulations. In other words, it jointly holds them to higher environmental standards. That is particularly important in China-Africa relations where the development of environmental laws and the mechanisms of their enforcement may not be as developed as in the United States and other Western countries. The inclusion of such environmental requirements in BITs that China signs with African states is doubly beneficial because it helps China improve its laws, which could be applied to foreign investors in China, and also helps African states improve their environmental laws to protect their environment without imposing unreasonable restrictions that are not equally recognized in China. Finally, it sets minimum standards by linking the environmental regulations to recognized human rights standards. This is particularly important in projects that affect large numbers of indigenous communities.

c. Corruption and Transparency

China and all African states with the exception of Botswana have a failing mark on Transparency International's ("TI") public sector corruption perception index.¹⁶⁹ All of Africa's traditional partners from the West seem to have reasonably weakened the public corruption plague.¹⁷⁰ According to the World Bank, public officials take about US\$1 trillion in bribes every year with another US\$1.5 trillion dollars paid to unduly influence procurement decisions.¹⁷¹ It is fair to assume that much of that money comes from western multinationals but it is also clear that Chinese companies are increasing their share on that front. For example, a recent TI report ranks Chinese firms

169. While China ranks 80th, most African states rank below that. See *Corruption Perceptions Index 2013*, TRANSPARENCY INT'L, <http://www.transparency.org/cpi2013/results>

170. See *id.* All western European countries, Canada and the United States rank very well on the scale.

171. Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 CORNELL INT'L L.J. 691, 692 & n.4 (2007).

towards the bottom of the transparency scale. Out of the world's 105 largest companies on the ranking scale, the highest ranked Chinese company claimed the sixty-ninth spot.¹⁷² Out of twenty-four major financial firms, the bottom three spots were taken by Chinese banks, namely, China Construction Bank Corp, Bank of Communications Co., and Bank of China Ltd. The total value of all the ranked firms is approximately US\$11 trillion.¹⁷³ The Chinese news source that carried the report concluded: "In the anti-corruption program rankings (100 percent indicating full transparency), the transparency of Bank of China and Bank of Communications was 0 percent"¹⁷⁴ Indeed, European business partners also complain about the opacity of Chinese business culture. For example, the European Ambassador to China recently said that "Europe's trade with China is being stymied by barriers including a lack of transparency and opaque business environment."¹⁷⁵

Public perception surveys in China also rate the business sector as the most corrupt sector followed by the police.¹⁷⁶ On the question of which country's businesses are more likely to bribe abroad (i.e., bribe payers index) out of the twenty-eight largest FDI exporters, China ranked second to last, next only to Russia.¹⁷⁷ Although TI does not have a bribe receiver's index, based on rankings on the perception of public corruption index, it is easy to see that most African countries would rank high on the receiving end.¹⁷⁸ As far as transparency and corruption is concerned, therefore, based on these reports, China-Africa business deals appear to be particularly vulnerable to corruption, which presents great obstacles to successful, long-

172. Qu Yi, *Report Shows Chinese Banks Lack Transparency*, CHINA.ORG.CN (July 13, 2012), http://www.china.org.cn/business/2012-07/13/content_25903847.htm.

173. *See id.*

174. *Id.* The full interactive index is available at *Visualising the Bribe Payers Index 2011*, TRANSPARENCY INT'L, <http://bpi.transparency.org/bpi2011/interactive/> (last visited Mar. 5, 2014) (listing the Netherlands as the least likely to bribe, the United States at number 10, and South Africa at 15 on the 1 to 28 scale).

175. Richard Quest, *Unlocking China's business potential*, CNN (June 28, 2012, 3:24 PM), <http://www.cnn.com/2012/06/28/world/europe/europe-eu-china-trade/index.html>.

176. *Fighting Corruption in China*, TRANSPARENCY INT'L (Nov. 8, 2012), http://www.transparency.org/news/feature/fighting_corruption_in_china

177. *Id.*

178. *See generally Corruption Perceptions Index 2013*, *supra* note 169.

lasting, broadly, and mutually beneficial partnership. For the economic relations to mature and take proper root, the investment legal framework has to address the issue of corruption and transparency in a meaningful way.

The political will to address this important issue appears to be present. As a recent *Financial Times* editorial noted, “Libya and Sudan show that the days when Beijing could be indifferent to corrupt or dysfunctional government in Africa are over.”¹⁷⁹ Indeed, during the 18th National Congress of the Central Committee of the Chinese Communist Party (“CPC”), President Hu Jintao said “If we fail to handle this issue [corruption] well, it could prove fatal to the Party, and even cause the collapse of the Party and the fall of the state.”¹⁸⁰ Significantly, a February 2011 amendment to the Chinese Criminal Code expressly makes the offering of bribes to foreign public officials for the purpose of acquiring “illegitimate business benefits” criminal conduct, punishable by law.¹⁸¹

Although corruption is difficult to define and even more so to verify, its negative impacts on investment and economic progress are without dispute.¹⁸² Today, multinational corporations and their hosts are constrained by a patchwork of domestic and international legal instruments.¹⁸³ The principal one is the United Nations Convention against Corruption.¹⁸⁴ China and nearly all African states have ratified this

179. Editorial, *China into Africa*, FIN. TIMES (July 19, 2012, 7:20 PM) <http://www.ft.com/intl/cms/s/0/80ac1cd8-d1a6-11e1-bbbc-00144feabdc0.html#axzz2BZkdDFHe>.

180. *CPC Pledges Unrelenting Efforts to Combat Corruption*, XINHUA NEWS (Nov. 8, 2012, 10:38 AM), http://news.xinhuanet.com/english/special/18pcnc/2012-11/08/c_131959538.htm.

181. For a good description of Chinese anti-bribery laws including recent amendments, see ANTI-CORRUPTION REGULATION IN 51 JURISDICTIONS WORLDWIDE 58–64 (Homer E. Moyer Jr. ed., 2011), available at <http://www.squiresanders.com/files/Publication/bc0b156f-f1de-4eb1-9553-9a35e5e43a44/Presentation/PublicationAttachment/c0a57610-6e13-49af-8df2-9d911d146dc2/AC2011%20China.pdf>.

182. Snider & Kidane, *supra* note 171, at 695–96.

183. For a detailed discussion of domestic and international anti-corruption legal instruments in comparative context, see *id.* at 700–15.

184. U.N. Office on Drugs & Crime, United Nations Convention Against Corruption, U.N. Doc. A/58/422 (Oct. 7, 2003).

convention.¹⁸⁵ Although its implementation presents enormous challenges, the standards it sets are useful for China-Africa investment treaties. The term corruption does not appear in the latest US BIT Model; however, the IISD Model has duly incorporated the basic standards of the UN anti-Corruption Convention in Article 13,¹⁸⁶ and adds some more beneficial standards.¹⁸⁷ Article 32 of the same model also obligates the home states to adopt and enforce laws criminalizing the same conduct when done by their citizens—natural as well as juridical.¹⁸⁸

The inclusion of these provisions is not only important but also easy to do in any future China-Africa investment treaties because these are not new obligations as China and almost all African states have already assumed the same obligations under

185. U.N. Convention against Corruption Signature and Ratification Status as of 29 November 2013, U.N. Doc. A/58/422 (entered into force Dec. 14, 2005). The exceptions are Chad, Guinea, Somalia, Sudan, and South Sudan. *Id.*

186. Int'l Inst. for Sustainable Dev. [IISD], IISD Model International Agreement on Investment for Sustainable Development art. 13 (Apr. 2005). It reads:

(A) Investors and their investments shall not, prior to the establishment of an investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the host state, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favor in relation to a proposed investment or any licenses, permits, contracts or other rights in relation to an investment.

(B) Investors and their investments shall not be complicit in any act described in Paragraph (A), including incitement, aiding and abetting, and conspiracy to commit or authorization of such acts.

187. *Id.* art. 22. It reads:

All host states shall ensure that

(A) the offering, solicitation or acceptance of an offer, promise or gift of any pecuniary or other nature, whether directly or through intermediaries, to any public official of the host state, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties to achieve any favor in relation to a proposed investment or any licenses, permits, contracts or other rights in relation to an investment; and

(B) any acts complicit in any act described in Paragraph (A), including incitement, aiding and abetting, conspiracy to commit or authorization of such acts; shall be made criminal offences in the host state and subject to appropriate criminal enforcement and sanctions. Host states shall make every effort to prosecute such activities in accordance with domestic law.

188. *Id.* art. 32.

the UN Convention.¹⁸⁹ Their inclusion in investment treaties has several advantages, however: first, it reminds and reinforces the obligations on all sides, and second, perhaps more importantly, it facilitates the enforcement of the obligations as a part of investor-state dispute settlement. If, for example, a host state fails to prosecute a public official who solicits a bribe from an investor, the investor could potentially seek redress for violation of the anti-corruption provisions in the investment treaty.

The US Model contains elaborate provisions on transparency; however, the concerns these provisions address are somewhat different from directly fighting the kind of corruption that the IISD Model envisions. The US Model's transparency concern is basically transparency in rulemaking and adjudication of matters that potentially affect foreign investment, i.e., publication of laws and decisions affecting investment.¹⁹⁰ Although transparency of such kind is absolutely essential for conducive business environment, as far as China-Africa investment relations are concerned, the more acute problem, which is not covered by other provisions, would be the kind of corruption that the IISD Model addresses.

d. Corporate Social Responsibility

The term “corporate social responsibility” does not appear in any of the US BIT Models and the most recent one is no exception. The IISD Model contains a provision that defines corporate social responsibility in very broad terms.¹⁹¹ This

189. As indicated above, Chinese domestic criminal code criminalizes the offering of bribe to foreign public officials, which is the corner stone of the UN anti-corruption Convention. Most of the African states are also parties to the African anti-corruption Convention. U.N. Convention against Corruption Signature and Ratification Status as of 29 November 2013, *supra* note 185. For a discussion of this convention, see Snider & Kidane, *supra* note 171, at 711–15.

190. U.S. 2012 Model BIT, *supra* note 10, arts. 10–11.

191. IISD Model International Agreement on Investment for Sustainable Development, *supra* note 186, art. 16(A)-(C). The pertinent part reads:

(A) In addition to the obligation to comply with all applicable laws and regulations of the host state and the obligations in this Agreement, and in accordance with the size, capacities and nature of an investment, and taking into account the development plans and priorities of the host state, the Millennium Development Goals and the indicative list of key responsibilities provided in Annex F, investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the

provision incorporates the ILO Tripartite Declaration on Multinational Enterprises and Social Policy¹⁹² and the Organisation for Economic Co-operation and Development (“OECD”) Guidelines for Multinational Enterprises.¹⁹³ Admittedly, the IISD Model is too broad to include in a negotiated BIT. The OECD Guidelines, which are non-binding, contain principles in such areas as human rights, employment and industrial relations, the environment, corruption, consumer interest, science and technology, competition, and taxation.¹⁹⁴

It might be difficult to agree on the details of all of these areas in investment treaties, however, the minimum standards in the area of labor, the environment, and corruption and transparency discussed in sections a, b and c above are vital in any future China-Africa investment treaties. China and Africa negotiations must also be informed by the maturing ILO and OECD Guidelines as suggested by the IISD Model. Indeed, the Fifth Ministerial Conference of the Forum on China Africa Cooperation Beijing Action Plan (2013–2015) expressly promises that “The Chinese government will continue to guide Chinese enterprises to actively fulfill social responsibilities and give back to the local communities.”¹⁹⁵ These promises need at some point be written into binding treaties in a mutually acceptable manner.

host state and local community through high levels of socially responsible practices.

(B) Investors should apply the ILO Tripartite Declaration on Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises, as well as specific or sectoral standards of responsible practice where these exist.

(C) Where standards of corporate social responsibility increase, investors should strive to apply and achieve the higher level standards.”

192. Int’l Labour Org. [ILO], Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (4th ed. 2006), *available at* http://www.ilo.org/empent/Publications/WCMS_094386/lang-en/index.htm.

193. Org. for Econ. Coop. & Dev. [OECD], Guidelines for Multinational Enterprises (2011), *available at* <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf>.

194. *See id.* (defining the relevant scope of these concepts).

195. Fifth FOCAC Action Plan, *supra* note 43.

e. Dispute Settlement

Dispute settlement is a key component of investment treaties because in many cases, domestic judicial systems are not well equipped to resolve investor-state disputes reliably, neutrally, equitably, and definitively. As discussed in Part II.B.4 above, the dispute settlement provisions in China-Africa BITs have evolved from domestic court litigation in the host state with only the quantum of compensation potentially referred to ad hoc arbitration,¹⁹⁶ to open access, for both the host state and investor, to international arbitration, ad hoc or institutional, including ICSID without limitation of the subject matter¹⁹⁷ at the discretion of the investor.¹⁹⁸

The dispute settlement provisions in these BITs had for decades largely lain dormant because the scale and magnitude of Chinese investment in Africa were not so high as to produce too many disputes requiring formal resolution. As Chinese investments in Africa increase and mature, disputes will also undoubtedly increase. There is no doubt that many disputes are already emerging out of Chinese investments made in the last decade. A mutually acceptable and effective dispute settlement mechanism is absolutely essential. The dispute resolution mechanisms contained in the existing BITs are fragmented and lack proper guidance to the investor as well as the host state. The existing levels and prospects of Chinese investment in Africa require an ingenious, mutually beneficial, culturally appropriate, and dynamic dispute resolution mechanism.

At this point in time, saying that international arbitration is a better means of investment dispute settlement is stating the obvious when the alternative is domestic court litigation. Working out the details of international arbitration is the more difficult question. This question is more acute for China and Africa for the following reasons. First, international investment arbitration as a modern means of transnational dispute resolution has developed in North-South relations predicated on western legal thought. Its Washington-London-Paris-Stockholm

196. See, e.g., China-Ghana BIT, *supra* note 97, art. 10.

197. See, e.g., China-Ethiopia BIT, *supra* note 97, art. 9.

198. See, e.g., China-Madagascar BIT, *supra* note 97, art. 10.

roots and modus operandi are unmistakable.¹⁹⁹ Those venues are still the custodians of the important institutions and expertise. China and all African states are cultural strangers to these venues.²⁰⁰ The venues, as mere physical locations alone, may not present serious difficulties; the problem lies in the lack of proper representation of both China and Africa on the arbitral panels and other important secretariat positions in almost all of these institutions.²⁰¹ That raises the more important question of whether ICSID or the other leading arbitral institutions in their current compositions are suitable fora for China-Africa investment dispute settlement. As one of the writers concluded elsewhere based on a border inquiry, the existing institutions have significant shortcomings in handling China-Africa investment disputes in a neutral, cost-effective, and culturally appropriate manner.²⁰² For example, as far as ICSID is concerned, which is the most relevant institution for purposes of investment disputes, a look at its half-a-century of arbitral justice shows its quintessentially North-South stature. The publically available ICSID statistics tell the whole story: while more than twenty percent of all ICSID cases involved African States,²⁰³ only two percent of the arbitrators and conciliators have been from Sub-Saharan Africa.²⁰⁴ By contrast, about seventy percent of all the arbitrators, conciliators and ad hoc committee members have been West Europeans or North Americans while the number of Western European respondents in these proceedings

199. The leading institutions are ICSID, the London Court of International Arbitration (“LCIA”), see LONDON COURT OF INT’L ARBITRATION, <http://www.lcia.org/> (last visited May 1, 2014); the Court of Arbitration of the International Chamber of Commerce (“ICC”), see COURT OF ARBITRATION OF THE INT’L CHAMBER OF COMMERCE, <http://www.iccwbo.org/products-and-services/arbitration-and-adr> (last visited May 1, 2014); and the Stockholm Chamber of Commerce (“SCC”), see STOCKHOLM CHAMBER OF COMMERCE, <http://www.chamber.se/the-scc-institute.aspx> (last visited May 1, 2014).

200. See KIDANE, *supra* note 8, at 270–393 (detailing the law, cultures, and economics of the world’s leading arbitral institutions and the position of China and Africa).

201. See *id.* (providing useful statistics and citations for each profiled institution).

202. *Id.* at 393.

203. ICSID, THE ICSID CASELOAD—STATISTICS 11 (2012) [hereafter ICSID 2012 Statistics], available at <http://icsid.worldbank.org/ICSID/Servlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English31>.

204. *Id.* at 16.

has been less than one percent.²⁰⁵ Having not participated in ICSID proceedings for years, in recent times, China appears to be taking part in a few cases. For example, a Chinese insurance group has recently initiated an arbitral proceeding against Belgium.²⁰⁶ Based on the limited information available, it is interesting to note that the Chinese company is represented by Kirkland & Ellis International out of London and Chicago, and the two arbitrators appointed so far are from England and New Zealand.²⁰⁷

It is not fair to attribute a serious lack of diversity to all other western institutions—especially the International Chamber of Commerce (“ICC”). According to the most recent ICC statistical report, in 2011, it received about 796 cases from 139 countries. Hearings were conducted in 63 countries, and about 78 nationalities were represented in arbitral panels.²⁰⁸ Be that as it may, the cultural and other barriers that China and Africa would face in the West are still undeniable. A simple look at the composition of even the ICC International Court of Arbitration shows no Chinese and only one African out of eighteen members.²⁰⁹ To the extent these institutions make a conscious effort to address the democracy and cultural deficit, they could be suitable on a case by case basis, however, China and Africa must also consider the alternative of designing their own institution particularly for the resolution of investment disputes, which often involve vital issues of public concern.

As one of the authors suggested in more detail elsewhere,²¹⁰ an arbitral institution within the framework of FOCAC could be particularly suitable. While the details need to be negotiated, once an agreement is made on the nature, location and

205. *Id.* at 11, 16.

206. Ping An Life Ins. Co. of China, Ltd. & Ping An Ins. (Grp.) Co. of China, Ltd. v. Kingdom of Belg., ICSID Case No. ARB/12/29 (Feb. 26, 2013).

207. *Id.* Further information is available on ICSID, <https://icsid.worldbank.org/ICSID/FrontServlet>.

208. The ICC Report itself is subscription based (US\$1200), but a summary of the statistics is available on the ICC Website at *Statistics*, INT’L CHAMBER COM., <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics> (last visited April 9, 2014).

209. *List of Court Members*, Int’l Chamber Com., <http://www.iccwbo.org/About-ICC/Organization/Dispute-Resolution-Services/ICC-International-Court-of-Arbitration/List-of-Current-Court-Members> (last visited April 9, 2014).

210. Kidane, *supra* note 8, ch. 15.

procedures of this FOCAC institution, China and African states could begin referencing it in their future investment treaties as an alternative forum for dispute settlement. Along the lines of the IISD Model, the most important characteristics of the FOCAC affiliated institution must include escalation procedures where alternatives to binding arbitration are adequately explored. Other considerations must include the location of the subject matter of the dispute in selecting the seat, diversity and proper cultural representation on the panels, transparency, appellate discipline, and effective mechanism of enforcement.²¹¹ A dispute settlement body imbued with these features under the auspices of FOCAC could provide a good alternative in China-Africa investment relations. The details would obviously need to be negotiated.

CONCLUSION

China and Africa face extraordinary challenges in ordering their economic relations—particularly their investment relations—by law. This Article has outlined several of these challenges. These challenges may be summarized as follows: first, through a complex mix of historical circumstances, they have been required to adapt and utilize normative and institutional apparatus created for a different purpose i.e., North-South, more specifically, West-East, West-Africa, and West-Latin America relations. Second, the problem of adaptability has been exasperated by fundamental doctrinal and cultural differences. More specifically, in terms of doctrinal diversity, whereas Chinese and most African societies largely maintain a different understanding of the function of private property, they are confronted with investment norms imbued with classic western ideologies. While on the one hand, they recognize that these norms have a history of success in ordering economic relations, on the other hand, they are confronted with the economic inequities enabled by the same norms. To make matters worse, there is more than a grain of suspicion between them that the stronger party might be desirous of employing such norms to its advantage. At the cultural level, while the

211. As far as enforcement is concerned, both the ICSID and New York Convention models could be instructive.

preference for harmony and non-binding soft norms pervades both the Chinese and most African legal cultures, through decades of interaction with the West, they have come to appreciate the virtues of predictability and uniformity that binding norms often bring. Their dilemma on this front is more acute when it comes to dispute settlement. Whereas the total allocation of blame rather than the restoration of order and harmony as the objective of dispute settlement is something that they have struggled to internalize down through the decades, they also recognize that pragmatism in today's business environment might demand adaptability to cross cultural notions and dominant means of resolution of disputes. It is with this background that this Article recommends the systematic revision and adoption of a modern and mutually beneficial and culturally appropriate China-African investment regime backed by a robust dispute settlement mechanism.

The existing BITs have significant shortcomings—indeed, they are all outdated. This conclusion includes the third generation of Chinese BITs exemplified by the China-Madagascar BIT discussed above. In short, the first two generations are outdated because they are not informed by modern developments in such areas as scope and admission, treatment, expropriation, dispute settlement, but more importantly, they totally omit prescriptions in such fundamental areas as labor, environment, corruption and transparency and generally corporate social responsibility. The last model is also already outdated for many of the above reasons but more curiously, it is outdated because it has some notable hallmarks of a North-South BIT, which could be a troubling trend. For China-Africa investment relations to overcome the challenges and continue the current trajectories of growth unhampered, their investment treaties must not ignore contemporary norms that link investment to sustainable development. They must also critically appraise the shortcomings of the existing mechanisms of dispute settlement and seriously consider an alternative mutually acceptable and culturally appropriate institutional mechanism for the resolution of their disputes.

