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The China-OHADA BIT, a Step in the Right Direction: A New Model of China-Africa BIT at a Regional or Sub-Regional Level

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Résumé

L'Afrique jouit non seulement de ressources naturelles, mais aussi d'un grand potentiel de marché. Ces dernières années, il y a une injection croissante d'investissements privés en provenance de Chine vers l'Afrique. La Chine souhaite exploiter le potentiel de l'Afrique en tant que marché émergent grâce aux investissements considérables réalisés par des entreprises privées. Parallèlement, les pays africains ont besoin d'investissements chinois dans divers domaines pour stimuler chaque aspect de leurs économies. L'investissement privé axé sur le marché nécessite un environnement d'investissement ouvert, stable, sécurisé et prévisible. Or, les traités bilatéraux d'investissement (TBI) existants entre la Chine et l'Afrique adoptent le modèle post-établissement axé sur la protection. La plupart de ces traités prévoient simplement des obligations générales de protection des investissements, laissant toutes les autres questions à la discrétion de l'État hôte. Les régimes juridiques instaurés par les TBI conclus entre la Chine et les États africains manquent de lisibilité, de prévisibilité et de cohérence. La conclusion de l'accord économique et commercial global entre l'UE et le Canada (AECG) suggère l'idée que la Chine pourrait s'inspirer de ce modèle pour conclure un accord bilatéral autonome avec les pays africains au niveau régional ou sous régional afin d'attirer des investissements chinois vers l'Afrique. Cet accord pourrait intervenir dans le cadre de l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) étant donné son niveau d'intégration et son autorité en matière de commerce et d'investissement sur le continent. Ce TBI modèle comportera des normes uniformes en matière d'accès aux marchés et de protection des investissements, ce qui limitera les risques d'interprétation divergente et partant, contribuera à l'instauration d'un climat d'investissement stable, sûr, prévisible et plus ouvert.

Mots-clés: discrétion politique, TBI modèle, climat d'investissement, Chine-OHADA TBI

Abstract

Africa enjoys not only natural resources, but also market potential. There has been a growing injection of private investment inflows from China to Africa recently. China needs to exploit Africa's potential as an emerging market for its tremendous investments by private enterprises. Moreover, the African countries need Chinese investments in various areas to boost aspects of their economies. Private, market-oriented investment calls for an open, stable, secure and predicable investment environment. However, existing bilateral investment treaties (BIT) between China and Africa adopt the protection-oriented, post-establishment model. The treaties merely provide for some general obligations of investment protection, leaving all other matters to the policy discretion of the host state. The China-Africa BIT regime is sporadic, uninformed and incoherent. The conclusion of the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) develops the idea that China might conclude a standalone BIT with the African countries at a regional or sub-regional level to attract Chinese investment inflows into Africa through an open, coherent and uniformed investment scheme. Given the integration of Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA) to be one single jurisdiction over trade and investment, the China-OHADA BIT is the one most likely to be expected. This standalone BIT regime inherently calls for an absolute standard for market access and investment protection, and uniformity to limit the discretion of interpretation, and as such, contribute to a more open, stable, secure and predictable investment climate.

Keywords: policy discretion, BIT regime, investment climate, China-OHADA BIT

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List of abbreviations

BCEAO	Banque centrale des états de l'Afrique de l'Ouest
BEAC	Banque des états de l'Afrique Centrale
BIT	Bilateral Investment Treaty
CACM	Central American Common Market
Canada	Model FIPA Canada Model Foreign Investment Protection and Promotion Agreement
CARICOM	Caribbean Community and Common Market
CCJA	Cour commune de justice et d'arbitrage
CCP	Common Commercial Policy (EU)
CEAO	Communauté économique de l'Afrique de l'Ouest
CEDEAO	Communauté économique des états de l'Afrique de l'Ouest
CEEAC	Communauté économique des états de l'Afrique Centrale
CEMAC	Communauté économique et monétaire de l'Afrique Centrale
CEPGL	Economic Community of the Great Lakes Countries
CET	Common External Tariff
CETA	Comprehensive Economic and Trade Agreement between EU and Canada
CIMA	Conférence interafricaine des marchés d'assurances
CIPRES	Conférence interafricaine de la prévoyance sociale
CPCM	Comité permanent consultatif du Maghreb
CSR	Corporate Social Responsibility
CUFTA	Canada-US Free Trade Agreement
EC	European Community
ECC	European Economic Community
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
EFTA	European Free Trade Association
EMU	Economic and Monetary Union
ERSUMA	École régionale supérieure de magistrature
EU	European Union

Euratom	European Atomic Energy Community
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FOCAC	Forum on China-Africa Cooperation
FTA	Free Trade Area
GDP	Gross Domestic Product
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IGO	Inter-Government Organization
IIA	International Investment Agreement
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
LDC	Least Developed Country
MERCOSUR	Mercado común del sur
MFA	Ministry of Foreign Affairs of People's Republic of China
MFN	Most Favored Nation
MOFCOM	Ministry of Commerce of People's Republic of China
NAFTA	North American Free Trade Area
NATO	North Atlantic Treaty Organization
NDRC	National Development and Reform Commission
NEPAD	New Economic Partnership for Africa's Development
NSOE	Non-State-Owned Enterprise
OAPI	Organisation africaine de la propriété intellectuelle
OCAM	Organisation commune africain et mauricienne
OECD	Organization for Economic Co-operation and Development
OHADA	Organisation pour l'harmonisation en Afrique du droit des affaires
RIA	Regional Integration Agreement
SACU	South African Customs Union
SADC	Southern African Development Community
SOE	State-Owned Enterprise
TFEU	Treaty on the Functioning of the European Union

TNC	Transnational Corporations
UDEAC	Union douanière et économique de l'Afrique Centrale
UEAC	Union économique en Afrique Centrale
UEMOA	Union économique et monétaire Ouest africaine
UMAC	Union monétaire en Afrique Centrale
UMOA	Union monétaire ouest-africaine
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	UN Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	Unification of Private Law
UNTS	United Nations Treaty Series
WTO	World Trade Organization

Content

Chapter 1 Introduction

1.1 The 1949-1978 Era

1.1.1 The initiation of China-Africa relations

China and Africa, the largest developing country and the continent with the largest number of developing countries, have a similar history and are faced with similar tasks. Having both suffered from colonial invasions, China and Africa easily understand each other's pursuit of independence, freedom, people's well-being and economic development. They are naturally connected with fate and future.[1] Due to "a shared sense of historical victimization by Western colonial powers" and a common identity of improving people's well-being and developing the economy,[2] China and Africa "have a natural feeling of intimacy."[3]

The China-Africa relationship started with China's military assistance in Africa. From the 1950s to 1970s, "China vigorously supported African liberation and independence movements."[4] "The Chinese were allowed by Tanzania, Ghana and Congo-Brazzaville to train freedom fighters from other liberation movements on their territory. Some African freedom fighters went to China for military training at the Nanjing Military Academy."[5] "The Organisation of African Unity Liberation Committee also received a large part of its military aid from China during 1971 and 1972. Liberation movements in countries such as Algeria, Guinea-Bissau, Sudan, Sierra Leon,

[1] Ministry of Foreign Affairs of the People's Republic of China, News Release, "Xi Jinping Holds Talks with His South African Counterpart Jacob Zama, Agreeing to Promote In-depth Development of Sino-South African Relations and Build a Model of New China-Africa Strategic Partnership" (26 March 2013) online: FMPRC <http://www.fmprc.gov.cn>.

[2] Yun Sun, "Africa in China's Foreign Policy" (14 April 2014), online: Brookings <https://www.brookings.edu>.

[3] Ian Taylor, *The Forum on China-Africa Cooperation (FOCAC)* (Oxon: Routledge, 2011) at 24; Qichen Qian, *Ten Episodes in China's Diplomacy* (New York: HarperCollins, 2005) at 200.

[4] Chinafrica Project, Press Release, "Top Chinese Official in Charge of African Affairs Chats with Netizens" translated by Tendai Musakwa (22 March 22, 2013) online: Chinafrica Project <https://chinaafricaproject.com>.

[5] Manyika Kangai, "China-Africa Relations: Past, Present & Future Win-Win" (27 February 2017), online: Linkedin <https://www.linkedin.com>.

Cameroon, Mali, Togo, Somalia, Zambia, Mozambique, Zimbabwe and South Africa received some form of military assistance from China."[6]

Apart from military assistance, China "also gave African countries all the help it could to support their economic construction."[7] "At the end of 1963, Chinese Premier Zhou Enlai (1949-1975) embarked on a ten-nation tour of Africa," to explain China's Africa policy and pledge to provide financial aid to the African countries and help them rebuild their productivity adversely affected by wars.[8] In 1965, China offered a 70,000,000 RMB interest-free loan to Tanzania and built the Friendship Textile Mill.[9] In 1972, China financed Benin to build the Friendship stadium.[10] In 1973, China provided financial support to Uganda and built the Kampala Ice Plant and Kibenba Farm.[11] From 1971 to 1977, China helped build up Mbarali Farm, Kiwena Coal Mine and Ma Hongda Sugar Refinery in Tanzania.[12] The most common aid project provided during the 1950s-1970s was the TanZam railway. On 5 September 1967, China signed an agreement with Tanzania and Zambia for the Construction of the TanZam Railway. It gave Tanzania and Zambia an interest-free loan of 21 million pounds and embarked on construction of the TanZam railway. The TanZam railway, completed in 1975, linked the port of Dar es Salaam in Tanzania with the town of Kapiri Mposhi in Zambia, 1,100 miles away.[13] The TanZam project constituted a historical example of China's

[6] *Ibid*.
[7] Supra note 4.
[8] Ian Taylor, *supra* note 3 at 11.
[9] Ministry of Foreign Affairs of the People's Republic of China, "China-Tanzania Relation" (July 2014), online: FMPRC <www.fmprc.gov.cn>.
[10] Ministry of Foreign Affairs of the People's Republic of China, "China-Benin Relation" (July 2014), online: FMPRC <www.fmprc.gov.cn>.
[11] Economic and Commercial Counsellor's Office of the Embassy of the People's Republic of China in the Republic of Uganda, "China's aid to Uganda" (May 2013), online: MOFOCM <http://ug2.mofcom.gov.cn>.
[12] China's Opening Up Office, *A 30-Year History: Exhibition on China's Opening Up*, online: MOFCOM <http://kaifangzhan.mofcom.gov.cn>.
[13] *Supra* note 5.

commitment to the continent,[14] and greatly boosted its standing in the region as an ally of Africa in general.[15]

China honoured its promises to provided Africa with a great amount of foreign aid despite its own domestic economic difficulties - the "Great Leap Forward" (1958-1960), the Great Chinese famine (1959-1961) and the Cultural Revolution (1966-1976).[16] It proved itself to be an earnest friend to Africa by its continuing financial support. In return for China's generosity, the African countries gave recognition to China, established diplomatic relations with China, and voted for China to replace Taiwan in New York.

In 1949, the Communist Party of China won the Chinese Civil War in mainland China and established the People's Republic of China (PRC), claiming to be the sole legitimate government of China. The new government needed political allies and sought diplomatic recognition in the international arena. The African countries had, from the beginning, given their recognition to Beijing. "In 1956, China and Egypt established diplomatic relations, marking the beginning of diplomatic relations between China and the African countries. From then on, China-Africa relations entered a period of rapid development."[17] 41 African countries established diplomatic relation with China in the 1960s and 70s. (To date, 50 African countries have established diplomatic relation with China, see Table One.)

Another problem China faced at that time was admission to the United Nations (the UN). The Republic of China (ROC) joined the UN as a founding member on 24 October 1945 as a charter member and one of the five permanent members of the Security Council. When the Communist

[14] Ian Taylor, *supra* note 3 at 55.
[15] *Ibid* at 56.
[16] Yun Sun, "China's Aid to Africa: Monster or Messiah?" (7 February 2014), online: Brookings <https://www.brookings.edu>.
[17] *Supra* note 4.

Party of China established the People's Republic of China (the PRC) in 1949, the ROC government retreated to the island of Taiwan. Beijing claimed to be the sole legitimate government of China and started its over-20-year journey of admittance to the UN. Each year, the United States was able to assemble enough votes to block this resolution until 1971 when the PRC achieved its seat at the UN with the African countries' support on "One China" policy. "In October 1971, a pro-Beijing resolution was voted in by 76 to 35 votes, with 17 abstentions, and this saw the admittance of China to the United Nations. This victory for Beijing was won with the vital support of a number of African countries: over a third of Beijing's votes were from Africa. Of the 23 co-sponsors of the 'important question', 11 of them were African and it is certain that without the African votes, China would not have succeeded. This has not been forgotten by Beijing and is routinely mentioned at Sino-African meetings."[18]

One may see that China-Africa relations "were primarily based on political solidarity."[19] China helped the African countries attain political independence and rebuild productivity.[20] The African countries in turn supported China to legitimise its "One China" policy and attain its seat at the United Nations.[21] China and Africa used this period to show better understanding of each other and a willingness to treat each other as equals.[22] Moreover, such mutual understanding fostered a friendship and kinship between China and Africa which formed the foundation of China-Africa relationship that has been consistently growing ever since.

1.1.2 Early "investment" in the form of aid projects based on political solidarity

[18] Ian Taylor, *supra* note 3 at 16.
[19] *Supra* note 5.
[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*

The initial China-Africa relationship was predominantly about political ties. The economic ties between China and Africa at that time was weak and politicised. While there were trade deals between China and Africa, the volume was very small, and the trade deals were completed on a government-to-government basis under a strict economic plan. For example, in 1964, the Founding Father of Tanzania, Julius Kambarage Nyerere, came to China to sign a trade agreement which fixed that in the next 5 years Tanzanians would buy any commodities they could afford from China and China would buy 5 million pounds of commodities from Tanzania per year.

The Chinese aid projects of the 1960s and 70s, arguably constituted China's early "investments" in Africa. However, as these "investment transactions" were driven by political ideology, aimed at earning Africa's supports for attaining its seat in the UN. These interest-free loans barely pursued commercial or economic interest.

Chinese aid to Africa is not a thing of the past. It started in the 1950s-70s era, continued thereafter through 80s and 90s, and greatly influences China's investment in Africa nowadays. Chinese aid to Africa evolved over time and soon became an essential economic component of China's Africa policy, tightly linked with investment. The terms of aid and investment are not always distinguished because aid is often given as forms of investment. China's unique presence in Africa nowadays combines foreign aid, foreign investment, trade and technology cooperation stemming from the time-honoured tradition of foreign aid.

1.2 The 1978-1999 Era

1.2.1 China's economic reform and opening-up

"A planned economy was once regarded as one of the striking features of socialism and communism."[23] Founded in 1949 as a hard-line socialist country, China "was implemented [as a]

[23] China Travel Guide, *Reform and Opening-up*, online: Chinaculturetour <http://www.chinaculturetour.com>.

centrally planned economic and closed Chinese society."[24] At that time, "China's central government had complete control over the economy"[25] and "a near monopoly on deciding how goods and services were allocated."[26] Agriculture was collectivized. Industrial products were planned in terms of both type of goods and quantity.[27] Collective ownership of agricultural and industrial products was applied to both distribution and the sales of such products.[28] Essentially, being a closed economy, there was scarcely any trade or investment between China and the outside world. This began to change in 1978 when China embarked on a transition from a planned economy to a market economy.[29]

Installed as a planned economy and a closed society, China fell far behind the other countries of the world. The Chinese government, led by Deng Xiaoping, launched a nation-wide reform and opening-up campaign to develop the economy and modernize society. In December 1978, the Third Plenary Session of the 11th Central Committee of the Communist Party of China officially launched the programme of "Reform and Opening-Up" (in Chinese, "改革开放"), marking the beginning of the Reform. The Reform fell within a wide range of areas, both political and economic.[30] "Political reform involved efforts to promote democracy, strengthen law enforcement, establish separation between government and enterprise, streamline government organs, perfect the system of democratic supervision, and safeguard stability and solidarity."[31] Economic reform

[24] Spotswood, "Reform and Opening up Policy in China" (23 November 2014), online: Studymode <http://www.studymode.com>.
[25] Antonio Graceffo, "A Short History of Chinese SOE Reform 1978–1992" (25 January 2016), online: Linkedin <https://www.linkedin.com>.
[26] Antonio Graceffo, "China's Partially Planned Economy" (20 June 2016), online: Linkedin <https://www.linkedin.com>.
[27] *Supra* note 23.
[28] *Ibid.*
[29] Economy Watch, "China Market Economy" (13 October 2010), online: Economy Watch <http://www.economywatch.com>.
[30] *Supra* note 23.
[31] *Ibid.*

involved the decollectivisation of agriculture, experimentation with free markets, formation of ownership structure, and introduction of foreign investment, etc.[32]

China's Economic Reform was carried out in two stages: "Welcoming In" (in Chinese "引进来") from 1978 to 1999, focused on market reform, domestic capital formation and technological advancement; and "Going Out" (in Chinese "走出去") from 2000 to date, involving "deepen access to foreign markets, natural resources and advanced technology, bringing about additional growth and stabilization."[33] The Economic Reform was a long-term plan to transform a highly-controlled planned economy to an innovative socialist market economy and "a closed or semi-closed state to a state fully opened up to the outside world."[34]

The first 20 years of the Reform focused on economic modernization and economic prosperity. The primary goal of "Welcoming in" was to achieve an economic boom through economic transformation - from a centrally planned economy to a market-oriented one, where the Chinese government introduced market principles, lifted price control, welcomed in foreign investments and contracted out state-owned industries. The central issue that stands out of the economic transformation was "the relationship between market forces and the power of government in the Chinese economy."[35]

At the beginning of the Reform, Chapter II of the Decision of the Third Plenary Session of the 11th Central Committee on "Reform and Opening to the Outside World" determined the relationship between market force and power of government in the Chinese economy:[36]

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[32] Paul Nash, "China's 'Going Out' Strategy" (10 May 2012), online: Diplomaticourier <https://www.diplomaticourier.com>.
[33] *Ibid.*
[34] Doc88, "Thirty Years of Reform and Opening Up" (10 March 2015), online: Doc88 <http://www.doc88.com>.
[35] Xuepeng Liu, "Market vs. Government in Managing the Chinese Economy" (October 15, 2014), online: China Research Center <https://www.chinacenter.net>.
[36] Stephen Herschler, "Special Issue: Introduction" (19 October 2014), online: China Research Center <Https://www.chinacenter.net>.

> "The basic economic system with public ownership playing a dominant role and different economic sectors developing side by side is an important pillar of the socialist system with Chinese characteristics and is the foundation of the socialist market economy. We must unswervingly consolidate and develop the public economy, persist in the dominant position of public ownership, give full play to the leading role of the state-owned sector, and continuously increase its vitality, controlling force and influence."[37]

On the one hand, China demonstrated "the effectiveness of a gradual and determined reform that releases the vitality of the market in a controlled way to maintain fast economic growth and a stable society."[38] On the other hand, however, it persisted in the retention of predominant state-owned sectors in important industries within an open market economy. That is the "China Model" or "Socialist Market Economy with Chinese characteristics" "with both market and government playing key roles in an intertwined way."[39]

Prior to the Reform, Chinese economy was centrally planned and overly-controlled by the government. The Reform aimed to weaken the role of government in economic management and shift the planned economy to a market-oriented one. But "China adopted a gradual approach to reform."[40] After 20 years of market reform, Chinese government had gradually loosened its grip on the economy,[41] but it still "has control of the commanding heights of Chinese economy," especially in pivotal industries.[42] This is because "the Chinese government considered the dominant role of public ownership a feature of its socialist market economy 'with Chinese characteristics;'[43] and the "gradual" pace was seen to ensure that "the government doesn't lose control of key resources, especially in sectors vital to national security, for instance, energy."[44]

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[37] *Supra* note 35.
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*
[44] China Daily, News Release, "China to Push forward Reform of State-Owned Companies" (10 March 2018) online: China Daily <http://www.chinadaily.com.cn>.

"The gradual approach adopted by China can be indeed conducive to long-term economic prosperity."[45]

A remarkable rise of state-owned enterprises (SOEs) was seen in the socialist market economy. Such open market economy based on predominant state-owned sectors contributed to the rise of SOEs. Under the interaction of market forces and government power, the SOEs became the pillar of the Chinese economy and played a leading role in China's overseas investments.

1.2.2 The rise of state-owned enterprise (SOE)

SOEs were the product of a government-planned economy. At that time, there was no private companies on the market, all were state-owned enterprises (China Labour Bulletin 2007 and Zhong n.a.),[46] and the SOEs were "incredibly unproductive and unprofitable."[47] The SOEs were a vehicle for the government to exercise control over the economy, where the Chinese government had full ownership of the enterprise.[48] There was "no clear separation between the government and enterprise." The SOEs were the most important force in the planned economy.[49]

Since the Reform and Opening-Up, instead of being eradicated, the SOEs with the implementation of privatisation and corporatisation, became the pillar of the Chinese economy and played a dominant role in China's overseas investments. In the 1980s, China implemented a largely planned but somewhat market driven economy.[50] Parts of the economy was opened up to private businesses, with most industries remaining under the control of the government through SOEs. Every year, SOEs had to complete assigned quotas by the government. But they "were allowed to sell their

[45] *Supra* note 35.
[46] *Supra* note 25.
[47] *Ibid.*
[48] *Supra* note 23.
[49] *Supra* note 25.
[50] *Supra* note 26.

excess production"[51] and given autonomy on how to spend surplus income over and above government quotas, "reinvesting the money in production equipment or paying bonuses to employees."[52]

As the Reform deepened in the 1990s, radical changes were made, involving partial privatization, trade liberalization, contracting out of state-owned industry, dismantling of job security, and lifting of price controls, protectionist policies and regulations.[53] "In 1994 the general corporate law was enacted, allowing for privately owned enterprises (POE). (Zhong n.a.)"[54] Subsequently, more industries were opened up for private enterprises and other forces, such as foreign companies, privately owned enterprises, township and village enterprises, entered the market and weakened the dominant role of SOEs in the Chinese economy.[55]

However, SOEs conformed to the changes and carried out corporational and organisational reform to blend into the market economy. In 1994, the SOE reform entered into the stage of corporatisation, a strategy meant to reduce over-employment, improve corporate governance, increase profitability and enhance competitiveness.[56] In 1997, the Chinese government started to convert the SOEs into shareholding corporations, either limited liability companies or share-holding limited companies.[57] "This meant that SOEs could begin to sell their shares on the Shanghai and Shenzhen Stock Exchanges," [58] and private investors could hold shares in SOEs. With the implementation of corporatisation and privatisation and a privileged status allowing acquisition of natural resources

[51] *Supra* note 25.
[52] *Ibid.*
[53] Chinaseite, *Reform and Opening-up Policies in China*, online: Chinaseite, <http://www.chinaorbit.com>.
[54] Supra note 25.
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.*

and capital at a much lower cost,[59] SOEs became larger and stronger. They controlled a greater market share, made huge profits, and became the pillar of China's economy. SOEs dominated all the "very important" industries including nuclear, space flight and aviation, shipping, military production, natural recourse and energy, electronic technology, financial services, health care, telecommunication, mechanical engineering, railway, and post, etc. "With so many fundamental sectors being controlled by the [SOEs], it could be said that this control touches every citizen, every day."[60] Furthermore, as SOEs usually control the upstream sectors such as resource and energy, they still play a leading role in China's outward trade and investment.[61]

1.2.3 Government-to-Government Investments focusing on infrastructure development carried out by SOEs

The volume of trade between China and Africa was merely 12 million dollars in 1950. It increased from $817 million in 1979 to $6,484 million in 1999, eight times as much as before.[62] More than half of the trade volumes were brought by SOEs. The SOEs also dominated the Sino-Africa investment market. In 1988, the China State Construction Engineering Corporation (CSCEC), a Chinese SOE in field of construction engineering, signed the first construction contract with the Botswanan government to build the China's Embassy in Botswana. This marked the shift from the China-Africa relationship driven by political ideology to commercial and economic interests. 20 years after China's reform and opening-up, investment and incidental labour and technology service brought by SOEs expanded from house-building to irrigation, fishery, electric, iron and

[59] *Supra* note 44.
[60] *Supra* note 26.
[61] *Supra* note 35.
[62] Ministry of Commerce of People's Republic of China, *The 50-year Trade and Economic Development between China and Africa*, online: MOFCOM <www.mofcom.gov.cn>.

steel industry, etc. Construction workers, medical personnel, seamen, corporation managers, software technicians, engineers and other specialists were dispatched in these programmes.

The implementation of China's reform and opening-up policy[63] in 1978 and market economy[64] in 1992 brought new opportunities to the Sino-Africa relations - increased trade deals, construction contracts, labour services, project advising, and foreign investments in the form of joint ventures, etc. The Sino-Africa trade and economic relations started to be driven by commercial and economic interests rather than political ideology, particularly after 1992 when China changed its government-planned economy into market-oriented economy. However, the Sino-Africa economic relations still exhibited a characteristic of government-to-government activity.

In the 1980s and 90s, Chinese investments in Africa took the form of aid projects, focusing on infrastructure development channelled through SOEs. While China called it aid, such "aid" might not be distinguished too much from investment. Usually, the African countries would make a request for building infrastructure, such as railways, water pipelines, dams, and hospitals etc., in high-level meetings with China. Once the request was accepted, China would offer free- or low-interest loans through its lending agencies and incite its state-owned construction companies to sign construction contracts with African governments. With the injection of capital, the SOE then carried out the construction projects.

By the end of 1999, 351 Chinese SOEs had launched construction projects in Africa. The total capital brought in by these projects was 440 million US dollars.[65] Some typical examples are as follows: in 1980, China signed a free-interest loan agreement to finance the building of the Great

[63] *Supra* note 53. It was an economic reform in China beginning in 1978, launched on the third plenary session of the eleventh central committee of the Chinese Communist Party.

[64] *Ibid.* In 1992, Chinese government decided to change the current government-planned economy into a market-oriented economy. The socialist market economy includes four modernizations: agriculture, industry, science and technology and the military.

[65] *Supra* note 62.

Hall of the People in Cape Verde. In 1987, China financed the repair of the Mugere Hydropower station in Burundi and brought the station back to life. China provided low-interest loans to Botswana for building the South Railway from 1982 to 1987, the North Railway from 1987 to 1989 and the Central Railway from 1991 to 1997. It provided financial aid to Benin for building the Lokossa Drainage Engineering in 1991, the repair of the Sport Stadium Beacon in 1993, the building of the Lokossa Hospital in 1995 and the Benin Government House in 1996.

One may find that the investment projects launched in Africa by Chinese SOEs in the 1980s and 90s mainly focused on infrastructure construction.[66] This is because the primary task of the African countries after being founded was to seek finance for developing infrastructure. Thus China, to prove itself a responsible stakeholder, provided Africa with financial aid to build infrastructure. The investment projects usually went through high-level negotiations and were made by way of signing free-interest or low-interest loan agreement between the governments of China and the African countries. They were channelled through Chinese lending agencies and conducted by Chinese state-owned construction companies. Chinese investments contributed to Africa's revenue creation and economic development through infrastructure construction projects.[67]

1.3 After 2000

1.3.1 China's "Going Out" policy

There were some overseas investments in the "Welcoming In" stage. However, "only state-owned enterprises (SOEs) or other approved provincial and municipal entities were allowed to invest

[66] "China's Investments in Africa: What's the Real Story?" (19 January 2016), online: Wharton <http://knowledge.wharton.upenn.edu>.
[67] *Supra* note 2.

overseas, which they did on a modest scale."[68] The rapid growth of Chinese investments into Africa especially private investments started with the adoption of China's "Going Out strategy". China initiated its "Reform and Opening Up" programme in 1978. The initial stage of "Welcoming In" focused on economic modernisation and economic prosperity. After 20 years of development, China's economy made tremendous progress. The Gross Domestic Product (GDP) grew from 367.87 billion RMB in 1978 to 10028.01 billion RMB in 2000, and 74358.55 billion RMB in 2016.[69] China's exponential economic growth required more resources and energies out of its self-production. With a continuing decline in domestic output, Beijing has to look outwards.[70] As China was awash with excess capacity, it needed to explore external markets to solve its industrial overcapacity. China thus launched the second round of reform "Going Out" to "deepen access to foreign markets, natural resources and advanced technology, bringing about additional growth and stabilization."[71]

China's "Going Out" policy, sometimes also referred to as the "Going Global" strategy, was announced in 2000 on the Third Session of the Ninth National People's Congress and "embedded in the Tenth Five-Year Plan on National Economy and Social Development in 2001, and included in every plan thereafter."[72] The "Going Out" policy was a long-term, innovation-oriented development plan, "in the context of which the government promulgated a series of regulations and circulars in order to facilitate and encourage overseas trade and investment.[73] The Chinese government encouraged its enterprises to "go out" - to trade abroad across the world and invest in

[68] *Supra* note 32.
[69] Data from National Bureau of Statistics of China
[70] "Overall, China's crude-oil output increased by 1.6 percent, while consumption of crude oil (i.e. the sum of net imports plus output) rose by 7.3 percent." See China Daily, 31 January 2008.
[71] *Supra* note 32.
[72] Catherine Elkemann & Oliver C Ruppel, "Chinese Foreign Direct Investment into Africa in the Context of BRICS and Sino-African Bilateral Investment Treaties" (2015) 13 Rich J Global L & Bus 593 at 599.
[73] *Ibid.*

overseas expansion.

Since the "Going Global Strategy's" inception, China's overseas foreign direct investment (FDI) made tremendous progress.[74] By the end of 2016, more than 24,400 Chinese companies launched overseas FDIs that covered 190 countries and regions across the world.[75] According to the UNTCAD database, China's global FDI outflows rose from US $1,774 million in 1999 to US $183,100 million in 2016; and its FDI stocks grew from US $26, 853 million in 1999 to US $1,280,975 million in 2016. As a result, China became the second largest source of global FDI outflow and sixth largest source of global FDI out-stock in 2016.[76] (See Table 2)

"In the early stages of China's 'Going Out' strategy, the bulk of overseas investment was directed towards trade and supporting business such as marketing and distribution."[77] "Light industrial, export-oriented firms, especially those requiring a low capital base, continued to flourish and expand."[78] China's manufacturing sector experienced overcapacity. Thus, China's "Going Out" strategy primarily focused on the export of low value-added products.[79]

In 2001, China acceded to the World Trade Organization (WTO). The "Going Out" strategy was consolidated and formalized as the primary goal of economic development.[80] "Chinese companies were encouraged to strengthen their international competitiveness by availing themselves of their rights to enter WTO markets, to which membership entitled them, and for which Beijing had committed itself to several major domestic market-opening concessions."[81] "Continued reforms

[74] Pinkerton blog, "China's 'Going Out' Strategy: Increasing Overseas Expansion" (21 July 2014), online: Pinkerton <https://www.pinkerton.com>.
[75] Reports Ministry of Commerce, Report on Development of China's outward Investment and Economic Cooperation 2016 at 3.
[76] *Ibid* at 4.
[77] *Supra* note 32.
[78] *Ibid.*
[79] *Ibid.*
[80] *Ibid.*
[81] *Ibid.*

and a booming export trade increased its capacity for foreign investment."[82] Just a few years later, "China moved to the front ranks of large global investors, transforming itself from a major exporter of goods into a major exporter of capital."[83] In 2006, the Chinese government encouraged companies to "go further outwards" (in Chinese, "进一步走出去"), "in an attempt to steer surplus capital away from speculative investment in real-estate and the stock market".[84] Subsequently, "Chinese companies engaged in larger and more complex foreign investment deals."[85]

1.3.2 Establishment of the Forum on China-Africa Cooperation (FOCAC)

The need for natural resources and the desire for overcapacity reduction pushed China to go out and seek external markets. In the Outward Investment Sector Direction Policy & 2006 Catalogue of Industries for Guiding Outward Investment issued by the National Development and Reform Commission ('NDRC'), the Ministry of Commerce ('MOFCOM') and the Ministry of Foreign Affairs ('MFA') special emphasis was given to "projects that can acquire resources or raw materials for which there is a domestic shortage and an urgent need for the national economic development", "projects that can promote the export of domestic products, equipment, and technologies with competitive advantages, as well as the export of labour service" and "projects that can significantly improve China's capacity in technology, research, and development, and can utilize global cutting-edge technologies, advanced management expertise, and professionals."[86] Africa, with rich natural resources and great market potential,[87] fit perfectly in China's "Going Out" strategy.

"The mounting saturation of China's export markets, combined with a rapid increase in the cost

[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*
[86] *Supra* note 72 at 600.
[87] *Supra* note 16.

of importing raw materials into China (due in the main to China's own demand, which increases prices), makes Africa more and more important to China's economy. Indeed, as the value of Chinese exports depreciates, Beijing has to maintain the growth of its economy by adding more Chinese 'content' to its exports (Business Day, February 22, 2007). Getting hold of raw materials is integral to this strategy; Africa, with its natural resources, thus fits squarely into Chinese policy both foreign and domestic. Indeed, it would be difficult to overstate the importance of Africa to China's own development."[88] "Abundant natural resources and a great potential market in Africa are very important for China's sustainable development; while for Africa, with social stability regaining in recent years, it is in urgent need of exterior support to help its economic development."[89] Africa particularly needed Chinese investments in infrastructure to stimulate its economic growth.[90]

Chinese commerce was also welcomed in Africa. "China exports mainly manufactured and consumer goods to Africa; and most of these are cheap products."[91] The goods produced and sold by Chinese manufacturers and entrepreneurs "are affordable for large parts of the population and thus help to develop the consumer sector across the continent."[92] "The price tag that may lure African consumers into switching to Chinese products"[93]. The ordinary customer in the less developed economy profited from cheap Chinese goods.[94]

[88] Ian Taylor, *China's new role in Africa* (Colorado: Lynne Rienner, 2010) at 15.
[89] Ian Taylor, *supra* note 3 at 67; Xinhua, 13 January 2006.
[90] *Supra* note 16.
[91] Yenkong Ngangjoh-Hodu, "Sino-African Relationship and Its Impacts on Africa's Regional Integration Processes" (2009) 10:2 Journal of World Investment & Trade 297 at 307.
[92] *Supra* note 72 at 612.
[93] *Supra* note 91 at 306.
[94] *Supra* note 72 at 612.

China needed Africa's resources and markets to solve the problem of its rapidly expanding growth; the African countries needed Chinese investments and commerce for economic growth. This mutual need brought China and Africa closely together.

From the 10th to 12th October 2000, a Forum on China-Africa Cooperation ministerial conference was held in Beijing. "More than 80 ministers from China and 44 African countries, representatives of 17 regional and international organizations, people from the business communities of China and Africa were invited to the conference."[95] The 2000 meeting was "the first gathering of its kind in the history of China-Africa relations,"[96] and "unique in Beijing's treatment of other regions and continents."[97] It proclaimed the birth of the Forum on China-Africa Cooperation (FOCAC).

The FOCAC is a multi-aspect framework for collective dialogue and cooperation between China and the African countries on the basis of equality and mutual benefit.[98] At the Beijing Conference, both sides expressed their determination to further consolidate and expand China-Africa cooperation at all levels and in all fields to establish a new-type of long-term and stable partnership based on equality and mutual benefit. The broad areas of priority of cooperation identified by China and the African countries included trade, finance, agriculture, transportation, environment, tourism, culture, education, science and technology, human resource development, medical care and public health. Its founding document - *Beijing Declaration of the Forum on China-Africa Cooperation (Beijing Declaration 2009)* emphasized that China-Africa cooperation should be based on equality and mutual benefit. "The assertion in the People's Daily (12 October 2000), at the time of the first FOCAC, that China and Africa 'should … enhance their co-operation and

[95] **Conference Documents** FOCAC, *The First Ministerial Conference of FOCAC*, 1st Ministerial Conference of FOCAC (15 September 2004).
[96] Ian Taylor, *supra* note 3 at 38.
[97] *Ibid* at 48.
[98] **Conference Documents** FOCAC, *Beijing Declaration of the Forum on China-Africa Cooperation*, 1st Ministerial Conference of FOCAC (15 September 2004) [Beijing Declaration 2009].

consultation in multilateral … organizations in order to *safeguard the interests of both*' is a reflection of this concern."[99]

Under the FOCAC framework, China and Africa will meet regularly at the ministerial level every three years. The Ministerial Conferences will be convened in China and Africa on an alternate basis.[100] The Ministerial Conference will release an Action Plan to set out the China-Africa cooperation programmes for the coming three years. To date, six Ministerial Conferences have been held since its inception, generating the *Programme for China-Africa Cooperation in Economic and Social Development 2009* of FOCAC I, the Addis Ababa Action Plan (2004-2006) of FOCAC II, the Beijing Action Plan (2007-2009) of FOCAC III, the Sharm El Sheikh Action Plan (2010-2012) of FOCAC IV, the Beijing Action Plan (2013-2015) of FOCAC V and the Johannesburg Action Plan (2016-2018) of FOCAC VI. These Action Plans facilitate the implementation of cooperation programmes in both economic and social development. The FOCAC emphasizes a planned cultivation of a long-term relationship.[101] A new era for the development of a stable and long-term partnership featuring equality and mutual benefit between China and the African countries has arrived.[102]

1.3.3 Chinese "aid" under the FOCAC framework

The FOCAC is a multifaceted framework for China-Africa cooperation in the 21st century. On the Chinese side, China commits to help Africa develop its economy. It pledges to give preference to the import of African products into the Chinese market; set aside special funds to support Chinese investments in Africa; encourage Chinese enterprises to participate in infrastructure construction

[99] Ian Taylor, *supra* note 3 at 25-26.
[100] *Ibid* at 46; see also **Conference Documents** FOCAC, *Programme for China-Africa Cooperation in Economic and Social Development*, 1st Ministerial Conference (25 September 2009) at 20.2.
[101] Chuka Enuka, "The Forum on China-Africa Cooperation (FOCAC): A framework for China's Re-engagement with Africa in the 21st Century" 30:2 (2010) 209 at 216.
[102] *Supra* note 95.

in Africa; promote investment in the exploration of natural resources in Africa; provide preferential loans, reduce or cancel debt owed by the heavily indebted economically poor and least developed countries in Africa; send senior experts

in agricultural technologies to Africa and set up demonstration centres of agricultural technology; establish overseas economic and trade cooperation zones in the African countries; set up financial branches; establish the African Human Resources Development Fund for the training of professionals of different disciplines and send medical teams to the African countries, providing them with medical equipment, facilities, medicine and additional training for local medical personnel, etc.[103] These multi-year, forward-looking commitments are addressed in the FOCAC Action Plans, and constitute the essential part of the Plans.

The FOCAC also establishes an inbuilt follow-up mechanism to monitor China's commitments towards Africa. At the first FOCAC ministerial conference China and Africa agreed to "establish corresponding committees for follow-up actions of the Forum on China-Africa Co-operation at Ministerial level."[104] "Under these mechanisms, the Ministers will meet in three years time to evaluate progress in the implementation of the Programme, Senior Officials in two years time and Ambassadors resident in China on a regular basis."[105] "This inbuilt monitoring mechanism increases the likelihood that commitments will be fulfilled."[106]

China sees its commitments of privileged market access, funding support, infrastructure projects, economic zone cooperation, preferential loans, debt relief, technical cooperation, finance assistance, human resource development cooperation, medical assistance, emergency

[103] *Supra* note 100.
[104] *Ibid* at 20.1.
[105] *Ibid* at 20.2.
[106] **Report** *South-South Cooperation: Africa and the New Forms of Development Partnership*, UNCTAD, 2010, UNCTAD/ALDC/AFRICA/2010 at 16.

humanitarian aid and volunteer programmes[107] as "aid" to Africa. While Chinese government tends to use the word "aid" and blur the distinction between the categories of 'aid' and 'investment', it is actually a combination of "foreign aid, direct investment, service contracts, labor cooperation, foreign trade and export."[108] Such "aid" does contribute to African revenue creation, local technological progress, employment opportunities and sustainable socio-economic development. However, there are multiple reciprocal economic benefits: "development and exploitation of Africa's natural resources, access to local market, employment opportunities for Chinese labors and service contracts for Chinese companies on infrastructure projects that China funds."[109] In the FOCAC era, China's aid to Africa is complex and pragmatic.

"China truly sees itself as Africa's 'brother' and hopes to help African countries develop".[110] "However, this does not mean China is being altruistic. Helping Africa is important, but China would not do so if it had nothing to gain."[111] "There is nothing wrong with being altruistic in one's motives," but it should be noted that, on the basis of mutual benefits laid out by FOCAC framework, China will not provide aid to Africa in exchange for nothing.[112]

The FOCAC is an outcome of the outward expansion by China's "Going Out" Policy in Africa. At the first Ministerial Conference of FOCAC Chinese President, Jiang Zemin (1992-2004), in his speech "China and Africa-Usher in the New Century Together" stressed that both sides should "give full play to their advantages in natural and human resources, tap to the full their respective productive and technological potential, take advantage of the others' strengths to make up for their

[107] *Supra* note 16.
[108] *Ibid.*
[109] Yun Sun, "China's Increasing Interest in Africa: Benign but Hardly Altruistic" (5 April 2013), online: Brookings <https://www.brookings.edu>.
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*

own weaknesses, and achieve common improvement."[113] Later in President Hu Jintao's visit to Nigeria, Kenya and Morocco shortly after the third Ministerial Conference of FOCAC in 2006, he brought up the "win-win economic cooperation" "which appeared to mean utilizing Africa's rich resources and market potential alongside China's 'practical know-how gained in the course of modernization'."[114] In this sense, China's aid means to access to Africa's rich natural resource and market, a critical goal of Beijing's Going Out strategy.[115]

1.3.4 Chinese investments after 2000

"Both the Chinese government and Chinese companies perceive Africa to be rich in natural resources, particularly in crude oil, nonferrous metals, and fisheries."[116] Africa attracts Chinese investments "as a result of her abundant natural resources."[117] China has never covered up her desire on Africa's resources and energies. Beijing had many times mentioned the significance of cooperation with Africa in natural resources and energy during the high-leader exchanges.[118] "Between 26 January and 4 February 2004, within a few weeks of FOCAC II, the Chinese President, Hu Jintao (2004-2013), embarked on a tour of France, Egypt, Gabon, and Algeria… During his visit to Algiers, …Hu asserted that 'both countries should strengthen economic and trade cooperation and expand the cooperation to cover oil and natural gas exploration,

[113] Ian Taylor, *supra* note 3 at 39; People's Daily, 11 October 2000.
[114] Ian Taylor, *supra* note 3 at 69; Xinhua, 27 April 2006.
[115] *Supra* note 16.
[116] *Supra* note 88 at 14.
[117] Simon Pierre Siqué & Jacob W Musila, "Challenges of Foreign Direct Investment Flows to Africa" in Malinda S Smith, ed, *Beyond the 'African Tragedy': Discourses on Development and the Global Economy* (Hampshire: Ashgate, 2006) 213 at 213.
[118] Ian Taylor, *supra* note 3 at 39; People's Daily, 11 October 2000. As early as the founding of the FOCAC, Chinese President Jiang Zemin (1992-2004) had implied that both sides should "give full play to their advantages in natural and human resources...". See also Ian Taylor, *supra* note 3 at 59; Xinhua, 5 February 2009. "Between 26 January and 4 February 2004, within a few weeks of FOCAC II, the Chinese President, Hu Jintao [2004-2013], embarked on a tour of France, Egypt, Gabon, and Algeria… During his visit to Algiers, …Hu asserted that 'both countries should strengthen economic and trade cooperation, and expand the cooperation to cover oil and natural gas exploration, infrastructure construction, communications, agriculture and human resources'."

infrastructure construction, communications, agriculture and human resources'."[119] The choice of Gabon and Algeria as destinations of Hu's visit showed China's burgeoning interest in the continent's oil. "During the tour, Hu himself referred to the necessity for Africa and China to improve cooperation regarding oil and natural gas fields on the continent. The communiqué issued upon the completion of Hu's visit to Algeria, for example, began by asserting that 'China and Algeria should strengthen economic and trade cooperation within the bilateral partnership framework and expand such cooperation to cover oil and natural gas exploitation'."[120]

China's desire for natural resources and aid commitment to Africa bring about its very unique model of investment in Africa – "Angola mode", also named as "resources for infrastructure", "tied aid" or "package deals"[121] – a deal structure which combines foreign aid, investment and economic development. "Typically, a beneficiary country receives a loan for the development of infrastructure, including electricity generation, telecom expansion, railway construction, and water catchments, while the repayment of the loan is done in terms of natural resources."[122] The loans are channelled through Chinese lending agencies, especially through its Export-Import Bank ('EXIM Bank'); which are in many cases backed by natural resources.[123] As the upstream sector of construction is controlled by SOEs, contracts of infrastructure project are generally awarded to Chinese state-owned construction enterprises[124] (See table 3).

To shed further light on the process: many African governments maintain a "wish list" of infrastructure projects.[125] During the Ministerial Conference of FOCAC, they arrange high-level

[119] Ian Taylor, *supra* note 3 at 59; Xinhua, 4 February 2009.
[120] Ian Taylor, *supra* note 3 at 60; Xinhua, 5 February 2009.
[121] *Supra* note 72 at 599-600.
[122] *Ibid.*
[123] *Supra* note 16.
[124] *Supra* note 72 at 599-600.
[125] *Supra* note 66.

meetings with Chinese government ministers or president to seek "aid" for infrastructure development.[126] Once a Memorandum of Understanding is signed, the project will be pitched to Chinese lending agencies, usually the Export-Import Bank, to obtain a loan package. The Chinese SOEs will found a joint venture with African government and sign the construction contract. When the feasibility study is finalized, the project moves forward.[127] As these projects require large amount of capital and long pay-back terms, the bank might require the African governments to secure the loan with their farm products or natural resources.

"Though commodity-backed loans were not created by China – leading Western banks were making such loans to African countries, including Angola and Ghana, before China Eximbank and Angola completed their first oil-backed loan in March 2004 – the Chinese built the model to scale and applied it using a systematic approach."[128] For example, "in 2007, the government of the Democratic Republic of the Congo and two Chinese construction companies founded a joint venture to bring a moribund copper mine back to life. They then negotiated with China's Export-Import Bank to secure a $6 billion commercial rate loan, guaranteeing repayment out of the future profits from the mine. The loan, which was later reduced to $3 billion, would be used to finance infrastructure built by the two Chinese companies."[129] Shortly after, China launched another aid project in Ghana to build its Bui Dam. Ghana secured a $562 million loan from China's Export-Import Bank with its cocoas. "According to Chinese scholars, since 1956, China has provided almost 900 aid projects to African countries, including assistance supporting textile factories, hydropower stations, stadiums, hospitals, and schools."[130]

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[126] *Ibid.*
[127] *Ibid.*
[128] *Ibid.*
[129] Deborah Brautigam, "5 Myths about Chinese Investment in Africa" (4 December 2015), online: EP <http://foreignpolicy.com>.
[130] *Supra* note 16.

This investment model has been widely criticized, as it is seen as "China's selfish quest for natural resources."[131] China's exponential economic growth after "Open Up" Reform requires more resources and energies then can be self-produced. Troubled by poverty, Africa with rich natural resources is badly in need of finance for developing economy. "Opponents assert that it is exploitative for China to finance African infrastructure projects in exchange for the continent's natural resources."[132] China invests in the infrastructure sector including roads, railways, hospitals and telecom systems in exchange for oil, iron, copper and zinc "that it urgently needs to fuel its own economy."[133] It is true that China's expansion in trade and economy in Africa "is driven by a desire to obtain raw materials and energy sources for China's ongoing economic growth and for new export markets."[134] However, there are several myths about Chinese engagement in Africa.

The first myth is that Chinese involvement in Africa is only to extract natural resources. At the sector level, mining and construction have always been the top concerns of China's FDIs in Africa. However, significant investments are also launched in sectors of finance, manufacturing, science and technology services and other areas. For example, by 2014, China had invested $5,310 million in finance, $4,400 million in manufacturing, and $1,360 million in science and technology services; accounting for 16.4%, 13.6% and 4.2% of its total FDI stock in Africa, in contrast to 24.7% in construction ($7,990 million) and 24.5% in mining ($7,930 million) (see Chart 1-1 and Chart 1-2). By the end of 2015, China's outward FDI stocks in finance, manufacturing, science and technology was $3,420 million, $4,630 million and $1,460, taking share of 9.9%, 13.3% and 4.2%; in contrast to 27.4% ($9,510 million) and 27.5% ($9,540 million) in construction and mining (see Chart 2-1 and Chart 2-2). By 2016, Chinese investments in finance, manufacturing, science and

[131] *Supra* note 2.
[132] *Supra* note 66.
[133] *Ibid.*
[134] *Supra* note 88 at 2.

technology services grew to $4,560 million, $5,090 million and $1,910 million, taking share of 26.1%, 28.3% and 12.8% (see Chart 3-1 and Chart 3-2). While the extractive industries and construction still account for the largest share, investments in manufacturing, finance and technology service are also active and there tends to be a growing diversification in investment targets.[135] Other important sectors include agriculture, culture and sports, wholesale and retailing, business service, realty, and electric, gas and water supply, transportation, post, irrigation, health, telecommunication, repair service and catering etc. (See Chart 4)

In terms of sectors, "it does not turn out to be just in natural resources."[136] Services are the most common sector and there are significant investments in manufacturing as well.[137] In terms of countries, "there's not really this pattern where you see more [investments] going into natural-resource-rich countries."[138] "Chinese investment is everywhere—in resource-rich countries like Nigeria and South Africa, and non-resource-rich countries like Ethiopia, Kenya, and Uganda."[139] By the end of 2016, China had invested in 52 out of 60 African countries and areas.[140] "Chinese FDI reaches almost all African countries, even those that do not have a formal diplomatic relation with China (e.g., São Tomé and Príncipe)."[141] Data of Chinese FDI flows into Africa for the period of 2003-2012 show that the bulk of Chinese investments mainly flowed into Algeria, Angola, Congo DR, Egypt, Ethiopia, Equatorial Guinea, Gabon, Ghana, Kenya, Niger, Nigeria, South

[135] **Working Papers** WB, *China and Africa: Expanding Economic Ties in an Evolving Global Context*, Working Paper No 95161 (2015).
[136] *Supra* note 66.
[137] Wenjie Chen, David Dollar & Heiwei Tang, "China's Direct Investment in Africa: Reality versus Myth" (3 September 2015), online: Brookings <https://www.brookings.edu>.
[138] *Supra* note 66.
[139] *Supra* note 137.
[140] See Statistics of Chinese Outward FDIs 2016, MOFCOM, National Bureau of Statistics of and State Administration of Foreign Exchange of the People's Republic of China.
[141] *Supra* note 135.

Africa, Sudan, Tanzania, Zambia, and Zimbabwe (see Table 4).[142] Its investments are not only visible in resource-rich countries like Zambia (copper), Zimbabwe (platinum), Algeria and Gabon (crude oil); but also the non-resource-rich countries like Ethiopia and Kenya. Nowadays, the scope of Chinese investment in Africa is extensive.[143] Chinese investments aim to be involved in every sector of Africa's economy.

The second myth about the China-Africa business relationship is that all the Chinese SOEs sit around and divvy up the projects at the FOCAC meetings.[144] This is not true. "Instead, there is 'a ton of competition' among Chinese state-owned enterprises, and even among subsidiaries of the same enterprise."[145] Private investments are becoming a more and more important part of Chinese engagement in Africa.

As pre-mentioned, the SOE is a historical outcome of planned economy, established for fully implementing the government's economic plans. In China, the SOE is a company with the state as the sole stockholder, owning 100% of shares and all the assets of the company. The sole stockholder could either be the central government or a local government. The SOE is an important tool for the Chinese government to implement its policies towards Africa. During the planned economy period, the SOE dominated all sectors of industries to wholly control every aspect of Chinese economy. Even after 1992 when the market economy took place in China, the SOEs still dominate the "very important" industries, such as nuclear, space flight and aviation, shipping, military production, natural recourse and energy, electronic technology, telecommunication,

[142] Except 2008, in that year 5,491 million US dollars flowed into Africa from China. The 248.8% growth of FDI flow into Africa led to the summit of China's FDI into Africa. 4,808 million dollars out of the total flowed into South Africa, taking the 85.57% of China's FDI flow into the whole African continent. However, because 5, 460 million dollars of this inflow was due to the ICBC (Industrial and Commercial Bank of China) purchase of the Standard Bank Group of South Africa in 2008, the 2008 data is viewed as an exception to the general statistical trend.
[143] *Supra* note 135.
[144] *Supra* note 66.
[145] *Ibid.*

mechanical engineering, railway, and post, to control the lifeblood of the country. But, due to the poor performance of traditional state enterprises in the market economy, China embarked on a restructuring programme of corporatisation. This strategy intended to improve corporate governance and profitability.[146] At this time, the state retains ownership and control of large enterprises, but the central government has little direct control over the operations of state-owned enterprises. In 1992, the Chinese government pushed ahead with the privatization of SOEs, allowing private investors to hold shares. Nowadays, business choices made by Chinese SOEs are based on smart consideration of cost, risk and benefit. SOEs have to compete for business against other SOEs and private investors.

"All Chinese enterprises making direct investments abroad have to register with MOFCOM. The resulting database provides the investing company's location in China and line of business. It also includes the country to which the investment is flowing, and a description in Chinese of the investment project."[147] The firm-level data compiled by MOFCOM shows that Chinese overseas investors are mainly composed of eight types of companies: state-owned enterprise (SOE), limited liability company (LLC), corporation limited (Co. Ltd), joint-equity cooperative enterprise, private-owned company, foreign-capital enterprise, Hong Kong/Macau/Taiwan-capital enterprise and collective enterprise.[148] Except for state-owned enterprises (SOEs), all other types of enterprises can be generalized as non-state-owned enterprises (NSOEs). The SOE has always been a most important player in China's overseas investment market. By the end of 2006, 81% of China's FDI stocks abroad was made by SOEs, only a small share of FDI out-stocks was made by NSOEs. But, the proportion of China's FDI stocks abroad by SOEs decreased continuously from

[146] *Supra* note 25.
[147] *Supra* note 137.
[148] **Reports** Ministry of Commerce, Report on Development of China's outward Investment and Economic Cooperation 2014 at 15.

81% by 2006 to 50.4% by 2015, easing back a little to 54.3% by 2016 after the fall. Instead, investments made by NSOEs increased more and more from 19% by 2006 to 49.6% by 2015 (See Chart 5).

The resulting database provided by MOFCOM also includes the proportion of different types of Chinese enterprises that invest abroad on a yearly basis. In 2006, 26.0% of enterprises that registered with MOFCOM for investing abroad were SOEs. But the proportion decreased continuously to 5.2% in 2016. One may also find that the most active investor has always been the limited liability company (LLC): in 2006, 33.0% of enterprises registered with MOFCOM were LLC, taking the most share of registered enterprises; and the proportion grew up to 67.4% ten years later in 2015. Corporation limited (CO. Ltd) and private-owned companies also play a significant role in Chinese overseas investments. By 2016, 26.2% of companies that invested abroad were private-owned company. (See Table 5)

Given China's increasing FDI stocks outward, the growth of private investments and the decline of SOE investments reinforce the importance of private investments in Chinese overseas investment market. Nowadays, SOE is only one type of many Chinese overseas investors.

Usually, investors make decisions based on a risk-interest assessment of the market where they want to launch investments. SOEs are capable of taking high risks and performing huge projects, which allows them to invest in less stable environments. Private investors are different. They look for stable investment markets where they will take low risks and achieve great interest. Their investment decisions mainly depend on the risk-interest assessment of a foreign investment market. Thus, a high proportion of private investments in a market constitutes a standard of the stability of that foreign investment market. The more private investments invested in a market, the better and more secure that market is and vice versa. Essentially, the rate of NSOE/SOE in a developed

market is higher than that in a developing market. Africa is the continent with the largest number of developing and least developed countries. Its market is small and unstable, blocked with serious acute problems like corruption, inflation, political instability, outdated laws, etc. Although more and more Chinese NSOEs invest abroad every year, hypothetically there may be the pattern where more Chinese private investments go into well-developed markets, with very few going into African market. China's investments in Africa might still be dominated by SOEs at both the capital and volume levels. However, this can be shown to not be the case.

Table 6 shows the number of investment projects launched by Chinese NSOEs and SOEs in some selected developed, developing and African markets. In the selected developed markets, more than 90% of Chinese foreign investment projects are launched by NSOEs. The NSOE/SOE rate is exceptionally high. In the selected developing markets, while NSOE investment does not take as great a share as it does in developed markets, it still accounts for a share of up to 85%. It is true that the NSOE/SOE rate of African markets is lower in comparison with that of other selected developed and developing markets. But, Chinese private investments truly play a significant role in most African markets. There are much more Chinese NSOEs than SOEs in number that invest in Africa. Chinese private investments are also becoming an increasingly important part of Africa's economy, and contributes largely to growth and employment.[149]

"The China-Africa relationship has evolved over time."[150] China has realized that Africa enjoys not only natural resources, but also market potential. Chinese investments in Africa initially focused on natural resource exploration through SOEs, but nowadays aim at serving the market with a growing injection of private investment.[151] China needs to exploit Africa's potential as an

[149] *Supra* note 44.
[150] *Supra* note 66.
[151] *Supra* note 137.

emerging market for its tremendous investments by private enterprises. The African countries need Chinese investments in various areas other than the natural resource sector to boost every aspect of their economies.

The private, market-oriented investment calls for political stability, friendly investment policy, efficient system of payment, great access to credit, large market potential, interrelated institutional system and mutual legal framework etc. In order to attract foreign investments, the African countries initiated necessary political and economic reforms, updated their domestic laws to comply with the broadly accepted international rules, negotiated and concluded numerous Bilateral Investment Treaties (hereafter as "BITs") to create stable and secure environment conducive to foreign investments, and adopted regional arrangement to enlarge markets and enhance participation in international trade and investment.

However, BITs concluded between China and Africa follow the protection-oriented, post-establishment model. To date, China has signed BITs with 35 African countries (see Table 7). They are short and simple. The treaties merely provide for some general obligations of investment protection, leaving all other matters to the policy discretion of the host state. The current China-Africa BIT regime is sporadic, outdated, uninformed and incoherent,[152] and the investment climate created is unstable, unsecured and unpredictable that can barely meet the needs of privatization. Additionally, "there is little or no connection between individual country agreements with China and the deep-rooted integration initiative needed to construct a functioning custom union or common market in Africa. The continuous shift towards bilateralism between individual African

[152] Won Kidane, "China's Bilateral Investment Treaties with African States in Comparative Context" (2016) 49:1 Cornell Int'l LJ 141 at 175-176.

countries and China only represent a departure from the precepts that motivated the architect of African regionalism."[153]

The author is arguing for the establishment of a BIT scheme which creates an open, stable, secure and predicable investment climate for investors to play equally in every state of Africa.[154] The conclusion of the Comprehensive Economic and Trade Agreement between EU and Canada (CETA) develops the idea that China might conclude a standalone BIT with the African countries at the regional or sub-regional level to attract Chinese investment inflows into Africa through a coherent and uniformed investment scheme. Given the integration of Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA) to be one single jurisdiction over trade and investment, the China-OHADA BIT is the one most likely to be expected. Thus, this dissertation proposes negotiating and concluding the China-OHADA BIT.

This dissertation suggests to establish a new China-Africa BIT regime of negotiating and concluding a standalone BIT between China and Africa at regional or sub-regional level. This one standalone BIT regime inherently calls for absolute standard for market access and investment protection, and uniformity to limit the discretion of interpretation, and as such, through limiting the policy discretion, contributes to a more open, stable, secure and predictable investment climate. This new regime would provide for progressive liberalization of investment and precise protection to investors. The prospective China-OHADA BIT would be mutually beneficial to China and the African countries. But given the one-way investment inflow from China into Africa, the scenarios of investment liberalisation and protection outlined in the treaty would mean less to the African

[153] *Supra* note 91 at 309.

[154] Markus Burgstaller, "The Future of Bilateral Investment Treaties of EU Member States" in Marc Bungenberg, Jörn Griebel & Steffen Hindelang, eds, *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (London: Springer Heidelberg Dordrecht, 2011) 55 at 69-70.

countries. However, it might enhance the bargaining power of the African countries to include some investor obligation provisions that have not appeared in the previous China-Africa BITs.

To conclude a standalone BIT at regional or sub-regional level, the first question raised is whether an organisation has the state-like competence to conclude BITs. This issue is dealt with in Chapter 2. Then, the dissertation checks the possibility of application of one standalone BIT in the China-Africa investment relation. Chapter 3 examines if any regional group in Africa is endowed with the competence to conclude BITs and explains why the China-OHADA BIT is the one most likely being expected. Chapter 4 discusses the channel through which the BIT affects FDIs, and evidences that the China-OHADA BIT is not redundant despite the regional arrangement of OHADA. Chapter 5 analyses the underlying problems in the current China-Africa BITs, and explains why current BITs are not enough for creating a positive climate for Chinese investments in Africa. Chapter 6 explains how the proposed China-OHADA BIT provides a more open, stable, secure and uniformed investment scheme for investments using comparisons with the Canadian model. This model comprises separate BITs with the African countries combining investment protection with market access and was recently adopted in the China and Africa BIT practice.

This dissertation provides a comparative analysis of existing China-Africa BITs in light of two options of BIT scheme - separate BITs with the African countries combining investment protection with market access and one single BIT at regional or sub-regional level reinforcing and harmonizing investment protection and reducing market access barriers and discriminatory treatment for Chinese investments.[155] Both China and Africa have adopted the Canadian approach in their recent BIT practice, such as the newly concluded China-Canada BIT and Canada-Africa BITs. There is a clear trend in practice to follow the Canadian model. However, by comparing the

[155] **General publications** EC, Commission, *Impact Assessment Report on the EU-China Investment Relations* (Brussels: EC, 2013) at 23.

impacts of these two options on the improvement of investment climate, the one standalone BIT regime is more appropriate for China-Africa investments and will provide a more open, stable, secure and predicable investment environment.

Chapter 2 Does the organisation have the competence to conclude BITs?

In the field of international investment law, unlike national legal systems, there is neither a central legislative body to enact laws, nor a supranational court to interpret and enforce the law at the international level.[156] "Those who created the law and those to whom the law was addressed were identical."[157] Traditionally, international law was sought to be formulated by states, and only by states, in form of treaties, agreements, conventions, protocol, etc. It is the state that has the exclusive prerogative to create international laws. In the field of international investment law, the state-state BIT pattern has for a long time been seen as the only workable format that could be thought of. However, the expansive power of inter-government organisations (IGOs)[158] involved in law-making practice makes new formats available. The IGO could be a qualified candidate for the contracting party of BIT. This was dramatically proven when the Minimum Platform for Investment for the EU FTAs was completed on 6ıMarch 2006 and foreign investment was included in the EU's Common Commercial Policy (CCP) by Article 207 of the Treaty on the Functioning of the European Union (TFEU) on 1 December 2009. There is a more compelling case than ever for the possibility of the new BIT format – the EU-Canada Comprehensive Economic and Trade Agreement (CETA). While the CETA is still waiting for the approval of the EU parliament to enter into force, it is the first BIT with a state to be the contracting party on one side and a group of

[156] Delano Verwey, *The European Community, the European Union and the International Law of Treaties* (Hague: T.M.C. Asser press, 2004) at 1.
[157] Jochen Von Bernstorff & Thomas Dunlap, *The Public International Law Theory of Hans Kelsen* (Cambridge, UK: Cambridge University Press, 2010) at 42.
[158] Organisation hereafter is short for inter-government organization (IGO).

states on the other. This new state-organisation BIT pattern will definitely bring a new generation of BITs.

My thesis proposes the China-OHADA BIT is the best model for fostering Chinese investments in Africa, suggesting adapting to the state-organisation BIT model, instead of the traditional state-state BIT model. Then, the first question is does the IGO have the competence to conclude BITs? To answer this question, the author firstly needs to address international personality. As Jan Klabbers stated, "personality ought to be established before one can have any rights, obligations, or competences."[159] International personality is defined as "a threshold for action"[160] and "a bundle of rights, competences, and obligations"[161]. It defines the legal capacity of an international entity and states what such an entity is able to do on the international plane.[162] To determine whether the IGO has the competence to conclude BITs, one needs to check the international personality of the IGO. Therefore, this section will start with the discussion of international personality (Part A). Then, the author will talk about state sovereignty in Part B before getting into the IGO's competence to conclude BITs. This is predicated on the assumption that an IGO's competence stems from the right of sovereignty transferred from its member states, or as some studies call it, its powers are conferred by its member states. States have long been the only accepted subject in international law. It has full international personality, and enjoys complete and comprehensive rights, duties and competences on the international plane. A state's competence to conclude treaties stems from the right of state sovereignty. "[S]overeignty has fostered the idea

[159] Jan Klabbers, "The Concept of Legal Personality" in Fleur Johns, ed, *International Legal Personality* (Farnham: Ashgate, 2010) 3 at 17.
[160] *Ibid* at 7.
[161] *Ibid* at 14.
[162] Clarence Wilfred Jenks, "The Legal Personality of International Organizations" in Fleur Johns, ed, *International Legal Personality* (Farnham: Ashgate, 2010) 229 at 233.

that there is no higher power than the nation-state"[163], therefore, international laws that address states can only be made by this paramount power itself. The supremacy of state sovereignty decides that only a state can make laws that address itself. However, the IGO is sought to be a "derivative" creature. It only has limited international personality essential for the exercise of its entrusted tasks. Any right or competence an IGO enjoys comes from the segment of sovereignty or powers transferred from its member states. That is to say, an IGO may possess the competence to conclude BITs only if its member states transfer the relevant segment of sovereignty or confer the power on to it.

The competence to conclude BITs shall be understood as to have both the authority to negotiate and sign BITs enforceable within the whole region and the ability to perform concluded BITs. This would not be a problem for states. State sovereignty is sought to have both the external and internal notions. The external notion of sovereignty endows a state with the supremacy and independency to conclude treaties, while the internal notion of sovereignty determines the state's ability to perform concluded treaties. For the IGO, firstly the external power should be conferred on it. The IGO, instead of its member states, will negotiate and sign a BIT enforceable within the whole region. However, having this external power is not enough to perform concluded BITs which must still be left in the hand of member states. In order to conclude BITs, instead of achieving the ability of performing BITs, an IGO shall possess powers that guarantee the regional integration to make the IGO a "common interest" on investments. Therefore, IGO's competence to conclude BITs turns to the issue of integration. Part C will mainly discuss the importance of integration to an IGO's competence to conclude BITs.

[163] John H Jackson, "Sovereignty-Modern: A New Approach to an Outdated Concept" in Asif H Qureshi & Xuan Gao, eds, *International Economic Law Volume I General International Economic Law: Theory and Fundamental Concepts* (New York: Routledge, 2011) 234 at 234.

2.1 The Nature of International Personality

The Black's Law Dictionary defines "personality" as "the legal status of one regarded by the law as a person; the legal conception by which the law regards a human being or an artificial entity as a person."[164] It further defines "international person" as "an entity having a legal personality in international law; one who, being a subject of international law, enjoys rights, duties, and powers established in international law and has the ability to act on the international plane." [165] Accordingly, holding international personality is both the condition and the result of being a "person" in international law. Only the one with international personality is able to perform international conducts as well as to enjoy rights, duties and competences on the international plane. International personality is both "a threshold for action"[166] and "a bundle of rights, competences, and obligations"[167].

"It is often suggested (usually implicitly) that actors can only perform legal acts if they possess personality granted – or, at least, recognized and accepted – by the particular legal system in which they wish to act."[168] "[I]nternational legal personality is thought to be a *condition sine qua non* for the possibility of acting within a given legal situation…without legal personality, those entities do not exist in law. Accordingly, they can neither perform the sort of legal acts that would be recognized by that legal system nor be held responsible under international law."[169] Thus, firstly, holding international personality is a prerequisite for an entity to act in international law.

Second, "holding rights and duties, sometimes competences" is the direct result of holding international personality, as Jan Klabbers states "personality ought to be established before one

[164] *Black's Law Dictionary*, 8th ed, *sub verbo* "personality".
[165] *Black's Law Dictionary*, 8th ed, *sub verbo* "international person".
[166] *Supra* note 159 at 7.
[167] *Ibid* at 14.
[168] *Ibid* at 17.
[169] *Ibid* at 5.

can have any rights, obligations, or competences."[170] Holding international personality allows a subject of international law to possess civil and commercial rights and duties, such as to contract, to possess properties, to sue before a court; as well as to possess some powers and competences to establish diplomatic relations, to conclude treaties, to sign multilateral agreements, and to become member of international organisations, etc.

However, it should be clarified that those rights, duties and competences held by international subjects vary from one to another. That is to say, "personality is flexible, rather than an all-or-nothing concept: one can have personality in various gradations."[171] Furthermore, "the capacity of participating in the creation of new rules, rights and duties, of concluding international agreements or entering into other legal relations with other international legal persons are not indispensable elements of the personality of subjects of international law."[172] Some international subjects may possess a special set of "competences or powers", while some may not. For example, a state holds the power to conclude treaties and to become member of international organisations, while organisation may not possess such power.

To conclude, "every type of subjects of international law possesses a special set of rights and duties. Some rights and duties are possessed by several types of subjects. There are subjects which have more rights and duties than the others."[173] However, not any international subject possesses a set of competences or powers. Just like the International Court of Justice (ICJ) states "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, duties and competences, and their nature depends upon the needs of the Community."[174]

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[170] *Ibid* at 17.
[171] *Ibid* at 15.
[172] Budislav Vukas, "States, Peoples and Minorities as Subjects of International Law" in Fleur Johns, ed, *International Legal Personality* (Farnham: Ashgate, 2010) 79 at 87.
[173] *Ibid* at 88.
[174] *Ibid* at 81.

The competence to conclude BITs is one of the particular aspects of international personality. As discussed before, not all the international subjects hold such competence. To determine whether an international subject is able to conclude BITs, one shall first check out its international personality. If concluding BITs falls in the coverage of international personality, it shall be understood that the entity has not only the authority or qualification to negotiate and sign BITs with other states or organisations, but also the ability to implement or perform its concluded BITs within its territory. This will be further discussed in the following parts.

2.2 The State's Competence to conclude BITs

2.2.1 The state enjoys full international legal personality

Current studies hold a quite open view in the delineation of international subjects. "[a]ny entity to which any norm of international law is addressed"[175] is acceptable subject on the international plane. Apart from states, IGOs, TNCs (Transnational corporations), individuals,[176] even people and minorities[177] can be deemed as international subjects. However, a state is the only one that possesses full international legal personality, particularly enjoying competences to concluding treaties; which dramatically differs from any other international subjects.[178]

It has been broadly accepted that a state is the "fundamental" [179] and original subject of international law. It possesses full international legal personality. It can perform any civil and commercial act, just like a person does in the national legal system, such as to contract, to possess

[175] *Supra* note 172 at 79.
[176] Oleg I Tiunov, "The International Legal Personality of States: Problems and Solutions" in Fleur Johns, ed, *International Legal Personality* (Farnham: Ashgate, 2010) 65 at 73. "Certain jurist assert that in international law there is a series of norms directly and immediately applying to individuals that create for them an international legal personality. According to the views of these authors, individuals are subjects of international law together with other subjects, i.e., states." Some theorists, based on the observation that international Human rights laws address individuals, claim the individual to constitute a type of international subjects.
[177] *Supra* note 172 at 88-104.
[178] *Supra* note 176 at 68.
[179] *Ibid.*

properties, and to sue before a court, etc. It possesses complete competence to establish diplomatic relations, to conclude treaties, to sign multilateral agreements, and to become a member of any international organisations. As one of the particular aspects of its international personality, a state with full international personality is able to negotiate and conclude BITs. However, where does a state's competence to conclude treaties come from? A state that holds full international personality, particularly the competence to conclude treaties, including concluding BITs, stems from the right of state sovereignty.

2.2.2 Supremacy of sovereignty decides that only a state possesses the competence of treaty-making

A state has for a long time been seen as the sole law-maker of international law with no limitations.[180] For Lord McNair, a state's competence of treaty-making stems from the state sovereignty. He stated, "the making of treaties is one of the oldest and most characteristic exercises of independence or sovereignty on the part of State 'the right of entering into international engagements is an attribute of State sovereignty'."[181] He "conceive[d] of the state as a two-sided personality: it is in some respects a legal entity in private law performing acts to manage its property, dealing with individuals in contracts, engaging in certain industries, owning certain goods and subjected, in principle, in its acts to the rules of private law; it is in other respects a higher legal being with eminent rights to which no other individual can lay claim and which take their source in the right of sovereignty, or the right to command individuals and to be obeyed by them."[182] Bodin developed Michoud's theory and named the eminent side of state personality as

[180] *Supra* note 157 at 42.
[181] Lord McNair, *The Law of Treaties* (Oxford: Oxford University Press, 1961) at 35, n 2.
[182] Charles Leben, *The Advancement of International Law* (Oxford: Hart, 2010) at 221, n 8.

"public power". He states that "sovereignty is the expression of [this] public power".[183] Bodin specified public power and believed that it includes "the power of law-making, the power to declare war and make peace, the power to establish offices of state, the ultimate right of judgment, the power of pardon the right of coining money, and the right of taxation".[184] Following Bodin, Loughlin drew "public power" closer to sovereignty by saying that "the power that is exercised through this institutional framework of government is what we generally recognise to be the sovereignty of the state." He regarded sovereignty as "the absolute and perpetual power of a commonwealth" and "the highest power of command".[185] "[A]s the source of law, the sovereign cannot be subject to the laws[186]…the sovereign does indeed provide the source of all positive law. Sovereign authority possesses what in the German tradition of public law is called Kompetenz-Kompetenz, 'the competence of its competence', or the competence to determine the limits, if any, of its own competence."[187] Therefore, "as a facet of sovereignty, competence is an expression of the absolute power of the state to enact law."[188]

The comprehensive, exclusive and unrestrained nature of sovereignty might be the first understanding of state sovereignty held by scholars since nineteenth century. It is believed that a state will naturally and voluntarily achieve sovereignty as soon as it is founded. Sovereignty is concerned with "a source of comprehensive and exclusive authority" of a state, and it is assumed to be "unrestrained".[189] Such comprehensive, exclusive and unrestrained nature of sovereignty

[183] Martin Loughlin, "Ten Tenets of Sovereignty" in Neil Walker, ed, *Sovereignty in Transition* (Portland: Hart, 2003) 55 at 67.
[184] *Ibid* at 64 & 65, n 47.
[185] *Ibid* at 67, n 59.
[186] *Ibid* at n 60.
[187] *Ibid* at 68, n 62.
[188] *Ibid* at 69.
[189] Bardo Fassbender, "Sovereignty and Constitutionalism in International Law" in Neil Walker, ed, *Sovereignty in Transition* (Portland: Hart, 2003) 115 at 117.

implies that a state and only the state can do whatever it wants to do on the international plane, including establishing diplomatic relations with any other states, becoming members of certain international organisations, concluding any sort of treaties, declaring war and making peace etc. Such competence of a state can only be restrained if the state itself voluntarily falls into a bound relation "by those rules of law to which they had agreed, either by the conclusion of treaties or customarily."[190] The exercise of state sovereignty of being bound by certain rules of law in the same breath creates international laws. Sovereignty grants a state the comprehensive, exclusive and unrestrained competence with the only exception of being bound by those rules of law which they agreed to be bound by, making the state the only qualified international law-maker.

Gradually, instead of using the words of "comprehensive, exclusive or unrestrained", many studies describe sovereignty to be suprema and equal. Tsagourias believes that "sovereignty as *suprema* and *summa postestas*[191] solidifies state personality and establishes states as the unique co-ordinates within the international realm. As a result, public international law emanates from the state, is organized around States and addresses the reciprocal relations between States."[192] Because sovereignty endows the state with supremacy, no higher order exists, international law which addresses to the highest order has no choice but to be made by this order.

"[S]overeignty has fostered the idea that there is no higher power than the nation-state"[193], therefore, international laws that addresses to states can only be made by this paramount power itself. As a result, competence to conclude treaties emanates from state sovereignty. To conclude, sovereignty solidifies state's personality of concluding treaties, making a state the qualified

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[190] *Ibid.*

[191] Nicholas Tsagourias, "International Community, Recognition of States, and Political Cloning" in Colin Warbrick & Stephen Tierney, eds, *Towards an 'International Legal Community'?* (London, UK: British Institute of International and Comparative Law, 2006) 211 at 218, n 27.

[192] *Ibid* at n 28.

[193] *Supra* note 163.

international law-maker. The supremacy of sovereignty guarantees a state's freedom of action including concluding treaties (BITs) with other states, because only the state itself can voluntarily restrain its own competence.

2.2.3 Internal sovereignty determines a state's ability of performing concluded treaties

Charles Leben discussed the internal and external sides of sovereignty based on the studies of Carré de Malberg and Arangio-Ruiz. He proposed that "there is supposedly a domestic notion of sovereignty and an external notion that are just the two sides of the same sovereignty," [194] and "one should not see two separate sovereignties in internal and external sovereignty."[195] "As for the meaning of each of the two sides, most scholars take it that sovereignty, in the internal sense, related to some superiority of the state person over all its subjects whereas external sovereignty can mean only independence relative to other equal states in the eyes of international law and not being subjected to any other higher person."[196]

Similar arguments were stated by Samantha Besson that sovereignty works in two ways: regarding internal affairs of a state in one hand and external relations on another. "External sovereignty can less easily be described as final or ultimate as it is necessarily equal; it can only be equally ultimate since a sovereign can only co-exist as an equal to other sovereigns.[197] In internal affairs, however, sovereignty is usually final." [198] Internal and external sovereignty cannot separate logically, because without internal sovereignty, external sovereignty cannot be defined and vice versa.

Arangio-Ruiz further developed the concept of the internal and external nature of the state, stating that the internal personality of a state represents a legal person, while in an external respect is a

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[194] *Supra* note 182 at 223.
[195] *Ibid* at n 16.
[196] *Ibid* at 224, n 18.
[197] Art 2(1) of the United Nations Charter.
[198] Samantha Besson, "Sovereignty in Conflict" in Colin Warbrick & Stephen Tierney, eds, *Towards an 'International Legal Community'?* (London, UK: British Institute of International and Comparative Law, 2006) 131 at 151 & 152.

factual or real person, a power.[199] His theory was understood by Leben that "the beings existing in this [international legal order] are not persons, in the sense of municipal law, but 'powers'.[200] The rules governing these powers are not those of a 'universal human society' or of 'a universal legal order of mankind', in other words, rules of some interindividual law, but rules that 'exist and act only as a function of the interests and conflicts of interest among powers'."[201] "Because its social basis [of international law] cannot be made up of individuals, because it [international law] cannot condition persons directly, [it] cannot be analysed in the same legal terms as municipal law."[202] Therefore, international law is a kind of law wholly different from municipal law, interindividual law, because it governs states, not persons directly. [203]

Michael Oakeshott indicated the two-sided sovereignty of state from a more political perspective. He stated that the modern state was a 'free' or 'sovereign' association in respect of three main characteristics: first, because its government was 'not subject to any superior external authority'; secondly, 'in virtue of being an association in terms of law'; and thirdly, because its government possessed 'the authority and the procedures to emancipate itself continuously from its legal past', in the sense that 'there was no law so ancient and so entrenched that it could not be amended or repealed'.[204] Put slightly differently, it might be said that sovereignty gives expression to three basic features of the modern state: internal coherence, external independence, and supremacy of the law."[205]

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[199] *Supra* note 182 at 227 & 231.
[200] *Ibid* at 229, n 38.
[201] *Ibid* at n 39.
[202] *Ibid* at 230.
[203] *Ibid* at n 40.
[204] *Supra* note 183 at 59, n 18.
[205] *Ibid*, n 19.

The distinction between external and internal notions of sovereignty is of great significance: the external side of sovereignty endows a state with independency, equality and supremacy to enact international laws, while the internal side of sovereignty makes a state a powerful superiority to realize the internal coherence within its domestic system. The external sovereignty endows a state with the power to negotiate and sign treaties on their own. It gives a state the personalized identity or qualification to conclude treaties. While, the internal sovereignty guarantees that there is a necessary legal power to implement the concluded treaties within the domestic system. It is the determinant element that should be weighted before concluding any treaty.

Before signing a treaty, parties are "required ... to ensure that a treaty will be applied municipally and receive the effect stipulated by the parties. It is the duty of a party to a treaty to see to it that its municipal law enables it to give effect to the treaty and that its organs – executive and judicial – are properly equipped with the powers required for that purpose; if that is not already the case, the defect must be remedied, for no State can plead a deficiency in its municipal law or organization against a complaint of a breach of a treaty obligation or of a rule of customary international law."[206] Lord McNair continued that "[t]he vast majority of treaties can only be fully implemented if all the branches of the Governments or the contracting parties – legislative, administrative, and judicial – possess or are forthwith invested with the necessary legal power to implement the treaty."[207]

"Viewing the whole trilogy of the codified law [1969 Vienna Convention, 1978 Vienna Convention and 1986 Vienna Convention], it is indeed curious that 'performance' is really hardly mentioned. The references to it in Articles 26, 27, 41, 58, 61, 70, 71 and 72 of the Vienna Conventions do not give the notion any obvious positive content, while the word 'performance'

[206] *Supra* note 181 at 78, n 1.
[207] *Ibid* at 78-79.

does not appear at all in the 1978 Convention. All three Conventions also refer frequently to the 'application' of a treaty, but those references may not always mean the same thing."[208] Shabtai Rosenne sought "how to perform a treaty-obligation is certainly the outcome of a political decision, and often one taken at the highest level of national administration. The International Court is thus constitutionally incapable of laying down positively how a treaty is to be performed… This is certainly one of the greyest of the grey areas in the codified law of treaties."[209]

"Performance" is different from "application" of a treaty. "Application" is about the adaption of international law in the domestic system. Rights and obligations created by a treaty shall be enforceable in domestic law. In practice, there are two approaches through which the application of a treaty is completed: the self-executing approach and the legislation approach, also named as the "monist approach" and the "dualist approach" respectively by Anthony Aust. Aust stated "the essence of the monist approach is that a treaty may, without legislation, become part of domestic law once it has been concluded in accordance with the constitution and has entered into force for the state… although there are many variations in how the monist approach is expressed in constitutions, three main features are common to most. First, although the constitution requires the treaty to have first been approved by parliament, there are exceptions for certain types of treaties or certain circumstances. Secondly, a distinction is made between treaties according to their nature or subject matter, some being regarded as being self-executing; others requiring legislation before they can have full effect in domestic law. Thirdly, a self-executing treaty may constitute supreme law and override an inconsistent domestic legislation, whether existing or future, though in some states where parliament is supreme, later legislation can override a self-executing treaty."[210] While

[208] Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986* (New York: Cambridge University Press, 1989) at 59.
[209] *Ibid* at 62.
[210] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007) at 183.

under the legislation approach or the dualist approach, "the constitution of the state accords no special status to treaties; the rights and obligations created by them have no effect in domestic law unless legislation is in force to give effect to them. When the legislation is specifically made for this purpose, the rights and obligations are then said to be 'incorporated' into domestic law."[211] Performing a treaty means that "all state organs, including the judiciary, state agencies and other public bodies, and depending on the nature of the obligation, private persons and bodies, must, if necessary, be bound by domestic law in such a way that the treaty obligations can be carried out."[212] A state is a legal order "where there is a body or person that has ultimate authority to determine the content and scope of application of legal norms over a roughly determinate geographical area and a roughly determinate set of subjects as well as holding a monopoly over the enforcement of such norms."[213] The ultimate authority within a given territory stems from the right of internal sovereignty. There is no question about a state's ability to perform treaties.

2.3 Organisation's Competence of Concluding BITs

States had for a long time been thought to be the only qualified treaty-maker on the international plane. Today however, a treaty created without the participation of other international actors, especially the IGO cannot be imagined. IGOs may participate in and make great impact on different stages of the treaty-making process: the initial negotiation, the draft-making process,[214] and even the after-conclusion period to stress states on matters regarding amendments, revisions

[211] *Ibid* at 32.
[212] *Ibid* at 179.
[213] Patrick Capps, "Sovereignty and the Identity of Legal Orders" in Colin Warbrick & Stephen Tierney, eds, *Towards an 'International Legal Community'?* (London: British Institute of International and Comparative Law, 2006) 19 at 21.
[214] Robert McCorquodale, "International Community and State Sovereignty: An Uneasy Symbiotic Relationship" in Colin Warbrick & Stephen Tierney, eds, *Towards an 'International Legal Community'?* (London, UK: British Institute of International and Comparative Law, 2006) 241 at 263 & 264; also see Malgosia Fitzmaurice & Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Utrecht: Eleven International, 2005) at 49.

and modifications of the signed treaty.[215] More importantly, IGOs have started to achieve treaty-making competence, to negotiate and conclude treaties, to whom they address rights and duties, just like states.[216]

"In 1960, Oscar Schachter assessed on the basis of the UNTS that approximately 200 treaties had been concluded between international organisations and 1,000 treaties concluded between international organisations and states. The World Treaty Index reports that in the period 1946-1965 of the total of 7,885 treaties published in the UNTS (Vols 1-598), 1,686 treaties, or 27 per cent, were concluded by international organisations. These treaties had been concluded by approximately 50 IGOs – which is one-quarter of those listed in the IOs Yearbok at that time. Twenty years later, Zemanek stated that 'more than 2000 treaties to which international organisations are parties, have been published in the UNTS'… For now, this appears a stable figure, as the UNTS in 2005 yielded 109 'international organisations' as parties to treaties published in the UNTS, and 29 'UN-Related organs and agencies'."[217]

The EU is the most successful example. It has to date entered into hundreds of treaties since it was born as the European Coal and Steel Community (ECSC). Recent bilateral treaties concluded between the EU and states include the *Protocol setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Community on the one hand, and the Government of Denmark and the Home Rule Government of*

[215] Malgosia Fitzmaurice & Olufemi Elias, *ibid* at 54.

[216] Antônio Augusto Cancado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, 2d ed (Boston: Martinus Nijhoff, 2013) at 194. There are numerous IGO treaties that in substance are not similar to state treaties. For example, with member states, the headquarters agreements; with non-member states, agreements of association, agreements of representation; among IGOs, "accords de liaison", agreements of succession etc. Also see Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Oxford: Hart, 2007) at 131.These IGO treaties do not address rights and duties. Instead it refers to IGO treaties pertaining to the implementation of its competence and taking on certain function of the member states.

[217] Catherine Brölmann, *supra* note 216 at 127.

Greenland, on the other hand signed on 18 September 2012; and the *Voluntary Partnership Agreement between the European Union and the Republic of Liberia on forest law enforcement, governance and trade in timber products to the European Union (FLEGT)* signed on 27 July 2011. The EU is also a contracting party to multilateral international treaties, such as the *UN Convention on the Law of the Sea (UNCLOS)* and the set of WTO agreements. The IGO treaty-making practice shows that a state does not hold a monopoly over law-making anymore. The IGO holds international legal personality, it enjoys rights and duties and it might possess the competence to conclude treaties as well.

2.3.1 The IGO enjoys separate international personality distinguishable from that of its member states but limited to the performance of its entrusted tasks

With respect to IGO's personality, the ICJ indicated in the *Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations* that:

> "… the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.
> Accordingly, the Court has come to the conclusion that the Organization is an international person."[218]

Thus, the IGO is accepted to be a subject, holding international legal personality. The International Law Commission (ILC) defines an IGO as "an institution established by a treaty or other instrument governed by international law and possessing its own legal personality. International organizations may include as members, in addition to states, other entities."[219] That is to say, IGOs

[218] *Supra* note 181 at 51 & 52.
[219] **Reports** *"State Responsibility" Report of the International Law Commission*, UNGAOR, 55th Sess, Supp No 10, UN Doc A/56/10 (2001) at 126.

"enjoy a separate international personality which is distinguishable from that of their Member States," making an IGO a separate international subject "that is qualitatively and quantitatively different from the simple summation of Member States."[220]

As previously discussed at the beginning of this section, international legal personality is "a threshold of action", without which, it is impossible for IGOs to take any action on the international plane. In the UN-Israel case, "the I.C.J., as intimated, was questioned as to whether the U.N. could possibly bring a claim against Israel (a non-member state at the time) over the death of Count Folke Bernadotte and some of his associates…the Court found it necessary to approach the case by analyzing whether or not the U.N. had international legal personality."[221] "…in ERTA[222], the issue was to decide whether the E.C., as it was then, has the power to conclude a treaty with Switzerland on road transportation, or whether the power to conclude such agreements still rested (in whole or in part) with the Member States…it seemed to approach the issue by analyzing the legal personality of the E.C., finding that such personality would cover international law (which may not be self-evident), and deriving from this international personality a power to conclude treaties in the field of transportation."[223] "Without international legal personality, the U.N. is unable to start proceedings under international law against a State. Also, without international legal personality, the E.U. is not capable of concluding treaties or performing other international legal acts."[224]

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[220] Malgosia Fitzmaurice & Olufemi Elias, *supra* note 214 at 57.

[221] *Supra* note 159 at 18; see also **Advisory Opinions** *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 174 at 178.

[222] **ECJ** *Commission v. Council*, C-22/70, [1971] ECR I-0263.

[223] *Supra* note 159 at 21.

[224] *Ibid* at 5.

"Both cases heuristically suggest that personality precedes action. Taken to the extreme, this might be interpreted that, without personality, no action would be possible."[225] Thus, the IGO must possess international personality to perform on the international plane in order to carry out the intentions of its founders.

Additionally, "having international personality for an international organization means possessing rights, duties, powers and liabilities, etc. as distinct from its members or its creators on the international plane and in international law."[226] "Before the advisory opinion of the International Court of Justice in *Reparations for Injuries Suffered in the Service of the United Nations*[227], capacity was generally thought to be enjoyed only by states but, since then, international institutions have enjoyed such capacity which their functions allow and which are permitted by states' recognition of that capacity."[228] Aust argues that "having international legal personality makes the organisation a subject of international law, with rights and duties under it, including the ability to enter into treaties with other subjects of international law, whether they are member states, non-member states or other international organisations. Its constituent instrument may provide that it shall have international legal personality. If it is a universal international organisation (membership open to all states), that provision is enough. Otherwise, international legal personality may be inferred from the purpose of the organisation, the powers given it by its members and its practice."[229]

However, IGOs "are only considered partial subjects in the sense that their rights and duties are limited by the founding documents in which the respective rights and obligations are conferred

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[225] *Ibid* at 21.
[226] CF Amerasinghe, "International Legal Personality Revisited" in Fleur Johns, ed, *International Legal Personality* (Farnham: Ashgate, 2010) 239 at 243.
[227] Scott Davidson, *The Law of Treaties* (Aldershot: Dartmouth, 2004) at xiii.
[228] *Ibid.*
[229] *Supra* note 210 at 398, n 27.

upon the organization by the founding States. Consequently, their international personality is seen as being confined to the rights and duties mentioned in these founding documents and as not stretching to other areas of international law."[230] The IGO is often described as a "derived" or "created" international subject because, different from a state that originally and automatically enjoys full international legal personality at birth, IGOs "do not possess international legal personality by their own will but depend on the action of States as their creators."[231] IGOs "are only considered partial subjects"[232] in the sense that their rights and duties are limited to "the performance of their duties",[233] or to "the discharge of their functions",[234] or to "the fulfillment of their stated purposes"[235] in the founding treaties. "[W]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[236]

As Fiore stated:

> "The status of a person in international society may be claimed by legal entities personified by reason of a well-defined purpose of international interest. This status is limited to the states which have recognized them as persons and given them the right to acquire certain

[230] Christian Walter, "Subjects of International Law", May 2007 (MPEPIL) at para 21-23.
[231] *Ibid* at para 26.
[232] *Ibid* at para 21.
[233] *Supra* note 226 at 254.
[234] *Ibid.*
[235] *Ibid*. Some theorist believe that the international legal personality of an organisation arises due to certain criteria, "the existence of which endow the organization with personality on the basis of general international law. The foundation of international personality is, it is said, not the will of the members but is to be identified in general international law." See also supra note 226 at 244, n 17; Finn Seyersted, *Objective International Personality of intergovernmental Organizations* (Copenhagen: Krohns Bogtrykkeri, 1963) at 53, who lays down the following criteria: international organs, "(i) which are not all subject to the authority of any other organizaed community except that of participating communities acting jointly, and (ii) which are not authorized by all their acts to assume obligations (merely) on behalf of the several participating communities." Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 1990) at 680, who summarises the criteria required as follows: "(i) a permanent association of States, with lawful objects, equipped with organs, (ii) a distinction, in terms of legal powers and purposes, between the organization and its member States, and (iii) the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more States."
[236] *Supra* note 181 at 51 & 52.

> privileges, which they must exercise and enjoy in order to fulfill the international mission for which they were created.
>
> The international personality of legal entities must, in principle, be considered as limited to the exercise of the international rights granted to them, and it cannot have any effect on states which have not recognized these entities as international juridical persons.

Fiore's resolution of the question of personality for international institutions turned on a functionalist vision of these organisations, a 'well-defined purpose of international interest.' Institutions are endowed with that legal status, whether expressed as rights or immunities, necessary to 'fulfill the mission for which they were created.'"[237]

"[T]he Constitution of the Food and Agriculture Organization of the United Nations provides that 'The Organization shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution,' and the Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development provide that the Bank and the Fund respectively 'shall possess full juridical personality, and in particular, the capacity: (a) to contract; (b) to acquire and dispose of immovable and movable property; (c) to institute legal proceedings'. The International Civil Aviation Convention provides that the International Civil Aviation Organization 'shall enjoy in the territory of each contracting State such legal personality as may be necessary for the performance of its functions. Full juridical personality shall be granted wherever compatible with the constitution and laws of the State concerned'. The agreement concerning the establishment of a European Central Inland Transport Organization provides that the Organization shall have the capacity to perform any legal act appropriate to its object and purposes, including the power to acquire, hold and

[237] David J Bederman, "The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel" in Fleur Johns, ed, *International Legal Personality* (Farnham: Ashgate, 2010) 263 at 332-333. "Like Dionisio Anzilotti before him, Fiore led his generation of Italian international jurists. The very first edition of Fiore's work, International Law Codified, which went into print in 1890, introduced the initial strands of the theory, which was more fully outlined in a long article appearing in 1899."

convey property, to enter into contracts and undertake obligations, to designate or create subordinate organs and to review their activity, subject to a limitation in respect of the ownership of transport equipment and material, and embodies an undertaking by member governments to 'recognize the international personality and legal capacity which the Organization possesses'. The Charter of the United Nations leaves on one side the concept of legal personality and provides that 'The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes'."[238]

To conclude, different from states with full international personality, the IGO merely has limited international personality necessary for the exercise of its functions. Mostly, it enjoys the private-sided personality: "it is in some respects a legal entity in private law performing acts to manage its property, dealing with individuals in contracts, engaging in certain industries, owning certain goods and subjected, in principle, in its acts to the rules of private law."[239] However, only a few IGOs enjoy the public-sided personality which allows them to conclude treaties with other international subjects. That is to say, not all IGOs necessarily hold the competence to conclude BITs. This is only the case if such competence is essential to fulfil their entrusted tasks and it usually should be expressly included in the founding treaty of that particular IGO. IGO's competence to conclude treaties has been solidified by the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*[240]. The 11th paragraph of preamble states that "international organisations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the

[238] *Supra* note 162 at 231.
[239] *Supra* note 182 at 221, n 8.
[240] *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, 21 March 1986, Doc. A/CONF.129/15.

fulfillment of their purposes." While the 1986 Vienna Convention has not yet entered into force,[241] it constitutes a precept of IGO's treaty-making competence.

2.3.2 An IGO is capable of concluding BITs only if its member states transfer the relevant segment of sovereignty or confers such power to the organisation

Treaty-making power, as one of the particular expressions of the public-sided international personality, stems from the right of sovereignty. However, an IGO does not in nature possess sovereignty. It is a derivative creature and its treaty-making competence requires the allocation of sovereignty (also referred to as 'power' in some studies) between the IGO and its member states. The dividable sovereignty theory and the principle of conferred power are often quoted to explain the source of IGO's competence to conclude treaties.

2.3.2.1 Dividable sovereignty

Sovereignty is traditionally understood to be exclusive to the nation state. However, absolute sovereignty is too idealistic and impracticable a notion under current international relations.[242] It "cannot satisfy the new developments in political and legal organization, and it ignores the plurality of sources of law and power in the new world order."[243]

John H. Jackson quoted Henry Schermers stating that "sovereignty has many different aspects and none of these aspects is stable. The content of the notion of 'sovereignty' is continuously changing, especially in recent years… from the above the author may conclude that under international law the sovereignty of States must be reduced."[244] "Limits are now regarded as inherent to external sovereignty."[245] Sovereignty with a certain amount of intensity of competence can be stripped

[241] The 1986 Vienna Convention needs 35 states to ratify to enter into force, and till now it has not met the need.
[242] **Reports** *An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peacekeeping*, UNSGOR, 1992, Supp No 17 UN Doc A/24/277-S/24111 at 17.
[243] Supra note 198 at 152.
[244] *Supra* note 163 at 239.
[245] *Supra* note 198 at 160, n 208.

from the sovereign state.[246] States are free to relinquish sovereign competences until the lack of basic sovereignty cause the states to disintegrate, merge with other states into an empire or become an integral part of another state.[247]

Sovereignty is still the unitary and ultimate power source.[248] However, it, or at least the competence or the intensity arising from sovereignty or its exercise[249] may be "delegated and hence divided."[250] Sovereignty is dividable, which means that sovereignty is no longer a monopoly held in hands of states. A sovereign state may allocate a certain amount of its sovereignty to an IGO for realizing its functions.[251] The Organisation, therefore, enjoys some limited competences granted by its member states. Moreover, there is no limitation on competences which could be transferred from states to an IGO. States can, of course, transfer BIT-making competence to an IGO if they thought it was essential for the fulfilment of functions and purposes of that IGO. Thus, IGOs can be capable of concluding BITs, if it is allocated relevant sovereignty.

2.3.2.2 Conferred power

[246] *Ibid* at 152.
[247] *Ibid* at 153.
[248] Stephen Tierney, "Questioning Authority: The Normative Challenge in Forging an International Community" in Colin Warbrick & Stephen Tierney, eds, *Towards an 'International Legal Community'?* (London, UK: British Institute of International and Comparative Law, 2006) 1 at 1
[249] *Supra* note 183 at 81-83. Some scholars like Martin Loughlin recognised the new challenge of sovereignty – "greater institutional integration in the international arena, leading to transfers of jurisdictional competence to supra-national bodies." But they sought "the 'ultimate' authority is not significantly affected by these novel institutional arrangements, they do not entrench on sovereignty." Even the innovative institution of EU is understood by Loughlin that member states merely "share competence" with or "transfer jurisdiction" to the EU, which "does not entail shared or transferred sovereignty, even if, with the acquiescence of the member state, European law assumes priority in any conflict with a provision of domestic law." States share competence or powers, not sovereignty with international institutions. But Loughlin argued that the new institutional configurations indeed do challenge the sovereignty of state. "such challenges…threats to capacity which are directed fundamentally at the political conception of sovereignty… the power of the modern state to impose its authority is diminishing… power in late modernity has so fundamentally altered in character that the modern concept of sovereignty as a transcendent and representational idea founded on the autonomy of the political is now redundant."
[250] *Supra* note 198 at 154 & 155, n 162.
[251] *Supra* note 189 at 132.

Avoiding resorting to discussions of sovereignty, some scholars use the "allocation of power between different levels of governance entities"[252] to explain the source of IGO's treaty-making competence. John H. Jackson argues that states transfer powers instead of sovereignty to IGOs. Kal Raustiala states that "it would make much more sense to discuss power allocations directly rather than in terms of sovereignty."[253] Raustiala believes that the sovereignty is not eroded by IGOs. The organisation merely acquires some powers regarding particular aspects of competence from its member states.

"International organizations may only exercise those powers that have been given to them, either when they were created or subsequently. This fundamental rule of the law of international organizations is called the principle of attributed powers, or the principle of conferred powers, or the principle of speciality…As the International Court of Justice (ICJ) has stated:

> international organizations … do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[254]

The EU adopts this principle of conferred power. And it is emphasized in the TEU as follows:

> "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."[255]

According to the ICJ in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, requested by the World Health Organization (WHO), the object of

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[252] *Supra* note 163 at 256.
[253] Kal Raustiala, "Rethinking the Sovereignty Debate in International Economic Law" in Asif H Qureshi & Xuan Gao, eds, *International Economic Law Volume I General International Economic Law: Theory and Fundamental Concepts* (New York: Routledge, 2011) 264 at 272.
[254] **Advisory Opinions** *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] ICJ Rep 103 at 25.
[255] Article 5(2) TEU.

the constituent instruments of international governmental organizations is 'to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals'."[256] "Powers of international organizations are, first and foremost, laid down in explicit provisions included in their constituent instruments (International Organizations or Institutions, General Aspects). Such explicit provisions indicate in more or less detail what powers the creators of the organization confer on the organization in order that it can perform its functions. Organs of the organization may refer to these provisions in order to specify the legal basis of decisions they take. By referring to the legal basis, the organ in question specifies that it acts within the powers bestowed on it. Explicit powers may also be given to international organizations subsequent to the conclusion and entry into force of their constituent instruments by a separate legal instrument…"[257] "If an institution merely expresses the consolidated will of its States Parties, it acts as a collegial organ of the latter."[258] International organisations with independent personality have "autonomous will" distinguished from the will of its member states. Thus, "[i]nternational organizations have at least one organ with the capacity to generate a will attributable to the organization alone."[259] Because the organisation is "capable of generating through its organs an autonomous will distinct from the will of its members",[260] powers of international organisations are not limited to explicit powers addressed in the provisions of its constitutional treaty, but also include implied powers that "come with explicit powers or, in a broader definition, with the functions given to the

[256] *Supra* note 254 at 75.
[257] Niels M Blokker, "International Organizations or Institutions, Implied Powers" (2009) 55:3 Current Genetics 349 at 349.
[258] Kirsten Schmalenbach, "International Organizations or Institutions, General Aspects" (2006) 33:2 Viva Origino 186 at 187.
[259] *Ibid.*
[260] *Ibid* at para 3.

organization."[261] For example, the notion of implied powers has been solidified in Article 308 of Treaty establishing the European Community. It states that:

> "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."[262]

The European Court of Justice (ECJ) explained that Art. 308 "is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act."[263]

"No international organization can create its own powers and competences. These are defined by the will of the Member States, as a rule through international treaties. International organizations must act within the framework of these treaties."[264]

As there is no limitation on powers which can be conferred upon an organisation, states may devolve treaty-making powers on an organisation, if such power is an indispensable requirement for performing the entrusted tasks of the organisation. That is to say, an organisation "may have a quasi-legislative power to develop substantive international rules and procedures governing its substantive field of activity."[265] An IGO's power of concluding treaties may be expressly included in its founding treaty, or implicitly come with the explicit power, specifically with the functions given to the organisation. For example, "[t]he TFEU provides for four cases in which the Union may conclude an agreement with one or more third countries or international organisations: 1)

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[261] *Supra* note 257.
[262] Article 308 of Treaty Establishing the European Community.
[263] **ECJ** *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms*, C-2/94, [1996] ECR I-1759 at I-1788.
[264] Matthias Hartwig, "International Organizations or Institutions, Responsibility and Liability", May 2011 (MPEPIL) at para 16.
[265] Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) at 8.

Where the Treaties so provide, 2) Where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union policies, one of the objectives referred to in the Treaties, 3) Where it is provided for in a legally binding Union act, and 4) Where it is likely to affect common rules or alter their scope."[266]

As early as 1971 in the ERTA Case of *Commission of the European Communities v. Council of the European Communities*m[267,] the Court of European Community accepted the implied power with the functions of the European Communities/Community (EC). In this case, the Council of the EC accused the Community of entering into an international agreement in an area for which no explicit power was granted, The Court held:

> "To determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions. Such authority arises not only from an express conferment by the Treaty—as is the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for association agreements—but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community Institutions."[268]

And:

> "Authority to enter into international commitments may not only arise from an express attribution by the Treaty, but equally may flow implicitly from its provisions. The Court has concluded inter alia that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexon."[269]

Thus, although there exist no explicit powers in this area, the Court sought there are implied powers contained within the Treaty.[270]

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[266] P.S.R.F. Mathijsen, *A Guide to European Union Law as Amended by the Treaty of Lisbon*, 10th ed (London, UK: Thomson Reuters, 2010) at 569.
[267] **ECJ** *Commission v. Council*, C-22/70, [1971] ECR I-0263.
[268] *Ibid* at para 15–16.
[269] *Ibid* at para 3.
[270] *Supra* note 257 at 352.

To conclude, unlike a state that originally and automatically achieves comprehensive and unrestrained sovereignty at birth and thereby holds full international personality, the IGO's personality is limited to what is essential to fulfil its functions. Such limited personality stems from the right of state sovereignty, moreover, that state transfers some aspects or segments of sovereignty to, or confers powers on the IGO, making it capable of taking actions and enjoying rights, duties and competences in certain field of international law. Therefore, an IGO could possibly possess the competence to conclude BITs only if its member states transfer relevant segments of sovereignty to or confer such power upon the organisation, and it is essential for fulfilling the entrusted tasks. The competence to conclude BITs will usually be explicitly addressed in the founding treaty of the organisation or be implied within that treaty.

2.3.3 As a common interest on trade and investment

Holding the competence to conclude BITs should be understood as having not only the identity or qualification to negotiate and sign the BIT but, more importantly, the ability to perform the treaty. The authority to conclude treaty and the ability to perform the treaty are juridically two different things.[271] The ability of performing treaties must be weighed before signing any treaty. The requirement of performing treaties stems from *pacta sunt servanda* – treaty obligations must be carried out faithfully.

2.3.3.1 Treaty obligations must be carried out faithfully

The conclusion of a treaty comprises the intention to create obligations for its parties.[272] At the draft stage of the Vienna Convention 1969,[273] "[t]he first Special Rapporteur (Professor Brierly) defined 'treaty', for the purposes of the draft articles, as 'an agreement …which establishes a

[271] *Supra* note 181 at 59.
[272] Kelvin Widdows, "What is an Agreement in International Law" (1979) 50 Brit YB Int'l L 117 at 136.
[273] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 18232 (entered into force 27 January 1980).

relationship under international law'. Paragraph 19 of his commentary makes it clear that by 'establishment of a relationship' the Special Rapporteur meant creation of rights and obligations." [274] "Professor Brierly was succeeded in 1952 by Professor (late Sir Hersch) Lauterpacht who made it clear" in Draft Article 1 that: "treaties are agreements…intended to create legal rights and obligations of the parties."[275]

"Further consideration was postponed to the Second Session where Switzerland tabled a further amendment adding the words 'providing for rights and obligations' after the words 'international agreement'[276] for the reason that the draft article was silent on agreements such as declarations not intended to have legal effect."[277] "The United Kingdom, too, supported Switzerland and thought the U.S.S.R. to be adopting too broad a view; there had always been a distinction between international agreements so-called, intended to create rights and obligations, and declarations simply setting out policy objectives." [278] "The amendments were referred to the Drafting Committee which, in oracular fashion, pronounced them superfluous, [279] claiming that the expression '…governed by international law' comprised the element of intention to create legal obligation." [280] Nevertheless, the conclusion of a treaty brings its contracting parties under international obligations, and such treaty obligations are binding upon its contracting parties.

Widdows thought that the bindingness of a treaty stems from party's intention of binding and being bound. He stated that "… to clarify some of the ideas behind use of the terms 'treaty' and 'international agreement'… it seems at the end to relate to nothing less esoteric than the parties'

[274] Supra note 272 at 126.
[275] *Ibid* at 127, see lauterpacht I, pp. 93 et seq.
[276] *Ibid* at 135, see A/CONF. 39/11/C. 384/Corr.1
[277] *Ibid* at n 9.
[278] *Ibid* at 136.
[279] *Ibid*, see A/CPMF. 39/11/Add. I, pp. 345-6
[280] Supra note 272 at 136.

intent."[281] Malgosia Fitzmaurice and Olufemi Elias agreed with Widdows and believed that "the crucial element in distinguishing between formal and informal instruments is the element of intention, i.e., whether parties to a treaty intended to be bound by it or not."[282] The intention of the parties plays the role of the elements of the concept of the treaty, "which distinguishes binding instruments from non-binding ones."[283]

Christine Chinkin quoted the *Qatar v. Bahrain* case and examined the primacy of "the intentions of the parties" and "the text and surrounding circumstances"[284]. He stated that "in determining whether an agreement exists, the Court [International Court of Justice] has emphasised the subjective intention of the parties but has simultaneously accepted that a legally binding agreement can objectively exist, as determined from the surrounding circumstances and the text of the instrument."[285] No matter whether it is the subjective intention of a state or an implied consent of the state based on surrounding circumstances, a state's intention of being bound by treaty is the most essential element of the binding nature of treaty obligations. The binding nature requires that treaty obligations must be carried out faithfully.

The principle that "treaty obligations must be carried out faithfully" is derived from the "antecedent general principle of law" - *pacta sunt servanda* [286] which is laid down in Article 26 of 1969 Vienna Convention, moreover, that "every treaty in force is binding upon the parties to it and must be performed by them in good faith." "In the twelfth plenary meeting it [Article 26] was adopted by 96 votes to none."[287] This principle is concerned with the matters of both validity and

[281] *Ibid* at 149.
[282] Malgosia Fitzmaurice & Olufemi Elias, *supra* note 214 at 26.
[283] *Ibid.*
[284] Christine Chinkin, "A Mirage in the Sand? Distinguishing Binding and Non-binding Relations between States" (1997) 10 Leiden J Int'l L 223 at 225.
[285] *Ibid* at 244.
[286] *Supra* note 227.
[287] Richard D Kearney & Robert E Dalton, "The Treaty on Treaties" (1970) 64 Am J Int'l L 495 at 517, n 116.

of ability.[288] The issue of validity refers to the application of a treaty within the territory of its contracting parties, while the issue of ability is concerned with the execution of a treaty by its contracting parties.

With regard to the issue of validity, Article 27 of 1969 Vienna Convention maintains that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Article 27 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, as well as Article 3 of the UN ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts and Article 31 of the UN ILC Draft Articles on Responsibility of International Organizations, similarly provide that no entity may invoke the provisions of its internal law to justify a violation of a norm of international law.[289]

The *pacta sunt servanda* probably stems from the contract principle in the common law system. "In the Common Law of England and the United States of America, where can you find specific authority for the principle that a man must perform his contracts? Yet almost every decision on a contract presupposes the existence of that principle. The same is true of international law. No Government would decline to accept the principle *pacta sunt servanda*,"[290] except for in particular cases under Article 46 of Vienna Convention 1969 and Article 46 of Vienna Convention 1986.

Article 46 of Vienna Convention 1969 stipulates that:

> "(1) A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its international law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. (2) A violation is manifest if it would be objectively evident to any State

[288] *Supra* note 181 at 59.
[289] Thomas Giegerich, "Foreign Relations Law", January 2011(MPEPIL) at para 6.
[290] *Supra* note 181 at 493.

> conducting itself in the matter in accordance with normal practice and in good faith."[291]

And Article 46 of Vienna Convention 1986 provides for that:

> "1.A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
> 2.An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.
> 3.A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith."

That is to say, there is only one exception to the principle *pacta sunt servanda,* moreover, that if any provision of a state's internal law or of rules of an organisation "is of fundamental importance and was manifestly violated in the treaty-making process, then, and only then, the respective State or international organization may claim the invalidity of the treaty" pursuant to Arts 46 of the two aforementioned Vienna Conventions.[292] That treaty obligations shall be carried out faithfully is strictly obeyed in practice and exception of this principle is very carefully adopted by tribunals.

The principle of *pacta sunt servanda* not only concerns the matter of validity, that no state or organisation may invoke the provisions of its internal laws to justify a violation of a norm of international law; but also gives rise to the issue of party's ability to perform treaty. When a party consents to be bound by some treaty, it is obligated to perform the obligations provided by that treaty. No entities in international relations may consent to be bound by treaties to perform which goes beyond the capacity of that entity. It is clear "how important it is to distinguish, in relation to a treaty, between the perfection of the international obligation and the perfection of the municipal

[291] *Supra* note 273, Article 46.
[292] *Supra* note 289 at para 7.

means to carry it out, because the former may occur without the latter."[293] A party to a treaty "may lack the necessary executive or legislative power to give effect to the treaty."[294]

When a party voluntarily falls into treaty obligations, it shall ensure that it is competent to bear those obligations. The ability of performing treaty obligations is usually weighed by the contracting party before signing the treaty. The party would not sign the treaty if a deficiency in its legal order prevents it from fulfilling treaty obligations. The ability to implement a treaty is concerned with the execution of such treaty, and usually depends on the speciality of said treaty.

"Viewing the whole trilogy of the codified law [1969 Vienna Convention, 1978 Vienna Convention and 1986 Vienna Convention], it is indeed curious that 'performance' is really hardly mentioned. The references to it in articles 26, 27, 41, 58, 61, 70, 71 and 72 of the Vienna Conventions do not give the notion any obvious positive content, while the word 'performance' does not appear at all in the 1978 Convention. All three Conventions also refer frequently to the 'application' of a treaty, but those references may not always mean the same thing."[295] Shabtai Rosenne stated "how to perform a treaty-obligation is certainly the outcome of a political decision, and often one taken at the highest level of national administration. The International Court is thus constitutionally incapable of laying down positively how a treaty is to be performed… This is certainly one of the greyest of the grey areas in the codified law of treaties."[296]

Before signing a treaty, parties are "required in order to ensure that a treaty will be applied municipally and receive the effect stipulated by the parties. It is the duty of a party to a treaty to see to it that its municipal law enables it to give effect to the treaty and that its organs – executive and judicial – are properly equipped with the powers required for that purpose; if that is not already

[293] *Supra* note 181 at 68.
[294] *Ibid* at 59.
[295] *Supra* note 208.
[296] *Ibid* at 62.

the case, the defect must be remedied, for no State can plead a deficiency in its municipal law or organization against a complaint of a breach of a treaty obligation or of a rule of customary international law."[297] "The vast majority of treaties can only be fully implemented if all the branches of the Governments or the contracting parties – legislative, administrative, and judicial – possess or are forthwith invested with the necessary legal power to implement the treaty."[298]

A state's ability to perform treaties is rarely questioned, because the state is one where there is a complex of norms with competent legislative, executive and judicial organs, making it capable of carrying out treaty obligations. "State is one where there is a body or person that has ultimate authority to determine the content and scope of application of legal norms over a roughly determinate geographical area and a roughly determinate set of subjects as well as holding a monopoly over the enforcement of such norms."[299] Once a treaty is incorporated into domestic law, such ultimate authority guarantees that all of its organs - executive, legislative and judiciary, state agencies and other public bodies, and, depending on the nature of treaty obligation, private persons and bodies - are bound by domestic law in a way that the treaty obligations can be carried out.[300]

When an IGO voluntarily enters into international obligations by way of concluding BITs, it has to ensure that firstly it has the personified qualification to negotiate and sign BITs. Such personified qualification refers to the constitutional requirements for the conclusion of a treaty[301] and the full power of the designated organ to conclude treaties[302] which in practice means the IGO has to achieve and exercise its treaty-making power within the scope of powers conferred by its

[297] *Supra* note 181 at 78, n 1.
[298] *Ibid* at 78-79.
[299] *Supra* note 213.
[300] *Supra* note 210 at 179.
[301] *Supra* note 181 at 59.
[302] *Ibid* at 60.

member states, as well as assign a representative with full authority of concluding treaties to guarantee the validity of concluded BITs. These are usually done by inserting necessary provisions in the written founding treaty, which is considered as the constitutional document of IGO. It usually clearly addresses the scope of law-making powers and requires its member states to revise their constitutions to comply with the founding treaty. The organ that can effectively subject the IGO to an international obligation is also clearly addressed in a public and unequivocal manner that the world has notice. An IGO will not be bound by the treaty made on its behalf by an organ or authority not competent under its law to conclude treaties.[303] By reallocation of the external competency and independency of concluding BITs between member states and the IGO, the IGO achieves the personified qualification. Such competent qualification or identity guarantees the validity of the conclude BIT. To be able to conclude BITs, an IGO must achieve the qualified identity. However, such identity or qualification seems no more than a superficial condition. An IGO will achieve the authority of concluding BITs once its member states transfer such power to it.

Before concluding BITs, does an IGO have to possess the ability of performing BITs? This may not the same case as a state. This is because the task of implementing BITs may still be left in the hands of the IGO's member states. Or at least, the performance of BITs that cannot be completed by the IGO alone. The IGO is more like to create an enabling environment for the successful implementation of BITs within its territories. However, it is obvious that to possess identity is not enough for an IGO to conclude BITs. The IGO has to display a common interest toward the rest of the world. The region must be treated as a whole in terms of investment. Otherwise, it makes no sense to conclude BITs with the IGO, and a state will seek to conclude BITs with each of its

[303] *Ibid* at 66; see also Article 21 of Harvard Draft Convention on the Law of Treaties, online: UN <legal.un.org>.

member states. Here, the author avoids using the expression of an IGO's ability of performing BITs. The IGO's ability of performing BITs, therefore, turns to issue of regional integration.

2.3.3.2 Why must there be one common interest

BITs, as their name indicates, exclusively govern investment relations between two parties.[304] "Bilateral" is not a mere quantitative limit on the number of contracting parties, it denotes that a bilateral treaty only accommodates the interests of two. As Jeswald W. Salacuse stated "the technical explanation is that a bilateral treaty must accommodate the interests of only two parties and is therefore far less complicated to negotiate than a multilateral, global treaty, which must accommodate the interests of many countries."[305] That is probably why the conclusion of BITs grew more sharply than that of multilateral investment agreements during last fifty years. The BIT only accommodates the interests of two, not multilateral interests. If there are de facto different bodies of interests on one side of the party, they achieve the ability to conclude BITs separately with other bodies of interests. This is exemplified by the special case of Hong Kong and Macao. Both regions during their one-hundred-year separation have formed unified and independent legal systems completely different from their motherland. After returning to China from their original colonizers,[306] both Hong Kong and Macao have maintained most of their independent legislative, executive and judicial powers. They have much more powers than other Chinese local governments. For example, they have ultimate judicial power. They maintain their independent legislative power both in internal and external affairs including the power of concluding BITs. To date, Hong Kong has signed 15 BITs, with 5 of them (BITs with Korea, Austria, Italy, Germany and UK) entering into force after the handover. Macao had both of its two BITs (concluded with

[304] Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010) at 1.
[305] *Ibid* at 12.
[306] Hong Kong returned from its British coloniser to PR of China on 1 July 1997. Macao returned from its Portuguese coloniser to PR of China on 22 December 1999.

Netherlands and Portugal) signed after its handover. In the case of Hong Kong and Macao, the power of concluding BITs is delegated to lower governments. As both regions form separate bodies of interests different from their parent country, they can conclude BITs with third states. Similarly, if an organisation can be treated as one body of interest, it will similarly achieve the ability to conclude BITs.

An IGO does not have to be a state before concluding BITs. It only needs to have one "common interest" over investment activities towards the rest of the world. As an organisation is a group of states, and each state represents a body of interest, if there are several different interests, it will be better to conclude BITs separately with each of member states, instead of one BIT with the entire region. The IGO has to form a "common interest", otherwise a state will seek to conclude BITs with each of its member states, instead of the organisation. The "common interest" allows for the organisation to be treated as a whole. A state has a complex of norms and competent legislative, executive and judicial organs that jointly form and serve the interest of the state; and simultaneously, nurture the state's ability of performing concluded treaties. The IGO at birth neither has a complex of norms, nor competent legislative, executive or judicial organs. Its "common interest" can only be formed if the necessary centralisation is completed. Once completed, the centralisation will in turn ensure the unified performance of BIT within the territory of such organisation.

2.3.3.3 Kelsen's centralisation and decentralisation theory

According to Kelsenism, a treaty is, the same as national law and international law, cognised as a legal order. "Kelsen conceived of a treaty as several substantively aligned declarations of will with respect to establishing a common treaty-based order. In this model, the parties state their willingness through their identical declarations of will to establish a legal order, which can then

obligate the treaty partners to different factual actions."[307] Both state[308] and "union or state" (organisation)[309] are sub-orders of international law with the primacy of international law. Moreover, Kelsen's absolute monism requires "that all legal orders must be cognised as part of one unified legal order."[310] Kelsen believed that all legal orders regulated the same human conducts,[311] based on which Kelsen identified that the difference between mentioned orders "was not one of kind, but only of degree".[312] There is only the difference of "quantity", not "quality". A state is merely an order more centralised in quantity than the international order. Therefore, if states have the capacity of entering into international treaties including BITs, so could other international entities.[313]

Kelsen compared confederation with federal state to explain his theory and stated that "these two main types of state unions differ only in the degree of centralisation and decentralisation. There was 'quantitative' not "qualitative' difference between the two types of union… a legal community that was – conceptually – completely centralized was one whose order consisted exclusively of norms that claimed validity for the entire legal sphere. By contrast, the completely decentralized legal order consisted of legal norms that were only valid for partial areas. The federal state differed from the confederation only in that the federal government in the federal state possessed a greater number of centralized powers."[314]

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[307] *Supra* note 157 at 175, n 81.
[308] *Ibid* at 87, n 42.
[309] *Ibid* at 175, n 81.
[310] *Supra* note 213 at 31.
[311] *Supra* note 213 at 32. There are different sounds such as Fitzmaurice, the advocator of absolute dualism, who said that "absolute dualism is the claim that legal orders are entirely autonomous from each other and regulate completely distinct fields of human conduct." And he continues that "international law loses its international character when it is employed by domestic courts because its source becomes the domestic legal norm which authorizes its employment. Hence, the norm described as 'international' retains its substantive content, but the source of its validity changes."
[312] *Supra* note 157 at 173, n 75.
[313] *Ibid* at 174.
[314] *Ibid* at 129-130.

Kelsen's theory is succeeded by Charles Leben[315] who believed that "any legal order which is based on a territory invariably consists of combination of norms, some of which are valid for the entire territory (Known as 'central norms') while others are valid for part of the territory only (and known as 'local' or 'partial' norms)…the degree of centralisation or decentralisation of a legal order can be a continuum."[316] "Any legal order involves such a combination of norms. A wholly 'centralised' legal order, with no 'local' norms is theoretically conceivable but is impossible to implement in practice. Conversely, a wholly decentralised legal order, with no central norm, is inconceivable…"[317] Both the international legal order and state legal order are "partly centralised and partly decentralised"[318]. Leben developed that "the degree of centralisation of an order can be gauged from the ratio of the number of central norms to the number of local norms. It can also be observed that some sectors of normative activity (defence, currency, taxation, citizenship, etc) are generally reserved to the central order in a state, whereas they are maintained at a decentralised level in an international legal order, that may be called a confederation or an international organisation."[319]

Jochen Von Bernstorff and Thomas Dunlap further analysed the difference between a state and international organisation legal orders, and they stated that "the central difference between the state legal system and the international organization lay in the classification of the international organization as part of the international legal order. According to the theory of the primacy of

[315] *Supra* note 182 at 175. But Leben argued that "between a state and an international organisation, albeit a very 'centralised' one like the European Union, there is a difference of kind and not merely of degree." "This difference lies in the recognition of non-recognition of the statehood of an entity by international law." And "it is the transfer of competence in terms of defence and foreign affairs that is the main (although possibly not the only) point in the shift."
[316] *Supra* note 182 at 172.
[317] *Ibid* at 259.
[318] *Ibid* at 172.
[319] *Ibid* at 260.

international law, the international organization, as a particular order of international law, was placed above the state… because of this hierarchical arrangement, the law of the international organization was potentially able to bind the states subordinated to it. On this question, then, there were no theoretical limitations regarding the content of the founding treaty. For that purpose, the barrier of a substantive concept of sovereignty preceding the law had been theoretically eliminated by the School."[320] The organisation can theoretically take back the power of concluding treaties performed by its member states through the constitutional treaty so provided.

"Another difference between the international organization and the state as a legal system is the different degree of centralization of the respective legal system. As a general rule, a union of states or an international organization left a considerable number of regulatory powers at the level of the member states. An international organization was thus a less strongly centralized order than the federal or unitary state. However, through a dynamic process of integration, such an international organization was able to centralize a growing number of competencies. In this way, the international order could, in a fluid process of transition, turn into a system with as strong a degree of centralization as was otherwise displayed only by state legal systems."[321] The transition is free and unlimited. An organisation may have all competences subordinated to member states centralised to the organisational level. In this case, "the confederation of states or international organization had then turned into a federal state, at that moment, the international organization not only turns into a state, but its legal order within the hierarchy of the monistic legal universe drops from the level of international law to the level of state legal systems. That did not entail a loss of status, however; rather, it allowed the state legal system to enjoy the privileges that general international law accorded to the state. They included especially the possibility of creating new

[320] *Supra* note 157 at 150.
[321] *Ibid* at 151.

international law in conjunction with other states and without any substantive restrictions. By contrast, the international organization had this privilege only with respect to the competencies granted by its particular legal order created by the treaty."[322]

To conclude, according to Kelsenism: 1) The difference between orders is merely quantitative, and 2) the transition between a less centralised organisation and a more strongly centralised state flows freely. As there is "no theoretical limitations regarding the content of the founding treaty" of an organisation, any powers or competencies could be centralised to the organisational level, and the organisation would display the state's power of concluding BITs by taking back such competence originally distributed to its member states.

2.3.3.4 Through which channel may an IGO complete the centralisation?

An organisation, through a dynamic process of integration, may turn into a system with strong degree of centralisation making it to show a unified front towards the rest of the world. "There has been an explosion of regional integration agreements (RIAs) in the last decades. Almost every country in the world is a member of one or more RIAs and more than half of world trade occurs within these trading blocs."[323] With the exception of few regions, such as, the North Atlantic Treaty Organization (the "NATO") that are established for security and military purposes, regional integration schemes in the context of globalisation strive for a larger market. Regional integration is considered to be concerned with the process "by which hitherto separate economies are combined into a single, larger region."[324] It "may be defined as the institutional combination of separate national economies into larger economic blocs or communities and it is basically concerned with the promotion of efficiency in resource use on a regional basis (Robson, 1998:1-

[322] *Ibid.*
[323] Zeynep Kaplan, "Regional Integration Agreements and Their Impacts on Third Countries" (2011) 14:26 Balikesir University Journal of Social Sciences Institute 133 at 134.
[324] *Ibid* at 136.

2)."[325] Therefore, regional integration is usually viewed as the abbreviation for regional economic integration, and economic integration is considered to be the main form of regionalism. The regional economic integration "refers both to market integration and economic policy integration (Pelkmans, 2001:6)."[326]

Economic integration may take different forms, in today's global practice, from the weakest to the strongest, including free trade areas, customs unions, common markets and economic and monetary unions.[327] "Free trade areas may be regarded as the weakest form of economic integration. In free trade areas, all impediments to trade, such as, import tariffs and quantitative restrictions are eliminated among parties and each member country can implement its own customs tariff with respect to third countries. The European Free Trade Association (EFTA), the Canada-US Free Trade Agreement (CUFTA) and North American Free Trade Area (NAFTA) are leading examples of free trade areas. Customs union is a second form of economic integration which involves all the provisions of a free trade area but also a common external tariff (CET) is implemented in member countries' trade relations with the rest of the world. This additional dimension avoids the problem of 'trade deflection', which occurs when goods from outside world are 'deflected' to whichever country in a free trade area imposes the lowest tariff on imports, before being reshipped (tariff-free) to their ultimate destination elsewhere in the same free trade area (Healey, 1995:6). Thus, customs unions appear to be more conducive to higher degrees of economic integration among member countries. The Central American Common Market (CACM) and the Caribbean Community and Common Market (CARICOM) are the examples of customs unions. One step up from a customs union is a common market, which is composed of an internal

[325] *Ibid* at 135.
[326] *Ibid*.
[327] *Ibid* at 136.

market. A common market is an agreement signed between two or more countries that allow the free movement of capital, labour, goods and services across the borders of the member countries. A common market also requires the harmonization or coordination of economic policies in areas, such as, industrial policy, competition policy or taxation. The strongest and the most developed form of integration is the economic and monetary union. An economic union makes economic policy centrally, rather than harmonizing policy areas as seen in a common market. In a monetary union a high degree of coordination or unification of monetary and fiscal policies are required as well as the adoption of a single currency and the establishment of a supranational central bank."[328] "The theory of economic integration, therefore, has a very broad scope".[329]

"Today, most of the RIAs [regional integration agreements] reflect complex structures that may cover services, investment, intellectual property rights, cooperation in competition policy, technical barriers to trade, dispute settlement, supranational institutional arrangements and so on."[330] While this goes far beyond matters of tariffs, commercial policies, monetary and fiscal policies routinely covered by Free Trade Areas, Custom Unions, Common Markets and Economic and Monetary Unions; they still fall in one of these four formats, and, in general, evolve in a process of integrating the preliminary format to achieve a higher degree of centralisation. Economic integration seems rightly a channel through which, step by step, an IGO may achieve a strong degree of centralisation and show a unified front towards foreign traders and investors. In practice, the EU's "free movement bills" model is a very typical example of the economic integration.

[328] *Ibid* at 136-137.
[329] *Ibid* at 137.
[330] *Ibid.*

"The European integration process has been a political project since its inception. The principal objective of the plan announced by French Foreign Minister Robert Schuman on 9 May 1950 was to make war between participating States, first and foremost France and Germany, impossible. These two 'hereditary enemies' had gone to war three times in less than 100 years, in 1870, 1914, and 1939. Two of these wars had developed into world wars. This political goal was initially pursued only by economic means after the Treaty establishing the European Defence Community had been rejected by the French National Assembly in 1954. As a first step, the two key military industrial sectors, coal and steel, were placed under the control of a supranational authority. After the European Coal and Steel Community (ECSC) had been created to this end by the Treaty of Paris (Treaty Instituting the European Coal and Steel Community [signed 18 April 1951, entered into force 23 July 1952] 261 UNTS 140), integration between its six members (Belgium, France, Federal Republic of Germany, Italy, Luxembourg, and the Netherlands) was extended to other economic areas with the establishment of the European (Economic) Community and the European Atomic Energy Community (Euratom) by the Rome Treaties (Treaty establishing the European Economic Community ['ECC'] [signed 15 March 1957, entered into force 1 January 1958] 294 UNTS 17 and Treaty establishing the European Atomic Energy Community ['Euratom'] [signed 25 March 1957, entered into force 1 January 1958] 294 UNTS 260). As a result, the EC became a major force in international economic relations but not in the fields of foreign or security policy. It was characterized as 'an economic giant, political mouse and military worm' by the Belgian politician Mark Eyskens."[331]

During the summit held on 29-30 May 1967 in Rome, Italy, to celebrate the tenth anniversary of the signature of the EEC and Euratom Treaties, heads of state or government expressed their

[331] Hanspeter Neuhold, "European Common Foreign and Security Policy", February 2011 (MPEPIL) at para 1.

intention of bringing into force the Treaty merging the institutions of the three Communities as of 1 July 1967. On 1 July 1967, the Merger Treaty entered into force, thus fusing the executives of the European Communities (ECSC, EEC, Euratom). From then on, the European Communities had a single Commission and a single Council.[332]

On 1 July 1968, remaining customs duties in intra-community trade were abolished 18 months ahead of what was scheduled in the Rome Treaty and the common customs tariff was introduced to replace national customs duties in trade with the rest of the world.[333] The European Community completed its integration to become a Custom Union.

At the summit in The Hague in 1969, the Heads of State or Government defined a new objective of European integration: economic and monetary union (EMU). The ultimate goal was to achieve full liberalization of capital movements, the total convertibility of Member States' currencies, and the irrevocable fixing of exchange rates.[334] "Then, in June 1998, the European Central Bank was established and, in January 1999, a unified currency, the euro, was born and came to be used by most EU member countries."[335]

Following these steps of economic integration, the EU gradually becomes a single market that guarantees the free movement of goods, capital, services, and labour. Thus, foreign investors will consider the EU as a whole when they decide the location of their investments. Factors essential to investment, such as, abundant raw materials, cheap labours, high technologies, information, capitals and markets were dispersedly located. Only when the restrictions on the free movement of these factors are removed can foreign investors freely choose the best location for their

[332] European Union, *The History of the European Union: 1967*, online: EU <https://europa.eu>.
[333] *Ibid.*
[334] European Parliament, *The Citizens of the Union and Their Rights*, online: Europarl <http://www.europarl.europa.eu>.
[335] *European Economic and Monetary Union (EMU)*, online: Investopedia <http://www.investopedia.com>.

investments within the region. Then, BITs that manage investment relation between the whole region and the rest of the world can be considered.

The "free movement bills" model allows for the diversity of domestic law. In this model, substantive investment-related laws are all decentralized to member states. Member states maintain their diversiform domestic laws, and the organisation is aimed at ensuring the unimpeded flow of all investment factors - raw materials, labour, capital, information, technology, products (which in nature fall in the categories of goods, both raw materials and products) and services (information and technology). By centralising the law regarding the free movement of the four factors among its member states, the organisation facilitates and guarantees the dispatch of foreign investments among the region and successfully attracts extra-regional investments to flow inward. Under this model, the organisation centralises and formulates rules on coordination which aims to eliminate barrels of market. It is a loose-control model based on market analysis. However, the EU's "free movement bills" model is not the only channel through which one can complete centralisation. Correspondingly, there is another model aimed at eliminating the difference and conflict of domestic laws, to complete the centralisation by way of legal integration.

Numerous domestic laws and regulations "may have an impact on the feasibility of undertaking a particular investment transaction by a given foreign investor, such laws and regulations include those governing taxation, commodity price controls, antitrust and competition, securities and corporations, environmental protection, and labor and working conditions, all of which may either expressly or implicitly offer advantages or disadvantages to a contemplated transaction. Equally relevant to investors are constitutional provisions on private property rights, the ability of foreigners to secure legal rights in land, and foreign investors' freedom to make and enforce

contracts."[336] "It is widely recognised that conflicts and divergences arising from the laws of different States in matters relating to international investment [trade] constitute an obstacle to the development of that investment [trade]."[337] "The harmonisation of trade laws and commercial practices is an important ingredient of regional integration, without which meaningful economic integration cannot be achieved. Economic integration needs a legal framework to foster and support it."[338] "On principle, the adoption by different countries of a common business law should be both a condition and a consequence of the building of an economic union and, a fortiori, of an economic and monetary union between these countries. Evidently, one should think, such unions cannot really function, if their member states do not have unified, or at least harmonized, laws in essential areas of economic activities."[339] Hence, another model in the form of legal integration aimed at eliminating legal conflicts between member states arises. The OHADA is a very typical example of legal integration to form a single legal jurisdiction on trade and investment.

The OHADA does not belong to any existing format of economic integration, and it is not a product of a process of integration of any existing economic unions. Namely, it is "not the creation of such an economic union that led to the harmonization of business law in the OHADA space. The countries of the OHADA space belong to different economic and monetary unions. These unions have laws of their own in some areas of their economic activities, more particularly in the area of competition."[340]

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[336] Jeswald W Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford: Oxford University Press, 2013) at 89-90.

[337] Ndulo Muna, "Harmonisation of Trade Laws in the African Economic Community" (1993) 42:1 ICLQ 101 at 107.

[338] *Ibid.*

[339] Bakandeja Wa Mpungu, Grégoire. "Overcoming the Civil Law/Common Law, Divide by Integration: The Case of OHADA" in Schmiegelow-Lauwers Michèle & Schmiegelow Henrik, *Institutional Competition between Common Law & Civil Law* (Belgium: Springer, 2014) 421 at 424.

[340] *Ibid.*

"As an illustration, eight of OHADA's West African member states are also members UEMOA, which they established with a view to creating a common market within a customs union permitting the free movements of goods, services, capital and persons. This union did initiate a process of harmonisation in different fields of the legislation of its member states and more particularly in the areas of banking and competition. Another economic community in West Africa, the Communauté économique des états de l'Afrique de l'Ouest (Economic Community of West African States) (CEDEAO) has the goal of building an economic union in West Africa. It comprises the member states of the UEMOA in addition to Guinea (Conakry) and five Anglophone countries, which do not belong to OHADA (Gambia, Ghana, Sierra Leone, Nigeria and Liberia). There is a similar organisation in Central Africa, the Communauté économique et monétaire de l'Afrique Centrale (CEMAC). Its members include six of OHADA's Central African States: Cameroon, Central African Republic, Chad, Republic of Congo (Brazzaville), Equatorial Guinea, and Gabon. CEMAC, which, in turn, established two unions: the Union Economique en Afrique Centrale (UEAC) and the Union monétaire en Afrique Centrale (UMAC). The objectives of UEAC are rather similar to those of UEMOA. UEAC has developed a competition law regulating domestic commercial practices as well as state practices affecting cross border commerce. UMAC essentially regulates foreign exchange transactions and banking."[341]

"Hence, OHADA is obviously not a mere product of a process of integration of an existing economic and monetary union, with which it would fix the rules of the game."[342] "It is, as it were, an independent variable, arising from the determination of the founding member states to set

[341] *Ibid*. "One might be concerned about risks of conflict of OHADA laws and UEMOA or CEMAC laws in certain areas, such as banking operations or the accounting rules of OHADA and UEMOA (SYSCOA) respectively (Sawadogo and Ibriga 2003). In fact, however, the areas of law for which the different regional organizations have competence are well circumscribed and in practice there do not seem to be problems of conflict of laws."
[342] *Supra* note 339.

common legal rules in specified areas for the entire West and Central African region."[343] The OHADA strives for the harmonisation of business laws within the region by way of enacting "uniform acts". The common rules eliminate the difference of laws among member states, and, therefore, facilitate intra-regional business and reduce the cost of transaction. Thus, the OHADA forms one legal jurisdiction over investment-related matters, making foreign investors view the region as a whole. The OHADA achieves centralisation through legal integration.

To conclude, there are several ways through which an IGO may achieve centralisation. To examine whether an IGO has been well integrated to show a unified front and, therefore, to achieve the competence to conclude BITs, the author shall make a case-by-case study.

[343] *Ibid* at 424-425.

Chapter 3 Does the OHADA have the competence to conclude BITs?

Like states, an IGO is able to conclude BITs if it is endowed with the relevant power by its member states. The next question will be whether any regional group in Africa has been endowed with such power to conclude one single BIT at regional or sub-regional level.

After achieving independence in the middle of 20th century, economic development became the prime concern of the newly founded African nations. In order to promote the economic development and to increase international influence, the African countries united and formed alliances. Over the last half century, numerous regional organisations were established on the African continent and they may fall into one of the following categories: 1) economic and monetary union simply aiming to enhance regional economic markets, mainly by free movement of goods, services, capital and technologies and currency management, such as Union douanière et économique de l'Afrique centrale (UDEAC, 1964-1994, in English Customs and Economic Union), the South African Customs Union (SACU), Union monétaire ouest-africaine (UMOA, 1962-1994, in English West African Monetary Union), Communauté économique de l'Afrique de l'Ouest (CEAO, 1973-1994, in English West African Economic Community), UEMOA (Union économique et monétaire Ouest africaine, in English West African Economic and Monetary Union) and CEMAC (Communauté économique et monétaire d l'Afrique Centrale, in English Central African Economic and Monetary Community); 2) economic union enforcing regional harmonisation and integration to pursue cooperation in all fields of economies such as Economic Community of West African States (ECOWAS), Communauté économique des états de l'Afrique Centrale (CEEAC, in English Economic Community of Central African States), Communauté

économique de l'Afrique de l'ouest (CEAO), and the Southern African Development Community (SADC); and 3) unions dealing with specific subjects like Organisation africaine de la propriété intellectuelle (OAPI, in English African Intellectual Property Organization), Conférence inter-africaine des marchés d'àssurances (CIMA, in English Inter-African Conference on Insurance Markets), and Conférence interafricaine de la prévoyance sociale (CIPRES, in English Inter-African Conference on Social Welfare), which contribute to the protection and improvement of intellectual property, insurance markets and social welfare in their member states.[344] "Most African countries belong to at least three or more separate regional integration agreements."[345]

Apart from the pre-mentioned African organisations, on 17 October 1993 L'Organisation pour l'harmonisation en Afrique du droit des affaires, shortened to OHADA, (in English is the Organisation for the Harmonisation of Business Law in Africa - "OHBLA") was created by the *Treaty on the Harmonisation of Business Law in Africa* signed in Port-Louis by its original 14 contracting parties from west and central Africa. The accomplishment of the OHADA is to adopt uniformed business laws in its entire region. This dissertation proposes concluding a standalone BIT between China and the OHADA. Why the OHADA, instead of any other African regional or sub-regional organisations? Does the OHADA have the competence to conclude BITs? Is its competence to conclude BITs addressed in its founding treaty, explicitly or implicitly? In fact, the competence to conclude BITs neither falls in the coverage of the OHADA Treaty, nor that of any other African organisations. The OHADA, through the harmonization of business law, is integrated to be one single legal jurisdiction over trade and investment activities, that shows a unified front to the rest of the world. While the OHADA is not authorized to conclude BITs with third states or organisations, it is, so far, the most appropriate option.

[344] *Supra* note 337 at 104.
[345] *Supra* note 91 at 299.

3.1 Profile of the OHADA

Current members of the OHADA are either West or central African countries. (Comoros is the only one that neither belongs to West nor Central Africa.) However, the OHADA is not the first choice of regional integration in this region. If one looks back at the historical development of regional integration in West and Central Africa, one will find that West and Central African countries tried to follow the EU model by way of market integration to achieve regionalism and, therefore, the great growth of economies.

In West Africa, the UMOA (West African Monetary Union) established in 1962 and the CEAO (West African Economic Community) founded in 1973 dealt separately with currency management and the free movement of capitals, persons, goods and services within their member states. In 1994 these two organisations were regrouped into the UEMOA (West African Economic and Monetary Union). The UEMOA "established a common currency in Benin, Burkina Faso, Ivory Coast, Mali, Niger, Senegal, Togo and Guinea Bissau: the CFA Franc. The purpose of the UEMOA is to increase the competitiveness of the economic and financial activities of the member states in the context of an open and competitive market, as well as to create a rationalised and harmonised legal environment. ... The monetary policy within the UEMOA is regulated by the Central Bank of West African States [Banque Centrale des États de l'Afrique de l'Ouest, BCEAO], whose primary mission is to guarantee the stability of banking and finance in the UEMOA region and to foster the smooth operation and supervise the security of payment systems within the UEMOA. Within the UEMOA region, all banking activity is governed by a uniform law on

banking regulations and by the Convention governing the Banking Commission of the UEMOA."[346] (See Graphic 1)

Similarly, in central Africa a combined organisation – the UDEAC (Central African Customs Union) with the same missions as the UMOA and the CEAO was created in 1964 and was replaced with the CEMAC (Central African Economic and Monetary Community, members include Cameroon, the Republic of the Congo, Gabon, Equatorial Guinea, the Central African Republic and Chad.) since 1994. "The CEMAC was established by a treaty signed in Chad on 16 March 1994. Its objectives are to assure stability in the management of the common currency and to secure the environment for economic activities and business in general, as well as to harmonize the regulations of national sectoral policies. The convention which establishes the Monetary Union of Central Africa (UMAC) governs the Bank of the Central African States [Banque des États de l'Afrique Centrale, BEAC], which issues the currency of the UMAC and governs, among others, the monetary policies of the UMAC."[347] (See Graphic 1)

Then, countries in West and Central Africa continued to pursue the cooperation and integration in all fields of economic activities, particularly in the areas of industry, transport, communications, energy, agriculture, natural resources, trade, customs, monetary and financial matters, human resources, tourism, education, culture, science and technology, which results in the establishment of the ECOWAS in 1975 and the CEEAC in 1984. ECOWAS absorbed all eight members of the UEMOA and recruits seven other West African countries of Cabo Verde, Gambia, Ghana, Guinea, Liberia, Federal Republic of Nigeria and Sierra Leone, and the CEEAC absorbed all six members

[346] "Overview of Regional Integration in Francophone and Lusophone Africa" (18 September 2012), online: Bgafricagroup <http://www.bgafricagroup.com>.
[347] *Ibid.*

of the CEMAC and recruits four other Central African countries of Angola, Burundi, DR Congo and Sao Tome and Principe. (See Graphic 1)

These economic organisations aim to foster economies by way of creating a common market, ensuring the stable management of common currency and enhancing the economic environment of trade and business within their member states. The EU model was firstly adopted. However, after years of effort, the outcome was small and limited. Both the precocious and futuristic members of these economic organisations recognised that to introduce projects, to harmonise national policies, to enhance market environments and other economic measures were not enough for economic development. They found that "economic integration cannot subsist without a solid legal framework."[348]

Some African laws do not comply with broadly accepted international principles and rules. "As you will be aware, this is a sharp departure from the legacy of transplants of legal systems of the former European powers to their respective African colonies and territories. Thus, in the area of business law, mainly French commercial and corporate law was extended to many African countries. This extension led to a certain unification of the law in the countries concerned. After independence, most of the countries simply retained this law as it was, without actually adapting it to the changing economic situations and needs of local businesses. As a consequence, it became clearly obsolete."

To invest in Africa is unsecured, judicially and juridically. The African countries hypothesised that the limited investments into the African countries was "a result of the judicial and juridical insecurity. As such, there is a strong need to rebuild the respective legal systems in order to enhance investors' reliance and to further attract foreign investment. The idea of the unification of

[348] Salvatore Mancuso, "Trends on the Harmonization of Contract Law in Africa" (2007) 13 Ann Surv Int'l & Comp L 157 at 158.

African laws has been considered as the only solution to eliminate obstacles to development amounting from the judicial differences among the varying African nations. Such a change would give the countries joining the process of regional integration the opportunity to assert their interests in a stronger and more confident manner within the international arena."[349]

"It is undeniable that the economic development in Africa can only be achieved with a secure and attractive legal framework for investment. With regard to the disparity in legislation in French-speaking countries at the time of their independence, the unification of their business law must be a priority."[350] Thus, the West and Central African countries decided to create a new organisation (the OHADA) which provides a clear, modern, effective and efficient unified legal system in the field of business law to permit investment with a sense of security.[351]

"As long-standing idea, the foundation of the OHADA Treaty was first laid during a meeting of finance ministers of the members of the franc CFA1 area held in Ouagadougou, Burkina Faso, in April 1991. A group of experts, led by Senegalese Justice Keba Mbaye, was appointed to conduct a feasibility study on a form of legal collaboration designed to promote economic integration and attract investments. Identifying low investment as a major obstacle to economic growth, Keba Mbaye presented his report to the French-speaking African summit in Libreville, Gabon, in October 1992, recommending the creation of a supranational organization comprising the entire franc area. The recommendation was adopted and a steering committee of three experts were appointed and tasked with drafting an international instrument as well as identifying the areas of law to be harmonized."[352] On 17 October 1993 the OHADA, was created by the *Treaty on the*

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[349] Salvatore Mancuso, "The New African Law: Beyond the Difference between Common Law and Civil Law" (2008) 14 Golden Gate University School of Law 39 at 40.
[350] *Supra* note 339 at 422.
[351] Michael C Ogwezzy, "Common Court of Justice and Arbitration: A Supranational Institution for the Administration of Commercial Disputes in Africa" (2013) 2 Nordic Journal of Commercial Law 1 at 1.
[352] *Ibid.*

Harmonisation of Business Law in Africa signed in Port-Louis by its original 14 contracting parties - Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Gabon, Equatorial Guinea, Mali, Niger, Senegal and Togo. To date, the OHADA has 17 members in total with the new recruits of DR Congo, Guinea and Guinea-Bissau (see Table 8).

The "OHADA's central accomplishment is the growing system of modern, business-related statutes. These are supported by an entire regime: a legislature to adopt a panoply of business laws, a supranational court that preserves the laws' uniformity by issuing decisions and interpretations applicable throughout the OHADA territory, and a permanent secretariat to perform an executive function compatible with OHADA's parliamentary-style governance."[353]

The "OHADA is an organization of currently 17 member states, principally francophone, in a continent facing many challenges, in particular poverty and underdevelopment. Legal and judicial insecurity are among the causes of these challenges. OHADA's approach is to address these legal deficiencies by the building of a new, effective and efficient legal system in the field of business law (Paillusseau 2004b) designed to facilitate business and offer procedures for resolving disputes inherent to the exercise of economic activities across national borders (Cerexhe 1978)."[354] "The primary role of OHADA is therefore to serve as a means of strengthening the legal and judicial security in its area of application in order to assist development progress by consolidating secure investments and economic integration through a unified business law."[355]

Although the OHADA absorbed members of the UEMOA and the CEMAC and recruited some members of the ECOWAS and the CEEAC, it is not a product of a process of integration of these economic unions. "It is, as it were, an independent variable, arising from the determination of the

[353] Claire Moore Dickerson, "Harmonizing Business Laws in Africa: OHADA Calls the Tune" (2005) 44:1 Colum J Transnat'l L 17 at 23.
[354] *Supra* note 339.
[355] *Ibid* at 422.

founding member states to set common legal rules in specified areas for the entire West and Central African region."[356] The OHADA has never ever aimed to replace these organisations. It is a newly founded institution with the purpose of harmonizing business laws between its member states.

To conclude, the OHADA pursues working on the legal integration of business laws between member countries.[357] It has recognized that laws of its member states are outdated and uncertain, making investments in the region difficult or even impossible. It, therefore, aims to reinforce legal and judicial security by adapting common modern rules and setting up appropriate judicial procedures to create trust for investors and to promote investments in the region. While the OHADA shares the same ultimate goals and members with some West and Central African economic organisations, one can see that it adopts a completely different model – through the legal integration to foster investments and economic development. The OHADA believes that trade and investment in Africa will be "facilitated by the confidence which has been created by the regional integration institutions guaranteeing legal certainty for business".[358] "The legal and judicial system of OHADA is a success story of legal integration."[359] Then does the OHADA have the competence to conclude BITs? The concept of international personality defines the legal capacity of international organisations.[360] It tells what an organisation is able to do on the international plane. So firstly, let's check out OHADA's international personality.

3.2 The OHADA's competence to conclude BITs

3.2.1 The international personality of the OHADA

[356] *Ibid* at 424-425.
[357] Thapelo Letsholo, "Boosting Trade, Development & Cultural Relations Across Africa", *Hospitality Marketplace Africa* (11 July 2012) 2 at 2, online: Proudlyafrican <http://www.proudlyafrican.info>.
[358] *Supra* note 346.
[359] *Supra* note 357.
[360] *Supra* note 162 at 233.

Article 46 of the Treaty provides that the OHADA has "full international judicial personality" in particular "to contract; to acquire furniture and real estate and to transfer them; and to initiate legal proceedings and to be a party in litigations".[361] With full international legal personality, the OHADA is treated as a "legal person" distinct from those of its member states, which has its own rights and duties. Its objective is to pursue legal and economic integration in the territory of the OHADA through the legislation and adoption of uniform modern rules concerning every aspect of business law. The founding treaty obviously endows OHADA with the private-sided personality, allowing the OHADA to act as a private person in international law. However, it does not say a word on the public-sided personality of OHADA. The competence to conclude BITs is not explicitly addressed in the provision of OHADA Treaty.

An IGO's personality takes its source in the right of sovereignty transferred from or powers conferred by its member states. The below section further examines both the external and internal, explicit and implicit powers conferred on OHADA.

3.2.2 Powers conferred on OHADA

Powers conferred on the OHADA are clearly addressed in Article 1 of the Treaty. Its member states endow the OHADA with the power to harmonize business laws between member states by "the elaboration and adoption of simple modern common rules". Article 5 of the OHADA Treaty clearly stipulates that the "elaboration and adoption of simple modern common rules" is implemented by means of enacting "Uniform Acts". Regarding the scope of "business laws", Article 2 of the Treaty provides that business laws shall include "regulations concerning Company Law, definition and classification of legal persons engaged in trade, proceeding in respect credits and recovery of debts, means of enforcement, bankruptcy, receiverships, arbitration, Employment

[361] Article 46 of OHADA Treaty.

law, Accounting law, Transportation and Sales laws, and any such other matter that the Council of Ministers would decide, unanimously, to so include as falling within the definition of Business Law, in conformity with the objective of the present Treaty".[362] That is to say, the OHADA is able to adopt uniform acts binding all of member states regarding the listed matters in Article 2 and any other matters falling in the definition of business law.

Firstly, the OHADA Treaty endows the OHADA with the explicit power to adopt uniform acts on "Company Law, definition and classification of legal persons engaged in trade, proceeding in respect credits and recovery of debts, means of enforcement, bankruptcy, receiverships, arbitration, Employment law, Accounting law, Transportation and Sales laws". To date, the OHADA has adopted 10 uniform acts concerning commercial law, company law, security law, receiverships, debts, accounting law, transports, arbitration law and mediation, almost all matters mentioned in Article 2 of the OHADA treaty except for matters regarding employment law and sales to consumers.

Secondly, the OHADA enjoys the implicit power to adopt uniform acts regarding "any such other matter that the Council of Ministers would decide, unanimously, to so include as falling within the definition of Business Law, in conformity with the objective of the present Treaty". The OHADA Treaty leaves some spaces for the Council of Ministers to produce "autonomous will" for achieving its objectives. One can say that "[t]he harmonization process is proceeding in accordance with a blueprint agreed by the OHADA Council of Ministers."[363] At its meeting in Bangui in March 2001, the Council exercised the entitled power and "decided that the harmonisation

[362] Article 2 of OHADA Treaty.

[363] Marcel Fontaine, "Explanatory Note to the Preliminary Draft OHADA Uniform Act on Contract Law" (2008) 13:1-2 Unif L Rev 633 at 633.

programme would also embrace '(…) competition law, banking law, intellectual property law, the law relating to commercial companies and interest groups, contract law, the law of proof'."[364] The OHADA Treaty explicitly specifies that all other matters that are unanimously decided can be included to be the subject of a Uniform Act.[365] That is to say, the OHADA is able to include unlisted matters, such as investment law, into the harmonisation process. However, there are three limits for the exercise of such implicit power: first, the matter shall fall in the coverage of "business law"; second, unanimous approval of representatives of the Council shall be achieved for enacting a uniform act on this matter; and third, to enact such a uniform act shall be in conformity with the objective of OHADA. No one will feel uncomfortable to include "investment law" in the coverage of "business law", because it is consubstantial with international economic relations.[366] According to Prof. Prince Hervé, the omission of FDI is due to the willingness at the time of the adoption of the OHADA Treaty, faced with an emergency, to proceed as a priority with a grooming of the legal framework of business law inherited from the colonization which was out of step with the African realities.[367] The ultimate goal of the OHADA is to foster investments in the region. According to Keba Mbaye, one of the founding fathers of the OHADA Treaty, the OHADA put the promotion of FDI as first priority.[368] Additionally, the harmonisation of investment law is congruent with the realization of OHADA's objectives. Thus, as long as the Council unanimously decides to include investment law in the harmonisation process, a uniform act on investments

[364] *Ibid.*
[365] Hervé Agbodjan, Prince, « Quelle place réserver à l'investissement direct étranger dans le droit OHADA? Réflexions à partir des expériences européenne et nord-américaine » (2017) 1 Droit économique 1 at 3.
[366] *Ibid* at 7.
[367] *Ibid.* « De notre point de vue, cette omission volontaire s'explique davantage par la volonté à l' époque de l'adoption du Traité OHADA de faire face à un toilettage du cardre juridique des affaires hérité de la colonisation lequel était en déphasage avec les réalités africaines. »
[368] *Ibid* at 6.

regulating the transnational investments either between the OHADA member states or the OHADA member states and non-member states could come into being.

The former helps to foster the cross-border investments between the OHADA member states. The uniform act can include favourable investment access conditions and privileged treatment merely applied to investments launched within the region. It can establish a privileged investment climate different from that with non-member states. The later will make OHADA a unified front towards foreign investments with non-member states. Such a uniform act equals to a unilateral commitment by the OHADA on the management and control over foreign investment inflows from non-member states. It may include definitions, investment admission, investment treatments, expropriation, fund transfer, dispute settlements and any other matter addressed in BITs. If it comes into being, the uniform act on foreign investments between the OHADA member states and non-member states will be a great step towards one unified BIT between the OHADA and any third country.

However, the problem is that the Treaty merely endows the OHADA with the internal power of harmonising national business laws of its member states. Even if the Council of Ministers unanimously include investment issue into the harmonisation proceeding, merely one uniform foreign investment code would come into being at the regional level. That is to say, the implicit power only allows the OHADA to harmonise the existing foreign investment codes of its member states to unify the management and control over foreign investments internally in the OHADA region. This uniform act on foreign investments, like any other existing uniform act, would be one of internal laws of the community. External power of concluding BITs with third states or organisations cannot be generated from such internal power.

To conclude, based on the Treaty, the OHADA has no competence to conclude BITs with third countries. To envision the China-OHADA BIT, it requires the member states to confer such

competence on the OHADA. The TFEU model – to add FDI in its CCP can be used as reference. While, currently OHADA has no competence to conclude BITs, through the harmonisation process, it has become one single legal jurisdiction over trade and investments.

3.2.3 One single jurisdiction over trade and investments

"Many issues arise with respect to the preparation and implementation of harmonizing legal instruments: the substantive scope of harmonization, the technical procedure, its formulation, the scope of application of the international instrument in the domestic legislative order and its monitoring."[369]

"The substantive scope of the area to be harmonized is determined not only by the choice of the international organization. Such choice will also take into the due consideration the mandate of the organization promoting the harmonization, the fact that other international organizations are working on similar issues (importance of avoiding duplication) and the technical constraints that are part of the domestic legal order (public policy exception, domestic procedural issues). On the technical front, the procedures used to elaborate and create a new instrument vary widely and depend on the institutional structure of the organization. Generally, and to simplify the process, the permanent secretary or a committee of experts or working group mandated by the decision-making body will present a draft or submit recommendations, member states then present their comments and proposed modifications after internal consultations, and the decision-making body adopts the final draft. This taking into regard in the formulation of the instruments the official working languages of the organisation, and the style and wording that will be used.

Determining the scope of application of the new instrument is often problematic and again varies according to the type of organisation and its mandate. For instance, are member states

[369] Salvatore Mancuso, "Harmonization of Commercial Law in Africa: The Project Related to Telecommunications in the OHADA Harmonization Process" (2006) 5:2 Journal of International Trade Law & Policy 55 at 58.

automatically bound by the instrument once it is adopted by the organisation or must they first sign and ratify it? When are the provisions of the international instrument considered in force and enforceable in domestic law? Another issue is the application of the instrument. Is there a supranational tribunal charged with overseeing the uniformity of application or the conformity of the national provisions implementing the instrument? Is there a consultative body charged with giving recommendations regarding the application of the instrument? Are the member states bound by those recommendations?"[370] Let's answer these questions one by one to see how the OHADA achieves integration to form one single jurisdiction over investments.

3.2.3.1 Adoption of uniform laws covering every aspect of business law

Even if an IGO does not need to take back the enacting power in every field before achieving the competence to conclude BITs, it has to possess the power of harmonizing laws in essential areas of economic activities.[371] This is because investment is not a one-time only deal, it includes a set of transaction happening across a duration of time. Once an investor starts an investment, it is concerned with every aspect of doing business: including the formation of a business enterprise, raising capital, securing loans, effecting commercial leases, selling and delivering goods, winding up a business, returning assets to productive use and resolving disputes, etc.[372] Such nature of investment requires a wide and open coverage of legal framework involving in every aspect of business laws.

3.2.3.2 Nature of investment

"The term 'investment' is generally used in two senses. One sense is the process by which a person or legal entity makes an investment. Thus, the act of purchasing 100 shares of stock on an exchange

[370] *Ibid* at 58-59.
[371] *Supra* note 339.
[372] Claire Moore Dickerson, "OHADA on the Ground: Harmonizing Business Laws in Three Dimensions" (2010) 25:1 Tul Eur & Civ LF 103 at 114.

or buying a shop in which to sell goods is an investment. The second meaning refers to the asset acquired as a result of investing. Thus, the shares purchased by the shareholder and the shop acquired by the shopkeeper are both considered investments."[373] In either sense, investment is like a merge of all relevant accounts involved in various aspects of business laws.

In the sense of being a process, when a foreigner decided to launch an investment in the host country, he might need to acquire land license for building factory, set up a company according to the local corporate law, issue equities shares or raise a bank loan for collecting money, hire experts and managers, import raw materials, export products, conclude commercial contracts, pay the income tax and the salary of workers, etc. Hence, "an investment typically consists of several interrelated economic activities each of which should not be viewed in isolation. The tribunal in *CSOB v Slovakia* stated:

> An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of overall operation that qualifies as an investment."[374]

Investment is more like a merge of all relevant accounts, including trade in goods and services, intellectual property, taxation, labour relations, a bank loan, a land license, an enterprise form, corporate social responsibility, etc. All these interrelated economic activities are governed by the domestic laws of the host state. Foreign investment involves almost every aspect of business law.

In the sense of being an asset, an investment is usually considered to include: "(1) movable and immovable property and related property rights; (2) various types of interests in companies or any

[373] *Supra* note 304 at 18.

[374] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2012) at 61; see also *CSOB v Slovakia* (1999), Case No ARB/97/4 (International Centre for Settlement of Investment Disputes), (Arbitrators: H van Houtte, A Bucher, P Bernardini).

other form of participation in a company, business enterprise, or joint venture; (3) claims to money and claims under a contract having a financial value; (4) intellectual property rights; and (5) business concessions."[375] Most BITs adopt this asset-based definition of investment, and the categories are found broadly in the definition of "investment" of BIT. For example, Article 1 of the 2005 US-Uruguay BIT provides that:

> (a) An enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

The German model BIT provides that an investment includes:

> "Every kind of asset, in particular movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges; shares of companies and other kinds of interest in companies; claims to money which has been used to create an economic value or claims to any performance having an economic value; intellectual property rights, in particular copyrights, patents, business secrets, technical processes, know-how and good will and business concessions under public law, including concessions to search for, extract and exploit natural resources."[376]

In either sense, it can be seen that investment is not a single act of activity, but a merge of activities. The rules on investment reach far beyond the domestic laws of the host country,[377] including corporate law, security law, intellectual property law, landing law, labour law, banking law or even environment law, health law, etc.

"Making a foreign investment is different in nature from engaging in a trade transaction. Whereas a trade deal typically consists of a one-time exchange of goods and money, the decision to invest in a foreign country initiates a long-term relationship between the investor and the host country.

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[375] *Supra* note 304 at 161.

[376] Alexandra N Diehl, "Tracing a Success Story or 'The Baby Boom of BITs'" in August Reignisch & Christina Knahr, eds, *International Investment Law in Context* (Utrecht: Eleven International, 2008) 7 at 10.

[377] Rudolf Dolzer & Christoph Schreuer *Supra* note 374 at 24.

Often, the business plan of the investor is to sink substantial resources into the project at the outset of the investment, with the expectation of recouping this amount plus an acceptable rate of return during the subsequent period of investment, sometimes running up to 30 years or more."[378]

"[T]ypical trade transaction is basically an exchange of goods or services for money. Once that exchange is made, the transaction is complete and usually no further legal relationship exists between buyer and seller. Investment transactions, on the other hand, are of a longer duration and once made result in a continuing legal relationship between the investor and the enterprise in which the investor has invested. Foreign investment also results in a continuing relationship between the investor and the foreign country where the investment occurred because the investment is now subject to the sovereignty of that country. Because an asset owned by the investor is subject to the jurisdiction of a foreign sovereign, the investor and its investment is subject to that sovereign's future actions. To the extent that those future actions have a negative impact on the investment, the investor and its investment are subject to the political risk emanating from that country. Normal trade transactions do not result in similar continuing relationships and so are not subject to the same kinds of political risks as foreign investment transactions."[379]

Based on the preceding analysis of "trade" and "investment", one may conclude that investment transaction is a merger of all relevant accounts involved in all areas related to business laws and is of long duration in the host state; and, therefore, needs a set of comprehensive legal norms to govern the entire investment process. However, it is incredibly difficult to draw a line on the scope of harmonisation, as there are so many rules that have a clear impact on foreign investments, such as taxation, banking and finance, intellectual property, trade in goods and services, antitrust, labour

[378] *Ibid* at 21.
[379] *Supra* note 304 at 28-29.

relations, corporate social responsibility, etc.[380] The question is whether all these relevant rules have to be harmonised for an IGO to achieve the competence to conclude BITs. There is no simple answer. An open attitude to the scope of harmonisation is advisable.

3.2.3.3 A wide and open coverage of harmonisation related to every aspect of business law

Investment is a transaction involving in various aspects of business laws. To create a single jurisdiction over investments, a wide and open coverage of integration related to every segment of business law is desirable. The objective of the OHADA is to implement a modern harmonized legal framework in the area of business laws that govern various aspects of investment in order to promote investment and economic growth in the region.[381] The main role of the OHADA is to harmonize business laws throughout its member states.[382] To fulfil its mandate, the OHADA is authorized to enact "Uniform Acts" related to every aspect of business laws.

Article 1 of the Treaty clearly stipulates that "the objective of the present Treaty is the harmonization of business laws in the Contracting States by the elaboration and adoption of simple modern common rules adapted to their economies,…".[383] Article 5 explains that the "elaboration and adoption of simple modern common rules" is implemented by means of enacting "Uniform Acts" relative to business laws binding all OHADA member states. Article 2 defines business laws as "regulations concerning Company Law, definition and classification of legal persons engaged in trade, proceeding in respect credits and recovery of debts, means of enforcement, bankruptcy, receiverships, arbitration, Employment law, Accounting law, Transportation and Sales laws, and any such other matter that the Council of Ministers would decide, unanimously, to so include as

[380] Americo Beviglia Zampetti & Pierre Sauvé, "International investment" in Andrew T Guzman & Alan O Sykes, eds, *Research Handbook in International Economic Law* (Cheltenham: Edward Elgar, 2007) 211 at 211.
[381] *Supra* note 369 at 59.
[382] Article 1 of OHADA Treaty.
[383] Article 1 of OHADA Treaty.

falling within the definition of Business Law, in conformity with the objective of the present Treaty".[384]

Thus it can be seen that the interpretation of "business law" set forth in Article 1 and clarified in Article 2 is extremely wide and open, "up to include the regulation of all the different components of the economic life (J. ISSA-SAYEGH, 2002)."[385] Article 2 lists several aspects of business laws to be harmonised, including general business law, company law and pooling of economic interest, arbitration law, accounting law, employment law, security law, bankruptcy law, debt collection and enforcement law and contracts for the carriage of goods by road.[386] Up to now, ten Uniform Acts have been adopted - including general commercial law, commercial companies and economic interest groups law, securities law, law of simplified recovery procedures and enforcement measures, law of collective proceedings for the clearing of debts, arbitration law, accounting law, law of contracts for the carriage of goods by road and co-operative societies law - covering almost all of the specific topics listed in Article 2, with the only exception being employment law (see Table 9). The Treaty also endows the Council of Ministers the power of enacting uniform acts related to unlisted matters that fall in the definition of business law, which allows the OHADA to extend the scope of its legal reforms to better suit the needs of its Member States and their investors.[387] The Council of Ministers of the OHADA has indeed decided to utilise these powers on other branches of law.[388]

"It is noteworthy that by virtue of article 2 of the OHADA Treaty which defines the areas comprising business law and specifies that the Council of Ministers may include other areas, the

[384] Article 2 of OHADA Treaty.
[385] *Supra* note 369 at 61.
[386] Article 2 of OHADA Treaty.
[387] Sydney Domoraud-Operi & Anthony S Riley, "Reforms to OHADA Commercial Law: Towards a More Attractive Legal Framework for Private Equity" (27 April 2014), online: Empea <https://www.empea.org>.
[388] *Supra* note 348 at 170, n 45.

Council during its March 2001 meeting which took place in Bangui, Central African Republic added seven new areas in the harmonization project of business law in Africa. These areas include the law on banking, competition, intellectual property, contracts, civil societies, co-operative and mutual societies and the law of evidence. Some draft Uniform Acts are already in preparation. They include the following: Uniform Acts on contracts, sales to consumers, labour and co-operatives and mutual societies. International instruments have greatly influenced the law on contracts, sale to consumers and labour."[389]

"The Uniform Act on secured transactions and guaranties is a coherent body of law, and many of its basic terms and concepts are similar to the common law and are also consistent with international business practice. This Uniform Act has the essential elements necessary to create a modern and efficient system of personal and real property securities. The law provides various guaranties which protect creditors, including banks, by securing the enforcement of their debtor's obligation. "[390]

"In a meeting organized in Libreville on February 2002, the Council of Ministers instructed the Permanent Secretariat of OHADA to contact the International Institute for the Unification of Private Law (UNIDROIT) in connection with the preparation of the Uniform Act on the law of contract. This draft covers major aspects of the law on contracts, namely, formation, validity, interpretation, execution and nonexecution. The working team of UNIDROIT are composed of representatives of major legal systems of the world. This proposed draft law on contract is adapted to the modern international commercial environment. The principles of UNIDROIT have been applied in various legal and arbitral cases. This law has been a subject of discussion in several

[389] Martha Simo Tunmde, "Harmonization of Business Law in Cameroon: Issues, Challenges and Prospects" (2010) 25:1 Tul Eur & Civ LF 119 at 135.
[390] *Ibid.*

international seminars and conferences. The UNIDROIT principles have inspired reforms in Russia, Estonia, Germany, Argentina, china and Lithuania."[391]

The Draft Uniform Act on the Law on Consumer Sales was conceived by a Canadian expert within the framework of the support that Canada gives to the OHADA. "The draft was examined during a conference organized by UNCITRAL [United Nations Commission on International Trade Law] in Vienna from 23 to 29 April 2003. This conference brought together some consumer organizations based in some OHADA member states. Therefore, not only was the African opinion taken into account in the drafting of the law on consumer sales, but also the opinion of UNCITRAL, whose objective is to ensure that all major legal systems of the world are taken into account in the drafting of international legal instrument."[392]

"The drafting of the Uniform Act on Labour Law, which is still under preparation, provides some fundamental principles of labour law which are already being applied by OHADA member states as a result of their ratification of major international conventions such as the International Labour Organisation (ILO)."[393]

3.2.3.4 The gravity of the centralisation process

The second question regards the gravity of the integration: harmonisation, unification, or uniformisation? They are all legal tools "for the coherent and uniform implementation of integration objectives.[394] Harmonisation is 'the removal of discord, the reconciliation of contradictory elements, between the rules and effects of two legal systems which continue in force as self sufficient bodies of law'.[395] Harmonisation recognises the plurality and relativism of laws,

[391] *Ibid* at 135-136.
[392] *Ibid.*
[393] *Ibid.*
[394] Boris Martor, *Business Law in Africa: OHADA and the Harmonization Process* (London, UK: GMB, 2007) at xxiv.
[395] AN Allot, "Towards the Unification of Laws in Africa" (1965) 14:2 ICLQ 366 at 377.

but attempts to reduce or eliminate conflicts between laws by creating common, minimum standards."[396]

"Harmonisation should not be confused with unification… unification implies

> the creation of a new, uniform legal system entirely replacing the preexisting legal systems, which no longer exists, either as self sufficient systems, or as bodies of rules incorporated in the larger whole; although the unified law may well draw its rules from any of the component legal systems which it has replaced." [397]

"For example, colonial authorities were successful in the unification (through the integration of customary, Western and Islamic laws[398]) of some branches of law - criminal, succession and property laws - in places like Northern Nigeria and Kenya."[399]

"From this definition, it is clear that unification is an overarching term, which may include harmonisation. Harmonisation is thus seen as a process which may likely end, although not in all cases, in the unification of laws. Writing on the pragmatic, conservative nature of harmonisation, Menski noted that 'harmonization as a process of ascertaining the admitted limits of international unification does not necessarily amount to a vision of total uniformity'.[400]The similarity between these two concepts- harmonisation and unification - is the attempt to attain a modicum of uniformity. Although the unification of laws is sometimes possible at the national level, the

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[396] Babatunde Fagbayibo, "Towards the Harmonisation of Laws in Africa: Is OHADA the Way to Go?" (2009) 42:3 Comp & Int'l LJS Afr 309 at 310.
[397] *Ibid* at 311; see also *Supra note 395*.
[398] Hong Yonghong, "Harmonization of Commercial Law in Africa and its Advantages on Chinese Investment in Africa from a Perspective of Legal Cooperation between China and Africa" in Salvatore Mancuso, ed, *OHADA International Conference* (Macau: Tipografia Macau Hung Heng, 2008) 71 at 73. "As soon as the development of African law is concerned, African customary laws are the native (original) laws in this continent. In the 7th century, Islamic law was spreaded to Africa. 15th century later, European law has been transplanted to Africa by force. After the independence of African countries, they inherited the law of former suzerains on one hand; and on the other hand still preserved their traditional customary law."
[399] *Supra note 400* at 311, n 9.
[400] Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2006) at 39.

complexities of international relations combined with (sub) national dynamics make it almost impossible at the international level."[401]

"The most radical form of legal integration is uniformization, i.e. the legal technique aiming at eliminating the differences among the national provisions by replacing them with a unique and identical text for all the States involved in the legal integration process. In this process the national authorities and parliaments have a mere secondary role, being the legislative function exercised by a supranational common authority; the adopted text contains the principle of supra-nationality, by which the uniform norm is directly integrated into the domestic legal order (ISSA-SAYEGH,1995). Therefore, to a certain extent States give up their sovereignty in favour of the supranational authority to which the law-making process has been granted."[402]

"Harmonization is a less radical technique than uniformization. It basically consists of changing domestic provisions from various countries that are not similar in order to make them all coherent or update them with a reform. Therefore, while respecting the particularities of the various national legal systems, harmonization gives the opportunity to reduce their differences in selected areas, and to enhance legal cooperation between the countries. Generally, this kind of result is obtained through directives or recommendations adopted by an international organisation who then passes them on to its member states for implementation (e.g. the European Union). Member states remain free to choose the most suitable form of adoption of the new regulations, as long as the result is the incorporation of the new harmonized rule, thus leaving them much more flexibility. Obviously, in this case the enforcement of the rules approved by the supranational authority entirely depends on the political will of the member States to enact the internal norms."[403]

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[401] *ibid* at 311.
[402] *Supra* note 369 at 56.
[403] *Ibid*.

In this way, "harmonisation represents a pragmatic, coordinated approach to regulate specific aspects of the law".[404] "The incorporation of different legal systems under a basic framework is an essential component of harmonisation. The resultant effect of harmonization is thus a situation whereby the common standards or set of rules take precedence over the national laws of member states."[405] "[H]armonisation represents an effective method of achieving standardisation and legal stability without necessarily trampling national egos."[406]

To show a unified front, the investment-related laws shall at least be harmonised. It is difficult to draw the line as to the scope as well as the gravity of integration before the author discusses IGO's competence to conclude BITs. There is no simple answer for these questions, however, of course, the higher the gravity, the better.

The OHADA is short for Organisation pour l'Harmonisation du Droit des Affaires en Afrique, and in English, Organization for the Harmonisation of Business Laws in Africa. "In spite of its name, the OHADA's main function is not to 'harmonise' the business laws of the states, which are contracting parties to the Treaty, but to unify them."[407] This is particularly reflected by the Uniform Act related to Commercial Companies and Economic Interest Groups.

The Uniform Act related to Commercial Companies and Economic Interest Groups has four parts, 920 articles. Instead of harmonising the corporate laws of member states, it is more representative of a unified corporate law adopted in the entire OHADA region. It details every aspect of corporate law, just like national company laws, including the constitution of a company, the operation of the company, civil liability, transformation, merging and splitting, liquidation of the company, etc.

[404] *Supra* note 400 at 311.
[405] *Ibid*; see also Stephen Weatherill, *Cases and Materials* on EU Law, 12th ed (Oxford: Oxford University Press, 2006) at 620.
[406] *Ibid* at 312.
[407] *Supra* note 339 at 425.

The Uniform Act on the General Commercial Law and the drafted Uniform Act of Contract are also as detailed as to be a unified law replacing national laws adopted in the OHADA region.

3.2.3.5 Direct application as domestic law

"For uniform law to have domestic effect it must be enacted, or existing legislation amended."[408] The founding treaty of any community contains provisions concerning the incorporation of laws into national systems.[409] Member States shall "undertake to create favourable conditions for the development of the Community and the attainment of its objectives, particularly in harmonising their strategies and policies. They are to refrain from any unilateral actions that may hinder the attainment of the objectives of the Community. In addition, each Member State, in accordance with its constitutional procedures, promised to take all measures to ensure the enactment and dissemination of such legislation as may be necessary for the implementation of the provisions of the Treaty. This process would, of course, have to be achieved by means of legislative approval and official publication in accordance with the rules in each system which govern the implementation of international agreements." [410] However, it must be realized that the incorporation of uniform law into domestic system may encounter several obstacles in the individual States.[411]

Obstacles to the application of uniform laws into the domestic system "may be created by national legislatures through delays in the adoption of the needed implementing and amending measures or by the adoption of measures that conceal the Community nature of the rules concerned."[412] "Other problems derive from the conflicts which arise between Community regulations and pre-existing

[408] *Supra* note 337 at 112.
[409] *Ibid.*
[410] *Ibid.*
[411] *Ibid.*
[412] *Ibid.*

or subsequent ordinary domestic laws."[413] "The search for a solution to all these problems is a matter of the utmost importance to the proper functioning of the Community institutions."[414]

Such obstacles, delay or conflicts are the major challenges which, according to many, stifle potentially beneficial cooperation between states.[415] These problems are not wilful but arise from a number of issues, "including the complexity of the implementing agreement, the ambiguity and indeterminacy of treaty language, limitations on the capacity of parties to carry out their undertakings, and the temporal dimension of social, economic and political changes contemplated by regulatory treaties. In trying to address the issue of non-compliance, the provisions of the treaty and those of the unified legislation should be directly applicable in the member states. This would signify the loyalty and fidelity on the part of the member states in the observance, in good faith, of the treaty provisions, 'being an element of the principle of *pacta sunt servanda*, according to which have the obligation to observe' and comply with their treaty obligations."[416] As Smits stated "the provisions of the unified legislation should be contained within a legal framework (treaty) that actually imposes a duty of adherence on member states. Such a framework would facilitate member states' understanding of their own and shared interests, information gathering and exchange of ideas. The adoption of a treaty would serve as an indication that states are willing to integrate their economies and comply with the treaty provisions."[417]

The particularity of the OHADA Uniform Acts is that "they are directly applicable in all Member States. They override pre-existing national legislation insofar as the provisions of these laws are

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[413] *Ibid.*

[414] *Ibid.*

[415] Ngaundije Doris Leno, "Development of a Uniform Insolvency Law in SADC: Lessons from OHADA" (2013) 57:2 J Afr L 259 at 278.

[416] *Ibid* at 279; see also **Working Papers** Asian Development Bank, *Regional Judicial Institutions and Economic Cooperation: Lessons for Asia*, Working Paper series on regional economic integration (2010) at 18.

[417] *Ibid* at 278; see also Jan Smits, *The Contribution of Mixed Legal Systems to European Private Law* (Antwerp: Intersentia, 2001) at 2.

contrary to those of the Uniform Acts."[418] As Article 10 of the Treaty stipulates "Uniform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws." The OHADA Treaty provides that unless otherwise specified in the Uniform Act, the Uniform Act will enter into force ninety days after publication in the Official Journal of OHADA without the need for additional domestic legislation from the member states.[419]

The OHADA Treaty does need to be ratified by the member state before it enters into force within the territory of that state. However, "[t]he Treaty calls for the elaboration of uniform acts to be directly applicable in member states notwithstanding any provision of domestic law."[420] Namely, the OHADA Uniform Act does not need to be ratified before entering into force. "Ratification is in accordance with the constitutional procedures of the member states. The constitutions of most of the member states, requires the intervention of the national parliament for its authorisation."[421] Such procedure may last long time. If there are conflicts between the community regulation and domestic laws, and member states do not want to modify their internal laws; the incorporation of community laws may delay or even fail. Ratification gives states the power to control the application of community regulations within their individual territories. However, if the community law is direct applicable in the domestic system, all of the preceding problems would be solved.

The OHADA Treaty provides that Uniform Acts "are directly applicable and binding in all OHADA countries, notwithstanding any contradictory provisions in existing or future national laws. All the domestic legislation that is not in compliance with the OHADA Uniform Acts is

[418] *Supra* note 339 at 422.
[419] See Article 9 of the Revised OHADA Treaty.
[420] *Supra* note 369 at 59.
[421] *Supra* note 415 at 269.

repealed by the very enactment of the relevant Uniform Acts."[422] "This implies that, upon ratification of the OHADA Treaty by a state, the state becomes automatically bound by the provisions of … uniform acts. This eliminates every possibility of escape by contracting states from their international obligations and thus creates a sense of unity of purpose among the contracting states."[423] Because the provisions of the uniform acts are automatically binding to member states, the treaty, therefore, makes no provision for sanctions.[424]

3.2.4 The OHADA as an independent functioning institution

The OHADA not only represents a body of rules, it is also an independent functioning institution. The "OHADA consists of a Council of Ministers assisted by a Permanent Secretary, a Common Court of Justice and Arbitration (Cour Commune de Justice et d'Arbitrage - CCJA) and a training school for judicial personnel and lawyers (École Régionale Supérieure de Magistrature - ERSUMA)."[425] These organs were established to keep the independent functioning of the OHADA, and, ultimately, to achieve the uniformity of business laws within the OHADA region.

3.2.4.1 The Council of Ministers

"The Council of Ministers is the supreme decision-making organ of the OHADA."[426] Its principal mandate is to discuss and adopt Uniform Acts with the advice of the CCJA. That's why it is considered as the legislative body of the OHADA. In addition to Uniform Acts, any decision regarding to the harmonization of OHADA is adopted by the Council of Ministers through an overall majority of the present Member States.[427]

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[422] *Supra* note 349 at 41.
[423] *Supra* note 415 at 276.
[424] *Ibid.*
[425] *Supra* note 369 at 59.
[426] *Supra* note 400 at 315.
[427] Article 30 of OHADA Treaty.

Besides its legislative power, the Council of Ministers also has: 1) the executive function, which comprises of the ability to: set the agenda upon the proposals from the Permanent Secretariat,[428] elect and replace the members of CCJA,[429] appoint the Permanent Secretary[430] and the Director General of ERSUMA[431], approve the annual budgets of CCJA,[432] appoint accounts of OHADA,[433] examine the annual financial statements of OHADA;[434] and 2) the function to issue regulations over the organisation and operation of the Permanent Secretariat and ERSUMA.[435]

The Council of Ministers is composed of the Ministers of Justice and Ministers of Finance from each member state. The chair of the Council of Ministers rotates continuously among all member states in alphabetical order in French each one-year term.[436] The chairman of the Council is the Minister of the member state who is holding the chair. The Council of Ministers shall meet at least once a year for deciding the annual programme regarding the harmonisation of business law and for adopting the Uniform Acts, upon the request of the chairman or at least a third of the member states.[437]

"Admittedly less democratic is the fact that the OHADA legislative body, the *Conseil des Ministres* (the Council of Ministers), is composed of Justice and Finance Ministers".[438] "This composition is a reflection of the primary role of national governments in this process",[439] "and thus is at least one step removed from the electorate. And the national structures that have adopted

[428] Article 29 of OHADA Treaty.
[429] Article 32 & 35 of OHADA Treaty.
[430] Article 40 of Revised OHADA Treaty.
[431] Article 41 of Revised OHADA Treaty.
[432] Article 45 of Revised OHADA Treaty.
[433] *Ibid.*
[434] *Ibid.*
[435] Article 40 & 41 of Revised OHADA Treaty.
[436] Article 27(2) of Revised OHADA Treaty.
[437] Article 28 of OHADA Treaty.
[438] *Supra* note 353 at 60.
[439] *Supra* note 400 at 315.

the entire system, including the national parliaments, manifest varying levels of democratic participation, depending on the particular country. This non-democratic aspect is a weakness of the OHADA Structure."[440]

"[T]he OHADA Treaty's delegation of the legislative role to senior officials of the national governments looks like a very pragmatic trade-off: the governments approved a treaty that restricts national sovereignty through legislation in exchange for some direct governmental control over that legislation. More to the point, as a practical matter the OHADA legislature's remove from the electorate will not necessarily have significant non-democratic consequences, at least for now."[441]

"Although this has been criticised as a 'non-democratic aspect... of the OHADA structure', it not only represents a practical way of balancing national sovereignty and supranationalism, but also beams the scrutiny lights on the activities and commitment of national governments to the OHADA. It is important to note that even the EU, which is regarded as the world's most advanced supranational organisation, still operates within the framework of mechanisms which protect the interests of national governments."[442]

Additionally, it is worth mentioning that, "decisions of the Council are reached by an overall majority of the member states present and voting.[443] This approach is indicative of the supranational aspirations of the OHADA. It is, however, expected that in the long term, the decisions on Uniform Acts will also be reached by majority vote."[444]

3.2.4.2 The Permanent Secretariat

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[440] *Supra* note 353 at 60.
[441] *Ibid* at 60-61.
[442] *Supra* note 400 at 315.
[443] Article 30 of OHADA Treaty.
[444] *Ibid.*; Adoption of the Uniform Acts by the Council of Ministers requests unanimous approval of the representatives of the Contracting States who are present and who have exercised their right to vote. See also Article 8 of OHADA Treaty.

The Permanent Secretariat, attached to the Council of Ministers, is the head of OHADA. It represents the OHADA and deals with the daily affairs of OHADA. The Permanent Secretariat seats is at Yaoundé (Cameroon), led by a Permanent Secretary with the tenure of 4 years, which is renewable once.[445] The recruitment, appointment and the power of the Permanent Secretary are regulated by the Council of Ministers.[446] The Permanent Secretariat is the executive body of the OHADA and performs administrative powers, which comprises of the ability to: assist the Council of Ministers and coordinate the activities of institutions, propose the agenda for the meetings of the Council, prepare drafts of Uniform Acts and the annual program of harmonisation of business law, process the adoption of Uniform Acts,[447] publish the Uniform Acts in the Official Journal OHADA,[448] and direct ERSUMA.[449]

"The Permanent Secretariat is the engine room of the organisation."[450] "The autonomous and a-political nature of the Secretariat is guaranteed by the fact that member states have no official representation within it."[451]

3.2.4.3 The CCJA

The CCJA is the judicial body of OHADA. It has jurisdiction over the uniform interpretation and application of the Treaty, the Uniform Acts and the regulations for implementing the Treaty, and other actions.[452] The CCJA performs judicial, advisory and arbitral functions to guarantee the uniformity of OHADA laws. We will discuss more details of the CCJA in next section.

3.2.4.4 ERUSMA

[445] Article 40 of Revised OHADA Treaty.
[446] *Ibid.*
[447] Article 7 of Revised OHADA Treaty.
[448] Article 9 of Revised OHADA Treaty.
[449] Article 41 of Revised OHADA Treaty.
[450] *Supra* note 351 at 4.
[451] *Supra* note 400 at 316.
[452] Article 14 of Revised OHADA Treaty.

The Regional Training Center for Legal officers, shortened to ERSUMA, is attached to the Permanent Secretariat. "The ERUSMA was established to train legal professionals in the member states."[453] "With the adoption of OHADA treaty and the creation of the CCJA, legal professionals have propagated OHADA norms to the applicable African society essentially through the intermediary of the legal profession. The mechanisms through which lawyers have brought the knowledge and changes of OHADA law to the society have to do with the regular application of law namely through consulting clients in their contractual relations and through preparing legal briefs based on OHADA law for presentation on behalf of the clients at the CCJA. Finally, both of these have led to a general formalisation of business relations that entails an increase in legal certainty and business trust."[454]

The ERUSMA also has a great impact on the expansion of the use of CCJA. The reluctance of attorneys to bring cases to the CCJA from their home jurisdictions is partly due to the inadequate legal understanding of the workings of the OHADA treaty, the CCJA and the Uniform Act.[455] "Therefore there is the need to educate attorneys and others in the legal community of the workings of the CCJA, the Uniform Acts and the Treaty. In dealing with this challenge, the OHADA has also created a Regional Training Center for Legal Officers (ERSUMA). ERSUMA trains judges and other legal officers, including lawyers, notaries and bailiffs, as well as academics and businessmen in OHADA law. With this training, the use of the CCJA should be expanded as members of the legal communities outside of the Ivory Coast become more familiar with the CCJA and its jurisprudence and this has become a significance of the CCJA in developing awareness about the OHADA law."[456]

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[453] *Supra* note 400 at 316.
[454] *Supra* note 351 at 17.
[455] *Ibid* at 14.
[456] *ibid*.

3.2.4.5 The Conference of Heads of State and of Government

While the Conference of Heads of State and of Government is not the permanent institution of the OHADA, it is of great importance to the functioning of the OHADA. It decides any and all questions concerning the OHADA Treaty.[457] The Conference is composed of the heads of state and governments of the Contracting Parties.[458] It is directed by the Head of State or of Government whose country chairs the Council of Ministers.[459] The Chair of the Conference or at least one-third of the member states can initiate the Conference to decide questions regarding the Treaty.[460] Any action of the Conference shall be decided by consensus or by an absolute majority of the present member states.[461]

In order to achieve the integration of business laws within the OHADA members, the Treaty grants the OHADA the power to draft common rules and to enact acts in form of "Uniform Acts". Among the above-mentioned permanent organs, the Council of Ministers, the Permanent Secretariat and the CCJA are involved in the adoption process of Uniform Acts. It is the Council of Ministers that debates the draft of rules concerning different aspects of business laws and finally passes the laws to be enforced among all member states by following the below steps (see Graphic 2).

The Permanent Secretariat prepares the draft in consultation with the governments of members and sends this draft to member states for their comments. Within 90 days and the extended 90 days, member states need to deliver their written comments to the Permanent Secretariat which will forward the draft along with the members' comments and a report to the CCJA for its advices on the draft. The CCJA is requested to provide its advice within 60 days after receipt for the

[457] Article 27(1) of Revised OHADA Treaty.
[458] *Ibid*.
[459] *Ibid*.
[460] *Ibid*.
[461] *Ibid*.

Permanent Secretariat to produce the final draft.[462] Finally, the Permanent Secretariat sends the final draft to the Council of Ministers and proposes the agenda for passing the law in the next meeting of the Council. Unanimous approval of the member states present and voting is requested for the adoption of the Uniform Acts.[463] The Uniformed Act become effective 90 days after it is published in the Official Journal of OHADA and it is directly applicable to all Member States and overriding on all the relevant national laws of the Member States. "It is useful to keep in mind that national parliaments are excluded from the Uniform Acts adoption proceedings."[464]

This will prevent the adoption of Uniform Acts from government interference of OHADA member states.

3.2.5 A supranational court charged with overseeing the uniformity and consistent legal interpretations across member states.

"OHADA law may be balanced and sophisticated, and it may be particularly suited to encourage both foreign and domestic investment; however, it will not be effective unless it is enforced."[465] "No matter how elegantly it is drafted, a statute is only as effective as its enforcement. We have seen that the OHADA laws' uniformity throughout the territory is protected by the CCJA's authority to interpret."[466] "The simple adoption of uniform laws is a relinquishment of sovereignty contemplated by the OHADA Treaty: a law that OHADA adopts is automatically and immediately an internal law of each of OHADA's member states. To accept a uniform interpretation and enforcement represents another significant step in the same direction."[467] The OHADA Treaty not only provides a mechanism for the elaboration and adoption of uniform business laws throughout

[462] Article 7 of Revised OHADA Treaty.
[463] Article 8 of OHADA Treaty.
[464] *Supra* note 349 at 41.
[465] *Supra* note 353 at 53.
[466] *Ibid* at 61.
[467] *Ibid* at 55.

member states, but also "creates a single supranational court to ensure that judicial interpretation of the OHADA laws will sustain and will not compromise their uniformity."[468] "After enshrining the supranationality and the primacy of OHADA law, those who drafted the Treaty created judicial supranationality within its geographic area."[469] "As T.G. de Lafon wrote (1995), 'a uniform law calls for a uniform jurisdiction'."[470]

"The CCJA is very important and innovative mechanism which lies at the heart of the OHADA system."[471] "It ensures the common interpretation and application of the OHADA Treaty and the Uniform Acts that harmonize African commercial law."[472] "Those who drafted the Treaty firstly elected to lay down known, uniform and modern laws and secondly to create the CCJA in order to respond to concerns in relation to the reliability of the legal system."[473] The first paragraph of Article 14 of the revised Treaty provides that "the Common Court of Justice and Arbitration is responsible for the uniform interpretation and uniform application of the Treaty, of the regulations promulgated to further the Treaty's implementation, of the Uniform Acts, and of other actions."[474] "The CCJA is the highest level of jurisdiction for all matters involving the application of the Treaty, as well as the Uniform Acts. It has jurisdiction over judicial (it rules on decisions rendered by the Courts of Appeal of the member States) and arbitration matters (supervisory role to the appointed arbitrators and granting enforceable status to the award), thus ensuring the harmonized interpretation of the Treaty, Uniform Acts and corresponding regulations and arbitration agreements. (J. ISSA-SAYEGH, 2002)"[475]

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[468] *Ibid* at 21.
[469] *Supra* note 351 at 8.
[470] *Supra* note 339 at 429.
[471] *Supra* note 351 at 18.
[472] *Ibid* at 8.
[473] *Ibid* at 5.
[474] Article 14 of Revised OHADA Treaty.
[475] *Supra* note 369 at 60.

"If the Council of Ministers by definition creates uniformity of text throughout OHADA's territory, the Common Court of Justice and Arbitration (CCJA), OHADA's supranational court, is responsible for maintaining uniformity of interpretation and implementation. Disputes concerning OHADA laws that are litigated through the formal judicial system will first pass through the national courts, and then to the CCJA instead of to the national supreme court. A judgment rendered by the CCJA is, for purposes of execution, treated as a judgment of the national judicial regime, which at this point is obligated to execute it. Thus, the Council of Ministers provides sophisticated and well-drafted business laws that are identical throughout the OHADA territory and regulate the formation, operation and winding up of businesses. Not only is a single text of each law applicable in all member states, but interpretation of the text drives toward uniformity as well. The CCJA's goal is to guarantee uniformity as its decisions apply to all member states in the same manner as would a decision of the highest national court. Enforcement, however, being back in the hands of the national judicial regimes, is less directly under the control of the OHADA institutions and their push to predictability and uniformity."[476]

"The jurisdiction of the Court can be traced to the provisions of Articles 13-18 of the OHADA treaty which grants the CCJA three main areas of jurisdiction. The CCJA performs the judicial functions of interpretation and review as a supranational court, consults and advises on draft uniform acts that the permanent secretariat has submitted for comments and administers and monitors arbitral proceedings within provision of Article 21 of the Treaty."[477] By performing judicial, consultative and arbitral functions, the CCJA ensures the harmonised interpretation and application of OHADA laws.

3.2.5.1 Judicial function

[476] *Supra* note 380 at 107.
[477] *Supra* note 351 at 8.

3.2.5.1.1 The CCJA as the supranational court of the OHADA states provides final judgements on all business issues regarding the interpretation and application of the Treaty, Uniform Acts and other actions

The first paragraph of Article 14 of the Revised Treaty provides that, "the CCJA is responsible for the uniform interpretation and uniform application of the Treaty, of the regulations promulgated to further the Treaty's implementation, of the Uniform Acts, and of other actions". Thus, generically, the CCJA has jurisdiction over the interpretation and application of OHADA laws. The third paragraph of Article 14 details that, on appeal, the Court may "rule on the decisions pronounced by the appellate courts of Contracting States in all business issues raising questions pertaining to the application of Uniform Acts and to the Regulations provided for in the present Treaty, save decisions regarding penal sanctions pronounced by the appellate courts".[478] It means that as the final appeal court, the CCJA has jurisdiction "with regard to all matters of business law falling within OHADA's scope of application except for criminal penalties, for which the national courts retain exclusive jurisdiction."[479] The OHADA Treaty gives the CCJA jurisdiction not only to hear questions of interpretation, but all matters having arisen pertaining to the application of Uniform Acts.[480] Thus, substantive matters will be brought to the CCJA.[481] "[A]s OHADA adopts new business laws, the CCJA increases its jurisdiction in the commercial arena."[482]

The CCJA, as the supranational court of the OHADA states, ensures uniformity by providing final decisions in all of the matters pertaining to the interpretation and application of OHADA laws. Article 14(4) provides that it "shall rule in the same manner on non-appealable decisions rendered

[478] *Supra* note 339 at 428-429.
[479] *Supra* note 351 at 11.
[480] *Supra* note 353 at 58.
[481] *Ibid.*
[482] *Ibid* at 57.

in the same litigation by any court of the Contracting Parties."[483] "By virtue of Article 20 of the OHADA treaty, the judgments of the CCJA are final and conclusive and their execution and enforcement shall be ensured by the Member States on their respective territories. In no case may a decision contrary to a judgement of the CCJA be lawfully executed in a territory of a Member State."[484]

It can be seen that "the decisions of CCJA have the flavour and authority of a final judgement of an international judiciary capable of immediate enforceability in each Member State. The CCJA therefore has the final and ultimate power as far as interpretation and application of the Uniform Acts are concerned, with the exception of judgements applying criminal sanctions of penalties which are governed by national laws of member states."[485] "It is important to note that CCJA rulings have non-appealable authority and are binding effective the date of their pronouncement. They are enforceable on the territory of each member state pursuant to the rules of civil procedure of the member state concerned. In this way the rulings of CCJA are assimilated with national jurisdictional decisions with all the consequences resulting from that assimilation. In each member state a writ of execution is attached to the rulings of the CCJA after control of the authenticity of the title by an authority designated by the government of the member state concerned."[486]

"The creation of the CCJA has led to the stability of the judicial system among the OHADA member states because the courts of first instance and courts of appeal have primary responsibility in application of OHADA treaty while the CCJA has the supreme responsibility of supervising the interpretation and application of community laws uniform acts, on which the national supreme

[483] Article 14(4) of Revised OHADA Treaty.
[484] *Supra* note 351 at 10.
[485] *Ibid* at 10-11.
[486] *Supra* note 339 at 429.

courts cannot rule."[487] "The national jurisdictions of member states decide in these matters on the levels of first instance and appeal",[488] while CCJA "serves as the Supreme Court in supranational capacity and as the court of final arbiter or last resort for the CCJA members states after which no further appeal will lie on the interpretation and application of OHADA business law."[489] The CCJA "can decide as instance of last resort on appeal against rulings of national courts", and, therefore, guarantees legal unification.[490] "Because the CCJA preserves the uniformity of the OHADA laws through its final say on matters concerning the application of OHADA laws, it truly represents a transfer of indicia of national sovereignty to a supranational authority."[491]

3.2.5.1.2 The CCJA as a third instance above two instances on the national level in its own right

As mentioned in the previous section, on appeal, the CCJA may rule on decisions with respect to all matters relative to the application of the Uniform Acts and the regulations contemplated by the Treaty. Such appeals may be brought to the CCJA "either directly by one of the parties of the proceedings at a lower instance or by referral of a national court ruling on appeal on a case to which it is referred and which raises questions concerning the application of the Uniform Acts (Art 15 of the Treaty)."[492] "This jurisdiction can be exercised only once the regular appeal proceedings have been exhausted before the national or domestic courts."[493]

"The CCJA has an enviable three avenues of appeal not common with other sub regional economic court."[494] An appeal to the CCJA can be made in three different situations. First, "[t]he parties can

[487] *Supra* note 351 at 17.
[488] *Supra* note 339 at 428.
[489] *Supra* note 351 at 16.
[490] *Supra* note 339 at 425.
[491] *Supra* note 353 at 56.
[492] *Supra* note 339 at 428-429.
[493] *Supra* note 351 at 11.
[494] *Ibid* at 17.

directly file an appeal before the CCJA against a decision of a domestic court once the regular appeal proceedings available in the domestic legal order have been exhausted. The appeal must be lodged within two months of service of the challenged decision. If the CCJA overrules the decision of the national court, the case is remanded for de novo review (*evocation a de novo*)."[495] Second, "[t]he parties can apply to the CCJA to annul a decision of a domestic court that they suspect fell within the exclusive jurisdiction of the CCJA. If the CCJA decides that the domestic court lacked jurisdiction, its decision will be annulled by the CCJA. "[496] "When the Court pronounces a cassation, it immediately rules on the cause without referring the case back to a national court of appeal for further decision on the cause. This means that the CCJA constitutes a jurisdictional instance in its own right. "[497] "This institutional design saves time for the parties, who do not have to return to a national court of appeal for a renewed procedure."[498] Third, "[t]he supreme court of a Member State can stay the proceedings and refer the case to the CCJA for a decision on subject-matter jurisdiction. If the CCJA finds that it has no jurisdiction to hear the case, the proceedings will resume before the domestic court but if the CCJA quashes the decision of the national court, it performs through a process known as *evocation a de novo* review over the case meaning that the case will have to start all over under the CCJA jurisdiction and issues raised will be considered afresh on it merit."[499] Such a significant characteristic of the CCJA is laid down in Article 14(5) of the Revised Treaty, that "[w]hile sitting as a court of final appeal, the Court shall decide on the merits." The CCJA is 'unique in the world and that no other court, not even the European Court of Justice has as many powers and prerogatives as the CCJA'."[500]

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[495] *Ibid* at 11-12.
[496] *Ibid.*
[497] *Supra* note 339 at 429.
[498] *Ibid.*
[499] *Supra* note 351 at 12.
[500] *Ibid* at 16.

The above-mentioned nature of the CCJA amounts to a third instance above the two instances on the national level.[501] The CCJA is incorporated in the national judicial system, serving as "an alternative avenue for the settlement of commercial disputes apart from the national court" and as the supreme court in all cases involving the interpretation and application of OHADA treaty among the seventeen contracting state parties.[502] Thus, by reducing the involvement of national courts that parties can directly file an appeal before, the CCJA can pronounce a cassation directly applicable to the cause. Therefore, the CCJA can prevent the delay and bypass on the application of uniform business laws, and, therefore, guarantees the uniformity of OHADA uniform acts.

3.2.5.1.3 Independence of the CCJA judges

"The CCJA is composed of nine judges;[503] however, the Council of Ministers might, taking into account the needs of the service and the financial possibilities, set a higher number of judges.[504] Judges of the Common Court of Justice and Arbitration are elected for a non-renewable term of seven years, from among the nationals of the Contracting Parties through a secret ballot by the Council of Ministers.[505] The Court sits in chambers of three judges. The operating procedures of the CCJA are to first ensure guarantee of judicial independence and security. The treaty did not specify that there must be a judge from a Member State. In addition, the CCJA has set itself the internal regulation that a judge must withdraw if the decision against which the appeal is brought was returned in his State of origin."[506]

[501] *Supra* note 339 at 429.
[502] *Supra* note 351 at 15.
[503] Article 31(1) of Revised OHADA Treaty.
[504] Article 31(2) of Revised OHADA Treaty.
[505] Article 31(3) of Revised OHADA Treaty; Article 32 of OHADA Treaty.
[506] *Supra* note 351 at 6-7.

"Before the election of the judges of the CCJA, the Permanent Secretary invites each state to submit its candidates.[507] One state cannot have two justices seated in the court but can nominate or submit two candidates out of whom one could be selected.[508] Under Article 31 of the OHADA Treaty, the personal requirements for candidates can be divided in three categories: Judges with at least fifteen years of professional experience who possess the qualifications required to occupy the highest judicial office in their respective countries; lawyers that are members of the lawyer's association or Professional Legal body or Association of one of the States Parties and with at least fifteen years of professional experience; and law professors with at least fifteen years of professional experience. One third of the judges of the CCJA must belong to the categories of lawyers and law professors.[509] Following the reception of the application, the Permanent Secretary lists all the candidates in alphabetical order and communicates that list to all member states at least one month before the election.[510] … Once elected, members of the CCJA enjoy diplomatic privileges and immunities, are irremovable and cannot hold any political or administrative function. However, they can have gainful activity after having been authorized by the court. In case of vacancy of a seat, for death or resignation of a judge, the judge will be replaced according to the renewal procedure. The members of the Court elect among themselves a President and two Vice - Presidents for a term of three years and six months."[511]

The independence of the CCJA judges is guaranteed by the use of a secret ballot and the requirement that no judge holds a political or administrative function. It is of great significance to the uniform and secured interpretation and application of OHADA uniform acts, as the officials

[507] Article 33(1) of OHADA Treaty.
[508] Article 31(5) of Revised OHADA Treaty.
[509] Article 31(3) of Revised OHADA Treaty.
[510] Article 33 of OHADA Treaty.
[511] *Supra* note 351 at 7.

who exercises the power of interpretation and application must be independent from possible intervention from the government of member states.

3.2.5.1.4 Problems with the CCJA

The CCJA is not perfect and problems do arise. Firstly, the unwillingness of national courts to refer OHADA-related cases to the CCJA. Secondly, the difficulty of execution of the CCJA's judgements. Thirdly, difficulty in administrative manageability and, fourth, a geographical issue. These issues will be discussed in order below.

Firstly, "[a]ppraising the functioning of the court, Dickerson observed that national courts are reluctant to send business-related cases to the CCJA. For financial reasons, parties not based in Côte d'Ivoire, where the CCJA is based, are hindered from appealing to the CCJA. The unwillingness of national courts to refer OHADA-related cases to the CCJA is largely attributed to the fear of losing 'interesting cases' to the CCJA. This attitude is, to some extent, a reflection of an attachment to national sovereignty which has the potential of impeding the progressive aspirations of the OHADA."[512]

"It is observed that since the CCJA decision is final, there is loss of judicial sovereignty by the member states. Undeniably the Supreme Courts of the member states are technically bypassed in OHADA matters when parties leapfrog from the Courts of Appeal to the CCJA. Indeed, the national supreme courts have not taken this phenomenon kindly as evidence have it that some OHADA cases are taken to the national supreme courts and neither these courts or the parties to the litigation are systematically referring such cases to the CCJA."[513]

"Justices of the national courts are concerned that they will not have enough work, or at least not enough interesting work, if an increasingly broad range of commercial matters passes directly from

[512] *Supra* note 400 at 315.
[513] *Supra* note 351 at 11.

the national appellate courts to the CCJA, thus skirting the national supreme courts entirely. If the CCJA does have this overarching role, as many who have studied the OHADA Treaty believe, then the CCJA will indeed be able to protect the laws' uniformity. What is factually obvious, however, is that the national supreme courts are in fact not sending all their business-related cases to the CCJA, and the parties apparently often do not insist that their case be removed. The supreme courts' motivation is clear enough; legal professionals within the region confirm that parties are equally reticent due to the perceived cost of removing the final appeal to the CCJA in Abidjan. The fact that the vast majority of appeals to the CCJA come from Côte d'Ivoire supports that conclusion. Until the OHADA structure finds a way to reassure non- Ivoirians on the expense front, it will be unlikely that the CCJA will play the fullest possible role in support of uniformity."[514]

Secondly, there are problems regarding the execution of the CCJA's judgements. "The issue arises at the junction where the parallel legal universe touches the national system, that is, at the point where the judgements rendered by the national courts have gone through their final appeal, whether or not to the CCJA. It can even be difficult to ascertain which national authority is responsible for the execution of judgements under OHADA laws."[515]

"We have seen that the legal profession complains of a breakdown at the transition between the OHADA regime and the national judicial systems. They report a lack of predictability when the local authorities are called upon to execute a judgement or arbitral award. Since the OHADA Treaty chose not to push the transfer of sovereignty to the point of establishing a separate OHADA method of enforcement, the practical impact of the OHADA laws, at least in the short term, depends on the will of the national governments."[516] "The need for adherence to democratic values

[514] *Supra* note 353 at 57-58.
[515] *Ibid* at 62.
[516] *Ibid* at 70.

is even more pertinent considering the fact that the onus of enforcing the CCJA judgments is placed on member states. The corollary to this is that the implementation of OHADA laws can be manipulated to suit the narrow interests of the ruling elite."[517]

Thirdly, "making the CCJA the *Cour de Cassation* instead of the Member States' Supreme Courts on all OHADA issues has led to difficulties in administrative manageability and made backlogs an unavoidable problem. This choice did remove the final interpretation of OHADA law from the national judiciaries, which are often accused of capture by political forces and extractive interests, and of solving conflicts of interpretation of OHADA provisions even before states review the matters. There is however a risk of causing jurisdictional conflict with domestic supreme courts which hampers the CCJA's manageability and given the scarcity of resources becomes a critical problem."[518]

Fourth, "according to Beauchard and Vital Kodo, another problem regarding the success of the CCJA may lie in the geographical origins of the appeals before the court, since an overwhelming number of appeals come from Ivory Coast, the seat of the CCJA. For example, from its inception in 1998 to August 2003 the CCJA in its supranational guise received 162 cases, with 57 from one year alone. In that time, the Court issued 44 decisions and seven opinions. Of the 162 cases, 116 were from the Ivory Coast.69 This can be explained in part by the consideration that Côte d'Ivoire is the most important economy among the member countries, with the likely corollary that business activity is a more important source of litigation there than in other Member States. However, these statistics also suggests that many other potential litigants may be reluctant to pursue their claims due to the perceived cost of removing the final appeal to the CCJA in Abidjan. Beauchard and Vital Kodo further criticize that the procedure before the CCJA is essentially a written and an oral

[517] *Supra* note 400 at 319.
[518] *Supra* note 351 at 13.

hearing is very rare. Appealing before the CCJA requires residence in Abidjan for the duration of the proceedings, including possibly for the attorney representing a non-Ivorian party and/or a *pro hac vice* representation by an Ivorian attorney. Apart from the problems linked to its location the Member States' national courts are at times reluctant to accept the CCJA's supranational jurisdiction."[519]

While there are problems regarding the success of the CCJA, as the last resort to the interpretation and application of OHADA laws, it guarantees the uniformity of said laws. Additionally, it serves as the third instance over the two instances at national level to hear appeals brought by parties and deliver cassations on the cause directly without referring to national courts. As the final appeal, the CCJA is able to make decisions on its merits. "The CCJA has been described as unique in the world and no other court, not even the European Union Court of Justice has as many powers and prerogatives as the CCJA."[520]

3.2.5.2 Advisory function

In describing the function of the CCJA, Article 14 of the Revised Treaty states that the CCJA provides not only the judicial judgements, but also the advisory opinions upon request.[521] The second paragraph establishes the advisory role of the Court by saying that "the Court may be consulted by any Contracting Party, or by the Council of Ministers, on any question within the scope of the prior paragraph. The same ability to request consultative advice from the Court shall belong to national courts hearing a case pursuant to Article 13, above."

Therefore, "[a]ny Member State or the Council of Ministers may request it to review the interpretation or an application of the Treaty, regulations for applying the treaty or the Uniform

[519] *Ibid* at 13-14.
[520] *Ibid* at 12.
[521] *Ibid.*

Acts."[522] Or, "a lower national court hearing a case regarding the application of OHADA law or its interpretation can request an advisory opinion to assist it."[523] Another situation that the CCJA can be consulted on is when it reviews draft Uniform Acts before the Council of Ministers votes on them.[524]

To conclude, "the CCJA will rule on, in the Contracting States, the interpretation and enforcement of the present Treaty, on such Regulations as laid down for their application, and on the Uniform Acts. The Court may be consulted by any Contracting State or by the Council of Ministers on all questions falling within the field of the preceding paragraph. The right to request the advice of the Court, as herein before mentioned, is recognised by the national courts hearing a case or litigation regarding the implementation of Uniform Acts is settled in the first instance and on appeal within the courts and tribunals of the Contracting States."

"Art 53 and following the regulation relating to the CCJA procedure (CCJA rules) determine the modalities of the CCJA's consultative role:

1) If the Court is consulted by a member state or by the Council of Ministers, the request must be presented in a reasoned writ, which the court circulates among the member states enjoining them to make their observations within a fixed deadline. The response of each member state is forwarded to the submitter of the request as well as all other member states having responded. A further deadline is fixed for direct discussion between the submitter and the authors of observations, after which the President of the Court decides whether a hearing should be held.

2) If the Court is consulted by a national court, the Court notifies the parties in litigation of the request as well as the member states enjoining them to submit their observations. What follows is

[522] *Ibid.*
[523] *Ibid.*
[524] *Ibid.*

the same procedure as above under 1). This procedure promotes a unified interpretation of the harmonized law. It has the advantage of involving not only the submitters of requests of consultations, but also the member states. In this way, the final interpretation is the result of a consensus emerging from the observations of all participants in the consultative procedure. Hence, its acceptance by all will not be a major problem."[525]

While the CCJA's advisory opinion is not binding, it is usually obeyed. Such a function does support the uniform interpretation and application of OHADA laws.

3.2.5.3 Arbitral function

"Arbitration is a method of dispute resolution involving one or more neutral third parties, agreed upon by the disputing parties and whose decision the parties recognize as binding."[526] Arbitration is an alternative form of dispute resolution to litigation. "In contemporary arbitration, the parties turn over the decision-making power to a private individual with stature, experience, and standing who can exercise authority similar to a judge in a court room. The decision is final, the proceedings are private, and decisions are typically made at a faster pace than in the court system with lower costs to all involved."[527] "In Roman law, arbitration agreements were admissible as a reflection of the recognized principle of freedom of contract."[528] "Arbitration has, for that reason, historically functioned as an independent adjudicative dispute resolution mechanism. It is characteristic that arbitration was perceived as superior for resolving price or damages disputes."[529] The advantages of arbitration make it a very welcomed form of dispute resolution to investors, particularly when the national judicial system of the host state is unreliable.

[525] *Supra* note 339 at 429-430.
[526] *Supra* note 351 at 3.
[527] *Ibid.*
[528] *Ibid.*
[529] *Ibid* at 3-4.

"There is no gainsaying that one of the obstacles to foreign investment in the [African] continent is the unreliability of national judicial systems. Recourse to the courts is sometimes frustrating due to a number of factors, including bureaucratic bottlenecks, lengthy court process, weak laws, and incompetent judicial officers."[530] In light of this, the drafters of the OHADA Treaty have provided for a common court to interpret and monitor the implementation of the Uniform Acts, and encourage arbitration for the settlement of contractual disputes to bolster the confidence of actual and potential investors.[531] "[T]he Preamble of the OHADA Treaty shows that the signatory states are willing to promote arbitration as a means of resolving contractual disputes. Hence, the Uniform Act on Arbitration Law and the Rules of Arbitration of the CCJA was adopted."[532]

The OHADA Treaty provides for two routes to arbitration: institutional arbitration under the auspices of the CCJA following the rules of arbitration and ad hoc arbitration under the Uniform Act on Arbitration.[533]

As mentioned, "[a]rbitration may be defined as the resolution of a dispute by private persons referred to as arbitrators. These private persons are appointed in principle by the parties in dispute by virtue of an arbitration agreement. The jurisdictional mandate of an arbitrator ends with a decision called arbitral award which terminates the dispute. A distinction is made between ad hoc arbitration and institutional arbitration. In ad hoc arbitration, parties freely define the rules relating to the composition of the arbitral tribunal as well as those relating to the procedure and the substance of the dispute. Institutional arbitration is administered by an arbitration centre or institution in conformity with the rules of the arbitration centre. OHADA arbitration has a dualistic aspect. It is regulated both by the Uniform Act on Arbitration and by the rules of arbitration of the

[530] *Supra* note 400 at 314.
[531] *Ibid.*
[532] *Supra* note 351 at 8.
[533] *Ibid* at 6.

Common Court of Justice and Arbitration (CCJA). These two legal instruments are based on international conventions on arbitration."[534]

3.2.5.3.1 The CCJA as a forum for institutional arbitration

In accordance with the OHADA Treaty and the Rules of Arbitration, the CCJA may serve as an arbitration centre for institutional arbitration, and "accompanies" and administers the arbitral procedure.[535] "The CCJA conducts, controls the procedure to be conducted before the arbitral tribunal, and administers the arbitration procedure in accordance with the treaty and the Rules of Arbitration."[536] It is in charge of appointing, confirming and replacing arbitrators, ensuring the smooth holding of proceedings and examining draft arbitral awards made by the arbitrators.[537]

"The prerequisites for this procedure are that either one of the parties (individual person or corporation of either private or public law) of a contract has its domicile or habitual residence in a member state of OHADA or the contract in question is to be fulfilled at least in part in the territory of a member state, and that there is an arbitration clause in the contract or an arbitration bond between the contracting parties to the effect that any dispute arising from the said contract should be resolved by arbitration even if the matter is *sub judice* in another jurisdiction."[538] However, "the seat of the arbitration must not necessarily be located within an OHADA member state."[539]

It is not in the competence of the CCJA to rule in the case, the CCJA merely plays an administrative role to nominate or confirm the arbiter(s), to follow the proceedings, and to review the draft of the

[534] *Supra* note 389 at 132.
[535] *Supra* note 339 at 431.
[536] *Supra* note 351 at 9; see also, **Working Papers** WB, International Bank for Reconstruction and Development, *Can OHADA Increase Legal Certainty in Africa?* , Justice and Development Working Paper Series17/2011 (2011) at 10.
[537] *Supra* note 389 at 134.
[538] *Supra* note 339 at 431.
[539] *Supra* note 351 at 15.

arbitral award.[540] That is to say, "does not settle disputes itself, but instead, like other international arbitration centres, provides the institutional procedures for arbitration."[541] "Mouloul (2008) rightly emphasizes the important administrative role of the CCJA, especially the appointment of the arbiter (s) (in case of disagreement over the nominee; in case three arbiters are necessary; in case no definite number is agreed upon) and the appreciation of the arbitral award."[542]

The CCJA "controls the proceedings by appointing or confirming the arbitrators. In order to resolve the dispute, the parties may appoint a sole arbitrator or three arbitrators who will be confirmed by the CCJA. It also intervenes in the appointment of arbitrators where the parties have agreed to appoint a sole arbitrator but fail to agree on the person of the arbitrator within thirty days from the date of notification of the request for arbitration to the other party. In that case the arbitrator shall be appointed by the CCJA and where the parties have agreed that the dispute shall be decided by three arbitrators: each party shall appoint one, and the third, who shall chair the arbitral tribunal, is appointed by the court, unless the parties have agreed that the arbitrator will be designated by the two other arbitrators. However, failing agreement between the two arbitrators on the third person, and at the expiration of a time limit fixed either by the parties or by the court, the third arbitrator is appointed by the CCJA."[543]

The CCJA also controls the arbitral proceeding by reviewing the arbitral award. "The arbiter(s) may not sign the arbitral award before having received the CCJA's opinion of the draft. While the Court's opinion can only propose strictly formal modifications in the draft arbitral award, it does provide necessary indications for the allocation of the cost of the procedure and it does fix the amount of the arbiter's fee. The arbitral awards have non-appealable authority and, with the

[540] *Supra* note 339 at 431.
[541] *Supra* note 351 at 4.
[542] *Supra* note 339 at 431.
[543] *Supra* note 351 at 4.

exequatur of the CCJA, are enforceable on the territory of each member state (Art 25 of the Treaty). They cannot be subject to opposition nor to appeal by way of cassation (Art 25, 1), though in specific cases, there might be a recourse to nullify arbitral awards (Art 26 of AU/DA)."[544]

Art. 25 of the OHADA Treaty states: "Such decisions may be enforced and executed by an order of Exequatur. Only the Common Court of Justice and Arbitration has jurisdiction to pronounce an order of Exequatur." The Exequatur may not be issued only when "1) The Arbitrator has not ruled by virtue of an agreement giving him jurisdiction, or has ruled by virtue of a void or expired agreement; 2) The arbitrator has not ruled in compliance with its conferred mandate; 3) the principle of adversarial procedure has not been respected; 4) the decision is contrary to international public order."[545] Such a mechanism "would have had the advantage of centralizing disputes about the exequatur at the CCJA. In this way, the arbitral award with the exequatur apposed would have been immediately enforceable in all member states."[546] "On the merits, the exequatur cannot be refused unless there is manifest evidence that it is contrary to the international "public order". In view of common rules like the Convention of the African Union on the prevention of corruption, we may already imagine the sense of this notion and expect that cases of refusal of exequatur will be extremely rare."[547]

3.2.5.3.2 CCJA as an ad hoc arbitral body

The CCJA may also serve as an ad hoc arbitral body. The ad hoc arbitration "is governed by the Uniform Act on Arbitration (1999). It provides default rules for incomplete arbitration agreements

[544] *Supra* note 339 at 431.
[545] Article 25 of OHADA Treaty.
[546] *Supra* note 339 at 432.
[547] *Ibid.*

between the parties. To the extent that these default rules are not mandatory, the parties are free to determine the rules for the procedure (Fouchard 2004)."[548]

The Uniform Act of Arbitration "provides common rules for the member states concerning both the subject matters of arbitration and the arbitral procedure, judicial remedies, as well as the recognition and enforcement of rulings."[549] "[I]n the areas of composition of arbitral tribunal, arbitral proceedings, arbitral awards and remedies against awards as well as their enforcement," the Uniform Act on Arbitration, "borrowed significantly from the UNCITRAL Model law on International Commercial Arbitration of 1985."[550]

"For example, it adopts the principle of autonomy of the arbitration agreement which posits that an arbitration agreement is independent from the main contract and its validity is not affected by the nullity of the main contract. Also, it adopts the principle of competence which attributes to arbitrators the powers to rule on their own competence when the existence or the validity of the arbitration agreement is contested before them.

The OHADA Uniform Act is compatible with international conventions to which OHADA Member States were already signatories. Indeed, Article 34 of the Uniform Act stipulates that foreign arbitral awards may be recognized within OHADA Member States by virtue of subsequent applicable international conventions. This stipulation which refers tacitly to the New York convention ratified on December 10th, 1958 relating to the compulsory enforcement of foreign arbitral awards seeks to enhance the practice of arbitration within the OHADA member states."[551]

[548] *Ibid* at 431.
[549] *Ibid* at 427.
[550] *Supra* note 389 at 133.
[551] *Ibid.*

It also worth to mentioning that "art. 25 of the Treaty grants the arbitral award the status of a quasi-jurisdictional decision with full international validity."[552] It provides that "Award pronounced in compliance with the stipulations provided herein shall have final and conclusive authorities in the territory of each Contracting state as judgments delivered by their national courts." "Only an annulment is possible, but only on six grounds restrictively enumerated in Art 26."[553] This is confirmed by the Uniform Act of Arbitration. "The Uniform Act provides neither appeal to a court of appeal, nor third party claims nor even a cassation appeal. This is a striking departure from the majority of African legislations, which until now recognized such appeals (Meissonnier and Gautron 2008)."[554]

"The CCJA has afforded an opportunity of an alternative arbitration avenue for settlement of Commercial disputes apart from relying on national courts of justice."[555] It may follow either an institutionalised procedure or the default rules of the uniform Act on Arbitration.[556] When the CCJA serves as an arbitral centre, while it does not act as an arbitral tribunal per se and does not itself settle disagreements, it "will for instance be in charge of appointing or revoking arbitrators and examining arbitration awards, and of verifying the compliance of the arbitration with the OHADA Arbitration Regulation. Arbitral awards rendered accordingly are enforceable in any OHADA member state subject to the granting of an execution judgement by the CCJA which has

[552] *Supra* note 339 at 432.
[553] *Ibid.* See also Article 26 of Uniform Act on Arbitration: "Recourse for nullity is only admissible in the following cases:
- if the arbitral Tribunal has ruled without an arbitration agreement or on an agreement which is void or has expired;
- if the arbitral Tribunal was irregularly composed or the sole arbitrator was irregularly appointed;
- if the arbitral Tribunal has settled without conforming to the assignment it has been conferred;
- if the principle of adversary procedure has not been observed;
- if the arbitral Tribunal has violated an international public policy rule of the States, signatories of the Treaty.
- if no reasons are given for the award."
[554] *Supra* note 339 at 432.
[555] *Supra* note 351 at 15.
[556] *Supra* note 339 at 430.

sole competence in this matter."[557] When functioning the ad hoc arbitration, the CCJA "has adopted principles that are in conformity with international trends in arbitration."[558] This "reinstates confidence among business men and investors as to legal security and certainty of their transactions in member states of OHADA."[559] However, "[i]t should be noted that the CCJA does not have the monopoly of arbitration in the OHADA space. There are national arbitration centers in several member states."[560]

[557] *Supra* note 351 at 16.
[558] *Supra* note 389 at 133.
[559] *Supra* note 351 at 16.
[560] *Supra* note 339 at 430.

Chapter 4 Is the China-OHADA BIT redundant?

4.1 Through which channel does a BIT precisely affects FDI?

BITs are routinely described as important tools for attracting FDI. There are many studies discussing the impact of BITs on FDI. There are two ways through which they conceptualise the link between BITs and FDI. One is the "function approach": that a BIT, by offering protection against political risks, or in a general way, creating a protective climate, attracts FDI. The other is the "decision-making approach": that a BIT, by reducing risks and increasing returns, increases the volume of FDI. The basic question is then "whether BITs, by creating a formally strong international 'rule of law,' meaningfully promote foreign investment. Do investors care about the international legal protections the treaties offer? Do they take the treaties decisively into account when deciding where to invest? A number of statistical studies, conducted by social scientists generally sympathetic to the law and development orthodoxy, have examined these basic questions, but results are inconsistent and contradictory."[561] They found that BITs "certainly have instilled a sense of security in foreign investors. These treaties have provided the assurance to foreign investors that should something go wrong within the host states due to governmental interference, then they have an international legal remedy."[562] However, "there is no credible evidence to

[561] Yackee Jason Webb, "Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?" (2008) 42:4 Law & Soc'y Rev 805 at 806.

[562] Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart, 2008) at 116. "Neumayer and Spess (2005) report that developing countries that sign large numbers of BITs can expect to see their shares of FDI nearly double. Salacuse and Sullivan (2005) also present evidence that investors care greatly about BIT protections. In their model, a developing country that enters a BIT with the United States can expect to see an additional $1 billion in FDI per year. A handful of unpublished but widely circulated studies report less-optimistic findings. Hallward-Dreimer (2003) and Tobin and Rose-Ackerman (2007) find that BITs do not have much, if any, positive effect on FDI; in an earlier study Tobin and Rose-Ackerman (2005) find that BITs may actually reduce FDI to high-risk countries, though these studies offer little in terms of explanation for these null or negative findings."

suggest that BITs have increased the flow of foreign investment."[563] The direct causal relationship between BITs and FDI flows can hardly be considered definitive.[564]

4.1.1 The function approach

The 'functional approach' unsuccessfully attempts to explain BIT's meaningful impact on FDI flows by linking investment to treaty protections. "Bilateral investment treaties have a long history as mechanisms to protect capital-exporting countries from the risks of unfair or discriminatory treatment by host states."[565] The logic of this "protective function" approach is that "by using the formal trappings of international law",[566] the BIT can bypass the unclear, changeable and unpredictable domestic laws and prevent host countries from treating foreign investors badly. "The formal safeguards and guarantees that BITs provide for non-commercial risks have acted as an incentive to potential investors."[567] However, it is suggested that such a conclusion seems rather too broad and unclear.

Making investments in other countries always carries risks. Investors would face "possible negative effects derived from ordinary commercial activities affecting the enterprise,"[568] that are normally described as 'commercial risks'. "For example, market sales may be less than expected, management may be inefficient, or the enterprise's technology may prove costlier or less effective than planned."[569]

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[563] *Ibid.*
[564] Yackee Jason Webb, "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence" (2011) 51:2 Va J Int'l L 397 at 434.
[565] Campbell Neil, O'Hara Jonathan & Cullen Timothy, "The Impact of New Transatlantic Trade Agreements on Commercial and Investment Transactions" (2015) 16:3 Business Law International 185 at 202.
[566] *Supra* note 565 at 828.
[567] IISD, *IISD Model International Agreement on Investment for Sustainable Development*, 2nd ed (Winnipeg: IISD, 2005) at v.
[568] *Supra* note 304 at 26.
[569] *Ibid.*

However, the risk may go beyond ordinary commercial risk, particularly in developing countries.[570] The government of the host country may intervene in the operation and development an investment project. For example, the enterprise may be expropriated by host government, a regulatory authority may establish price control over the products of foreign investor or riots in host country may damage investment assets, etc.[571] "These risks derive from the exercise of political power and imply 'the probability that a host government will, by act or omission, reduce the investor's ability to realize an expected return on his investment'."[572] "Risks associated with the actions of the state where the investment is located are typically referred to as political risks."[573] While the types of political risks may vary from one country to another, "the most frequent political risks include: (1) transfer and convertibility restrictions, (2) expropriation, (3) breach of contract, (4) non-honouring of sovereign financial obligations, (5) terrorism, (6) war, (7) civil disturbance, and, (8) other adverse regulatory changes."[574]

Any protection against preceding political risks is always provided for foreign investment primarily under the law of the host country.[575] However, "investors complain that the rules are unclear," and they "have little trust in the reliability and fairness of property rights and government enforcement" in the host country.[576] The "host country officials may not always act fairly or impartially toward foreign investors and their enterprises"[577] and the domestic legal system of the

[570] Jennifer Tobin & Susan Rose-ackerman, "Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties" [2005] Yale Law & Economics Research Paper N.293 1 at 1.
[571] *Supra* note 304 at 26.
[572] Noah Rubins & N Stephan Kinsella, *International Investment, Political Risk and Dispute Resolution: a Practitioner's Guide* (New York: Oceana, 2005) at 3.
[573] Hoyos Juan Camilo, "The Role of Bilateral Investment Treaties in Mitigating Project Finance's Risks: The Case of Colombia" (2013) 40:2 Syracuse J Int'l L & Com 285 at 289.
[574] *Ibid.*
[575] *Supra* note 562 at 84.
[576] *Supra* note 570 at 2.
[577] Jeswald W Salacuse & Nicholas P Sullivan, Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, (2005) 46 Harv Int'l LJ 67 at 67.

host country may prove to be inadequate, unfair or ineffective to prevent foreign investments from political risks. Even if local laws are able to offer adequate, fair and effective protection to foreign investors, they are liable to change[578] with adverse effects on investors. Based on the reality that the protection and remedies the host country provides may be inadequate, unfair or ineffective and "[h]ost governments can easily change their own domestic law after a foreign investment is made,"[579] the motivation for the inclusion of such protection in an international instrument, therefore, arises.[580]

"BITs are currently the dominant means through which foreign investments in host countries are regulated under international law (Kishoiyian 1994, Schwarzenberger 1969, Walker1956).[581] The treaties are a response to the weaknesses of customary international law under which foreign investment is subject exclusively to the territorial sovereignty of the host country (UNCTAD 1998)."[582] In other words, "BITs undercut a state's sovereign right to 'subject foreign investors to its domestic [administrative] legal system'."[583] BITs are designed to set a certain level of protection. Once the protection is included in a BIT, foreign investments would be protected through international enforcement of the treaty.[584] The nature of international law allows a BIT to bypass the unclear and variable laws of the host country as the BIT prevails in any case where its standards of protections are inconsistent with the domestic laws of the host country. "[T]he principle of territorial sovereignty gives States the power to admit or exclude aliens, including

[578] *Supra* note 562 at 83.
[579] *Supra* note 577.
[580] Jamieson Sara, "A Model Future: The Future of Foreign Direct Investment and Bilateral Investment Treaties" (2012) 53 S Tex L Rev 605 at 609.
[581] *Supra note 570* at 6-7.
[582] *Ibid.*
[583] *Supra* note 580 at 607, see also Rudolf Dolzer, "The Impact of International Investment Treaties on Domestic Administrative Law" (2006) 37 NYUJ Int'l L & Pol 953 at 953.
[584] *Supra* note 570 at 8.

foreign firms, from their territory as well as full jurisdiction over existing investments." However, "by using the formal trappings of international law to prevent host countries from treating investors badly,"[585] BITs "tie the hands" of policy makers (Guzman 1998).[586] In this way, BITs "safeguard investors against injurious acts and omissions by host governments as well as other forces generating political risks in the host country. Otherwise, investors will be relying on host country's domestic law and courts for protection, which in particular jurisdictions may be risky for the investment."[587]

BITs can bypass not only the domestic laws, but also the potentially inadequate and unfair domestic legal process of the host country. By creating a unique dispute settlement system, a BIT "allows for private investors, independent of their home country, to take their grievance against the host state directly to international arbitration and bypass the host country's domestic court system (Investor-State arbitration). In the arena of international law and arbitration, there are no other similar procedures afforded to individuals, and, as such, those disputes must be settled between the Contracting States."[588]"Generally, 'when a state enters into a BIT, it effectively extends a standing offer to eligible investors to arbitrate any relevant investment dispute through international arbitration'[589] and if the investor chooses to bring such claim, the investor may simply initiate the arbitration proceedings."[590] The investor-state arbitration allows foreign investors to bypass defective domestic courts that are "considered corrupt, biased, inefficient, or dependent on

[585] *Supra* note 565 at 828.
[586] *Ibid* at 806.
[587] *Supra* note 577 at 290, see also *Supra* note 304 at 20.
[588] *Supra* note 580 at 606.
[589] Jarrod Wong, "Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Dispute" (2006)14 Geo Mason L Rev 135 at 141.
[590] *Supra* note 580 at 611.

the executive."[591] It is worthwhile mentioning this issue. To reiterate, BITs bypass inadequate and variable domestic laws, however, without a BIT, a foreign investor can merely resort to the domestic court system that may produce unfair judgements.

BITs have also resolved many of the uncertainties and unpredictability[592] brought about by the variable domestic laws of the host country. The treaties increase the predictability of the investment climate by "locking in" domestic reforms in international treaties, "thus making policy reversals less likely,"[593] as "no state can unilaterally change international law or the provisions of BITs."[594] Besides, BITs "are of long duration, usually ten or twenty years, with continuing coverage for 20 years after termination on investments made whilst they are in force."[595] Such long-term protection under BITs successfully guarantees the elements of stability and predictability.

Investors require a safe environment to invest abroad.[596] The driving force for the initiation and proliferation of the BIT movement is the perceived inadequacy, unfairness, ineffectiveness and instability in the host country's domestic legal system,[597] and "the need and desire of investors to be able to 'safely and securely' invest in foreign countries."[598] Therefore, BITs are traditionally designed "to provide foreign investors and their investments with a level of protection against political risk,"[599] and to create a stable, transparent and non-discriminatory international legal

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[591] *Supra* note 152 at 173.
[592] Glenn Gallins, "Bilateral Investment Protection Treaties" (1984) 2:2 Journal of Energy & Natural Resources Law 77 at 95.
[593] Dirk Willem Te Velde & Dirk Bezemer, "Regional Integration and Foreign Direct Investment in Developing Countries" (2006) 15 Transnational Corporations 41 at 47.
[594] *Supra* note 562 at 83.
[595] *Ibid* at 84.
[596] *Supra* note 577 at 290, see also *Supra* note 304 at 109.
[597] Robert Hunter, "Strategic Suggestion on Using China's Bilateral Investment Treaties to Protect Outbound Investment" (2010) 40 Corporate Legal Affaires 48 at 48; see also Ofodile Uche Ewelukwa, "Africa-China Bilateral Investment Treaties: A Critique" (2013) 35:1 Mich J Int'l L 131 at 198.
[598] *Supra* note 580 at 613.
[599] *Supra* note 304 at 26.

framework to facilitate and protect those investments.[600] To date, investment protection remains the main goal and function of modern BITs, however, another objective addressed by an increasing number of BITs is to promote investment through liberalization. To achieve such goals, provisions of BITs are specifically designed to address the prejudicial practices of host countries,[601] such as restrictions on repatriation of profits, expropriation of assets as well as other indirect taking of properties,[602] losses caused by war, civil disturbance, terrorism, devaluation of investment values due to regulatory changes,[603] and other similar concerns in accordance with various types of political risks as previously discussed. Additional to provisions designed to provide protection against political risks, BITs include provisions regarding the treatment of different investors as well as a "dispute resolution mechanism applicable to alleged violations of those rules,"[604] to secure a non-discriminatory, secure and stable legal framework to facilitate and protect foreign investments.

"Consequently, countries began to realize that BITs are a necessary tool for attracting foreign investors to invest in their own country."[605] They believe that the formal protections that BITs provide for political risks have not only acted as a useful reassurance to those with existing investments but also as a rational incentive to potential investors.[606] Some academics describe BITs as a significant incentive to attract foreign investments with a view that protections for foreign investment are presumed to attract investment flows to host countries that will lead to

[600] *Supra* note 577.
[601] *Supra* note 580 at 608.
[602] *Supra* note 570 at 6-7.
[603] Efraim Chalamish, "The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?" (2009) 34 Brook J Int'l L 303 at 307-308.
[604] *Supra* note 72 at 606; see also Kenneth J Vandevelde, "The Economic of Bilateral Investment Treaties" (2000) 41 Harv Int'l LJ 469 at 469.
[605] *Supra* note 580 at 613.
[606] *Supra* note 562 at 84.

economic development.[607] They believe that BITs have the ability to attract potential investors through by offering protections on their investments.

It is imprudent to conclude that BITs have the ability to protect and, therefore, to attract foreign investments. If so, it implies that high political risks are the main obstacle to foreign investment inflows and the need to reduce such risk is the main concern of investors when they make decisions. This was true in the context of early post-World War II.

"Protection was a topic of particular importance in the decades after the Second World War, when established investments, especially in natural resources, were affected by Government takings, in the context of either large-scale socio-political reforms or recent decolonization."[608] "The principal measures against which investors seek protection are expropriations, nationalizations and other major cases of deprivation of property and infringement of property rights of investors. As already noted, the first post-war decades saw many instances of large-scale action of this kind,"[609] the consequences of "resulting efforts to assert control over their natural resources,"[610] "the spread of communism and concern for the impacts of decolonization on business interests in newly independent developing countries."[611] Investors faced great risks of loss of assets and non-repatriation of funds and they had little confidence in the legal framework of the host countries. Certain instruments at an international level to limit the power of host countries was urgently needed, and, therefore, the creation of BITs was initiated.

Given this origin, the initial BITs were singularly focused on just one aspect of the investment process: the protection of foreign investments against political risks.[612] The signing of BITs can

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[607] *Supra* note 570 at 8.
[608] UN, *International Investment Agreements: Key Issues, Volume I* (New York: UN, 2004) at 31.
[609] *Ibid* at 32
[610] *Ibid*.
[611] *Supra* note 567.
[612] *Ibid.*

dramatically increase investors' confidence, as such treaties secure the interests of foreign investors against unduly detrimental actions of the host Government.[613] Therefore, it was concluded that BITs had a substantial positive impact on investment decision and served as significant incentives to foreign investments.

However, "both the historical context and the ideological motivations [of the host countries] have today changed. Although the not-so-distant past has left some mistrust and apprehension in its wake, the actual likelihood of large-scale action of this sort is today rather unlikely,"[614] even in the high-risk continent of Africa. "[H]ost countries appear to be increasingly inclined to provide assurances of fair treatment to future investors, including undertakings against expropriation, promises of full compensation and acceptance of dispute-settlement procedures, both because they consider it useful for attracting FDI and because they do not consider it probable that they would wish to take such measures in the foreseeable future."[615]

Host countries, indeed, take a serious attitude towards ensuring a safe and stable investment environment. An increased awareness and change in mentality, has resulted in a willingness to self-regulate by, either including favourable protective treatment in local laws, or by entering into binding contractual obligations by signing project-specific investment contracts with foreign investors. One can find similar provisions dealing with prohibition against expropriation, right of fund transfer, compensation for losses, non-discriminatory treatment and binding dispute settlement mechanism etc., that BITs are said to provide[616] in the domestic laws of host countries and/or in investment contracts. BITs are no longer the only or main instrument of protections

[613] *Supra* note 608 at 31.
[614] *Ibid* at 32.
[615] *Ibid* at 33.
[616] Perera A Rohan, "The Role and Implications of Bilateral Investment Treaties" (2000) 26:1 Commonwealth L Bull 607 at 607.

against detrimental measures of governments. Protections provided against political risks in domestic laws of host countries and/or project-specific investment contracts seem much easier to reach and more effective. It is difficult to distinguish their comprehensive impacts on FDI flows from that of BITs. However, protection in local laws and investment contracts certainly dilute the broader impacts of BITs.

Due to the change of attitude and self-regulation of host countries, the preceding assumption of high political risks are currently less existent. "It may be that BITs effectively address problems that … are of little importance to most investors."[617] For example, BITs provide protections against expropriation, but the risk of expropriation have become slight for investors.[618] Furthermore, instead of treating foreign investors badly, many countries provide higher and preferential domestic protections to attract foreign investments. If foreign investors are not overly worried about the risk of detrimental actions by government, "then they might not have much rational incentive to concern themselves with BITs."[619]

Actually, the evidence that foreign investment is positively associated with the conclusion of BITs in many countries is lacking. For many countries, data of FDI inflows shows that "the existence of BITs has no effect on FDI flows,"[620] or "BITs appear to play a minimal role in stimulating FDI inflows."[621] For example, "Angola has not concluded a BIT with China and yet is the highest recipient of Chinese FDI in the region."[622] It is rather difficult to prove that the increase of FDIs is directly due to BIT protections. While this may have been true in certain historical contexts, nowadays, the assumption that the signing of a BIT would in itself be an act that attracted foreign

[617] *Supra* note 564.
[618] *Ibid.*
[619] *Ibid.*
[620] Ofodile Uche Ewelukwa, *Supra* note 597 at 202-203.
[621] *Ibid* at 203
[622] *Ibid.*

investments have proven to be unfounded.[623] The relationship between BIT protection and FDI is weak and unclear.

In the current global investment-friendly context, instead of being tools to attract foreign investments, BITs serve as credible commitment devices "by means of strong dispute settlement mechanisms"[624] to guarantee certain rights to foreign investors.[625] No matter whether the domestic legal regime changes, the BIT promises to treat foreign investors no more or less favourably than nationals. It commits to provide full protection and security for foreign investments, and it guarantees prompt, adequate and effective compensation in the event of expropriation, and free transfer of funds and proceeds in convertible currency (Dolzer & Stevens 1995).[626] However, such commitments would appear to only have relevance "when the investment is threatened or actually harmed by host government action".[627]

It is the domestic legal regime of host countries that creates the basic investment climate. "The effect of the treaty is to improve the investment climate in the host country and thereby heighten investor confidence."[628] The BIT merely provides "supplementary legal protection and remedies" "in the case of perceived inadequacy, unfairness or ineffectiveness in the host state's domestic legal framework."[629] From this perspective, the domestic legal regime of host countries may sometimes be insufficient to adequately protect foreign investors, "and BITs help fill the legal void by

[623] *Supra* note 567.
[624] Axel Berger et al, "Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions inside the Black Box" (2013) 10:2 International Economics & Economic Policy 247 at 249. "BIT scholars typically emphasize that the treaties' credible commitment potential stems from their incorporation of enforceable promises to arbitrate treaty disputes (e.g., Walde 2005)." See also *Supra note 565* at 808.
[625] Jeswald W Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries" (1990) 24:3 Int'l Law 655 at 673.
[626] *Supra* note 565 at 808.
[627] *Supra* note 625 at 673.
[628] *Ibid.*
[629] Robert Hunter, *Supra* note 597; see also Ofodile Uche Ewelukwa, *Supra* note 597 at 198.

supplying an international rule of law that provides both investor-friendly substantive rules and a supporting institutional structure to enforce those rules."[630]

In conclusion, in the current investment-friendly context, the protective function of BIT has a very weak impact on the attractiveness of FDIs. BITs have become credible commitments by means of investor-state dispute settlement. "The need for [such] credible legal protection against discriminatory and discretionary treatment results from the incentive of host country governments to modify the terms of investment in the post-establishment phase."[631] BITs play a preventive and supplementary role in protecting foreign investors against the detrimental measures of host countries, only when host countries treat foreign investor badly.

4.1.2 The decision-making approach

The 'functional approach' fails to prove the direct causal relationship between BIT protections and the increase of foreign investments. It suggests that protections offered by BITs reduce political risks and solve collective action problems in general, however, their impact is ambiguous.[632] Considering the failures of the 'functional approach', another approach investigates whether the presence of BITs meaningfully influences individual investment decisions, moreover, whether foreign investors take the presence of BITs into account when deciding where to invest.[633] The general interest is in the decision-making processes of foreign investors.[634] If the "BIT protective function" approach understands the relation between BIT and FDI from the "macro legal side"[635] of BITs, the "investment decision making" approach justifies the micro impact of BITs on investment decision-making process.

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[630] *Supra* note 565 at 807-808.
[631] *Supra* note 624 at 249.
[632] *Supra* note 570 at 11.
[633] *Supra* note 565 at 805.
[634] *Supra* note 570 at 2.
[635] *Supra* note 562 at 90.

"With the possible exception of certain subsidized government enterprises, investors are concerned about two factors in making and managing their investments: return and risk. Indeed, one can say that return and risk are the driving factors behind all investment decisions."[636] "Because of the fundamental importance of the investor's evaluation of risk and return in making an investment decision, the basic thrust of host country incentives and guarantees is either to raise the expected rate of return that the investor would otherwise earn or deduce the risk to which it would be otherwise subjected to the point that the investor judges that the project with the promised incentive affords it a satisfactory rate of return at an acceptable level of risk. Thus, for example, a host state that is prepared to grant a tax exemption on a foreign investment project income is hoping to influence the initial investment decision by increasing the anticipated rate of return to the investor, and a host government's proposed agreement to arbitrate any disputes with the investor before an international tribunal has the effect of reducing the perceived political risk of the project.

Accordingly, one can group incentives and guarantees into two categories: (1) those that seek to increase investment returns, such as tax exemptions, subsidies, and agreements to purchase products at a minimum price; and (2) those that reduce investment risks, such as guarantees to provide foreign exchange for debt servicing, agreements for the settlement of any eventual disputes by an international forum, and guarantees against nationalization or expropriation except upon prompt, adequate, and effective compensation."[637]

Thus, some studies try to understand how the provisions of a BIT, usually on a provision-by-provision basis, to minimize risks and maximize returns during the period of investment affect the investment decision-making process.[638] Their general interest is in the decision-making processes

[636] *Supra* note 304 at 26.
[637] *Supra* note 336 at 100-101.
[638] Rudolf Dolzer & Christoph Schreuer, *Supra* note 374 at 21.

of foreign investors.[639] It is suggested that BITs have little or no impact on investment decisions,[640] however, even when leaving aside this conclusion, this approach to the problem itself is flawed. To suggest that BITs have either a positive or a negative impact on investor decision-making is not appropriate as the provisions of a BIT never directly deal with the rights or duties of foreign investors.

First, unlike national law or investment contracts, international law generally does not directly address investors.[641] While BITs "may impose on States duties (or recognize rights and competencies) that concern investors, to their benefit or to their detriment, they normally do not deal directly with [investors,] TNCs or their affiliates by expressly recognizing their rights to or imposing obligations on them."[642] BITs limit harmful state measures or government acts and the state's authority to intervene in the operation of foreign investments, which, indirectly affects foreign investors. In recent years, "the development of international legal norms for the protection of human rights and for the suppression of international crimes and terrorism is increasingly bringing individuals within the ambit of international law as to rights as well as duties established by international law,"[643] however, there is obviously no clear and ready-made analogy to business activities.[644] While, in a number of areas, such as competition and restrictive business practices, "the contents of international standards for TNC activities are becoming increasingly clear and definite,"[645] "it is clear that international standards relating to TNC conduct have by no means reached the stage of legal perfection that would render them capable of being [directly invoked by

[639] *Supra* note 570 at 2.
[640] *Supra* note 565 at 828.
[641] *Supra* note 608 at 29.
[642] *Ibid.*
[643] *Ibid.*
[644] *Ibid.*
[645] *Ibid.*

foreign investors].”[646] Instead of directly addressing the right and duty of investor, BITs contribute to the creation of a favourable legal framework that foreign investors are increasingly taking into account when making investments.[647]

According to the “investment decision” approach, BIT provisions will be categorized into two categories: those that reduce investment risks such as provisions regarding issues of expropriation, fund transfer, losses by wars and dispute settlement etc., and those that increase investment returns such as provisions on issues of taxation and admission, etc. Investors will take BIT’s efforts to minimize risks and maximize returns, wholly or on a provisional basis, into account when making investment decisions. However, such provisions never directly deal with the rights or duties of foreign investors. It is very awkward to conclude that foreign investors make decisions based on BITs that never directly addresses them.

A BIT cannot be directed at foreign investors, it even, expressively refers investors to the legal regime of host country. The “relative standards” of national treatment and most-favoured treatment strongly reflects this. “The most common standards of treatment in use in IIAs are the “most-favoured-nation” (MFN) standard, the national treatment standard and the standard of “fair and equitable” treatment. The first two are known as relative (or contingent) standards, because they do not define expressly the contents of the treatment they accord but establish it by reference to an existing legal regime, that of other aliens in the one case and that of host State nationals in the other. The legal regime to which reference is made changes over time, and the changes apply to the foreign beneficiaries of MFN or national treatment as well.”[648] Instead of addressing any definite contents, BITs refer the matter to the domestic legal regime of host countries.

[646] *Ibid* at 30.
[647] *Ibid* at 31.
[648] *Ibid* at 25.

Additionally, BITs merely provide general principle on some essential issues that may concern foreign investors. When an investor decides where to invest, he or she has to estimate the details that influences risks, costs and returns. The details are covered either by investment contracts or the domestic laws of the host countries. The BIT merely requires foreigners to be treated no less favourably than nationals or other aliens. Details regarding the maintenance, management, operation, expansion, sale etc. are regulated by domestic laws.

Actually, it has been proven that BIT's impact on investment decision-making is over-weighted and not even close to that of domestic laws, investment contracts or regional integration arrangement. It is the local law and the investment contract that truly deal with every specific aspect of investment operation. Both of them have a highly noticeable impact on investment decisions. Like BITs, regional integration agreement cannot directly address investors, but through a different manner, it does indeed significantly affect the investment decision. The author will discuss this later.

Domestic laws are immediately and directly applicable to foreign investments once admitted in the host country. The TNCs or foreign affiliates "are subject to that country's jurisdiction and operate under its legal system."[649] The complex operations of a modern enterprise usually give rise to a range of issues such as land purchase, creation of a new company, issuance of operation licenses, protection of intellectual property rights, contracts of sale, labour employment, acquisition of raw material, environment protection, finance support, etc. Every aspect of such an investment operation "functions under the laws in effect in the host country."[650] It is obvious that the domestic legal regime of the country concerned can directly affect the outcome of investment decisions. For example, favourable tax treatment can directly increase investment returns, a

[649] *Ibid* at 28.
[650] *Ibid* at 31.

preferential contractual arrangement may substantially cut off the transaction costs, and "the issuance of construction permits, and operation licences can affect the profitability of an enterprise and may even sometimes lead to its closing down."[651]

Furthermore, "the complex operations of a modern enterprise give rise to a host of legal problems that may lead to disputes."[652] One kind of possible dispute is that between private parties. "Classical international law has generally not been directly concerned with disputes between private parties."[653] BITs merely deal with investor-state disputes and state-state disputes. Disputes of private parties are largely resort to the national court or arbitral system of the host countries. Therefore, "the presence of a properly functioning national system of administration of justice is a central element"[654] that foreign investors take in account when decide where to invest. This, once again, proves the significant impact of domestic laws on investment decisions. Due to the immediate and direct impact on every aspects of investment operations, some studies suggest that favourable domestic laws are more effective in attracting FDIs. In contrast, "the main problems of international relevance that may arise in this respect" merely "concern the possibility of restrictive and/or discriminatory national measures" that indirectly affect the operations of foreign affiliates.[655]

Investment contracts are also able to affect foreign investors' decisions, even more significantly and directly in specific areas. In many cases, host countries adopt the targeted investment contract "to attract investors to specific sectors needing foreign capital and associated know-how."[656] Foreign investors are very pleased to create "their own individualized 'BITs' " with host countries

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[651] *Ibid.*
[652] *Ibid* at 35.
[653] *Ibid.*
[654] *Ibid.*
[655] *Ibid* at 28.
[656] Ofodile Uche Ewelukwa, *Supra* note 597 at 204.

"in the form of a legally binding investment contract,"[657] as the contracts often include terms "quite one-sided in favor of foreign investors."[658] Investment contracts "essentially function as personalized, investment-specific 'BITs'."[659] Such contracts can include any project-specific terms that immediately and directly favour foreign investors. For example, the contract can grant exemptions for foreign investors from national tax laws, offer special subsidies and public services to foreign investors,[660] and include binding and enforceable arbitration agreements,[661] etc. This will definitely increase returns and reduce risks. By imposing specific contractual obligations on host countries, investment contracts serve as a significant incentive to FDIs and play a dominant role in the investor decision-making process.

The conclusion that BITs have more or impact on investment decisions is weak and undefinitive, as "[t]he decision to invest is affected by a variety of factors".[662] With reference to the complexity of modern investments, one should keep in mind that BITs are merely one of the numerous determinants in the FDI decision making,[663] and it may even be difficult to "determine with any precision whether the existence of a BIT is one of them."[664] The factors that foreign investors take into account include much more than just the existence of BITs. Factors such as macroeconomic policies, the state of financial development, the quality of institutions, peace, openness and security, market size, economic growth, the quality of infrastructure, labour costs and labour quality, the personal relations a firm has with local partners and customers, and even ethnicity and social

[657] *Supra* note 565 at 811.
[658] *Supra* note 570 at 2.
[659] *Supra* note 564 at 43.
[660] *Supra* note *570* at 2.
[661] *Supra* note 565 at 811-812.
[662] *Supra* note 625 at 673.
[663] *Supra* note 608 at 378.
[664] *Supra* note 625 at 673.

connections[665] "typically bear most heavily on the decision (UNCTAD, 1994)."[666] In fact, many studies "suggest that BIT has little or no impact on investment decisions, a result consistent with research suggesting that the formal trappings of [international] law often have only modest effects on private behavior."[667]

4.2 By limiting the policy space of the host country, BITs are used to improve the host country's investment climate

Either on the macro or the micro legal side, "the effectiveness of BITs as a means to attract international investments has been called into question."[668] While both theories (the "function approach" and the "decision-making approach") fail to address the link between BIT and FDI, one should not disregard BITs. Rather than witness BIT's failure in attracting FDIs, we tell such a long story to indicate that old approaches to the matter of BIT's impact on FDI are problematical, and to figure out through which exact channel that a BIT affects FDI.

First, both approaches reach the conclusion based on a static analysis of the individual provisions. They view BIT provisions in isolation and ignore the fact that all provisions interact with each other. The "function approach" evaluates the object and purpose of provisions, or of what the provisions seek to accomplish,[669] then links such functional incentive to FDI inflow. The "function approach" mainly focuses on the provisions for treatment and investment protection. The treaty may, therefore, attract FDIs in view of the protection of those provisions. The "decision-making approach" analyses how BIT's provisions affect investment decision.[670] The advocates of

[665] Ofodile Uche Ewelukwa, *Supra* note 597 at 203-204.
[666] *Supra* note 608 at 378.
[667] *Supra* note 565 at 828.
[668] *Supra* note 72 at 617.
[669] *Supra* note 608 at 22.
[670] *Ibid.*

"decision-making approach" believe that some provisions could increase investment returns, and some might reduce investment risks, and therefore affect the investment decision and further increase the FDI inflow. This static analysis on BIT's substantive provisions, either wholly or individually, fails to prove the strong link between BIT and FDI; as this is not how a BIT works. When we examine a BIT's impact on FDI, one must see it as a dynamic process that: 1) all provisions interact with each other, and 2) the objectives, overall structure and substantive provisions as well as the application of the treaty are interconnect with each other.

All provisions of a BIT interact with the others. A very typical example is the provisions on the definition of "investment" and "return". "The elements of the term 'returns' often mirror the elements of the term 'investment'. 'Investment' includes shares in a company, and thus 'returns' includes dividends. Because 'investment' includes debt, 'returns' includes interest payments. Because 'investment' includes intellectual property, 'returns' includes royalties. And because 'investment' includes contracts, such as professional or management service agreements, 'returns' includes fees."[671]

Besides, "[t]he meaning of a term may change, because of the way in which another term is defined or because of the formulation of a particular rule. Thus, the definition of 'investment' may determine the exact scope of a provision concerning expropriation; at the same time, the exact formulation of a provision on expropriation may in fact supplement or amend the formal definition of 'investment'."[672] "Many investment agreements impose restrictions on the right of the host country to expropriate investment, including in particular an obligation to pay compensation for expropriated investment. The term 'investment' indicates the types of interests for which a host

[671] *Ibid* at 133.
[672] *Ibid* at 23.

country must pay compensation in the event of an expropriation."[673] "For example, many investment agreements define 'investment' broadly enough to include debt as well as equity interests. Thus, expropriation of a company could give rise to an obligation to compensate not only the owners of the company, but its creditors as well. Similarly, where the definition of 'investment' includes concessions or administrative permits and licenses, action to abrogate such administrative acts may constitute compensable expropriation."[674] Like the provision on expropriation, "[t]he term 'investment' is important to provisions on admission and establishment of investment because it describes the types of activity by foreign investors that the host country must allow (to the extent required by the provision). Where 'investment' includes all assets, this provision potentially opens the host country's economy to virtually every form of economic activity. For example, the typical broad definition of 'investment' combined with an unqualified right of establishment would grant to foreign investors in principle the right to acquire land and mineral resource rights and form companies or other legal entities to engage in every kind of activity, commercial or otherwise, in which such entities may engage. Further, inclusion of contract rights within the meaning of 'investment' would suggest that the right to establish investment might include the right of covered investors (typically entities from the home country) to enter into contracts which generate property interests or assets in the territory of the host country."[675]

The objective, overall structure, substantive provisions as well as the application of the treaty are all interconnect with each other. In any BITs, "definitions are not neutral and objective descriptions of concepts; they form part of an instrument's normative content. They determine the object to which an instrument's rules apply and thereby interact intimately with the scope and purpose of

[673] *Ibid* at 136.
[674] *Ibid* at 137.
[675] *Ibid* at 135.

the instrument. Particular terms may be given a technical meaning, which may or may not coincide with their 'usual' or 'generally accepted' meaning. The meaning of a term, as found in a definition in a particular instrument, may be specific to that instrument, and may or may not be easily transferable to other instruments and contexts."[676] For example, "the definition of 'investment' in [an] agreement will not be binding on the ICSID Tribunal, as it reflects the specific agreement of the parties."[677]

Furthermore, the provision on "performance requirement" might not appear in a protection-oriented BIT. "Beginning in the 1960s, and increasingly in the decades that followed, in order to enhance the local economy's benefits from FDI, host countries sought to impose on foreign investors, usually as conditions for admission or for the grant of special incentives, requirements concerning certain aspects of their operations, such as local content and export performance. By replacing stricter and more rigid regulations, such "performance requirements" contributed for a time to the liberalization of FDI admission, at the cost of creating trade distortions." [678] "Developing country arguments that performance requirements were necessary to counter possible restrictive practices of TNCs and to enhance the beneficial effects of FDI".[679]

To conclude, provisions of BIT are never performed individually, but work with the other provisions and function within the overall structure to serve certain specific objectives.

Additionally, both approaches link BIT provisions to the interests of foreign investor. From the perspective of foreign investors, to attract FDI a BIT has to serve their interest in some way or other. Therefore, the "function approach" concludes that BITs are able to attract FDI because they reduce political risks and solve collective action problems that investors may suffer in the host

[676] *Ibid* at 23.
[677] *Ibid* at 363.
[678] *Ibid* at 29.
[679] *Ibid.*

country. The "decision-making approach" indicates that BIT affects investor's interests by either reducing investment risk or increasing investment return. However, as previously mentioned, BIT provisions merely provide very general principles on limited issues and never directly address the right or duty of foreign investors, so it is of limited usefulness and significance to categorize the provisions and analyse their direct effects on investors' interests.

The BIT relies on, but more importantly improves, the national legal regime of the host country by limiting their governmental authority. The relative standards of national treatment and MFN treatment strongly support that the BIT adheres to domestic laws of host country. But more often, the BIT bypasses the "bad" national legislation and prevents FDIs from being treated unfavorably by harmful government actions. The BIT directs government actions and measures, and, therefore, like all other international instruments, it can limit the authority of the host country to certain extent. One should analyse BITs' impact on FDI from the view of how BITs improve the legal framework of the host country by limiting the autonomy of government of the host country.

BIT attracts FDI, not by protecting investors or by affecting investment decisions, but by limiting the policy-making space of the host country to improve the legal framework of the host country, contributing to a favorable investment climate under which foreign investment operates. This point of view is based on the recognition that investor benefits in the situation where "national, regional and world markets function efficiently and [where] the impact of Government measures that adversely affect or distort their functioning is minimized. In an increasingly integrated world economy, however, the proper functioning of the market depends not only on the control of Government measures that seek to regulate, or otherwise directly influence, the conduct of foreign investors, but also on the presence of a broader national and international legal framework protecting the market from public or private actions and policies that distort its operation

(UNCTAD, 1997)."[680] The BIT is designed to improve the legal framework by limiting the government's interference in investment operations to ensure the proper functioning of the market. This is because, "like all international agreements, IIAs [BITs] typically contain obligations that, by their very nature, reduce to some extent the autonomy of the participating countries."[681] By limiting, to a certain extent, the freedom of action of the state's party to them, BITs limit the policy options available to decision-makers of the host countries.[682]

It is worth mentioning that the BIT functions in a supplementary manner to the domestic legal regime of host country. Foreign investment is mainly affected by domestic conditions where it is located.[683] The domestic legal regime of the host country constitutes the central part of legal framework under which the foreign investment operates.[684] It is also a central element of a country's investment climate.[685] The BIT only provides "supplementary legal protection and remedies"[686] when domestic legal system cannot act adequately, fairly or impartially; for example, "when the investment is threatened or actually harmed by host government action".[687] In this view, the legal framework for investment climate is established through both national legislation and the BIT, sometimes as well as the regional integration agreement (and other international instruments) if there is one. To examine what the BIT can do to the formation of the legal framework, one must pay attention to the interaction between the national legal regime, BIT and the regional integration agreement: to what extent the BIT limits the policy space of the host country is reflected in its national legislation, and if the BIT is coordinated with the regional integration arrangement. Both

[680] *Ibid.*
[681] *Ibid* at 39.
[682] *Ibid* at 37.
[683] *Supra* note 570 at 2.
[684] *Supra* note 608 at 35.
[685] *Ibid.*
[686] Robert Hunter, *Supra note 597*; see also Ofodile Uche Ewelukwa, *Supra* note 597 at 198.
[687] *Supra* note 625 at 673.

the function approach and the decision-making approach do not discuss BITs' relation with national legislation or regional integration agreement. Instead, they propose that the treaty itself can individually affect FDIs in some way or other.

BITs are used to improve the host country's investment climate. "If countries concentrate on making special deals with foreign direct investors, we speculate that they might neglect measures that improve the investment climate overall. One could study this problem at the level of individual deals to see if their terms permit multinationals to opt out of restrictive local rules or to get better protections from costly government policies. This is an important research priority, but it is beyond the scope of this paper. Instead, we focus on BITS, the one generic policy that clearly singles out foreign direct investors and consider their effects. However, we realize that our results will not be definitive. BITs are a relatively new phenomenon in international business, and their impact is only beginning to be felt."[688]

In conclusion, "it is by now generally accepted that host countries can derive considerable benefits from increased FDI (UNCTAD, 1999a; see also the chapter on FDI and development in volume III)...Governments participate in IIAs [BITs] because they believe that, on balance, these instruments help them attract FDI and benefit from it."[689] One does not have to be skeptical of BITs' positive impact on FDI. However, there is a need to better understand the way through which the treaty affects FDI. The following sections will, based on the dynamic analysis on BIT provisions, from the view of limiting policy margin through the interaction between the national legal regime, BIT and RIA, discuss what investment climates the existing China-Africa BITs and the proposed China-OHADA BIT create and their impacts on China's investment in Africa.

[688] *Supra* note 570 at 3.
[689] *Supra* note 608 at 37.

4.3 Impact of the regional integration arrangement on the build-up of FDI-friendly climate

The African countries have long time been aware of the importance of FDI to their economies and make great efforts to attract FDIs from all over the world. The African countries update their national laws and policies in line with the universally accepted international rules; participate in various regional integration agreements and conclude numerous BITs with capital-exporting countries. Their common goal is to establish a legal framework aimed at creating an open, active, stable and predictable investment climate, and, therefore, to increase the injection of foreign investments in various sectors of Africa's economy. My dissertation hopes to increase China's private investments in Africa by arguing for a new generation of BITs between China and OHADA region, aimed at forming an open, active, stable and predictable Sino-Africa investment climate. The first question is whether this bilateral arrangement between China and OHADA is really necessary for the establishment of such an investment climate and the increase of Chinese investments in Africa.

The challenge over the value of this China-OHADA BIT firstly comes from the fact that many FDIs occur between countries without any bilateral investment agreements. "For example, Brazil is often cited as an example of a country that has successfully attracted sensible foreign investment without either becoming a party to ICSID or ratifying or concluding many BITs with capital-exporting countries."[690] Moreover, there is no BIT between China and the US, two of the top economies in the world. "Certainly, major investments have been made when no BIT existed at all between the host country and the investor's home country. For example, between 1978 and 1989, approximately 350 United States companies invested more than $3.5 billion in China despite the

[690] *Supra* note 562 at 86.

fact that no BIT existed between the two centuries, and that BIT negotiations had been dragging on for over five years. On the other hand, one does not know whether additional investments would have taken place if the United States and China had signed a BIT. Similarly, there have been cases when investments have been made in countries where the investor was unaware of the existence of a BIT."[691]"[T]here is no conclusive evidence to suggest that the conclusion of a BIT between a [home] country and [host] country has necessarily increased substantially the flow of investment from the former to the latter."[692] It, therefore, seems that the China-OHADA BIT is not that necessary to China-Africa FDIs.

In addition, as previously discussed, the investment climate is affected by many factors, such as national legal regime, relevant regional arrangement, BIT, macroeconomic policies, financial development, institutional efficiency, market size, economic growth, infrastructure, labour costs and quality, peace and security, and even ethnicity and social connections, etc.[693] The China-OHADA BIT merely serves as one of these elements and is not the sole factor of the China-Africa investment climate. As previously mentioned, the African countries have updated their national laws and policies in line with the universally accepted international rules and become actively involved in various regional integration arrangements such as the OHADA, and, particularly, the African countries seek to conclude BITs with China. To date, there has been 35 BITs concluded between China and individual African countries. This raises the questions; Aren't these existing arrangements sufficient to form an open, active, stable and predictable investment climate between China and Africa? Is the China-OHADA BIT redundant?

[691] *Supra* note 625 at 673.
[692] *Supra* note 562 at 86.
[693] Ofodile Uche Ewelukwa, *Supra* note 597 at 203-204.

One might say that the China-OHADA BIT links China to a much larger economy - the OHADA region, instead of small and separate individual African economies. First, as previously mentioned, a BIT is not mandatory for FDIs between large economies, like China and the US. Second, it should be the OHADA, by reducing transaction costs and enlarging market size, that creates a FDI-friendly climate; and by taking advantage of market size and economies of scale, that attracts FDIs from all over the world, and, of course, from China. Even without the China-OHADA BIT, as at present, the OHADA can effectively attract global foreign investments, and of course, Chinese investments. It is the regional arrangement of the OHADA that better respond to the needs of Africa's economic realities. The regional integration arrangement of the OHADA changes the economic factors – transaction costs, market size and economic growth - which typically and mainly affects the FDI, making the China-OHADA BIT redundant. However, it is in fact the regional arrangement of the OHADA that makes the China-OHADA BIT necessary.

To solve this problem, we need to start by discussing the impact of regional integration on FDI.

"There has been an explosion of regional integration agreements (RIAs) in the last decades. Almost every country in the world is a member of one or more RIAs and more than half of world trade occurs within these trading blocs."[694] The regional integration, often termed as 'economic integration', can be defined as "the institutional combination of separate national economies into larger economic blocs or communities and it is basically concerned with the promotion of efficiency in resource use on a regional basis."[695] Different regional arrangements have different contents and goals, and vary in terms of degree or depth ranging from free trade areas, customs unions, common markets and economic and monetary unions.[696] The regional integration may go

[694] *Supra* note 323 at 134.
[695] *Ibid* at 135-136
[696] *Ibid* at 136, "Free trade areas may be regarded as the weakest form of economic integration. In free trade areas, all impediments to trade such as import tariffs and quantitative restrictions are eliminated among parties and each

beyond the preceding economic integrations and take form of legal integration, finally benefiting the economy of the area, such as our targeted subject of study the OHADA.

Some evidence shows that regional integration is associated with greater FDI inflows from outside the area (UNCTAD 2009).[697] "RIAs are considered a means to improve member countries' chances to attract FDI. RIAs affect several factors on the list of possible FDI determinants, including effective market size, economic growth and trade costs."[698] "As noted by UNCTAD (2000: 21): 'Economic integration increases market size and enhances economic growth. As market size and economic growth are in turn important determinants of FDI inflows, regional integration is often expected to stimulate FDI.'"[699] As a matter of fact, "promoting investment is a prominent objective of many RIAs."[700] The logic is that the RIA will generally reduce internal barriers to trade[701] and combine separate economies into a larger market[702] to take advantage of "sufficient utilisation of resources and exploitation of economies of scale",[703] and thus, will increase the volume of investments.

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member country can implement its own customs tariff with respect to third countries." The North American Free Trade Area (NAFTA) is the typical example of free trade areas. "Customs union is a second form of economic integration which involves all the provisions of a free trade area but also a common external tariff (CET) is implemented in member countries trade relations with the rest of the world…Central American Common Market (CACM) and the Caribbean Community and Common Market (CARICOM) are the examples of customs unions. One step up from a customs union is a common market which is composed of an internal market. Common market is an agreement signed between two or more countries that allow the free movement of capital, labor, goods and services across the borders of the member countries. A common market also requires the harmonization or coordination of economic policies in areas such as industrial policy, competition policy or taxation. The strongest and the most developed form of integration is economic and monetary union. Economic union contains making economic policy centrally, rather than harmonizing policy areas as in common market. In a monetary union a high degree of coordination or unification of monetary and fiscal policies are required as well as the adoption of a single currency and the establishment of a supranational central bank."

[697] *Supra* note 624 at 252.

[698] **Working Papers** IFW, Kiel, *Regional Integration and FDI in Emerging Market*s, No 1418 (2008) at 2.

[699] *Ibid,* n 1.

[700] Maurice Schiff & L. Alan Winters, *Regional Integration and Development* (Washington, DC: Oxford University Press, 2003) at 17

[701] Joel P Trachtman, "International Trade: Regionalism" in Andrew T Guzman & Alan O Sykes, eds, *Research Handbook in International Economic Law* (Cheltenham: Edward Elgar, 2007) 151 at 152.

[702] *Supra* note 323 at 136.

[703] *Supra* note 117 at 219.

There has been an emerging concern about the relationship between FDI and regional integration arrangements in recent years, coinciding with strong growth in both the number of RIAs and the value of FDI in economic development.[704] There are many different channels through which the RIA could potentially impact FDI.[705] The regional integration may affect the intra-regional FDI (member states as source countries invest in another member state) and extra-regional FDI (non-member states as source countries invest in any member states), the inward FDI and outward FDI, as well as the horizontal FDI (market-seeking FDI) and vertical FDI (efficiency-seeking FDI). In the context of the African continent, outward FDI rarely exists and most inward FDI is extra-regional.[706] So the following discussion will focus on the empirical studies of the regional integration's impact on the horizontal and vertical FDI from sources outside the region.

In fact, a large portion of FDI may not be placed squarely within either of these two categories, "but instead belong to a different class, one in which firms have multiple plants, as in the horizontal model, but produce different varieties of a final good, rather than a homogeneous good,"[707] as in the vertical model. The differentiation between horizontal and vertical FDI remains useful in this context, "even though the typology of FDI has become increasingly complex."[708] This is because "the type and motive of investment play an important role in determining how FDI is affected by RTAs (Barrell and te Velde, 2002)." The author, therefore, distinguishes extra-regional FDI as "between horizontal (market-seeking: affiliates selling similar products) and vertical (efficiency and natural resource seeking: affiliates exploiting efficiencies or control over inputs)."[709]

[704] *Supra* note 597 at 42.
[705] **Working Papers** IDB, *Regional Integration and the Location of FDI*, Working Paper No 414 (2003) at 3.
[706] *Supra* note 597 at 46.
[707] *Supra* note 705 at 6.
[708] *Supra* note 698 at 3.
[709] *Supra* note 597 at 45.

In the model of horizontal FDI, "mutinationals are firms with multiple production facilities producing a homogeneous good,"[710] one of which is located together with the company's headquarters in the home country and the other in the host country. Each production facility supplies the domestic market of either the host or the home country where it is located.[711] "The horizontal type of FDI tends to dominate when relative factor endowments and, thus, relative prices are similar in the home and the host country".[712] "The reason is that very different factor prices will make it too costly to produce in the higher cost country. Furthermore, for a given level of trade costs, multinational activity will arise across countries of similar sizes. Otherwise, a domestic firm in a large country will have an advantage in serving the smaller country through trade (since trade costs are incurred on a small trade volume), compared to a multinational which has to bear the fixed costs of producing in two locations."[713] The horizontal FDI "is motivated essentially by serving the local market of the host country or region, involving a horizontal replication of similar production lines in different locations."[714] Therefore, it is also called a 'market-seeking' FDI.

The horizontal FDI can be seen as a substitution of trade. The multinational activity in the horizontal model, therefore, "depends on the interplay between trade costs and [plant-level] economies of scale. In the absence of trade costs, there would be no reason for multinational production, since firms could concentrate their production in the home country, taking advantage of economies of scale and serving the foreign market through trade. As trade costs increase,

[710] *Supra* note 705 at 4.
[711] *Ibid* at 5.
[712] *Supra* note 698 at 3.
[713] *Supra* note 705 at 5.
[714] *Supra* note 698 at 3.

multinational production arises as long as plant-level economies of scale are not too high. In this sense, one can think of horizontal multinational activity as a 'tariff-jumping' strategy."[715]

While, in the vertical FDI model, the multinational is a single firm with a corporate sector in the home country and a production facility in the host country.[716] "As the corporate sector is more capital intensive than the production sector, firms localize each 'stage' of production to take advantage of the differences in factor prices. The model ignores trade costs, and the production facility produces for both the domestic market and the source country market. An implication of this model is that one would only expect to observe this type of (vertical) FDI taking place between countries with sufficiently different factor endowments, so as to ensure that factor prices do not equalize."[717] "The latter vertical type of FDI is motivated by international cost differentials and involves slicing up the value chain through relocating specific stages of the production process to where they are most cost effective to undertake." (Carr et al. 2001)[718] "A key difference between this and the horizontal model depicted above is that the production of each plant is not just for domestic consumption, but rather for both countries. Thus, this type of FDI does not substitute trade, as is the case with the homogeneous good horizontal model."[719]

The empirical studies suggest that "horizontal FDI from sources outside the region may be stimulated by the removal of trade barriers within the RIA. This is because effective market size increases. An external investor may now locate production facilities in one member country of the RIA and serve the local markets of several or all member countries from there."[720] "The increase in the size of the market can generate new investment in activities subject to economies of scale,

[715] *Supra* note 705 at 4.
[716] *Ibid.*
[717] *Ibid.*
[718] *Supra* note 698 at 3.
[719] *Supra* note 705 at 6.
[720] *Supra* note 698 at 4.

which might not have been profitable before the RIA was formed."[721] However, the regional integration arrangement may not necessarily lead to the increase of horizontal FDI. Multinational corporations make horizontal investments to bypass high tariffs. Since there will be a fixed cost of establishing a new plant,[722] if it is cheaper to pay the external tariff, there is no need "jump" it and foreign investors may supply each of the individual countries through trade.[723] "[T]he external tariff has to be high enough for this channel to be relevant."[724]

"The formation of the RIA can also facilitate vertical investment within the region of production by multinational corporations based outside the region",[725] "because lower trade costs will reduce the costs of establishing international production networks across member countries of an RTA."[726] The multinational corporations can take advantage of the sufficient utilisation of resources and establish efficiency-seeking affiliates in different countries within the regional grouping.[727]

To test these theoretical predictions, many studies try to quantify RI's impact on FDI by either the "0/1 dummy variable model" or "gravity model". Some studies "examined the individual regional groupings: Andreas Waldkirch (2003) and A. Monge-Naranjo (2002) for NAFTA, Blomström and Kokko (1997), Daniel Chudnovsky and Andreas Lopez (2001), for MERCOSUR [Mercado Común del Sur], and UNCTAD [United Nations Conference on Trade and Development]."[728] Other studies systematically evaluated "the effects of regional integration of FDI for a large sample

[721] *Supra* note 705 at 9.
[722] *Ibid.*
[723] *Ibid.*
[724] *Ibid.*
[725] *Ibid.*
[726] *Supra* note 597 at 45.
[727] *Ibid.*
[728] *Ibid* at 50.

of countries,"[729] and attempted to reach generalized verdicts regarding the effects of RIAs on inward FDI sourcing from outside the region. For this purpose, "Y. E. Levy et al. (2002) address the issue of RI [regional integration] and FDI at a basic level, using dummies for regions, applying the analysis to the OECD [Organisation for Economic Co-operation and Development] database covering"[730] FDI from 20 OECD source countries to 60 host countries, from 1982 through 1998. "One shortcoming of this data is that it does not cover FDI between developing countries. Yet, it is the most complete source available for bilateral FDI, which is a key ingredient to study the effects of integration on foreign investment."[731] Te Velde and Bezemer "examined the relationship between RI and FDI in developing countries."[732] They "estimated a model explaining the real stock of United Kingdom and United States FDI in developing countries, covering 68 (for United Kingdom FDI) and 97 (United States FDI) developing countries thus moving beyond analyses on the basis of the familiar OECD database."[733] All these studies came to a consensus that regional integration leads to further extra-regional FDI, especially vertical FDI.

The generalized conclusion that the RIA leads to the increase of inward FDI from outside the region is not definitive because FDI between developing countries has not been examined (FDI between developed countries and FDI sourcing from developed countries in developing countries have been examined) and some studies argue that "both FDIs and RIAs are too diverse to allow for generalized verdicts regarding the effects of RIAs on FDI flows to member countries."[734] "FDI may respond differently depending on … its motive (e.g., market-seeking or efficiency-seeking). A host of specific characteristics may determine whether, to which extent and where exactly an

[729] *Supra* note 705 at 11.
[730] *Supra* note 597 at 49.
[731] *Supra* note 705 at 11-12.
[732] *Supra* note 597 at 63.
[733] *Ibid* at 64.
[734] *Supra* note 698 at 2.

integration scheme has the desired effects on FDI; e.g., membership (North-South or South-South integration), the type of integration (institutionalized or market-driven), its degree on paper (ranging from free-trade area to common market) as well as in actual practice (implementation deficits), and the treatment of outsiders (fortress or open regionalism)."

However, as stated, most FDIs cannot be classified clearly in one or other of these categories. They have both the features of horizontal and vertical FDI. The insistence of a possible decline in horizontal FDI that the RIA may bring is unsubstantiated. Besides, to what extent and where exactly a regional integration arrangement may affect FDIs cannot be clearly predicted and should be based on case-by-case studies. When viewed as a binary (yes or no) question, people tend to reach the generalised conclusion that regional integration can increase the extra-regional FDI into the entire region. For example, Uttama and Peridy say that the RIA increases further market potential and thus increases FDI.[735] Feils and Rahmanand Rahman state that "[T]he formation of an RIA generally leads to an increase in inward FDI into the entire region (e.g., Dunning 1997)."[736] Yeyati Eduardo Levy et al. state that "whatever the motive for FDI, the extended market effect should result in more FDI for the RIA as a whole."[737] Wolf et al. conclude that "[F]inally, although joining an RIA may lead to a reduction in certain types of FDI, if formation of RIAs leads to improvement in the members' economic effectiveness, overall FDI inflows should rise."[738] It is with this understanding that the African countries actively participate into various regional integration arrangements.

[735] Nathapornpan Piyaareekul Uttama & Peridy Nicolas, "The Impact of Regional Integration and Third-Country Effects on FDI" (2009) 26:3 ASEAN Economic Bulletin 239 at 248.
[736] Feils Dorothee & Rahman Manzur, "The Impact of Regional Integration on Insider and Outsider FDI" (2011) 51:1 Management International Review 41 at 44.
[737] *Supra* note 705 at 9.
[738] *Supra* note 736.

"Most African countries have relatively small market sizes due to their small populations and per capita incomes."[739] They consider small market size as one of the main reason "why Africa has fallen behind other regions in attracting FDI."[740] "A small market size deters the inflow of FDI",[741] and therefore Africa "seeks to enhance and strengthen regional economic integration in order to enlarge the market."[742] The reason why the African countries want to pool their sovereignties with others in the area of economic management is that they find their nation states are too small to act alone.[743]

"African leaders have long recognised the need for closer regional ties as a way to overcome the fragmentation of the continent, one of the major constraints to its economic development. Economic integration is perceived by many African leaders and governments as a promising vehicle for enhancing economic and social development in their respective countries. The idea is reinforced by the relatively successful experiences of integration between Western European countries, the United States-Canadian Free Trade Agreement and other integration schemes among countries in Latin America and in the Pacific and Asian region."[744] In 1980, the Lagos Plan of Action and the Final Act of Lagos set out the vision for an integrated Africa.[745] "The Lagos Plan envisaged that, via regional economic communities, the challenges of Africa's poverty and underdevelopment would be overcome. Some of the milestones of the Plan included the strengthening of existing regional economic institutions, creation of new ones, tariffs stabilisation and harmonisation of tariffs system across the different regional economic communities."[746] The

[739] *Supra* note 117 at 221.
[740] *Ibid* at 219.
[741] *Ibid* at 221.
[742] *Ibid*.
[743] *Supra* note 700 at 6-9.
[744] *Supra* note 3371 at 103.
[745] *Supra* note 91 at 300.
[746] *Ibid.*

theme of regional integration has been restated in "the Special United Nations Session on Africa in 1986 and numerous other high-level statements and reports on African policy and development strategy."[747]

"Over the last half century, there has been the development of over ten different regional trade blocs in Africa. Most African countries belong to at least three or more separate regional integration agreements."[748] These include the West African Economic Community (CEAO), the West African Monetary Union (UMOA), the West African Economic and Monetary Union (UEMOA), the Economic Community of West African States (ECOWAS), the Central Africa Customs Union (UDEAC), the Economic and Monetary Community of Central African (CEMAC), the Central African Customs and Economic Union (UDEAC), the Communauté Economique des Etats de l'Afrique Centrale (CEEAC), the Preferential Trade Area for Eastern and Southern African States (PTA), the Southern African Development Community (SADC), the South African Customs Union (SACU) the African and Organisation Commune Africain et Mauricienne (OCAM); the Comité Permanent Consultatif du Maghreb (CPCM); the Economic Community of the Great Lakes Countries (CEPGL), the New Economic Partnership for Africa's Development (NEPAD) and the Organisation for the Harmonisation of Business Law in Africa (OHADA), etc.[749] Although some of them do not work well and make very limited progress towards meaningful FDI increase,[750] such as the CEEAC, and their achievements so far remain small in comparison to other developing countries or in the context of worldwide FDI increase, Africa's regional schemes in fact lead to the injection of FDIs into the continent.

[747] *Supra* note 337 at 104.
[748] *Supra* note 91 at 299.
[749] *Supra* note 337 at 104.
[750] *Supra* note 91 at 299.

However, it is too early for the African countries to celebrate their success. It has been unanimously confirmed that "new FDI will certainly not be evenly distributed"[751] among the constituent member states, and "existing FDI stocks in the region may be relocated."[752] That is to say, while the RIA may bring more FDI to the entire region, there will be winners and losers. First, individual constituent members may not all observe gains of new FDI inflows.[753] For example, Brazil is proved to benefit most from MERCOSUR after it was established. Other member states cannot gain as many FDI shares as Brazil. Some may even see losses of existing FDIs "due to stiffer competition from their more handsome partners."[754] For instance, before a regional integration area is launched, a multinational might have a horizontal FDI in several member states in a given region. When barriers to trade within the region are eliminated, the firm may choose to concentrate production in a single plant and shift to location with greater efficiency, and supply the rest through trade.[755] "RIA members are unlikely to equally share FDI-related benefits."[756] Access to a regional integration area may even worsen the FDI environment in those member states (with less efficiency) who are not well-prepared. "A key question, then, is what determines whether a country is a winner or a loser in this game."[757] "What exactly can a country do to make itself more attractive to foreign investors."[758]

Many factors on the side of host country are found to be associated with the location of FDI, including economic factors such as economic growth, market size, labour skills and labour productivity, infrastructure, financial and technological development; institutional factors such as

[751] *Supra* note 705 at 9-10.
[752] *Ibid*.
[753] *Supra* note 736 at 42.
[754] *Supra* note 705 at 21-22.
[755] *Ibid* at 9-10.
[756] *Supra* note 698 at 24.
[757] *Supra* note 705 at 10.
[758] *Ibid* at 23.

institutional efficiency, maturity of regulatory framework, availability of project finance, investment policy, tax treatment; and natural factor such as raw materials, distance to sources, etc.[759] Many studies have begun to address the importance of preceding factors for inward FDI (Wheeler and Mody, 1992; Dunning, 1993; te Velde, 2003). They found that, first, those factors changed/enhanced by RIA are less relevant to the location of potential FDI such as transaction cost and market size. Feils and Rahman have proved that "[F]ollowing accession to an RIA, an individual RIA member's market size becomes less important as a determinant for inward FDI."[760] "The FDI literature has shown that the host country market size is an important positive determinant of inward FDI (see, for example, Globerman and Shapiro 2003). However, following accession, the individual member's market size may no longer be a limiting factor since the RIA pact increases the "size of the country" (Buckley et al. 2001, p. 252) and the entire RIA may be accessed from any member country. Therefore, market size should be less important as a determinant of FDI inflows."[761]

Additionally, factors serving as the characteristics of the host countries "make them relatively more or less attractive than their RIA partners as a potential location for foreign investment."[762] As stated, the regional integration arrangement makes some factors weaker and less important to the attractiveness of FDI in individual member states. While, some other incentives, such as rich resource, preferential policy, high labour efficiency, high economic growth, etc., which constitute location-specific advantages with reference to the motivations of multinational corporations will, to certain extent, determine the location of FDI. For example, a palm oil multinational company can enjoy an enlarged market no matter where it locates within a given region, then, it will probably

[759] *Supra* note 597 at 53-54.
[760] *Supra* note 736 at 44.
[761] *Ibid.*
[762] *Supra* note 705 at 3.

establish its production facility near to the raw material. Member states with rich palm plantation will, therefore, be more attractive to this multinational. In conclusion, within a regional integration area, the location of the potential FDI depends on "the interaction between the motivations of the firms making the FDI and the variation in the location-specific advantages among the RIA members (Dunning 1997; Eden 2002; Ethier 1998; Feils and Rahman 2008; Rugman and Verbeke 2007)."[763]

What if a member state does not have any comparative advantages with reference to the motivation of a multinational? Assuming that the economic factors of member states in a given region are as good as their partners', if one of member states does not have a rich storage of the resource that a multinational company is looking for, or any convenience for transportation to the destination market, this state will be least attractive to the resource-seeking foreign investor. Then what exactly can this member state do to make itself more attractive to the multinational company? Issuing FDI-friendly policy could be an implementable recommendation. For example, the government can grant subsidies to the multinational corporation or make legislation to offer corporate income tax credits, to overcome its lack of resources and inconvenience for transportation. While theoretically host country may improve any factor to make itself more or less attractive to potential FDI, it may be too difficult or even impossible to change natural factors (e.g. lack of minerals) or to change economic factors (e.g. infrastructure support, GDP [Gross Domestic Product] growth, enhancement of financial technology) within a short period. Only preferential policy can be issued or changed in a relatively short time depending on the request of foreign investor, to make it a location-specific advantage to attract potential FDI. That is why Buckley et al., Feils and Rahman stated that "joining an RIA can create a structural break in the existing FDI policy regime."[764] To

[763] *Supra* note 736 at 42.
[764] *Ibid* at 44.

beat their competitors, member states themselves have to undertake promotional measures to encourage FDI flows to their individual countries. "At any rate, extending the market may bring about winners and losers, which may generate interesting political economy dynamics."[765]

One should be very careful that the regional integration brings FDIs to a region as a whole, otherwise the uneven distribution of such FDIs might cause a fierce competition for FDI inflows among individual member states of that region. If the regional integration scheme does not include investment rules or place any limitations on member states' FDI policy space, unhealthy competition of policy incentives may arise, just like in the continent of Africa. The African countries, having 90% of least developed countries (LDCs) in the world, have a lack of economic incentives and are not able to make themselves economically attractive to FDI in a short period. Resource is the dominant determinant on the location of FDI. Rich resource definitely makes one country more attractive than its competitive partners, to foreign investors, particularly Chinese investors (as China's FDIs in Africa are resource-seeking FDIs). To overcome their inefficiency and shortages of resources in comparing with their handsome partner, the African countries naturally turn to issue preferential policies. Policy incentive provides them an easier way to attract FDI into their own countries. Therefore, many African countries become locked in a "race to the bottom" in terms of tax incentives or a "race to the top" in terms of subsidy incentives to attract FDI, even as the policy incentives reduce its potential benefits to these countries. However, the excessive government intervention will cause market disruptions and distortions. Foreign investors take a risk that the African countries may remove these preferential policies once their investments are made. The cause instability and unpredictability to rise. This is the exact reason why there should be an international instrument that can limit the policy space of each member state as

[765] *Supra* note 705 at 9-10.

potential host country to ensure the proper functioning of market, as well as coordinate, with the spirit of regional integration agreement, to help create an open, free, stable and predictable investment climate within the whole region.

Like all international agreements, this instrument will limit to a certain extent the autonomy of the state party to it and thereby limit the policy space of its contracting states as potential host countries.[766] Meanwhile, it must recognize that governments have always had the role of policy maker in order to attract foreign investments into their own countries and to advance their development;[767] and thereby it must allow its contracting states a certain amount of policy space to promote their development.[768] "This is all the more important since the principal responsibility for the design and implementation of development objectives and policies remains in the hands of the individual countries' governments."[769] "National Governments, after all, remain responsible for the welfare of their people in this, as in other, domains."[770] "Governments seek, therefore, to tailor such [instrument] in a manner that allows them the policy space they need to advance their paramount objective of national development (Corrales, 1999)."[771] Particularly, such instrument need to "recognize important differences in the characteristics of the parties involved, in particular the economic asymmetries and levels of development between" contracting parties.[772] It should create a mechanism that allows each contracting party to preserve specific policy space for achieving their individual development goals.

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[766] *Supra* note 608 at 37.
[767] Marc Bungenberg, "The Politics of the European Union's Investment Treaty Making" in Tomer Broude et al, eds, *The Politics of International Economic Law* (New York: Cambridge University Press, 2011) 133 at 136.
[768] *Supra* note 608 at 107.
[769] *Ibid.*
[770] *Ibid* at 37.
[771] *Ibid* at 56.
[772] *Ibid* at 39.

If this international instrument does not allow its contracting parties "to pursue their fundamental objective of advancing their development - indeed make a positive contribution to this objective" -- it runs the risk of being of little or no interest to them.[773] "This underlines the importance of designing, from the outset, [this international agreement] in a manner that allows [its] parties a certain degree of flexibility in pursuing their development objectives."[774]

In conclusion, in the context of China-Africa investment, Africa's regional schemes indeed enhance the investment climate and attract more extra-regional FDIs, particularly vertical FDIs. It seems that even without the bilateral arrangement between China and the OHADA, ECOWAS or any other Africa's regional groupings, these regional integration schemes, particularly the OHADA, are able to largely increase the injection of Chinese private investments in various sectors of Africa's economy, by reducing the transaction costs and increasing the market size. However, the uneven distribution of the new FDIs brought by these regional arrangements may cause the unhealthy competition of policy incentives that undermines the proper functioning of China-Africa investment market. Therefore, an international instrument which can reduce such protectionist policies is in need. W The author considers the China-OHADA BIT as a good option, which can not only "recognize important differences in the characteristics of the parties involved, in particular the economic asymmetries and levels of development" of OHADA member states,[775] and allows them to pursue their FDI objectives; but also limit the policy space of the OHADA member states and thereby ensure the proper functioning of the region market. Additionally, the China-OHADA BIT is coordinated with the spirit of regionalism. It is necessary to have such a balancing and coordinative mechanism, to both maintain a certain policy space for its contracting

[773] *Ibid.*
[774] *Ibid.*
[775] *Ibid.*

parties to promote their development and create an appropriate stable, predictable and transparent FDI framework to ensure the proper functioning of the market.[776] Even with the strongly positive effects of OHADA or of any other regional arrangements in Africa, the presence of China-OHADA BIT is not redundant.

While, this poses a challenge: namely, when concluding the China-OHADA BIT, "how to link the goal of creating an appropriate stable, predictable and transparent FDI policy framework that enables firms to advance their corporate objectives on the one hand, with that of retaining a margin of freedom necessary to pursue their national development objectives, on the other. These objectives are by no means contradictory."[777] The question is not so much whether the China-OHADA BIT should provide for flexibility, "but rather what degree of flexibility would be consistent with the aims and functions of such agreement[s]. In other words, there is a need to balance flexibility and commitments, in order to arrive at a realistic level of flexibility and commitment from each contracting party according to its state of development."[778] "The flexibility considered here relates to a particular set of objectives, those that concern the promotion of the development of" OHADA member states to the China-OHADA BIT, "without losing sight of the need for stability, predictability and transparency for [Chinese] investors."[779] "To find the proper balance between obligations and flexibility - a balance that leaves sufficient space for development-oriented national policies - is indeed a difficult challenge."[780] A discussion of flexibility in the China-OHADA BIT might be further intensified, but it is not an issue of my dissertation.

[776] *Ibid* at 37.
[777] *Ibid.*
[778] *Ibid* at 57-58.
[779] *Ibid* at 57.
[780] *Ibid* at 39.

Chapter 5 Do current China-Africa BITs create a positive climate for investments?

To date, China has signed 145 BITs (123 have come into force), 34 (20 have come into force) of which are signed with the African countries. This section looks at the underlying similarities and differences of the BITs between China and Africa, to locate and emphasize the common features applicable to all the existing China-Africa BITs. As discussed in the previous section, the BIT functions through balancing the rights and obligations of states and investors. Therefore, this section assesses their provisions from the discretion-limiting aspect. This section compares each provision ranging from preamble to final provision and captures their interrelationships, to see what common features the China-Africa BITs possess, the messages the BITs convey and the Sino-Africa investment climate created by the treaties. The comparative analysis is based on 30 China-Africa BITs (20 have entered into force and 10 have been signed but have not yet entered into force). The other 4 BITs between China and Chad, Guinea, Libya and Namibia are excluded because no resources were found.

All the China-Africa BITs are simple and similar. They commonly have a two-to-four-line preamble stating the intention of contracting parties and a concise text of 12 to 16 provisions presenting the basic issues commonly found in global BIT practice - definitions, promotion and protection of investment, treatment of investment, expropriation, compensation for damages and losses, repatriation of investment and returns, subrogation, settlement of disputes between contracting parties, settlement of disputes between investors and one contracting party, other obligations, application, relations between contracting parties, consultations, entry into force,

duration and termination. Now the author will review the China-Africa BITs and compare each provision to see the features of the BITs and the investment climate created by these treaties.

5.1 China-Africa BITs in Comparative Context

5.1.1 Preamble

The China-Africa BITs, like any other BITs, address the objective in the preamble. Almost all of the existing BITs between China and the African countries contain a short, three-line preamble with almost the same wording, and often address as follows:

> "The Government of the People's Republic of China and the Government of ---- (hereinafter referred to as the Contracting Parties),
> - Intending to create favorable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party;
> - Recognizing that the reciprocal encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of the investors and will increase prosperity in both States;
> - Desiring to intensify the cooperation of both States on the basis of equality and mutual benefits;
>
> Have agreed as follows:"[781]

The first line of preamble contains a clear objective that China and the African countries intend to create some favorable conditions for the investments. Accordingly, there should be provisions thereafter in the text that offer investors certain benefits or facilitations for their investments. However, except for the provision of "Promotion and Protection of Investments" which includes a clause providing for assistance in obtaining visa and working permit for foreign investors, no more favourable conditions are definitely addressed in the China-Africa BITs. The second line of preamble expresses the objective of investment protection and promotion. Both China and the African countries believe that investment is the key to increasing prosperity. They, therefore,

[781] Preamble of China-Equatorial Guinea BIT.

signed BITs with the intention to increase investment through "reciprocal encouragement, promotion and protection of such investment." This is the core objective, as issues addressed in the following text are completely centred on investment promotion and protection. The last line of preamble emphasizes equality and mutuality which, however, seems to be little more than empty phrases. Some China-Africa BITs, such as the China-Mozambique BIT and the China-Mauritius BIT, do not include this in their preambles (see table 10a).

It worth to mentioning that China's BITs with Ghana, Nigeria, Benin and Mali require investors to respect host state's sovereignty or, in particular, the authority of the stipulating laws on the investment admission in their preambles (see Table 10B). It states that investors have the duty to respect the host country's sovereignty and laws and the BIT may not place any limit on the policy discretion of the host country with respect to investment admission. Given the imbalance that in practice, only Chinese investors invest in Africa and no African investors invest in China, this signals that the African countries are afraid of losing policy discretion, at least, over the investment admission.

To conclude, the preamble of China-Africa BITs is simple and generic. Different from the US or Canadian BITs, which usually contains definite objectives in the preamble, such as stimulating the flow of private capital, asserting claims and enforcing rights with respect to investment under national law, and protecting health, safety, environment, and labour rights etc. Except for the first line, no more concrete objective can be found in the preamble. An ambiguous expression might leave space for policy discretion, instead, a clear and concrete objective always constrains the policy space. The emphasis of state sovereignty in some BITs might strengthen this argument. Secondly, the preamble implies a bias in favour of the interest of investor, as it only discusses facilitation, encouragement, protection and promotion of foreign investments. The African

countries want to attract China's investments, but they are unwilling to exchange their policy discretion for the investment inflow.

5.1.2 Definition of investments

In the China-Africa BITs, definitions in Article 1 merely include the terms of "investment", "investor", "return" and sometimes "territory". The terms of "investment" and "investor" are of great significance, as they specify the "subject-matter coverage"[782] of a BIT. They narrow the types of economic interests and the ranges of natural and legal persons that are capable of being protected under the treaty. "[T]hey determine the extent and the manner in which the other provisions are to be applied.[783]

Let us firstly take a look at the term "investment". All the existing BITs[784] between China and the African countries give "investment" a broad asset-based, open-ended definition, a typical example is as follows:

> "For the purpose of this Agreement,
>
> 1. The term 'investment' means every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting party in the territory of the latter, and in particularly, though not exclusively, includes:
>
> (a) movable and immovable property and other property rights such as mortgages and pledges;
>
> (b) shares, debentures, stock and any other kind of participation in companies;
>
> (c) claims to money or to any other performance having an economic value associated with an investment;
>
> (d) intellectual property rights, in particularly copyrights, patents, trade-marks, trade-names, technical process, know-how and good-will;
>
> (e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.

[782] *Supra* note 608 at 114.
[783] *Ibid* at 115.
[784] The China-Seychelles BIT is the only one that additionally includes a definition of "indirect investment".

> Any change in the form in which assets are invested does not affect their character as investments."[785]

First, all the BITs "define an investment as an asset, rather than a process or transaction by which an asset is acquired. Thus, they tend to employ asset-based definitions of investments. Such definitions tend to be broad in scope."[786] Almost all the China-Africa BITs use the phrase "every kind of asset" to describe "investment", excepting only the China-Gabon BIT, which describes "investment" as "every kind of assets or capital contribution", and the China-Uganda BIT that defines "investment" as "every kind of property" with an explanation of property as "goods, rights and interests of whatever nature" (see table 11a). There is no obvious difference between "asset", "property" and "asset or capital contribution", as such definitions are commonly followed by an illustrative, non-exhaustive list of five categories of investment: 1) movable and immovable property and rights; 2) all kinds of participations in company; 3) claims to money or any performances with an economic value; 4) intellectual and industrial property rights; and 5) business concessions. "These five categories are expressly included within the definition of 'investment', but the listing is not exhaustive."[787] "Assets of 'every kind' are included, even if they do not fall under the five categories,"[788] "suggesting that the term embraces everything of economic value, virtually without limitation."[789]

While the China-Africa BITs have the same five categories of investments, "there are numerous variations in the precise language used to describe them."[790] For example, the China-Cote d'Ivoire BIT and the China-Congo BIT describe the property right as "mortgages and pledges"; the China-Gabon BIT and the China-Benin BIT indicate that the property right includes mortgages, pledges,

[785] Article 1 of China-Congo BIT.
[786] *Supra* note 304 at 160.
[787] *Supra* note 608 at 119.
[788] *Ibid.*
[789] *Ibid.*
[790] *Ibid* at 120.

usufructs, liens, real securities and similar rights; the China-Uganda BIT emphasizes that the property rights include not only the movable and immovable, but also tangible and intangible rights; and the China-Ghana BIT, as the earliest concluded treaty, simply provides for movable and immovable property and other property rights (see Table 11b). Regarding intellectual property, some BITs such as the China- Cote d'Ivoire BIT, the China-Gabon BIT and the China-Ghana BIT "cover[s] only the main types of intellectual property - copyrights, industrial property, know-how, and technological process", while "other BITs adopt an open-ended language that appears to cover every type of intellectual and industrial property,"[791] such as the China-Uganda BIT (see Table 11b). "Such variations, however, may be of relatively small importance because the five categories are merely illustrative of the types of interests included within the term 'investment'. An interest that does not fall within any of the five categories is nevertheless an 'investment' if it can be considered an 'asset'."[792]

Second, "recognizing that investment forms are constantly evolving in response to the creativity of investors and the rapidly changing world of international finance,"[793] many China-Africa BITs, such as the China-Cote d'Ivoire BIT, the China-Gabon BIT, the China-Uganda BIT (see Table 11b) etc.,[794] emphasise that any change in the amount or in the form in which assets are invested or reinvested does not affect their character as investments. Thus, the existing BITs give "investment" a definition "as broadly as possible so as to accord protection to all conceivable forms of investment."[795]

[791] Ofodile Uche Ewelukwa, *Supra* note 597 at 162.
[792] *Supra* note 608 at 120-121.
[793] *Supra* note 380.
[794] China's BITs with Congo, Sierra Leone, Tunisia, Botswana, Kenya, Madagascar, Benin, Djibouti, Mali, South Africa and Morocco also emphasise that any change in the form in which assets are invested does not affect their character as investments.
[795] *Supra* note 562 at 100.

Third, the China-Africa BITs apply to investments made both prior to and after the conclusion of the agreement. Limitations can still be placed on such a broad, open-ended definition of "investment". There could be a temporal limitation on the definition of investments: does the BIT merely apply to investments made after the BIT's entry into force,[796] or "the rights and treatment granted to 'investments' include investments made before, as well as after, the conclusion of the BIT?"[797] "Capital-exporting countries naturally want the treaty to protect all investments made by their nationals and companies, regardless of the time when they were made."[798] Host countries might "on the other hand, sometimes seek to limit the BIT to future investment only."[799] This raises the questions: Do the China-Africa BITs apply to pre-existing investments? Are they retroactive?[800]

As "exclusion of pre-existing investment creates the possibility that existing investors will oppose ratification of an agreement by their home State because it provides them no benefits and it may place them at a competitive disadvantage relative to investors who establish investments after entry into force of the agreement,"[801] and it may also "undermine the credibility of a host country's promise to provide a favourable investment climate,"[802] most of the China-Africa BITs apply to investments made both prior to and after the conclusion of the agreement. They mostly stipulate that the agreement applies to investment made "prior to or after its entry into force"; or some BITs use the phrase "prior to as well as after the entry into force of this Agreement", such as the China-Equatorial Guinea BIT; or some, such as the China-Gabon BIT and the China-Morocco BIT,

[796] Ofodile Uche Ewelukwa, *Supra* note 597 at 160.
[797] *Supra* note 625 at 664.
[798] *Ibid.*
[799] *Ibid* at 665.
[800] Ofodile Uche Ewelukwa, *Supra* note 597 at 160.
[801] *Supra* note 608 at 123.
[802] *Ibid.*

provide that "As for matters in the future where this Agreement may be applicable, shall include investments by means of foreign currencies made by investors of one Contracting Party in the territory of the other Contracting Party subject to laws and regulations of the other Contracting Party". The China-Kenya BIT simply stipulates that "The agreement, under this clause, presupposes to apply retrospectively to investors of either Contracting Parties" (see Table 11c). Among the BITs reviewed, only the China-Djibouti BIT and the China-Tunisia BIT set a temporal limitation on "investment". The China-Djibouti BIT is the only one that provides protection to investments made after the entry into force of the Agreement (see Table 11d).

However, some BITs such as the China-Benin BIT, China-Mali BIT, the China-Equatorial Guinea BIT, the China-Seychelles BIT and the China-Madagascar BIT, etc., "exclude claims from arbitration if the events leading to these claims occurred before the entry into force of the agreement."[803] The reason "for the reluctance to cover investments established prior to the entry into force of an agreement is legal certainty."[804] If the BIT "supersedes older treaty obligations" of some treaties with investment provisions or other investment related instruments, it potentially give "an investor the right to choose between different international regimes."[805] Some BITs impose some other special limitation on the scope of investment. For example, the China-Mauritius BIT only applies to investments that are specially approved by the host contracting party. The China-Mozambique BIT applies, in the case of Mozambique, to investments made in conformity with its national investment law (see Table 11e).

"Instruments mainly directed at the protection of FDI usually define investment in a broad and comprehensive manner. They cover not only the capital (or the resources) that have crossed

[803] *Ibid.*
[804] *Ibid.*
[805] *Ibid.*

borders with a view to the acquisition of control over an enterprise, but also most other kinds of assets of the enterprise or of the investor -- property and property rights of various kinds; non-equity investment, including several types of loans and portfolio transactions; and other contractual rights, sometimes including rights created by administrative action of a host State (licences, permits, etc.)."[806] All the China-Africa BITs adopt the broad asset-based, open-ended definition of "investment", which means they intend to expand protection to every type of interest if it can be considered "asset". Such protection is retroactive as it not only applies to the investment made after the conclusion of the agreement, but also pre-existing investment in accordance with the asset-based definition. Among all the BITs reviewed, only two BITs impose temporal limitation on investment and another two impose certain special limitations. All the other BITs disclude the temporal limitation and apply to investment made both before and after the entry into force of the treaty. The broad asset-based, open-ended definition of "investment" and the relief of temporal limitation send a quite clear message that China and the African countries want to maximize the protection of the interest of investor by expanding the coverage of protection to every type of interest existing both before and after the conclusion of BIT. Preliminarily, the China-Africa BITs may follow the protection-oriented model.

5.1.3 Definition of investors

"Investment agreements generally do not apply to all investment. Rather, they typically apply only to investment by investors who are connected with at least one of the other treaty partners through nationality or other links, according to the agreement's provisions."[807] Thus, the term of "investor" is another element critical for determining the coverage of a BIT.[808] With respect to the relationship

[806] *Ibid* at 23.
[807] *Ibid* at 117.
[808] *Ibid.*

between an investment and the investor for the investment to be covered, most China-Africa BITs apply to investment "invested by" investor (see Table 12a). "The obvious inference is that the investment must be owned or controlled by the investor."[809] However, none of the BITs define the terms "invested by". Some BITs, such as China's BITs with Uganda, Ghana, Seychelles and Mozambique do not explicitly state the relationship (see Table 12b).

In the China-Africa BITs, "investor" is classified in two categories: natural persons and legal entities, sometimes referred to as 'economic entities'. "The category of natural persons requires no elaboration."[810] All the China-Africa BITs adopt the nationality criteria. Only those with the same nationality as one of the other contracting party are eligible investors. Permanent residents or people who temporarily live in one of the contracting party's home country cannot be considered investor in the other party. The only qualifying link of a natural person with the contracting party to the treaty is nationality,[811] and thereby only investments by the nationals of one of the other party are protected under the China-Africa BITs. The common wording of provisions regulating natural investor in the China-Africa BITs is "who have nationality of either contracting party in accordance with its law,"[812] or "who are nationals of either contracting party in accordance with the laws of that contracting party."[813] The China-Mauritius BIT is the only exception as instead of using the term of "investor", it stipulates "national" and "company", and it defines "national" as a natural person who is a citizen of the Contracting Party. (See table 12c)

[809] *Ibid* at 130.
[810] *Ibid* at 117.
[811] *Ibid.*
[812] Article 1.2(a) of China-Equatorial Guinea BIT, Article 1.2(a) of China-Ethiopia BIT, Article 1.2 of China-Gabon BIT, Article 1.2(a) of China-Benin BIT, Article 1.2 of China-Cote d'Ivoire BIT.
[813] Article 1.2 of China-Botswana BIT.

The category of artificial persons, by contrast, is defined to include or exclude a number of different types of entities in different China-Africa BITs,[814] and the results are chaotic. Firstly, in case of legal persons, their qualifying link with the contracting party which is often as the nationality of legal persons is determined by different criteria.[815] Among the criteria in use, the country of incorporation, the country of the company seat and the country of ownership or control are prominent.[816] "[M]ost investment agreements use one of three different criteria for determining nationality".[817] "In many cases, they use some combination of these criteria. Other criteria are occasionally used as well",[818] such as the country of domicile. "[I]t should be noted that a significant number of internationally active enterprises can be excluded from the scope of an investment agreement through the cumulative use of the various above-mentioned criteria."[819]

The criteria adopted by China-Africa BITs for determining the link between a legal person and a Contracting Party include: the single criteria of ***the country of incorporation,*** such as the China-Algeria BIT, the China-Equatorial Guinea, the China-Nigeria BIT, the China-Tunisia BIT, the China-Mauritius BIT, the China-Mali BIT and the China-South Africa BIT; the combined use of ***the country of incorporation and of seat,*** such as the China-Botswana BIT, the China-Cameroon BIT, the China-Congo BIT, the China-Sierra Leone BIT, the China-Djibouti BIT, the China-Gabon BIT, the China-Kenya BIT, the China-Madagascar BIT and the China-Morocco BIT)' and the combination of ***the country of establishment and of domicile,*** such as the China-Egypt BIT, the China-Ethiopia BIT, the China-Mozambique BIT, the China-Sudan BIT, the China-Cape Verde BIT and the China-Congo DR BIT (see Table 12d). It worth mentioning that the China-

[814] *Supra* note 608 at 117.
[815] *Ibid.*
[816] *Ibid.*
[817] *Ibid* at 128.
[818] *Ibid.*
[819] *Ibid* at 130.

Benin BIT uses the term "registered office", the China-Uganda BIT and the China-Seychelles BIT use the term "headquarter" and the China-Zambia use the term "principal place of business". It is unclear if these expressions are the same as "seat" (see Table 12e). Additionally, some China-Africa BITs adopt different criteria in respect of each contracting party. The China-Cote d'Ivoire BIT adopts the establishment and seat criteria in respect to China and a broad illustrative of legal entities in respect to Cote d'Ivoire. The China-Ghana BIT adopts the establishment and domicile criteria in respect to China and the incorporation and registration criteria in respect to Ghana. The China-Zimbabwe BIT adopts the establishment and domicile criteria in respect to China and the incorporation and seat criteria in respect to Zimbabwe (see Table 12f). Clearly, there is no uniform criteria among China-Africa BITs.

The criteria of establishing the nationality of a legal person "presents the question of the extent to which the parties to an agreement wish to link the legal coverage of the agreement with the economic ties between the parties and the covered investment. One country may be seeking to establish a generally favorable investment climate and may be prepared to extend treaty coverage to investments that have minimal economic ties with the other party, while another country may wish to extend treaty coverage only to investments with strong economic ties to the treaty parties."[820] Clearly, the criteria of the country of incorporation requires less economic ties with the home country than that of the combination with other criteria, as any company established in accordance with the law of home country can claim protection under the BIT even though no nationals of that country participate in the ownership or management of the company.[821]

All China-Africa BITs include the country of incorporation as the either the only or one of the criteria because of its ease of application. "[T]here usually will not be any doubt concerning the

[820] *Ibid* at 117-118.
[821] *Ibid* at 128.

country under whose law a company is organized. Further, the country-of-organisation is not easily changed, meaning that the nationality of the investor usually will be permanent under this approach. Because an important purpose of some investment agreements is to attract investment by providing a stable investment regime and because changes in the nationality of an investor will result in the loss of treaty protection for investment owned by the investor, a definition of 'investor' that stabilizes the nationality of the investor and thus the protection afforded to investment is particularly consistent with the purposes of investment agreements that seek to promote or protect foreign investment."[822]

However, the criteria of incorporation "relies on a relatively insignificant link between the investor and the country of nationality. Under this test, a company may claim the nationality of a particular country even though no nationals of that country participate in the ownership or management of the company and even though the company engages in no activity in that country. In effect, the company could claim the benefits of nationality of a particular country, including protection under the treaties of that country, despite the fact that it conferred no economic benefit of any kind on that country."[823] "This should perhaps be of concern principally to the home country, which finds itself protecting an investor that brings it no economic benefit."[824] Therefore, many China-Africa BITs add the additional criteria of either the country of seat or of domicile to strengthen the economic tie between a company and its home country.

Secondly, the wordings addressing these criteria are unclear and misused and raises questions. First, BITs adopting the incorporation criteria mix the use of the words 'incorporate', 'constitute' and 'establish'. Some BITs, like the China-Gabon BIT, stipulate "legal persons *established* in

[822] *Ibid.*
[823] *Ibid.*
[824] *Ibid.*

accordance with the laws of…"; some, like the China-Benin BIT, address "legal entity, including company, association, partnership and other organisations, *incorporated or constituted* under the laws and regulations of…"; and some others, like the China-Cote d'Ivoire BIT, provide for "economic entities, including companies, corporations, associations, partnerships and other organizations, *incorporated and constituted* under the laws and regulations of…".

Second, very few BITs adopting the country of seat have specified the "seat of a company". "Generally speaking, 'seat of a company' connotes the place where effective management takes place."[825] It could be "its registered office", for example, the China-Benin BIT stipulates that "legal entity, including company, association, partnership and other organizations, incorporated or constituted under the laws and regulations of the People's Republic of China or of the Republic of Benin and having *its registered office* in the territory of…"; or the "principal place of business", such as the China-Zimbabwe BIT providing for that "the term 'investors' means:… in respect of the Republic of Zimbabwe:… corporations, firms and associations incorporated or constituted under the laws in force in Zimbabwe and having their *principal place of business* in Zimbabwe;…". Most of the BITs have not defined the "seat of a company", is it the location of the registered office, the principal place of business or any other place of management? Similarly, BITs adopting the country of domicile have never set up the conditions to be a domiciliary of the relevant contracting party to receive the privileges of the treaty.[826]

More importantly, there is a broad misuse of the term – "economic entity" in many China-Africa BITs. The term "investor" in many China-Africa BITs is described as "economic entities"[827], including companies, corporations, associations, partnerships and other organisations, irrespective

[825] *Ibid* at 129.
[826] *Supra* note 152 at 148; see also Article 2.1(b) of China-Egypt BIT.
[827] See Article 1 of China-Congo BIT and Article 1 of China-Cote d'Ivoire BIT.

whether or not they are for pecuniary profit or with limited liability. This language indicates that, "any juridical person as well as any commercial or other company or association with or without legal personality . . . irrespective of whether or not its activities are directed at profit," may be considered investors.[828] However, the term "economic entity" can hardly be coordinated with the term "non-profit".

Thirdly, it is worth mentioning that there is a trend for China-Africa BITs to seek broad coverage encompassing as many of its artificial entities as possible, no matter what legal forms are taken or for what purposes. Entities can be excluded on the basis of their legal form and/or their purpose.[829] "[T]he host country could find that restricting the legal form of the investors may have an adverse impact on its ability to attract certain types of investment. For example, small or medium-sized investors are often organized differently from large investors, making greater use of forms of business associations other than the corporation or société anonyme. Certain types of investments are likely to be associated with certain types of investors. For example, professional service agreements often are associated with partnerships. Thus, a decision to discourage certain forms of investors ultimately may have the effect of discouraging certain types of investment."[830] Besides, "[e]ntities may be excluded because of their purpose. For example, an investment agreement may exclude non-commercial entities, such as educational, charitable or other entities not operated for profit."[831] However, "the kinds of activities in which a nonprofit entity engages may produce desirable forms of investment, such as a research facility."[832] Perhaps for all these reasons, the

[828] *Supra* note 608 at 126.
[829] *Ibid* at 117.
[830] *Ibid* at 126.
[831] *Ibid.*
[832] *Ibid* at 127.

China-Africa BITs tend to includes as many artificial entities as possible, regardless of their forms or their purposes.[833]

The China-Africa BITs display a generally open attitude towards the accepted forms of investors: the China-Ghana BIT, as the very first BIT signed between China and Africa in the 1980s, in respect of Ghana, merely accepts "state corporations and agencies and companies registered under the laws of Ghana" as investors. It particularly includes "State Corporation" as a protected investor which was the main form of foreign investor at that time. While interestingly, the China-Tanzania BIT - the most recent China-Africa BIT signed after the China-Canada BIT – emphasises the opposite, moreover, enterprise irrespective of whether it is owned or controlled by a private person or the government is investor.[834] The second generation BITs signed before 2000 either define "investors" as "economic entities" and/or "legal persons", or give the term of "investors" a close-ended list of descriptive illustrations. For example, China's BITs with Egypt, Algeria, Cape Verde, and Sudan describe "investors" as "economic entities", BITs with Gabon and Morocco describe "investors" as "legal persons" and the China-Cameroon BIT uses both terms; however, none of them give further explanation of the terms "economic entities" or "legal persons". China's BITs with Nigeria, Mauritius, South Africa, Zambia and Zimbabwe describe "investors" as "corporations, firms and associations" or "any company, firm association or body", etc. While various terms are used, they give a close-ended list of investors - only the entity that is constituted in one of the listed forms can be protected. The third generation BITs signed after 2000 which define "artificial investors" adopt an open-ended definition. They usually stipulate "investors" as legal entities, ***including*** companies, associations, partnerships or other organisations, sometimes with the expression of "***with or without legal personality***". This is not a close-ended list of

[833] *Ibid* at 126.
[834] See Article 1.2 (b) of China-Tanzania BIT.

investors, but a non-exclusive list of illustrations. It implies that investors include but not limited to the listed forms. Any entities with or with legal personality are investors under the protection of the treaty. The stipulation will include more forms of investors irrespective of their legal status. Some BITs even extend the scope of investors to non-profit entities, such as China's BITs with Cote d'Ivoire, Botswana, Congo and Mozambique. (See Table 12g)

To conclude, the China-Africa BITs seek to include any forms of entities to be defined as investors but simultaneously require a strong economic tie between investors/investments and the home country. All the BITs, with no exception, accept nationals as the natural investors, and in respect of artificial investors, many of them require the investor to fulfil not only the criteria of incorporation, but also additional criteria, such as the test of seat or domicile. The China-Tanzania BIT even requires a combination of three criteria of incorporation, seat and substantial business activities.[835] Thus, it ensures that the protection under the BIT is only available to entities with strong economic ties to the home country and any benefit raised out of the treaty is limited to the exact home country or its nationals.

5.1.4 Admission

As mentioned before, with respect to the relationship between investment and investor for the investment to be covered, most China-Africa BITs apply to investment "invested by" investor (see Table 12a). In such provision of the definition of "investment", except for the China-Seychelles BIT and the China-Uganda BIT, all the other BITs reviewed including the China-Tanzania BIT stipulate that "investment" is an asset "***invested in accordance with the laws and regulations of the other Contracting Party in the territory of the latter"*** (see Table 12a and 12b, italic and underlined parts). The provision of application accordingly provides that "The Agreement shall

[835] *Ibid.*

apply to ***investment, which are made*** prior to or after its entry into force by investors of either Contracting Party i***n accordance with the laws and regulations of the other Contracting Party in the territory of the latter***."[836] The China-Africa BITs stipulate that investments shall be "invested" or "made" in accordance with the laws and regulations of the host country. The word "invest" and "make" therein should be understood as a dynamic process with admission as part of the chain. Considering that the lack of admission provision is common in all the China-Africa BITs, such stipulation means that the whole process of an investment launched in the territory of the host country shall comply with the laws and regulations of that country - to make it clear – in which sector an investor can launch investments and how to rise an investment in the territory of the host country is completely determined by the laws and regulations of that country. In the below provision of "promotion and protection of investment" or "promotion of investments", while the wordings are different, it clearly provides that each Contracting Party shall encourage and "***admit the investments by investor in accordance with its laws and regulations"*** (see Table 13).

To conclude, the China-Africa BITs do not accord positive rights of entry and establishment to foreign investors. All the China-Africa BITs adopt the investment control model. The host country will reserve the power of addressing laws on investment admission. While the BITs aim to promote and create favorable investment conditions, they expressly leave the precise conditions of entry and establishment to the laws of host country. In practice, namely, China's investments are welcome but remain subject to African laws at the point of entry. The investment control model makes the African countries feel comfortable, as it leaves a great amount of policy space up to discretion.

5.1.5 Promotion and protection of investment

[836] Article 11 of China-Congo BIT.

All China-Africa BITs include a very unique and particular provision of "Promotion and Protection of Investment" or "Promotion of Investments" that one may not find in other BITs. There are three types of obligations typically addressed by the provisions: (1) the general obligation of promoting investments, (2) the general obligation of protecting investments, and (3) a specific obligation of providing assistance in obtaining visas and working permits. The BITs reviewed refer to one or more of these obligations. Issues covered by obligation (1) and (3) are the same among all of the BITs and are addressed in similar wording. Standards with respect to obligation (2) are quite variable from one BIT to another.

The provision "Promotion and Protection of Investment" or "Promotion of Investments" usually imposes a general obligation of promoting investments on host countries, stimulating that each Contracting Party shall encourage and/or create favorable conditions for investors of the other Contracting Party to make investments in its territory and admit or accept such investments in accordance with its laws or in line with its general economic policy. However, apart from providing facilities for obtaining visa and working permit for investors, almost all the China-Africa BITs do not specify any other promotional activities that Contracting States are expected to undertake. The China-South Africa BIT is the only one that calls for additional assistance in obtaining licence agreements and contracts for technical, commercial or administrative assistance. "These provisions are of special importance within the Sino-African context because one of the greatest impediments to trade and investment on the African continent are the non-tariff barriers ('NTB'), like delays of customs clearance procedures, complex documentation requirements, and unpredictable procedures at the border."[837] Some BITs, even less favourably, do not include the visa/working permit assistance clause. For example, China's BITs with Gabon, Egypt and

[837] *Supra* note 72 at 608.

Morocco merely provide for a hortatory and general requirement of investment promotion without any specific favourable assistance arrangements (see Table 14a).

Besides (1) the general obligation of promoting investments and (3) the specific obligation of providing assistance in obtaining visas and working permits, parts of the China-Africa BITs also include (2) a general obligation of protecting investments. This general obligation of protecting investments is named as "General and absolute standards of treatment obligation to protect investments" by Ofodile.[838] He stated that "The obligations identified are 'general' because they pertain to all aspects of the existence of an investment in a host country. The obligations are also 'absolute' because they are not dependent or conditioned on how a Contracting State treats investment by nationals or nationals of other countries."[839]

However, the clause(s) of the general obligation of protecting investments is problematic - the standards adopted by the China-Africa BITs are so different from one another; and the lack of a definition of the standards makes it unclear whether the same standard in any two of the BITs has the same meaning.

There are four standards typically addressed under the general obligation clause: (1) guarantee of full and complete protection and safety; (2) guarantee of constant protection and security; (3) guarantee of protection against unreasonable or discriminatory measures; and (4) guarantee of fair and equitable treatment.[840] Different BITs adopt a different combination of these standards. Some BITs provide (1) full protection, (3) non-discriminatory protection and (4) fair and equitable treatment to foreign investments, such as the China-Benin BIT and the China-Gabon BIT; some BITs include (2) constant protection, (3) non-discriminatory protection and (4) fair and equitable

[838] Ofodile Uche Ewelukwa, *Supra* note 597 at 165.
[839] *Ibid.*
[840] *Ibid.*

treatments in the general protection of investments, such as the China-Egypt BIT and the China-Djibouti BIT; some BITs stipulate (2) constant protection and security and (3) non-discriminatory protection, such as BITs between China and Cote d'Ivoire, Congo, Cape Verde, Mali, Nigeria, Sierra Leone, Kenya, Botswana and Mozambique; some provide for (3) non-discriminatory protection and (4) fair and equitable treatment, such as the China-Morocco BIT and the China-Equatorial Guinea BIT; and some stipulate (1) full protection and (3) non-discriminatory protection, such as China's BITs with Uganda, Tunisia and Cameroon. However, a few BITs do not include such general obligation of protecting investments. They are the China-Congo DR BIT, the China-Zimbabwe BIT, the China-Ethiopia BIT, the China-Zambia BIT, the China-South Africa BIT, the China-Sudan BIT and the China-Ghana BIT. (See Table 14b)

The various combinations of standards imply that the China-Africa BITs might provide protection to varying degrees of the investments to varying degrees through the adoption of different standards. However, the general obligation of protecting investments is problematic as none of the China-Africa BITs reviewed give the definition of these standards. The author is not sure whether the "full" and "constant protection" are the same or what the difference between them is; or to what extent the "fair and equal treatment" may protect an investment.

The term "full and complete protection and safety" literally implies "that the parties intended to provide the investor with a guarantee against all losses suffered due to the destruction of the investment, for whatever reason and without any need to establish the person responsible for the cause of the damage. The implication of this construction was that the 'full protection and security' clause had the effect of providing a foreign investor with an insurance by the host state against the risk of having his investment destroyed under whatever circumstances."[841] One may believe "that

[841] *Supra* note 616 at 610.

the term 'full protection and security' should be construed as an absolute obligation which guarantees that no damage will be suffered by a foreign investor within a host state,…"[842] "On the other hand, the contention of the Government was that the standard set by the 'full protection and security' clause was the same standard of protection for the exercise of 'due diligence' based on fault, which was the minimum standard under customary international law."[843]

"In a more recent case concerning Elettronica Sicula SPA (ELSI) between the USA and Italy adjudicated by a Chamber of the International Court of Justice, the US Government had invoked Article V(1) of the BIT which imposed an obligation to provide 'most constant protection and security' without however seeking to place an interpretation that this obligation constituted a guarantee by the host state involving strict liability of that state."[844] "[A] reasonable construction of the term 'enjoy full protection and Security' denotes the obligation to exercise due diligence to protect foreign nationals or companies from investment losses. ...The host state would be obliged to compensate the investor only in the event that the latter is able to demonstrate that the host state has failed to act reasonably under the circumstances. The obligation on the host state is to act with due diligence and as expressed by Prof. Freeman 'due diligence is nothing more nor less than the reasonable measure of prevention which a well-administered government could be expected to exercise under similar circumstances'."[845]

However, it is questionable "whether the 'full protection and security' provision [in China-Africa BITs] created a 'strict liability' regime which renders the host state liable for any loss arising from destruction of the investment, even if caused by a person whose acts are not attributable to the state

[842] *Ibid.*
[843] *Ibid.*
[844] *Ibid.*
[845] *Ibid* at 611, see also Alwyn V Freeman, "Responsibility of States for Unlawful Acts of Their Armed Forces" (1959) 57:8 Mich L Rev 12 at 14.

and under circumstances beyond the state's control;"[846] as none of the BITs give the term a definition. It is unclear if the concepts of "full protection and security" in any two of the China-Africa BITs which mention it are alike; or if they have the same meaning as the term "constant protection and security" mentioned in some other BITs. "Given the vague language of many clauses in the BITs reviewed, estimations about their development implications are only, at best, guesses. Terms such as 'full protection and security,' 'fair and equitable' treatment, … cannot be easily defined and their scope depends on individual arbitrators and will likely vary from one case to another. Thus, the full implications of the BITs reviewed will ultimately depend on the arbitrators chosen to interpret a given agreement in a given case."[847]

The provision of "promotion and protection of investment" or "promotion of investments" in China-Africa BITs gives a response to the objectives of creating favorable investment conditions and promoting and protecting investments set up in the preamble. It is truly hortatory, but general, unclear and unidentified. In respect of investment promotion, except for the China-South Africa BIT, most BITs merely include an obligation of providing assistance with respect to visas and work permits in the last clause of the provision; some BITs do not even specify any promotional or protective activities which the contracting parties are expected to undertake.[848] In respect of investment protection, the BITs provide for various protective standards, but none of them give a definition of the standards making it unclear to what extent the standards may provide protection to investments. To particularly include the promotion and protection of investment provision, although it is general and unidentified, clearly gives the message that Africa really wants Chinese investments. The reason that no specific promotional or protective activities are addressed may be

[846] *Ibid* at 610.
[847] Ofodile Uche Ewelukwa, *Supra* note 597 at 180-181.
[848] Among all eight reviewed BITs between China and OHADA member states, the China-Gabon BIT is the only one that does not include the visa and work permit facilitation arrangement.

the lack of legal technology. Another guess may be that they are afraid of losing discretion. Some African countries are not developed enough to give proper stipulations which can keep balance between providing favourable conditions and preserving discretion.

5.1.6 Investment treatments

The application of general standards of treatment is an important feature of the current trends in global BIT practice,[849] and so it is in the China-Africa BITs. Three types of standards are addressed in China-Africa BITs: national treatment, most-favoured treatment and fair and equitable treatment. The first two are referred to as relative standards of treatment that "defines the required treatment to be granted to investment by reference to the treatment accorded to other investments,"[850] while the "fair and equitable treatment" is the absolute standards of treatment which is non-contingent. National treatment requires the host country to extend to foreign investors treatment that is at least as favourable as the treatment that it accords to national investors.[851] "It stipulates formal equality between foreign and national investors."[852] "The national treatment standard seeks to ensure a degree of competitive equality between national and foreign investors."[853] Thus, the admitted foreign investment can compete with the national investment on the same ground. In the global BIT practice, some BITs require the treatment accorded to investments "the same as" or "as favourable as" that which is accorded to its national investments. "This formulation suggests that the treatment offered to foreign investors is no better than that received by national investors."[854] However, under the national treatment clause of China-Africa BITs, "host countries usually commit to grant investors of the other contracting party treatment that is **no less favorable** than

[849] *Supra* note 608 at 25.
[850] *Supra* note 72 at 606.
[851] *Supra* note 608 at 161.
[852] *Ibid.*
[853] *Ibid.*
[854] *Ibid* at 173.

that granted to investment from their own citizens."[855] This offers "the possibility not only of equal treatment but also of better treatment for foreign investors where this is deemed appropriate."[856] "National treatment is now a common feature of China-Africa BITs, but this was not always so..."[857] "For instance, some of the earlier BITs do not have national treatment provisions,"[858] such as the China-Ghana BIT signed in the 1980s, most of the 1990s BITs including the China-Ethiopia BIT, the China-Sudan BIT, the China-Egypt BIT, the China-Zimbabwe BIT, the China-Congo DR BIT, the China-Algeria BIT, the China-Zambia BIT, the China-Mauritius BIT, the China-Cape Verde BIT and the China-Tunisia BIT signed in the 2000s. The purpose of the omission is "to avoid equality of treatment between national and foreign investors for a host country with strong reservations about limiting its freedom to offer preferential treatment to domestic firms for certain purposes. This approach is the most restrictive in terms of investors' rights and the most respectful in terms of host country discretion."[859] However, such an omission is rare today in the China-Africa BITs.[860]

"The national treatment standard is perhaps the single most important standard of treatment enshrined in international investment agreements (IIAs). At the same time, it is perhaps the most difficult standard to achieve, as it touches upon economically (and politically) sensitive issues. In fact, no single country has so far seen itself in a position to grant national treatment without qualifications."[861] There is a requirement of a certain degree of flexibility in the treatment of national investments especially in developing countries.[862] "Given the significance of national

[855] Ofodile Uche Ewelukwa, *Supra* note 597 at 166.
[856] *Supra* note 608 at 162.
[857] Ofodile Uche Ewelukwa, *Supra* note 597 at 166.
[858] *Ibid.*
[859] *Supra* note 608 at 184.
[860] Ofodile Uche Ewelukwa, *Supra* note 597 at 183.
[861] *Supra* note 608 at 161.
[862] *Ibid.*

treatment for development, some countries may find it hard to give up their power to treat foreign and domestic investors differently."[863] This is why some China-Africa BITs, as mentioned earlier, are silent on national treatment; or some others use exceptions to "exclude certain types of enterprises, activities or industries from the operation of national treatment."[864] In the Sino-Africa investment context, exceptions to national treatment are required in order to retain a measure of the host country discretion in investment matters.[865]

All the China-Africa BITs with the national treatment clause include exceptions concerning the exclusion from national treatment commitments. The most common expression they use are "without prejudice to its laws and regulations", or "subject to its laws and regulations" or "conformément à ses lois et règlements" (see Table 15a). This type of "**country-specific exception**" allows the contracting party to reserve the right to differentiate between domestic and foreign investors under its laws and regulations.[866] Some BITs adopt the "**subject-specific exceptions** which exempt specific issues from national treatment."[867] For example, the China-Seychelles BIT exclude privileges by virtue of taxation from national treatment. Some others adopt both the "country-specific" and "subject-specific exceptions", for example, the China-Mozambique BIT stipulates that the host country is not obligated to extend to investors the benefit, preference or privilege resulting from any special arrangements concerning free trade zone, customs union, common market; taxation; or frontier trade (see Table 15b).

[863] *Ibid* at 162.
[864] *Ibid* at 165.
[865] *Ibid* at 162.
[866] *Ibid* at 165, The China-Benin BIT, the China-Cote d'Ivoire BIT, the China-Serra Leone BIT, the China-Botswana BIT, the China-Congo BIT, the China-Gabon BIT, the China-Djibouti BIT, the China-Madagascar BIT, the China-Mali BIT, the China-Nigeria BIT, the China-South Africa BIT, the China-Kenya BIT and the China-Tanzania BIT adopt the "country-specific exception" model.
[867] *Ibid* at 165.

"The number and scope of exceptions determines the practical effect of national treatment under an investment agreement."[868] The China-Africa BITs including the most recent China-Tanzania BIT stipulate that the application of national treatment shall be subject to the national laws of host country. The host country is, therefore, free to make any exceptions to national treatment as they want. While the China-Africa BITs provides for the national treatment, such treatment is limited to the domestic laws of host country. The inclusion of national treatment in the China-Africa BITs is done in such a way as to preserve a high level of the host country's authority.

In many China-Africa BITs, national treatment co-exists with other standards of treatment, MFN and fair and equitable treatment. In some BITs, such as the China-Tanzania BIT, the national treatment is stated in a "stand alone"[869] provision; while in some other cases, it is found in a separate clause combined with MFN. Some BITs, such as the China-Gabon BIT, the China-Cameroon BIT, the China-Morocco BIT and the China-Seychelles BIT, with separate national treatment and MFN treatment clauses "specify also that each contracting party shall accord to investors of the other contracting party or parties the better of national or MFN treatment."[870] Others do not specify "whether one or the other standard should apply in case of conflict between the two"[871] (see Table 15c). "The effects of these variations revolve around the level to which the investor/investment is to be treated vis-à-vis other classes of investors."[872] The former provides for more protection as "they expressly require the better of national or MFN treatment to apply."[873] However, the latter "by not specifying which standard applies, leaves it to the host country to

[868] *Ibid.*
[869] *Ibid* at 176.
[870] *Ibid* at 177.
[871] *Ibid.*
[872] *Ibid.*
[873] *Ibid.*

determine whether to compare the treatment accorded to a foreign investor with domestic or other foreign investors, regardless of which offers better protection."[874]

National treatment in China-Africa BITs applies only to investments that have already been admitted to the host state. This conforms to the stipulation of "invest by… in accordance with the laws and regulations of contracting party" in the definition of investment, that restricts the operation of the treaty to investments from other contracting party admitted in accordance with the laws and regulations of the host state.[875] As the national treatment applied only to the post-entry phase of investment, the pre-entry phase is left to the sovereign right of host state in terms of deciding on investment admission.[876]

Most-favoured-nation treatment "guarantees treaty-protected investments will receive treatment at least as favorable as the treatment the host country grants to investments by nationals and companies from any third state."[877] "All China-Africa BITs provide for the MFN standard at the post-establishment phase",[878] requiring the host state to provide treatment no less favorable than that it accords to the investments of any third state. Variations on the exceptions to the MFN standard exist, however. Most China-Africa BITs exclude the preference by virtue of customs union, free trade zone, economic union, taxation and frontier trade from the MFN treatment commitment. Some of the BITs, such as the China-Gabon BIT, the China-Uganda BIT, the China-Cameroon BIT, the China-Seychelles BIT, the China-Madagascar BIT and the China-Nigeria BIT, remove the facilitation of frontier trade. Some such as the China-South Africa BIT consider advantages to development finance institutions as an exception (See table 15d).

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[874] *Ibid.*
[875] *Ibid* at 167.
[876] *Ibid* at 162.
[877] *Supra* note 625 at 668.
[878] Ofodile Uche Ewelukwa, *Supra* note 597 at 167.

Both the national treatment and the MFN treatment are contingent standards based on the treatment given to other investors.[879] "National treatment seeks to grant treatment comparable to domestic investors operating in the host country."[880] "MFN seeks to grant foreign investors treatment comparable to other foreign investors operating in the host country."[881] What if the treatment given to national or other foreign investors is lower than the required treatment by international law, the China-Africa BITs provide for the absolute standard of fair and equal treatment.

All China-Africa BITs contain the fair and equitable treatment provision, requiring investments by investors of the other Contracting Party to be treated fairly and equitably. However, unlike the US or Canada BITs which refer the fair and equitable treatment to "a treatment no less than that required by international law",[882] namely the minimum standard of treatment, none of the BITs adopt the minimum standard or amplify the meaning of the fair and equitable treatment.[883] There is a broad mixed use of the treatment with the standard of general obligation of protecting investments. In the China-Mauritius BIT and the China-Benin BIT, the fair and equitable treatment is addressed in the "Promotion and Protection of Investments" provision, keeping silent about the investment treatment provision. The fair and equitable treatment therein serves as one of the elements of the general obligation of protecting investments paralleled with the full protection and security, constant protection and security and non-discrimination requirements.[884] Most of the

[879] *Supra* note 608 at 161.
[880] *Ibid.*
[881] *Ibid.*
[882] *Supra* note 625 at 667-668.
[883] Except for the China-Tanzania BIT, the China-South Africa BIT is the only one that gives a further explanation of the fair and equitable treatment. Article 3.1 stipulates that "Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party."
[884] Some of them include the fair and equitable treatment in both the investment treatment and the general obligation of protecting investments, such as the China-Gabon BIT, the China-Morocco BIT.

BITs put the fair and equitable treatment in the provision "Treatment of Investments", which is regarded as one of the standards of treatment paralleled with national treatment and most-favoured-nation treatment,[885] tied or independent to the national treatment or most-favourable treatment. For example, China's BITs with Ghana, Cape Verde, Egypt, Ethiopia, Sudan, Congo DR, Zimbabwe, Zambia, South Africa and Algeria is coupled with the most-favourable treatment. The fair and equitable treatment shall not be less favourable than that accorded to investments and activities associated with such investments of a third state. Some China-Africa BITs requires the fair and equitable treatment to be referred to the national treatment or the MFN treatment, either of which is more favourable, such as the China-Cameroon BIT, the China-Gabon BIT and the China-Morocco BIT. While a number of BITs have independent fair and equitable treatment clauses that are not tied to any particular principle or set of principles, including China's BITs with Cote d'Ivoire BIT, Mali, Congo, Equatorial Guinea, Nigeria, Sierra Leone, Botswana, Kenya, Mozambique, Tunisia, Djibouti, Uganda, Seychelles, Madagascar and Tanzania (see Table 15e). Different from other BITs that include all of the three standards of treatment in one provision, the China-Seychelles BIT, the China-Madagascar BIT and the China-Tanzania BIT place the fair and equitable treatment in a separate provision.

The national treatment, most-favourable treatment and the fair and equitable treatment are general standards and principles of investment protection. The early China-Africa BITs do not contain national treatment, in such a way to preserve a high level of authority which allows host state to treat its own and foreign investors differently. BITs signed after 2000s commit the national treatment that requires host state to provide treatment to foreign investments no less favourable than that it accords to its own national investments. However, most of the national treatment

[885] See Article 3 of the China-Congo BIT, Article 3 of the China-Equatorial Guinea BIT, Article 3 of the China-Mali BIT and Article 3 of the China-Mozambique BIT.

clauses stipulate that the application of national treatment shall be subject to the laws of host country. Thus, the host country is free to make any exceptions to national treatment as they want. All China-Africa BITs provide for MFN treatment, requiring the host state to provide treatment to investments no less favourable than that is accorded to any third state. They commonly impose on the contracting state an obligation to treat investments from other contracting state fairly and equitably, while none of them give a definition of the fair and equitable treatment. To conclude, it appears that the China-Africa BITs provide for various protective standards and principles of treatment, however, they leave the host state with a lot of room for discretion.

In the China-Africa BITs, the general standards and principles of treatment are followed by a major category of investment protection provisions, consisting of measures that seek to address concerns specific to foreign investors,[886] including takings of property, compensation for losses by war, transfer of funds and subrogation of insurer of investor. All the protective provisions once again clearly send the message that the China-Africa BITs focus is on investment protection.

5.1.7 Takings of property

"One of the primary functions of any BIT is to protect foreign investments against nationalization, expropriation, or other forms of interference with property rights by host country governmental authorities."[887] (All forms of taking property is hereafter referred to as 'expropriation'.) In general, the China-Africa BITs "recognize the right of host countries to expropriate the property of investors,"[888] and the conditions required to make expropriation lawful are all the same. Almost all the China-Africa BITs[889] require expropriation to meet the following four conditions: "(1) for

[886] *Supra* note 608 at 34.
[887] *Supra* note 625 at 670.
[888] Ofodile Uche Ewelukwa, *Supra* note 597 at 168.
[889] The China-Ghana BIT merely provides for three conditions without "for the public interests"; the China-Uganda BIT includes three of the conditions without the "under domestic legal procedure"; the China-Kenya BIT provides for merely two conditions, "for the public benefit and against compensation."

the public interests; (2) under domestic legal procedure; (3) without discrimination; (4) against compensation." All the China-Africa BITs, usually in the last clause, require the compensation to be paid by means of a convertible currency and to be freely transferable.

While the expropriation provision in China-Africa BITs looks alike there are variations in terms of the time in which compensation should be paid, the type of valuation method to be used and whether interest should be paid on the accrued sum.[890] "Thus, there is a noticeable difference in the details regarding the payment of compensation."[891]

There are great variations regarding **the time in which compensation should be paid**. Some BITs, such as the China-Congo BIT, the China-Equatorial Guinea, the China-Benin BIT, the China-Cote d'Ivoire BIT, the China-Djibouti BIT, the China-South Africa BIT, the China-Tunisia BIT, the China-Serra Leone BIT, the China-Zambia and the China-Botswana BIT, stipulate that the payment of compensation should begin "immediately before the expropriation is taken or the impending expropriation becomes public knowledge, whichever is earlier."[892] Some other BITs, such as the China-Gabon BIT and China-Mali BIT, require payment to begin "immediately at the time of the expropriation taken place or know to the public."[893] The China-Mozambique BIT stipulates that the compensation shall be equal to the market value of the investment expropriated "immediately before the expropriation became public knowledge." The China-Ethiopia BIT, the China-Egypt BIT, the China-Sudan BIT, the China-Algeria BIT, the China-Ghana BIT, the China-Cape Verde BIT, the China-Nigeria BIT and the China-Congo DR BIT stipulate that the compensation shall be equivalent to the value of the expropriated investment "at the time when

[890] Ofodile Uche Ewelukwa, *Supra* note 597 at 169.
[891] *Ibid.*
[892] Article of 4.2 of China-Congo BIT, Article of 4.2 of China-Equatorial Guinea, Article of 4.2 of China-Benin BIT and Article of 4.2 of China-Cote d'Ivoire BIT.
[893] Article 4.2 of China-Gabon BIT and Article 4.2 of China-Mali BIT.

expropriation is proclaimed."[894] The China-Zimbabwe BIT and China-Cameroon BIT require payment to begin "immediately before the date on which the actual or impending expropriation becomes publicly known."[895]

Many China-Africa BITs, usually the older ones, stipulate that the compensation shall be equivalent to the **value** of the expropriated property at the time the expropriation is announced, immediately before the expropriation takes place or at any other point in time mentioned above "but leave it open how to determine the value of such property."[896] The word "value" "does not specify the type of valuation method to be used. Its language might permit the application of market value, book value, or some other method, each of which might have a different result."[897] Interestingly, the China-Zimbabwe BIT and the China-Mauritius BIT use the even more vague expression the "genuine value". "By contrast, more recent BITs stipulate that the market value of the property … shall be the basis for determining the value of the expropriated property",[898] such as the China-Cameroon BIT, the China-Congo DR BIT, the China-Zambia BIT.

"Some variations also exist in the provisions relating to **payment of interest**. While some BITs[899] are silent on the issue and do not address accrued interest at all, others address this issue directly. According to the China-Benin BIT, compensation payable in the event of an expropriation 'shall include interest at a normal commercial rate from the date of expropriation until the date of payment.' "[900] Similar stipulations can be found in the China-Cote d'Ivoire BIT, the China-Zambia BIT, the China-Mauritius BIT, the China-Djibouti BIT, the China-Madagascar, the China-

[894] Article 4.2 of China-Congo BIT and Article 4.2 of China-Ethiopia BIT.
[895] Article 5.2 of China-Cameroon BIT and Article 4.2 of China-Zimbabwe BIT.
[896] Ofodile Uche Ewelukwa, *Supra* note 597 at 169-170.
[897] *Supra note 625* at 671.
[898] Ofodile Uche Ewelukwa, *Supra* note 597 at 169-170.
[899] China's BITs with Gabon, Congo DR, Cameroon, Algeria, Nigeria, Sudan, Egypt, Tunisia and Cape Verde are silent on the payment of interest.
[900] Ofodile Uche Ewelukwa, *Supra* note 597 at 169-170.

Seychelles BIT, the China-Serra Leone BIT, the China-South Africa BIT, the China-Mozambique BIT and the China-Equatorial Guinea BIT, etc. Additionally, the difference between "interest at a normal commercial rate"[901] and "a current commercial rate applicable to the currency"[902] also present a wide variation in interpretation.[903]

In addition, the China-Gabon BIT, the China-Egypt BIT, the China-Sudan BIT, the China-Cape Verde BIT, the China-Ghana BIT, the China-Nigeria BIT, the China-Madagascar BIT and the China-Algeria BIT "call for payment of compensation '**without unreasonable delay**,'" while the China-Zambia BIT, the China-Tunisia BIT, the China-Djibouti BIT, the China-Mozambique BIT and the China-Mauritius BIT "call for payment '**without delay**.'"[904] Article 4.3 of the China-Gabon BIT states "Rules for verification and payment of compensation shall be made without undue delay."

It also worth mentioning that most of the China-Africa BITs refer to the standard of compensation. "Many, if not most, BITs have adopted the traditional rule, expressed in the so-called 'Hull formula,' that such compensation must be 'prompt, adequate, and effective'."[905] Although all the BITs reviewed consistently provide for the payment of compensation, they do not specifically provide for "prompt, adequate and effective compensation" which represents "a marked departure from the position most developing countries took in the 1970s and 1980s regarding compensation."[906] Thus, the greatest variations may arise with respect to the standard of compensation despite the use of exactly the same wording.[907]

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[901] See Article 4.2 of China-Benin BIT, Article 4.2 of China-Cote d'Ivoire BIT and Article 4.2 of China-Equatorial Guinea BIT.
[902] See Article 4.2 of China-Congo BIT.
[903] *Supra* note 625 at 671.
[904] Ofodile Uche Ewelukwa, *Supra* note *597* at 169.
[905] *Supra* note 625 at 670.
[906] Ofodile Uche Ewelukwa, *Supra* note 597 at 169.
[907] *Supra* note 625 at 670.

Additionally, there is a difference in the scope of which measures are qualified to be compensated. The focus of most BITs is "on expropriation and nationalization or 'similar measures'" while a few BITs include measures on effects equivalent to expropriation or nationalisation.[908] For example, the China-Gabon BIT, the China-Madagascar BIT, the China-Morocco BIT, the China-Seychelles BIT, the China-Zambia BIT, the China-South Africa BIT, the China-Kenya BIT, the China-Tanzania BIT and the China-Mozambique BIT require compensation to be paid by "expropriation, nationalization or any dispossession having effect equivalent to nationalization or expropriation against the investments."

As discussed above, all the China-Africa BITs accept expropriation only if the conditions are met. Except for few BITs, the conditions are commonly for the public purpose, under domestic legal procedure, without discriminatory and against compensation. However, variations with respect to the details of the payment of compensation exist.[909]

5.1.8 War clause

In the wake of provisions on property takings in China-Africa BITs, "provisions may also be found that concern protection against injuries caused by civil war or internal disorder. These provisions, however, assure investors not of indemnification in all cases, but of non-discrimination in the award of compensation. That is to say, contrary to the usual run of expropriation provisions, foreign firms in such cases are to be compensated only when domestic firms [or firms of a third country] in similar situations are."[910] "All the BITs reviewed in this article have provisions directed at protecting investors from discrimination in the event of property damage as a result of war or other civil strife. There are variations in the scope and content of war clauses."[911]

[908] Ofodile Uche Ewelukwa, *Supra* note 597 at 168-169.
[909] *Ibid* at 169.
[910] *Supra* note 608 at 33-34.
[911] Ofodile Uche Ewelukwa, *Supra* note 597 at 171.

In terms of scope, all the BITs cover man-made disturbances and none address natural disasters. Furthermore, all the BITs mention 'a state of national emergency' as the triggering event."[912] While, "the specific loss-causing damage that the BIT protects against"[913] varies expressively,[914] the scope is more or less the same as the provisions make a non-exclusive list and the wording "other similar events" may include any events such as war, insurrection, or riots.

With respect to the content, "[n]one of the BITs provide a parameter for determining the amount of compensation to be paid, [...]. While some of the BITs grant MFN treatment as regards restitution, indemnification, compensation and other settlements,[915] others[916] accord both MFN and national treatment protection."[917]

"Some BITs go a step further and address issues such as requisitioning of investment property by the forces or authorities of a contracting party and destruction of investment property by forces and authorities of a contracting party. For instance, the China-Cote D'Ivoire BIT provides:

> investors of one Contracting Party who . . . suffer losses in the territory of the other Contracting Party resulting from: (a) requisitioning of their property by the forces or authorities of the other Contracting Party, or (b) destruction of their property by the forces or authorities of the other Contracting Party, which was not caused in combat action or was

[912] *Ibid.*

[913] *Supra* note 625 at 672.

[914] The China-Gabon BIT, the China-Congo DR BIT and the China-Cameroon BIT refer "war, a state of national emergency, revolt, riot or other similar events" as loss-causing damages. The China-Cote d'Ivoire BIT includes "war, a state of national emergency, armed conflicts, insurrection, riot or other similar events". The China-Benin BIT mentions "war or other armed conflict, a state o national emergency, insurrection, riot, revolt other similar events". The China-Equatorial Guinea BIT includes "war, a state of national emergency, insurrection, revolution, riot or other similar events".

[915] Such as the China-Gabon BIT, China-Cameroon BIT, China-Congo DR BIT, China-Mauritius BIT, China-Egypt BIT, China-Algeria BIT, China-Sudan BIT, China-Ghana BIT, China-South Africa BIT, China-Cape Verde BIT, China-Tunisia BIT, China-Zambia BIT, China-Morocco BIT, China-Ethiopia BIT.

[916] Such as the China-Equatorial Guinea BIT, China-Mali BIT, China-Benin BIT, China-Congo BIT, China-Cote d'Ivoire BIT, China-Djibouti BIT, China-Nigeria BIT, China-Serra Leone BIT, China-Kenya BIT, China-Congo BIT, China-Uganda BIT, China-Zimbabwe BIT, China-Mozambique BIT, China-Madagascar BIT, China-Seychelles BIT, China-Botswana BIT and China-Tanzania BIT.

[917] Ofodile Uche Ewelukwa, *Supra* note 597 at 171.

not required by necessity of the situation, shall be accorded restitution or reasonable compensation."[918]

Similar stipulation can be found in the China-Congo BIT and the China-Tanzania BIT.

5.1.9 Fund transfer

"The monetary transfer provisions of most BITs deal with five basic issues: (1) the general nature of the investor's rights to make monetary transfers, (2) the types of payments that are covered by the right to make transfers, (3) the nature of the currency with which the payment may be made, (4) the applicable exchange rate, and (5) the time within which the host country must allow the investor to make transfers."[919].

In the current China-Africa BITs, all the above provisions "provide for the removal of restrictions not only on capital movements but also on current payments, including transfer of profits from investments";[920] and guarantee that investors are free to exchange foreign currency. The problem is that "none of the BITs reviewed explicitly apply to inbound transfers of funds"[921] while, "the majority use language suggesting they apply to both inbound and outbound transfers."[922] "A review of the China-Africa BITs suggests the need to clarify whether the provision applies to inbound as well as outbound transfers; most of the BITs reviewed are not clear on this point."[923]

With respect of the types of payments that are covered by the right to make transfers, the China-Africa BITs commonly guarantee the transfers of investments and returns, and they go into details to provide non-exclusive examples of the types of investments and returns, including capital movement, payment and earnings. "In most treaties the concept of 'returns' determines the breadth

[918] *Ibid* at 172.
[919] *Supra* note 625 at 669.
[920] *Supra* note 608 at 34.
[921] Ofodile Uche Ewelukwa, *Supra* note 597 at 174.
[922] *Ibid.*
[923] *Ibid* at 186.

of the monetary transfer rights, and it is usually given special meaning in the BIT's definitional section."[924] What is covered by "returns" "makes considerable difference in terms of the extent of the guarantee of free transfer of funds accorded the investor."[925] Most China-Africa BITs provide for the free transfer of investments and "returns" however a few BITs, such as the China-Gabon BIT and the China-Cameroon BIT, specifically guarantee the transfer of investments and "net cash profit". This is because of the special meaning given to returns in the China-Gabon BIT as "the net profit after taxation yielded by an investment, includes but without limit to profits, dividends, royalties and any legitimate income".[926] This is different from most of the BITs that define "returns" as the amounts yielded from investments, including profits, dividends, interests, capital gains, royalties, fees and other legitimate income. Interestingly, the China-Kenya BIT employs a close-ended list of protective payment. The use of language suggests that the limited examples of payments it listed in Article 6 is exclusive (see Table 16a). Provisions on transfers in China-Africa BITs "are very detailed and provide examples of the types of investments and returns on investment that can be repatriated" however the specificity varies.[927]

"Almost all the BITs provide for transfer of funds in 'any convertible currency' or 'a freely convertible currency' and specify the applicable exchange rate."[928] Mostly, transfers shall be made "at the prevailing market rate of exchange applicable within the Contracting Party accepting the investments and on the date of transfer" and the China-Mauritius BIT provides that in absence of such a market rate, the official rate of exchange shall apply. The China-Mali BIT and the China-Benin BIT[929] guarantee that "in the absence of a market for foreign exchange, 'the most recent

[924] *Supra* note 625 at 669.
[925] *Supra* note 608 at 133.
[926] Article 1.3 of China-Gabon BIT.
[927] Ofodile Uche Ewelukwa, *Supra* note 597 at 172.
[928] *Ibid* at 174. The China-Nigeria BIT is the only one that does not mention exchange rate.
[929] Article 6.4 of China-Mali BIT and China-Benin BIT.

exchange rate for the conversions of currencies into Special Drawing Rights" shall apply.[930] The China-Madagascar BIT and the China-Mali BIT stipulate that "Where there is no prevailing market exchange rate, the applicable exchange rate shall be the rate between the most recent rate between the relating currency and the special drawing right." While, the China-Gabon BIT, the China-Cameroon BIT, the China-Zimbabwe BIT and the China-Congo DR BIT provide that transfers shall be made "at the rate of exchange applicable on the date of transfer." Particularly, "the China-Ghana BIT provides that transfers shall be made 'at the official exchange rate as determined by the Central Bank of the Contracting State accepting investment on the date of transfer'," [931] and "market rate shall be applicable if no official exchange rate is available" [932] (see Table 16b).

Most of the BITs reviewed do not provide for the time within which the host country must allow the investor to make transfers with the exceptions that the China-Zimbabwe BIT and the China-South Africa BIT require the transfer to be made **without delay**, the China-Tunisia BIT requires the transfer to be made without due delay and the China-Tanzania BIT requires **without any delay**. However, the China-Gabon BIT and the China-Morocco BIT mention the treatment regarding transfers, stipulating that "Treatment provided in this Article shall at least be equivalent to the treatment accorded to investors of the most-favored nation where under similar circumstances." Furthermore, "some BITs provide for some limited exceptions to the rights of investors to repatriate funds. For example, the China-Uganda BIT, the China-Madagascar BIT, the China-Seychelles BIT and the China-Tanzania BIT include an important balance-of-payment exception and also provide that the investor must meet formalities in the law prior to such transfer[933] (see Table 16c).

[930] Ofodile Uche Ewelukwa, *Supra* note 597 at 172.
[931] *Ibid.* Article 6.1 of China-Ghana BIT.
[932] See Article 6 of China-Ghana BIT.
[933] Ofodile Uche Ewelukwa, *Supra* note 597 at 173.

"For both the investor and the host country, the BIT provisions on monetary transfers are among the most important in the treaty. On one hand, foreign investors consider the ability to transfer income and capital and to make foreign expenditures freely as indispensable to operating and profiting from their investment project; therefore, their home countries, through the BIT negotiation process, press for unrestricted guarantees to make monetary transfers. On the other hand, chronic balance-of-payments difficulties of many host countries and the host countries' need to conserve foreign exchange to pay for essential goods and services considerably reduce their ability and their willingness to grant investors the unrestricted right to make monetary transfers."[934] "As a result of these conflicting goals, the negotiation of BIT provisions on monetary transfer is often one of the most difficult negotiations to conclude. Capital-exporting countries seek broad, unrestricted guarantees on monetary transfers, while developing countries press for limited guarantees, subject to a variety of exceptions."[935] This is probably why the China-Africa BITs[936] leave a backdoor open for the African countries to issue domestic laws to regulate fund transfer or even impose obligations on investors. They commonly include the expression of "subject to its laws and regulations" or "in accordance with its laws and regulations" in the provision of fund transfer, requiring the fund transfer to be complied with the domestic laws of the host country. The China-Madagascar BIT particularly addresses that "The transfer shall be subject to laws and regulations of the Contracting Parties, and fulfill the procedure and obligation requirements by the laws and regulations provided in these laws and regulations." While the BITs provide for many details of fund transfer, they still leave space for the African countries to issue laws to regulate the procedure of transfer or even impose obligations on investors, which may frustrate the transfer.

[934] *Supra* note 625 at 668-669.
[935] *Ibid* at 669.
[936] The China-Seychelles BIT is the only one among the BITs reviewed that does not include any limitation in the provision of fund transfer.

Except for the China-Uganda BIT, none of the BITs reviewed emphasise that domestic laws and regulations shall not be used to frustrate the fund transfer (see Table 16d).

5.1.10 Subrogation

While variations exist, subrogation provisions in China-Africa BITs commonly deal with four issues: 1) the subject who may enjoy the right of subrogation, 2) against what one may claim for subrogation, 3) the right to be subrogated, and 4) the extent for exercising subrogation.

Regarding the subject who may enjoy the right of subrogation, most BITs provide for Contracting Parties or its designated agency, some use the word of "its agency" or "any of its institution". The China-Mauritius BIT extends the subject of subrogation from a state or its designated agency to statutory body or corporation designated by the Contracting Party. With respect to what one may claim for subrogation against, China's BITs with Congo, Mozambique, Kenya, Algeria, Botswana, Djibouti, Sierra Leone and Cote d'Ivoire stipulate that the Party or its designated agency may claim right of subrogation against the payment under an indemnity; China's BITs with South Africa, Cape Verde, Ghana, Egypt, Nigeria, Congo DR, Zimbabwe, Sudan, Ethiopia and Madagascar use the expression of payment "under a guarantee"; and China's BITs with Benin, Tanzanian, Mali, Seychelles, Cameroon, Equatorial Guinea and Uganda specify that Contracting Parties shall recognize the subrogation rights against a payment under a guarantee or a contract of insurance against non-commercial risks. The China-Gabon BIT accept any guarantee against non-commercial risks; the China-Mauritius BIT and the China-Tunisia BIT adopt very vague wording, stipulating that the claim can be made against payment made by the Contracting Parties in respect of investments by their own investors. The author is not sure if the different expressions have the same meaning. All the China-Africa BITs recognise the subrogation and the transfer of the rights and claims and stipulate that the exercise of the subrogation shall not be greater than the original

right or claim or to the same extent (see Table 17). The subrogation provision indirectly protects Chinese investments in Africa, as the African countries recognise the right and claim of Chinese government or its designated agency when it makes a payment under an indemnity or guarantee to its investments.

5.1.11 State-state dispute settlements

"[M]ost recent BITs provide for two distinct dispute settlement mechanisms: one for disputes between the two contracting states and the other for disputes between a host country and an aggrieved foreign investor. With respect to the former, most BITs provide that in the event of disputes over the interpretation or application of the treaty, the two states concerned will first seek to resolve their differences through negotiation and then, if that fails, through ad hoc arbitration."[937] This also applies to China-Africa BITs, where the parties are required to firstly settle the disputes as far as possible by consultation through diplomatic channel then ad hoc arbitration.

Provisions on State-State Dispute Settlements in China-Africa BITs enjoy a high commonality. They all provide for the establishment of ad hoc tribunal, the appointment of arbitrators, procedural rules of arbitration, the finality of the award and the issue related to administrative support. Merely slight variations on the time limits exist. A significant initiation worth mentioning is the transitional arrangement of a mixed committee provided for in the China-Gabon BIT, the China-Morocco BIT and the China-Cameroon BIT. It stipulates that if a dispute cannot be settled through consultation, it shall be submitted to a mixed committee with all members from both Contracting Parties and the mixed committee shall hold meeting without delay. If such a committee fails, the dispute can then be submitted to ad hoc arbitration. None of the China-Africa BITs mention

[937] *Supra* note 625 at 672.

adjudication before the International Court of Justice. There is an obvious intention to minimise the impairment of economic ties between contracting parties.

5.1.12 Investor-state dispute settlement

"[T]he second generation of bilateral investment treaties since the 1980s/1990s has made an important contribution to the creation of a unique investor–state arbitration system. The task of these international arbitral tribunals was, and still is, to decide between the interests of the investor in protecting his foreign investment from state intervention, on the one hand, and the interests of the host state in implementing its public aims on the other hand. This led to a dispute arbitration system which denationalizes and depoliticizes conflicts between investors and states. It appears that investors currently view international investor–state arbitral proceedings as the most suitable instrument of last resort for the law-based resolution of such problems. The investor can independently assert the standards guaranteed in bilateral investment treaties against the host state directly at the level of international law."[938]

Such separate system for disputes between an aggrieved foreign investor and the host country government is addressed in the Investor-State Dispute Settlement (ISDS) provision.[939] It allows "investors to unilaterally initiate binding international arbitration against the state hosting their investment. This development is particularly striking, as historically international law has not recognized a right of private parties to seize international tribunals to resolve treaty disputes."[940] The ISDS might create "the potential for an individual investor, with or without the approval of its

[938] Tillmann Rudolf Braun, "For a Complementary European Investment Protection" in Marc Bungenberg, Jörn Griebel & Steffen Hindelang, eds, *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (London: Springer Heidelberg Dordrecht, 2011) 95 at 95-96.
[939] *Supra* note 625 at 672.
[940] *Supra* note 565 at 805.

home government, to press a conflict that may ultimately have diplomatic implications and may affect relations between the two countries concerned."[941]

International arbitration, of course, is not a unique resolution for disputes between an investor and a state. Amicable negotiation and domestic remedies in host countries are broadly included in BITs as alternative options. The ISDS provisions in China-Africa BITs include all of the dispute-settlement mechanisms – amicable negotiation, domestic remedy and international arbitration including both institutional and ad hoc arbitration. This section will mainly address three issues: (1) the compulsory amicable negotiation, (2) the formal procedures for dispute settlement and (3) particularly the international ad hoc arbitration.

5.1.12.1 Compulsory amicable negotiation as a prerequisite for initiating formal proceedings

"At the outset it should be noted that the majority of dispute-settlement clauses in IIAs [BITs] relating to investor-State disputes mandate the use of informal methods of dispute settlement in the first instance. Recourse to informal methods will, hopefully, lead the investor and host State towards an amicable, negotiated settlement of their differences. … The requirement for consultation or negotiation is valuable to States not only because it helps to defuse tensions in some instances, but also because it may underline the amicable spirit in which most States hope to conduct their investment relations (UNCTAD, 1998a, p. 88). Furthermore, the obligation to negotiate and consult before initiating the other means of dispute settlement is not to be taken lightly: it is an obligation of substance and context. The parties to the dispute must negotiate in good Faith."[942] "Where provision is made for an amicable settlement of disputes, time limits are often countenanced as a means of facilitating the interests of both protagonists, … Usually, the

[941] *Supra* note 625 at 673.
[942] *Supra* note 608 at 353.

time limits range from three months to 12 months. More recently, a six-month period appears to have become commonplace."[943]

As a matter of fact, almost all China-Africa BITs reviewed[944] require amicable resolution of the disputes through negotiations within a specified period, commonly within six months,[945] prior to referring the matter to formal resolutions.[946] Their provisions on ISDS usually stipulate, at the very beginning, that any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party ***shall, as far as possible, be settled amicably through negotiations*** between the parties to the dispute. ***If the dispute cannot be settled through negotiations within six months,*** the investor of one Contracting Party ***may submit the dispute to*** the competent court of the other Contracting Party, or international institutional arbitration, or an ad hoc arbitral tribunal.[947] That is to say, in China-Africa BITs, "[t]here should be an attempt by the Contracting Parties to resolve disputes by means of negotiations prior to starting formal procedures. If this fails, disputes can then be presented either to a competent judicial authority of the host country"[948] or to arbitration. Obviously, amicable negotiations have a positive impact on the economic ties between China and Africa. The

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[943] *Ibid* at 354.

[944] The China-Ghana BIT is the only exception in that its investor-state dispute settlement provision merely provides for an ad hoc arbitration for disputes limited to the amount of compensation. Neither the amicable negotiation, nor formal procedures including domestic judicial remedies and institutional arbitration is mentioned.

[945] There are differences regarding the starting point of the time limit. China's BITs with Benin, Tunisia, Uganda and Mali count the starting point of the six months from the date the dispute has been raised by either party to such dispute. The China Seychelles BIT and the China-Tanzania BIT provide that the time limit shall be counted from the date negotiations were initiated by either party to the dispute. China's BITs with Morocco, Cameroon and Madagascar stipulate that the counting of six months will start from the date of written notification. The China-Equatorial Guinea BIT counts the six months from the date when the request for the settlement has been submitted. And China's BITs with Cote d'Ivoire, Congo, Congo DR, Gabon, Algeria, Cape Verde, Ethiopia, Sierra Leone, Sudan, South Africa, Mauritius, Mozambique, Nigeria, Djibouti, Egypt, Zambia, Zimbabwe, Botswana and Kenya do not address the issue in respect to the starting point of time limit.

[946] *Supra* note 562 at 95.

[947] See Article 9 of China-Sierra Leone BIT.

[948] Francesco Seatzu & Paolo Vargiu, "Africanizing Bilateral Investment Treaties (BITS): Some Case Studies and Future Prospects of a Pro-Active African Approach to International Investment" (2015) 30:2 Conn J Int'l L 143 at 157.

requirement for negotiation prior to any formal procedure helps to minimise the impairment of China-Africa investment relations.

5.1.12.2 Formal procedures for dispute settlement between investor and the host country

Disputes can be submitted to formal proceedings - either a competent domestic court in the host country or the international arbitration if they cannot be settled through the amicable negotiation within a given time limit. All of the China-Africa BITs include the choice of submitting investor-state disputes to a competent domestic court in a host country or/and to international arbitration, either institutional or ad hoc arbitration, or both.[949] The key issue is which tribunal will hear a case if and when a dispute arises.[950] More specifically, whether investors under China-Africa BITs ultimately have the power to invoke compulsory international arbitration to secure a binding award; as the great significance of the ISDS provisions contained in BITs is to "essentially shift the burden of perceived domestic court problems, especially the assumed bias problem, onto the host state by creating an international mechanism that structurally limits the host state's ability to pursue a legal process."[951]

Thus, the questions come to be: first, whether the presence of ICSID arbitration in a treaty makes any other remedies, in particular, local remedies of the host country unavailable, as the ICSID Convention explicitly excludes local remedies. Second, in China-Africa BITs, are national courts the same as international arbitration so as to be one of many options available to foreign investors for the ISDS, or do they serve as a precondition to trigger international arbitration? Broadly speaking, the questions is whether there is a requirement on the exhaustion of local remedies. Third,

[949] Ofodile Uche Ewelukwa, *Supra* note 597 at 174.
[950] *Ibid.*
[951] *Supra* note 152 at 173.

who is entitled to initiate the dispute settlement procedure, the aggrieved foreign investor or the host country?

5.1.12.3 Does the presence of ICSID arbitration clause in the ISDS provision excludes other remedies, particularly local remedies?

"The recent trend among BITs is to provide a separate procedure, normally under the auspice of the International Center for Settlement of Investment Disputes (ICSID), for disputes between an aggrieved foreign investor and the host country government. By concluding a BIT, the two states, in most cases, give the required consent needed to establish ICSID jurisdiction in the event of a future dispute."[952] The question arises that because the ICSID Convention stipulates that ICSID arbitration, does it exclude any of the other remedies? "The international character of ICSID dispute settlement is emphasized by the provisions of Articles 26 and 27 of the ICSID Convention. Article 26 of ICSID Convention states:

> 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy'. …"[953]

"The ICSID Convention explicitly excludes the local remedies rule, unless a State contracting party expresses a reservation to preserve the operation of the rule under Article 26 of the Convention."[954]

"Article 27 of the ICSID Convention addresses the relationship between ICSID Arbitration and the remedy of diplomatic protection:

> 'No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.'

[952] *Supra* note 625 at 672.
[953] *Supra* note 608 at 358.
[954] *Ibid* at 357.

This provision ensures that diplomatic protection is excluded as a possible remedy once the parties have both consented to submit the dispute to ICSID."[955] Thus, one may ask whether the presence of ICSID in the ISDS provisions makes other remedies, no matter whether they are judicial or diplomatic, unavailable. If the answer is yes, the China-Africa BITs with ICSID clauses will guarantee the investor's access to international arbitration and, therefore, the disputes will be settled in a fair and mutually acceptable manner.

Before addressing this issue, we should first address the issue that "[T]he ICSID is not always explicitly mentioned" in China-Africa BITs,[956] and, even if it is, it is sometimes merely used as guidance for ad hoc arbitral procedures. For example, the China-Ghana BIT does not make any reference to ICSID. While the China-Cape Verde BIT, the China-South Africa BIT, the China-Algeria BIT, the China-Congo DR BIT, the China-Egypt BIT, the China-Mauritius BIT, the China-Sudan BIT, the China-Nigeria BIT, the China-Zimbabwe BIT and the China-Zambia BIT mention ICSID, they merely use its arbitration rules as guidance for ad hoc arbitral procedure. Disputes that cannot be settled through amicable negotiations may resort to a competent court in the host country or an ad hoc arbitration under the direction of ICSID procedural rules.

Regarding the ICSID jurisdiction over the investor-state disputes, Article 25(1) of the ICSID Convention provides for two conditions: one is membership (see Table 21), the other is consent to ICSID jurisdiction.

Firstly, "[i]t must be a party to the Convention at the time the dispute is submitted to the Secretary-General of ICSID."[957] Article 25(1) of the ICSID Convention stipulates that:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, **between a Contracting State** (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) **and a national of another**

[955] *Ibid* at 358.
[956] Ofodile Uche Ewelukwa, *Supra* note 597 at 174.
[957] *Supra* note 608 at 364.

> **Contracting State**, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

"It is important to note that China had signed the ICSID Convention by February 1990 although it did not ratify it until January 7, 1993."[958] So, the China-Ghana BIT signed in the 1980s does not make reference to ICSID. Some African countries such as Ethiopia have signed (Sep. 21, 1965), but have not ratified the ICSID convention to date. The China-Ethiopia BIT, therefore, stipulates that if a dispute involving the amount of compensation for expropriation cannot be settled by negotiation, it may be submitted at the request of either party to an ad hoc arbitral tribunal or arbitration under the auspices of the ICSID **once both Contracting Parties become a member States thereof**. Cape Verde, Djibouti, Equatorial Guinea and South Africa have never become ICSID members. The China-Cape Verde BIT and the China-South Africa BIT, therefore, merely use ICSID arbitral rules as a guidance for the ad hoc arbitration. Interestingly, the China-Djibouti BIT and the China-Equatorial Guinea BIT refer to the ICSID jurisdiction. They both allow the parties to submit the dispute to ICSID if such dispute cannot be settled by negotiation. However, the ICSID arbitration therein may have no jurisdiction over the investor-state disputes, although it is included in the treaty, as Djibouti and Equatorial Guinea have not achieved membership of ICSID yet (see Table 18a). Some other African countries, while being members of the ICSID, merely adopt ICISD arbitral rules as guidance for the procedure of ad hoc arbitration in their BITs with China. For example, the China-Algeria BIT, the China-Congo DR BIT, the China-Egypt BIT, the China-Mauritius BIT, the China-Sudan BIT, the China-Nigeria BIT, the China-Zimbabwe BIT and the China-Zambia BIT make reference to ICSID, "but only in relation to the use of its rules of procedure as guidance for ad hoc tribunals authorized to adopt their own rules of procedure."[959]

[958] *Supra* note 152 at 148-149.
[959] *Ibid.*

Apart from the requirement of membership, the ICSID Convention also includes a request of consent to ICSID jurisdiction, stipulating that:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, **which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally**."[960]

That is to say, even if both Contracting Parties of a BIT are members of ICSID, not all references to ICSID arbitration in the ISDS clause "necessarily mean that ICSID will have jurisdiction in particular cases."[961] Only when the parties to the dispute "give consent to the conduct of an arbitration under the ICSID Convention, that renders any other remedy unavailable. This relates, in particular, to remedies in national law. Thus, ICSID arbitration is an exclusive procedure, subject to the prior consent of the parties, unless otherwise stated."[962]

"[T]he ICSID Convention grants jurisdiction to that arbitral mechanism only where the parties to the particular dispute give their consent in writing to ICSID arbitration."[963] "Under the ICSID Convention, this is done by the notifying the Secretary-General of ICSID of a request for arbitration, who thereupon sends a copy of the request to the respondent party. The request must contain information on the issues in dispute, the identity of the parties and evidence of their consent to ICSID arbitration in accordance with the rules of admissibility."[964]

In practice, it is usually the investor that submits a request for ICSID arbitration, serving as his consent to be under the jurisdiction of ICSID. The request contains the evidence that the respondent

[960] Article 25(1) of the ICSID Convention.
[961] *Supra* note 608 at 360.
[962] *Ibid* at 358.
[963] *Ibid* at 360.
[964] *Ibid* at 361.

host country has already offered its pre-consent in the investment contract, in its national legislation or in the BIT with the home country of that investor.

Even the disputed State Party and the home state of the investor are members of ICSID, and the State Party has its offered pre-consent, for example, in the BIT; the investor may not freely access ICSID arbitration. This is because the ICSDI Convention allows states to preserve some rights on ISDS. Article 26 of ICSID Convention stipulates that:

> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. **A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention**.

That is to say, "the State party retains a degree of sovereign control over the availability of ICSID arbitration by being able to require the prior exhaustion of local remedies. In effect, this reverses the rule of customary international law, in that the inapplicability of that rule is presumed in the absence of an express statement by the State party to the dispute (Schreuer, 1997a, pp. 196-197). Such a statement can be made at any time up to the time that consent to arbitration is perfected as, for example, in a BIT offering consent to ICSID arbitration, in national investment law or in the investment agreement with the investor party to the dispute. The requirement cannot be introduced retroactively once consent to ICSID arbitration has been perfected (Schreuer, 1997a, p. 198)."[965] If there is a requirement for the prior exhaustion of local remedies in a BIT, such requirement will be interpreted as the condition to consent to ICSID arbitration, and the foreign investors will not be able to access to ICSID arbitration until they complete the required local procedures. Such a requirement is a significant impediment to accessing the ICSID arbitration system.

To conclude, the presence of ICSID arbitration in the China-Africa BITs is not at the exclusion of other remedies. Some China-Africa BITs do not include international institutional arbitration, they

[965] *Ibid* at 358.

merely adopt the ICSID arbitral rules as guidance for the ad hoc arbitration procedure. To trigger ICSID arbitration, the Contracting Parties of BITs shall be members of ICSID, the disputed parties must give consent to the jurisdiction of ICSID, and the requirement of exhausting local remedies should be satisfied if it is so provided for in the relevant legislations. Thus, the ICSID arbitration in the China-Africa BITs merely serves as one of many options for disputes between an investor and the host country.

5.1.12.4 Is the exhaustion of local remedies required before the use of ICSID arbitration?

All the BITs reviewed include the domestic judicial remedy as an option for the ISDS, "but remain silent on whether the disputant investor has an obligation to exhaust [such] local remedies."[966] Thus, one may ask whether domestic judicial remedies are equal to international arbitration so as to be one of many options available to foreign investors for dispute settlement, or whether it serves as a precondition to trigger the binding, third-party international arbitration.

Such question arises because the customary international law indicates that "each State has the right 'to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities'."[967] "Most investor-State disputes are prompted at least in part by issues arising within the host country. Where the host country has in place a modern system of law, it may reasonably believe that, where no express provision has been made to override national jurisdiction, such local issues should be determined within the local court system. This approach shows respect for the host country's judicial system."[968]

[966] *Ibid* at 356.
[967] *Ibid* at 355. Such fundamental customary rule is emphasised by the United Nations Charter on Economic Rights and Duties of States, which was adopted by the General Assembly on 12 December 1974.
[968] *Supra* note 608 at 357.

"Arguably, it should not be possible to exclude so basic a rule of customary international law without express words. Some support for this view may be garnered from the decision of the Chamber of the International Court of Justice in the case concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy) (ICJ, 1989b). In this case, the Chamber of the Court considered, inter alia, whether a foreign investor was required to exhaust local remedies before the investor's home country could pursue an international claim with the host country concerning an alleged breach against the investor. The Friendship, Commerce and Navigation Treaty (FCN) in question provided for international arbitration between the two States but was silent on the need to exhaust local remedies. Did this mean that the local remedies rule was not applicable? The Chamber of the International Court of Justice responded in the negative. The majority judgment maintained:

> 'The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so' (ibid., paragraph 50)."[969]

"On the other hand, as far as investor-State dispute settlement is concerned, the understanding of many negotiators is that the formulations used in BITs, unless otherwise explicitly expressed, normally imply that the contracting States have dispensed with the requirement that local remedies must be exhausted (Schreuer, 2001, pp. 390-396; Peters, 1997, pp. 233-243)."[970] "In practice, States almost never insist on the exhaustion of local remedies."[971] There is a need to clarify the requirement on the release from the exhaustion of local remedies.

None of the China-Africa BITs reviewed explicitly require the exhaustion of domestic judicial remedies, however, many BITs include the requirement to conduct an **administrative review**

[969] *Ibid* at 356-357.
[970] *Ibid* at 357.
[971] *Ibid* at 358.

procedure[972] (see Table 18b). Most of them entitle the host country to decide what constitutes the exhaustion of administrative review procedures in their domestic laws. Some BITs such as the China-Botswana BIT, the China-Mozambique BIT, the China-Congo BIT, the China-Cote d'Ivoire BIT, the Djibouti BIT, the China-Kenya BIT, the China-South Africa BIT and the China-Sierra Leone BIT include a clause which particularly stipulates that if the investor has resorted to the domestic court, the domestic administrative review procedure shall not apply. That is to say, under these BITs, if the domestic laws of the host country impose an obligation of exhausting domestic administrative review procedures on foreign investors, the investors either has to do so before initiating the international arbitration or resort to the domestic court of that host country. In no case is the by-pass of domestic remedies possible, unless the dispute is settled by amicable negotiation prior to the initiation of formal remedies. China's BITs with Benin, Equatorial Guinea, Mali, Uganda, Seychelles and Tanzania instead provide that the decision of a competent court is final. Such stipulation has equal effect to the aforementioned clause. The investors have to exhaust administrative review procedures before resorting to any international arbitration if the domestic laws of host country so require it; otherwise, investors may submit the dispute to a competent court of the host country and have no further choice to resort to in arbitration.

The China-Cote d'Ivoire BIT even expressively requires investors to exhaust the domestic administrative review procedures before resorting to any international arbitration, stipulating in Article 9.3 that:

> "If such **dispute cannot settled amicably through negotiations**, any legal dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party **shall be exhausted the domestic administrative review procedure** specified by the laws and

[972] China's BITs with Botswana, Congo, Mozambique, Benin, Equatorial Guinea, Seychelles, Tanzania, Uganda, Madagascar, Mali, Cote d'Ivoire, Djibouti, Kenya, South Africa and Sierra Leone require the exhaustion of domestic administrative review procedures.

> regulations of that Contracting Party, before submission of the dispute the aforementioned arbitration procedure. ..."

The aforementioned BITs leave the host country to decide whether investors have to go through the domestic administrative review procedures. The stipulations help to guarantee the control of the host country over the ISDS process, either by the application of domestic judicial procedures or, in case that a competent court was not selected, by the exhaustion of domestic administrative review procedures before resorting to international arbitration if it is so required in domestic laws of that host country.

Once the exhaustion of local administrative review procedure is interpreted as a condition to the consent of host country to subject themselves to the jurisdiction of ICSID tribunals or/and of ad hoc arbitral tribunals, such a requirement will be a significant impediment to accessing the international arbitration system,[973] particularly when there is no time limit on such processes. "Naturally, the rate at which domestic proceedings are completed varies from country to country, but where the time limit is as short as three months, it can be maintained that the value of the need to exhaust local remedies is undermined: most domestic legal systems require more than three months for judicial processes to be completed."[974] However, except for the China-Tunisia BIT, which employs a three-month limit with respect to the administrative review procedure in the Protocol to the Agreement, none of other China-Africa BITs impose a time limit on this administrative review procedure. Investors may become trapped in an endless domestic procedure and have no hope of accessing international arbitration in a timely manner. Additionally, corruption and bias may occur in the domestic administrative review procedure.

5.1.12.5 Who is entitled to trigger the dispute settlements?

[973] *Supra* note 152 at 152.
[974] *Supra* note 608 at 356.

Another issue relating to investor's free access to international arbitration is the choice of dispute-settlement method. The choice of method in BITs "are tending towards an 'investor choice model', in that the choice of venue, whether national or international, is offered to investors, coupled with a unilateral offer to respect that choice on the part of the State party to an IIA. … In practice, however, investor choice is still bounded by many restrictions."[975]

"As a matter of principle, offering choice of method to the investor does not exclude the possibility of offering the same choice to the host country. It is up to the host country to decide, when negotiating an investment agreement, whether it wishes to offer free choice of means to the investor alone – by expressing a unilateral commitment to accept the investor's choice in the terms of the agreement – or to reserve similar freedom for itself. Should the latter approach be taken, it would effectively preserve the host country's discretion to impose its method of dispute settlement on the investor, at least where it initiates a claim against the investor. Although this may not be a common occurrence, it does emphasize the possibility that the investor may be a respondent rather than a claimant and that the host country may wish to enjoy the same freedom of choice of dispute-settlement method that current practice offers to the investor."[976]

Investors are often offered a free choice of local courts to settle their disputes with the host country. The problem is whether the host country preserves a similar freedom for itself when concluding a BIT that may undermine the free access for investors to international arbitration. This is because an action can be brought by the host country even without the active consent of the investor, and once the dispute is submitted to the competent court, the choice of such procedure will be final. A State Party's choice of domestic judicial remedies allows the aggrieved host state to settle the

[975] *Ibid* at 374.
[976] *Ibid* at 374-375.

dispute through a procedure that they are familiar with, however, the respondent investor might have to take the risk of being treated unfairly under the domestic judicial system of the host state. Some China-Africa BITs, such as the China-Congo BIT, the China-Congo DR BIT, the China-Botswana BIT, the China-Mozambique, the China-Tunisia BIT, the China-Nigeria BIT, the China-Sudan BIT, the China-Mauritius BIT, the China-Algeria BIT, the China-Egypt BIT, the China-Zambia BIT, the China-Ethiopia BIT, the China-Zimbabwe BIT and the China-Zimbabwe BIT, grant both the foreign investor and the host state the choice to submit their disputes to a competent domestic court. All the others, such as China's BITs with Benin, Cote d'Ivoire, Djibouti, Kenya, South Africa, Seychelles, Sierra Leone, Equatorial Guinea, Uganda, Mali, Tanzania and Madagascar etc., offer the free choice of competent court to the investor alone (see Table 18c).

With respect to the choice of international arbitration, the central issue is whether the investors can unilaterally initiate the procedure or "[s]hould an investor choose international dispute settlement, then the active consent of the host country is still required."[977]

International arbitration cannot be triggered without the consent of both disputed parties. "In relation to ad hoc dispute settlement, no procedure can begin without the agreement of both parties to submit to such methods in an arbitration or conciliation agreement. In relation to institutional systems, the host country party must still consent in accordance with the applicable rules that seek to determine when valid consent has been given."[978] As noted above, "in relation to ICSID arbitration or conciliation, the contracting State party to a dispute must agree in writing to the registration of any dispute brought against it by an investor. This may be done in an investment agreement or in national law. In either case, the investor must still accept that offer by requesting

[977] *Ibid* at 374.
[978] *Ibid.*

those proceedings."[979] However, host countries may offer their unilateral pre-consent to international arbitration in a BIT and foreign investors would thereby achieve the possibility to unilaterally initiate an international dispute settlement.

The strictness and coverage of the choice of international arbitration varies considerably. "The classification of BITs proposed by Yackee (2009) differentiates between three types of ISDS provisions. The strongest type offers comprehensive pre-consent concerning the investors' possibility to unilaterally initiate binding international arbitration of disputes."[980] "This approach is sometimes interpreted as creating a compulsory internationalization of investment disputes at the whim of an investor."[981] "Partial pre-consent restricts this possibility to a limited class of disputes, for example, on the amount of compensation for expropriation. A considerably weaker type offers just 'promissory' ISDS, i.e., without any guarantee for the foreign investor of being able to bring a claim to international arbitration."[982]

Among all the BITs reviewed, China's BITs with Benin, Cote d'Ivoire BIT, Mali, Madagascar, Uganda, Seychelles and Tanzania contain a pre-consent to international arbitration given by the state party, however, there remains the condition of the exhaustion of local administrative review procedure as a precondition to that consent. The China-Gabon BIT, China-Morocco BIT and the China-Cameron BIT restrict investors' possibility to unilaterally initiate binding international arbitration to issues regarding the amount of compensation in the case of expropriation, while other issues shall be submitted "under mutual consent of both Contracting Parties". The China-Congo BIT, the China-Cote d'Ivoire BIT, the China-Kenya BIT, the China-South Africa BIT, the China-Botswana BIT, the China-Mozambique BIT, the China-Sierra Leone BIT and the China-Djibouti

[979] *Ibid.*
[980] *Supra* note 624 at 250.
[981] *Supra* note 608 at 374.
[982] *Supra* note 624 at250.

BIT stipulate that either party may submit their disputes to ICSID arbitration or ad hoc arbitration, provided that the Contracting Party involved in the dispute may require the investor concerned to exhaust the domestic administrative review procedure specified by the laws and regulations of that Contracting Party before submission of the dispute the aforementioned arbitration procedure. Such stipulation offers no guarantee for the foreign investors to bring a claim to international arbitration. China's BITs with Sudan, Mauritius, Algeria, Egypt, Congo DR, Zambia, Zimbabwe, Ethiopia and Cape Verde do not mention the institutional arbitration. As for ad hoc arbitration, all these BITs limit its jurisdiction to issues regarding the amount of compensation for expropriation at the request of either Party. The ad hoc arbitration may not have jurisdiction over other issues except issues regarding the compensation of expropriation (see Table 18d).

To conclude, none of the China-Africa BITs reviewed provide for a comprehensive pre-consent to international arbitration. The strongest type of consent that the BITs contain is partial pre-consent restricted to the satisfaction of a possible precondition of the exhaustion of domestic administrative review procedures or to a limited class of disputes concerning the compensation of expropriation. Many of them simply offer "promissory" ISDS with the consent of both parties needed, and the international arbitration may be subject to the exhaustion of domestic administrative review procedures or the domestic judicial remedy will prevail if the investor has resorted to a competent court. The core issue of formal procedure for dispute settlement is whether the investor has the possibility to unilaterally initiate binding international arbitration. The answer under China-Africa BITs is no. The biggest obstacle is the domestic control of host state over the ISDS procedure, either by the domestic administrative review procedure or a competent court. There is a fear of losing control over the ISDS procedure. The host state preserves discretion for investor-state dispute settlement.

5.1.12.6 Issues concerning international ad hoc arbitration

Most China-Africa BITs reviewed, except for the China-Tunisia BIT, contain ad hoc arbitration to grant investors more option for dispute settlement. "The principal advantage of ad hoc dispute settlement is that the procedure can be shaped to suit the parties."[983] "Ad hoc arbitration depends upon the initiative of the parties for their success."[984] The parties must make their own arrangements regarding the selection of arbitrators, the procedure, the applicable law, the finality and the enforcement of award and administrative support, etc. These issues do not arise in relation to institutional arbitration as the institutional system itself has a set of rules to define the tribunal's personal jurisdiction once the parties agreed to submit the dispute to it. However, in relation to ad hoc arbitration, these are central issues.

As mentioned "the parties themselves determine most of the issues surrounding the process and these determinations are not normally controlled by IIA [BIT] provisions."[985] Some BITs may be unclear or even be silent on these important questions,[986] and leave the disputed parties to determine the entire process. They may at times "offer the parties some guidance on the procedures that can be followed under ad hoc arbitration", most notably the standardised rules offered by ICSID or UNCITRAL.[987] Some BITs, instead, merely accredit ad hoc arbitration to be established under standardised rules of certain intergovernmental organisation, such as the ICSID or UNCITRAL. Accordingly, ISDS provisions in China-Africa BITs can be divided into two categories: the "tribunal choice model" that expressly provides for the establishment of ad hoc arbitral tribunal and leaves so-established tribunal to decide the procedural rules, usually with

[983] *Supra* note 608 at 351.
[984] *Ibid.*
[985] *Ibid* at 353.
[986] *Ibid* at 365.
[987] *Ibid* at 353.

reference to the arbitration rules of ICSID; and the "UNCTRAL model" that strictly requires ad hoc arbitration to follow the standardised arbitration rules of UNCTRAL. Most China-Africa BITs follow the former model;[988] only the China-Benin BIT and the China-Mali BIT follow the latter, and the China-Tanzania BIT contains the both (see Table 18e). Both models, however, stipulate issues regarding: (1) the types of disputes can be submitted to arbitration, (2) the constitution of arbitral tribunal, (3) the procedural rules, (4) the applicable law, (5) the finality and enforcement of the arbitral award, and (6) sometimes the costs of the tribunal.

5.1.12.7 The types of disputes which can be submitted to arbitration.

Most China-Africa BITs provide that any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party may be submitted to an ad hoc arbitral tribunal. However, this is not the same case in earlier China-Africa BITs signed in the 1980s and 1990s. "Under the older BITs that China concluded with countries in Africa, only a narrow range of issues could be submitted for arbitration. For example, under Article 10(1) of the China-Ghana BIT, only disputes 'concerning the amount of compensation for expropriation' may be submitted to an arbitral tribunal." [989] Similar stipulation can be found in the China-Cape Verde BIT, the China-Ethiopia BIT, the China-Congo DR BIT, the China-Zambia BIT, the China-Egypt BIT, the China-Algeria BIT, the China-Sudan BIT and the China-Mauritius BIT. "The scope of the investor-State dispute settlement provisions have evolved over time in the direction of less restriction on the right of the investor to invoke mandatory international arbitration."[990]

5.1.12.8 The constitution of arbitral tribunal

[988] See Article 9.4 of China-Cote d'Ivoire BIT and Article 9.5 of China-Congo BIT.
[989] Ofodile Uche Ewelukwa, *Supra* note 597 at 174.
[990] *Ibid.*

Most BITs provide for the choice of constituents, the appointment of chairman and other relevant issues in the clauses regarding the constitution of ad hoc arbitral tribunal. An issue thereof "is to simply provide that disputes may be submitted to an ad hoc tribunal without clarifying whether the arbitral tribunal has to be local or international."[991] Very few China-Africa BITs expressly use the terms "international" or "national" arbitration when describe ad hoc arbitration. The China-Mauritius BIT is the only one use the term 'international arbitration'. The China-Madagascar BIT is the only one that employs "un organe d'arbitrage existant sur le territoire de la Partie Contractante" to resolve investor-state disputes. However, this will not present a problem for BITs that adopt "UNCTRAL model", as the entire process is required to follow the internationalised rules of UNCTRAL; neither will it be a problem to most of the "tribunal choice model" BITs which request the tribunal to be constituted by arbitrators from each Contracting party and the chairman to be a national of a third State having diplomatic relations with both Contracting Parties. Although such stipulation does not expressly mention an international arbitral tribunal, the tribunal constituted is thereby international in nature. BITs, such as the China-Uganda BIT, the China-Equatorial Guinea BIT, the China-Seychelles BIT, the China-Morocco BIT, the China-Gabon BIT and the China-Cameroon BIT, that leave it to disputed parties to determine the constituent of the tribunal clarify the ad hoc arbitration to be at international level (see Table 18f).

"[I]nvestor-State disputes should be resolved by means of internationalized dispute-settlement mechanisms governed by international standards and procedures, with international arbitration at its apex."[992] "[T]he willingness to accept internationalized dispute settlement on the part of the host country may well be motivated by a desire to show commitment to the creation of a good

[991] *Ibid* at 175.
[992] *Supra* note 608 at 350.

investment climate."[993] "Such procedures are said to encourage investor confidence and security and help to create the appearance and reality of fairness in the dispute-settlement process."[994]

5.1.12.9 The procedural rules

As mentioned, most of the "tribunal choice model" leave the tribunal established under the BIT to determine the procedural rules on its own, normally appointing the ICSID arbitration rules as guidance. "In this way, ad hoc arbitration can come closer to institutional systems, where the choice of procedural law is resolved by the applicability of the rules and procedures of the institutional system itself."[995] However, the "tribunal choice model" does not inevitably lead to the application of ICSID arbitration rules. It is the tribunal that has the complete authority to decide what procedural rules to be applied. It could be the ICSID arbitration rules as recommended, or the UNCTRAL arbitration rules, or some separate rules made by the tribunal itself. Under the "UNCTRAL model". The arbitral procedure has to strictly follow the UNCTRAL arbitration rules. Very few BITs, such as the China-Equatorial Guinea BIT, the China-Uganda BIT, the China-Seychelles BIT, the China-Morocco BIT, the China-Gabon BIT and the China-Cameroon BIT, do not discuss procedural rule and leave it to the disputed parties.

5.1.12.10 The applicable law

The China-Mauritius BIT is the only BIT to not discuss the matter of applicable laws. In such case, the choice of law is subject to the agreement by disputed parties and, in absence of such agreement, the standard rules of internationalised dispute-settlement mechanisms apply. To clarify, disputed parties often adopt standard rules for the conduct of ad hoc arbitration, such as those provided for in the UNCITRAL Arbitration Rules, or in the ICSID Arbitration Rules.[996] Although these rules

[993] *Ibid.*
[994] *Ibid* at 347.
[995] *Ibid* at 365.
[996] *Ibid.*

become the "procedural law" of the ad hoc arbitration, "they remain subject to any rules of law applicable to the arbitration from which the parties cannot derogate."[997] That is to say, these rules provide for "which law is to govern the procedure of the tribunal" as well as "which substantive law will govern the resolution of the dispute."[998]

For example, Article 33(1) of the UNCITRAL Arbitration Rules stipulates that "The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."[999] "Article 42(1) of the ICSID Convention deals with the applicable substantive law as follows: '(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.' This provision establishes an order of preference as to the applicable law. First, the Tribunal will apply the rules of law agreed by the parties. In the absence of such agreement, the law of the contracting State party to the dispute – including its conflict-of-laws rules (which may, in turn, point to the law of another State as the applicable law) will be applied. Finally, the Tribunal will turn to any applicable rules of international law."[1000]

Thus, "[w]hen the BIT concerned is silent on the matter, or when the disputing parties fail to agree on the applicable law, the determination of it varies from one dispute settlement mechanism to another. For instance, ICC Arbitration Rules provide that in the absence of an agreement by the disputing parties as to the law to be applied, the tribunal would have the discretion to apply the

[997] *Ibid.*
[998] *Ibid.*
[999] *Ibid;* see also Article 33(1) of UNCITRAL Arbitration Rules.
[1000] *Ibid* at 366.

law it deems appropriate. However, the UNCITRAL rules state that in the absence of an agreement between the parties, the tribunal will apply the law determined by the conflict-of-law rules that the tribunal considers appropriate. ICSID, on the other hand, states that in the absence of an agreement between the parties, the tribunal 'will apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.'"[1001]

Almost all the China-Africa BITs reviewed specify that disputes shall be resolved "in accordance with the laws of the host country, the relevant BIT, and recognized principles of international law."[1002] Only the China-Benin BIT, the China-Mali BIT and the China-Tanzania BIT "have an expanded list of applicable law."[1003] Article 9.7 of the China-Cameroon BIT, Article 9.4 of the China-Congo DR BIT, Article 9.7 of China-Congo BIT, Article 9.4 of China-Cote d'Ivoire BIT, for example, "stipulates that the tribunal shall adjudicate in accordance with the laws of the Contracting State to the dispute accepting the investment including its rules on the conflict of laws, the provisions of this Agreement as well as generally recognized principles of international law accepted by both Contracting States".[1004] "Compare this with Article 9(5) of the China-Benin BIT, which stipulates that 'the arbitral tribunal shall make arbitral award based on: (a) provisions of this Agreement; (b) laws of the State where the investment was made including its rules on the conflict of laws; (c) the principles of international law accepted by both Contracting Parties; (d) specific bilateral agreements on investment between the Contracting Parties; (e) and other international treaties on investment to which both Contracting Parties are or may become parties.'"[1005]

[1001] *Supra* note 562 at 102-103; see also Article 42(1) of the ICSID Convention.
[1002] Ofodile Uche Ewelukwa, *Supra* note 597 at 175.
[1003] *Ibid.*
[1004] *Ibid.*
[1005] *Ibid.*

5.1.12.11 The finality and enforcement of the arbitral award

"All the China-Africa BITs stipulate that arbitral decisions shall be 'final' and 'binding.' Article 9(6) of the China-Benin BIT stipulates that 'the arbitral award shall be final and binding upon both parties to the dispute. Both Contracting Parties shall commit themselves to the enforcement of the award.' "[1006] The difference relates to the enforcement obligations under some BITs, such as the China-Congo DR BIT, China-Cameroon BIT and the China-Gabon BIT, the "[c]ontracting Parties commit themselves to the enforcement of arbitral decisions 'in accordance with their respective domestic laws.'"[1007] While under other BITs, the Contracting Parties commit themselves to enforce arbitral awards. No reference is made to enforcement of arbitral awards in some BITs, such as the China-Equatorial Guinea BIT and China-Uganda BIT, etc.[1008]

5.1.12.12 The costs of the tribunal

The China-Africa BITs commonly require both parties in dispute to bear the costs of its appointed arbitrator and of its representation. The costs of the President and the tribunal shall be borne equally by the parties. Some BITs additionally address that the tribunal has the power to direct a higher proportion of the costs to one of the parties to the dispute.

5.1.13 Umbrella clause

"'Umbrella' clause, also as 'observance of undertakings' clause, are common in BITs. Under an umbrella clause, the host country typically agrees to respect other obligations it has regarding the investment of investors of the other Contracting Party arising from other agreements."[1009] "Depending on how an umbrella clause is interpreted, 'other agreements' could include investment

[1006] *Ibid.*
[1007] *Ibid* at 176.
[1008] *Ibid.*
[1009] *Ibid.*

contracts, other bilateral treaties, and other multilateral agreements. …UNCTAD estimates that about 40% of existing BITs contain an umbrella clause."[1010]

In the China-Africa BITs, the umbrella clause of may be found in the provision of "Other Obligations", "Application of Other Rules", "*Regles Applicables*", "*Engagement Specifique*" or "Final Provision". The Contracting Party is obligated to abide by any more favourable treatment provided for in other agreements to investments signed by the other Contracting Party. The scope of "other agreements" varies among BITs: in some BITs, it refers only to the domestic laws of Contracting Parties' home country or international agreements, while in others it includes not only the legislation of either Contracting Party but also investment contracts or even extends to international agreements. The China-Botswana BIT considers "other agreements" as other international agreements or treaties already entered into by the Contracting Parties. The China-Algeria BIT, the China-Congo DR BIT, the China-Equatorial Guinea, BIT, the China-Ghana BIT, the China-Ethiopia BIT, the China-Cape Verde BIT, the China-South Africa BIT, the China-Sudan BIT and the China-Zambia BIT merely require the Contracting Parties to respect more favourable treatment provided for in their domestic laws. China's BITs with Cameroon, Morocco and Madagascar stipulate that either domestic laws or international agreements will prevail over the present Agreement if they contain more favourable rules. Besides the prevailing application of domestic laws and international laws, the China-Benin BIT, the China-Congo BIT, the China-Cote d'Ivoire BIT, the China-Sierra Leone BIT, the China-Mozambique BIT, the China-Kenya BIT, the China-Uganda BIT, the China-Nigeria BIT, the China-Djibouti BIT, the China-Mali BIT and the China-Tunisia BIT additionally impose on each contracting party an obligation to observe any commitments or obligations it has entered into with the investors of the other Contracting Party.

[1010] *Ibid.*

The China-Tanzania BIT requires the Contracting Parties to observe the favourable treatment provided for in domestic laws and international agreements, as well as written commitments in form of agreement or contract between the Contracting Party and the investor (see Table 19). However, not all the BITs reviewed contain an umbrella clause. The China-Gabon BIT, the China-Egypt BIT, the China-Mauritius BIT and the China-Zimbabwe BIT have no umbrella clause in their texts. Most China-Africa BITs contain the umbrella clause, which means that besides the pre-mentioned national treatment, MFN treatment and the fair and equitable treatment, the treaties allow the application of more favourable treatment provided in other laws, agreements or contracts.

5.1.14 Final provisions

Issues mentioned in the final provisions of China-Africa BITs may include consultations, relations between contracting parties, amendment or revision, entry into force, duration and termination, etc., among all of which issues of duration, relations between contracting parties and consultations are of great importance.

First, duration decides how long the foreign investments will be protected under the Agreement. Foreign investments need fixed and long-term protection. "[A]ll the China-Africa BITs have a definite duration and generally specify that they shall remain in force for a minimum fixed period; almost all provide for an initial term of 10 years which can be renewed."[1011] Once a BIT enters into force, contracting parties cannot terminate the BIT until the ten-year period has been fulfilled. A termination notice shall be made before six months (the China-Benin BIT, the China-Gabon BIT, the China-Cameroon BIT, the China-Morocco BIT and the China-Seychelles BIT) or one year (all the other China-Africa BITs reviewed) before the date of such termination. Regarding the renewable period, the China-Benin BIT, the China-Gabon BIT, the China-Morocco BIT and the

[1011] *Ibid* at 161.

China-Cameroon BIT adopt another fixed term of 10 years; while the others leave it to the contracting parties to terminate the BIT at any time after the initial 10 years by giving at least one year or six months' notice to the other contracting party. With respect to investments made prior to the date of termination of the BIT, except for the China-Seychelles BIT, all the other BITs provide that the BIT shall continue to be effective for a further period of ten years from the date of termination. The China-Seychelles BIT provides for a further 20 years protective period. The China-Zambia is unique in that it provides for a shorter protective term of 5 years and a further period of 5 years if either Parties fails to give a written termination notice (see Table 20).

Second, a few BITs (the China-Botswana BIT, the China-Cote d'Ivoire BIT, the China-Congo BIT, the China-Kenya BIT, the China-Mozambique BIT and the China-Sierra Leone BIT) include a provision of "relations between contracting parties", stipulating that the Agreement shall apply irrespective of the existence of diplomatic or consular relations between the Contracting Parties. This is of great importance particularly in the countries where political stability has not yet developed. Under this provision, the change of government will not lead to the loss of protection over investments.

Third, most China-Africa BITs[1012] have the provision of "consultations". The provisions in the BITs enjoy a high similarity. They commonly require the Contracting Parties to hold meetings from time to time to: 1) review the implementation of the Agreement; 2) exchange legal information and investment opportunities; 3) resolve disputes arising out of investments; 4) forward proposals on promotion of investment; and 5) study other issues in connection with investments. Where either Party request consultation on any matter of "investment", the other

[1012] China's BITs with Gabon, Cameroon, Mauritius, South Africa, Tunisia, Madagascar, Morocco, Kenya and Seychelles do not contain the "Consultations" provision.

Party shall give a prompt response and the consultation shall be held alternatively in the capital of either Party.

Currently, China's investments in Africa are mainly made in the form of international tendering by state-owned companies. The consultation meeting is, in practice, a pre-preparation critical for the launch of an investment project. In the meeting, the Parties discuss details of the project: what projects China will launch, in which form, what facilitations Africa will offer, benefit allotment, etc. Another important task of the meeting is to resolve disputes arising out of investments. Obviously, the purpose is to minimise the impairment of economic ties between China and Africa. The provision of "Consultations" has a positive impact both on investment promotion and protection.

5.2 Features of the China-Africa BITs

The preceding comparative analysis shows that the China-Africa BITs enjoy a "considerable uniformity".[1013] There are certain differences on the details, for instance, the precise language used to describe the five categories of investments, the criteria of establishing the nationality of artificial investors, standards of the general obligation of protecting investments, exceptions to MFN, the time in which compensation for expropriation should be paid, the scope of war clause, the applicable exchange rate of fund transfer, the procedural rules and cost allocation of ad hoc arbitration, and the agreement duration, etc., which vary from BIT to BIT; but there is its generality on the substantive matters and text structure. Current China-Africa BITs have similar provisions and commonly address the following issues: preamble, definitions, promotion and protection of investments, treatments of investments, expropriation, compensation for losses, fund transfer,

[1013] *Supra* note 72 at 606; see also Axel Berger, "China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making" (2010) 17:1 Chinese Journal of International Economic Law 1.

subrogation, state-state dispute settlement, investor-state dispute settlement, other obligations, application, relations between contracting parties, consultations, entry into force, duration and termination, etc. The similarities are universal, no matter if the BITs were concluded between China and northern, southern, eastern or western African countries, or between China and the least developed African countries such as Benin, Mozambique, Uganda, Sudan and Zambia[1014] or some relatively developed countries such as Egypt and South Africa. Geographic location or level of development is not a factor that causes variations among China-Africa BITs. The BITs do not display regular or continuous change over time. Except for the most recent China-Tanzania BIT, there is no essential difference between BITs signed in the 1980s, 1990s, 2000s and 2010s. When considering the relationship between provisions and the interests of the parties involved – investors and their home countries and host countries,[1015] what the China-Africa BITs have in common is that the host countries preserve absolute powers and discretion on matters concerning foreign investments except for the release for basic investment protection as provided in the agreement.

The China-Africa BITs are geared towards providing protection to investors.[1016] They "seek to safeguard the interests of the investors (or, in broader context, to promote FDI by safeguarding the investors' interests)."[1017] All the BITs firstly set up the goal of promoting and protecting investments in the preamble and seek to expand the protection to every kind of interests invested by every type of entities through the way of adopting a broad asset-based, open-ended definition of "investment" and a catch-all definition of "investor" in Article 1. They further stipulate that such protection is available to investments made both prior to and after the conclusion of the

[1014] See list of least developed countries (as of June 2017), United Nations, Committee for Development Policy, https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf
[1015] *Supra* note 608 at 22.
[1016] Ofodile Uche Ewelukwa, *Supra* note 597 at 206.
[1017] *Supra* note 608 at 23.

agreement when addressing the temporal application of the agreement. Then, they provide the guiding principles of the treaty in the provisions of "protection and promotion of investments" encouraging host countries to admit foreign investments and to provide such investments with full or constant protection and security, non-discrimination and fair and equal treatment. The treaties also provide for national and MFN treatment in the "treatment of investments". The BITs require the host country to accord to investments treatment no less favourable than that is accorded to the investments by its nationals or other foreign investment, which "leaves open the possibility of subjecting host country actions to review in accordance with standards of treatment that may be in practice more favourable for foreign, as compared to national [or other foreign], investors."[1018] Some BITs allow foreign investors to take advantage of more favourable treatment if so provided by national laws of contracting states, other international agreements, or contracts. The general principles and standards are followed by the substantive provisions on investment protection in matters of expropriation, compensation against wars, free transfer of funds and subrogation. The China-Africa BITs seek to restrict or even prohibit the national measures harmful to foreign investments.[1019] They also provide for state-state dispute settlement as well as investor-state dispute settlement to deal with disputes raised therein. Both require compulsory amicable negotiation or consultation prior to any formal procedure, which obviously aims to minimise the impairment of China-Africa investment relations. Finally, they provide for a fixed and long-term protective period over investments and some of them particularly stipulate that whether diplomatic relations exist or not, the agreement applies. Superficially, all the provisions of China-Africa BITs relate to investment protection and promotion; however, after in depth analysis, one may find that

[1018] *Ibid* at 174.
[1019] *Ibid* at 24.

the BITs tend to preserve state discretion as far as possible when providing for protection over foreign investments.

5.2.1 Simple and generalised stipulations

One may find that the China-Africa BITs are quite simple. They merely provide for some general principles and standards for investment protection and promotion. Concrete stipulations are barely solidified in the provisions. For example, the provision of "promotion and protection of investment" provides for general principles of investment protection and promotion, which require the host state to encourage and admit investments from the other party but, except for assistance in obtaining visa and working permit for investors, no more concrete conditions on this matter are expressly addressed in the treaty. The China-Africa BITs leave the host state with a wide margin of discretion when determining the procedures, terms and limits that govern investment admission. The principles also require the host state to provide full or constant protection and security, take non-discriminatory measures and accord fair and equitable treatment to investors; but none give any further explanation about these general requirements, leaving tribunals to decide interpretation of these requirements on a case-by-case basis.

Additionally, the China-Africa BITs contain a description of the national treatment standard and the most-favoured-nation treatment standard but are silent on whether the standards apply to like or same situations. Many international investment agreements specify the factual situations in which investment treatment applies, mostly, limiting the standards to like or identical circumstances.[1020] This would offer a narrow scope to the treatment as the incidence of a like or identical situation.[1021] However, without such qualification, the China-Africa BITs offer the widest scope possible on any matter that is relevant to determining whether the investor is being given

[1020] *Ibid* at 171.
[1021] *Ibid*.

standard national treatment or most-favoured-nation treatment which can be considered.[1022] As such, this leaves the host state the policy space to decide how the investment treatment is given.

The China-Africa BITs commonly set up two goals in their preambles: one is to create some favourable conditions for investments, the other is to encourage, promote and protect investments. There should be provisions thereafter in the text that offer certain facilitations and protective measures for the investments. However, except for the assistance in obtaining visa and working permit for foreign investors, no more favourable conditions are definitely addressed in the treaties. The China-Africa BITs include major categories of investment protection provisions consisting of expropriation, compensation for losses by war and fund transfer, etc. but they allow the host state to preserve some autonomy over the liberalisation and protection investment. For example, under the context of China-Africa BITs expropriation shall be made under the "domestic" legal procedure of the country in which the investment is made and not under the "fair" procedure. Compulsory compensation for losses by war is not granted in the War provisions; foreign firms are to be compensated only when domestic firms or firms of a third country in similar situations are similarly compensated.[1023] Furthermore, regarding the transfer of funds, "[a] few BITs have provisions subjecting the guarantee to the domestic legislation of the host country."[1024] They stipulate that "each Contracting State shall, 'subject to its laws and regulations,' guarantee the transfer of investment and returns held within its territory."[1025]

In general, the texts of China-Africa BITs are particularly hortatory but overly simple and generalised. In view of BIT as exception to the general customary law principle that recognises the right of states to manage and control aliens and their investments in the territory, such simple

[1022] *Ibid* at 173.
[1023] *Ibid* at 33-34.
[1024] Ofodile Uche Ewelukwa, *Supra* note 597 at 174.
[1025] *Ibid* at 172.

and generalised stipulations leave the host state a great margin of autonomy. The protection provisions in the BITs which provide specific measures that seek to address investors' concerns about buying or renting property, compensation for losses and fund transfers that leave certain margin of discretion and do not rule out the interference of the host state.

5.2.2 National treatment with country-specific exceptions

Most recent China-Africa BITs contain a national treatment commitment which stipulates formal equality between foreign and national investments[1026] and even leaves open the possibility of awarding more favourable treatment to foreign investments.[1027] It awards the host state a great flexibility in granting that the national treatment is qualified without prejudice to domestic laws and regulations of the host state. "In most Sino-African BITs a provision granting nation treatment is now included but accompanied by the phrase 'without prejudices to its laws and regulation,' thereby restricting it to a best effort clause. National treatment is thus not granted unless the host countries' laws and regulations grant foreign investors treatment not less favourable than that accorded to domestic investors. Other Sino-African BITs include a paragraph allowing for national treatment, but in a separate protocol China reserves the right to maintain laws and regulations towards foreign investors that are incompatible with national treatment."[1028] That is to say, China-Africa BITs "have national treatment provisions that are qualified and apply without prejudice to domestic laws and regulations of the host country".[1029] Whether and in what sectors an investor can enjoy national treatment dependent on the legislation of host country? Foreign investors can enjoy national treatment only if the laws of host country so grant it. By changing domestic laws, host countries under China-Africa BITs can withdraw national treatment in some sectors that they

[1026] *Supra* note 608 at 161.
[1027] *Ibid* at 174.
[1028] *Supra* note 72 at 610.
[1029] Ofodile Uche Ewelukwa, *Supra* note 597 at 166.

previously grant it in when the foreign investments were made. By leaving a space for host country to make such possible change of laws lows down the stability and predictability of China-Africa BITs.

This type of "country-specific exception" allows the contracting party to reserve the right to differentiate between domestic and foreign investors under its laws and regulations;[1030] where the application of national treatment shall be subject to the national laws of host country. The host country is free to make any exceptions to national treatment as they so wish. While the China-Africa BITs provides that the investor receive national treatment, such treatment is limited to the domestic laws of host country. The inclusion of the provision of national treatment in the China-Africa BITs is done in such a way as to preserve a high level of authority to the host country.

5.2.3 Investment control

All the China-Africa BITs adopt the investment control model. They "do not accord positive rights of entry and establishment to foreign investors from the other contracting party",[1031] leaving the matter to national discretion.

The entry and establishment of foreign investments "is a matter of domestic jurisdiction arising out of the State's exclusive control over its territory (Brownlie, 1998, p. 522)."[1032] "States have traditionally reserved to themselves absolute rights, recognised in international law, to control the admission and establishment of aliens, including foreign investors, on their territory."[1033] That is to say, states have the absolute discretion on whether and under what conditions to permit the entry

[1030] *Supra* note 608 at 165. The China-Benin BIT, the China-Cote d'Ivoire BIT, the China-Serra Leone BIT, the China-Botswana BIT, the China-Congo BIT, the China-Gabon BIT, the China-Djibouti BIT, the China-Madagascar BIT, the China-Mali BIT, the China-Nigeria BIT, the China-South Africa BIT, the China-Kenya BIT and the China-Tanzania BIT adopt the "country-specific exception" model.
[1031] *Ibid* at 148.
[1032] *Ibid* at 144.
[1033] *Ibid* at 143.

and establishment of foreign investments.[1034] "Given the absolute nature of the State's right to control the entry and establishment of aliens, there is no compulsion in law upon a prospective host State to grant such rights to foreign investors."[1035] As a matter of fact, most BITs recognise a states' full control on the matter of investment admission as do the China-Africa BITs.

All the BITs reviewed do not address the issue of admission and establishment of investments of the other contracting party. When addressing the term of "investment", they limit the coverage of the agreement to investments that are made in accordance with the laws and regulations of host state. All the BITs stipulate that "the term 'investment' means every kind of asset ***invested by*** investors of one Contracting Party ***in accordance with the laws and regulations*** of the other Contracting Party..." Accordingly when providing for the temporal scope of "investments" in the provisions of "Application", the BITs stipulate that the agreement shall apply to ***investments made*** prior to as well as after its entry into force by investors of the other Contracting Party ***in accordance with the legislation or rules of that Party***. "Such a limitation in an investment agreement obviously is intended to induce foreign investors to ensure that all local laws and regulations are satisfied in the course of establishing an investment by denying treaty coverage to non-compliant investment."[1036] Thus, the China-Africa BITs adopt the investment control model, which preserve the host state's discretion on investment admission. Some BITs expressly affirm the Parties' authority on the admission of foreign investments in their preambles. For example, the China-Nigeria BIT emphasises that investors have the obligation to respect the host country's sovereignty and laws. The China-Mali BIT clarifies in the preamble that "chaque Partie

[1034] *Ibid* at 144.
[1035] *Ibid* at 146.
[1036] *Ibid* at 122.

Contractante a le droit d'élaborer les lois sur l'acces et la realisation de l'investissement sur son territoire."

There is a strong interaction between investment treatment and investment admission. At what stage of the investment process does national treatment or most-favoured-nation treatment apply?[1037] This issue involves consideration of whether the national treatment or most-favoured-nation treatment applies to both the pre- and post-entry stages of the investment process or whether the treatment standards apply only to investments that have already been admitted to a host country.[1038] All the China-Africa BITs adopt the post-entry model that "restrict the operation of the treaty to investments from other contracting parties that are admitted in accordance with the laws and regulations of the host contracting party."[1039] The investment treatment standards in China-Africa BITs apply only to the post-establishment phase of an investment and there is little question that the pre-entry phase is left to the sovereign right of host states in terms of deciding on investment admission.[1040] This option preserves the strongest right to discretion by the host country while offering investment treatment to foreign investments at the post-entry stage.[1041] Under the China-Africa BITs, the host state offers a degree of investment treatment but does not limit their regulatory powers too greatly.[1042] "Application to post-establishment treatment only, thereby preserving the right to treat domestic and foreign investor differently at the point of entry, e.g. through screening laws and operational conditions on admission."[1043]

[1037] *Ibid* at 164.
[1038] *Ibid*.
[1039] *Ibid* at 167.
[1040] *Ibid* at 162.
[1041] *Ibid* at 185.
[1042] *Ibid*.
[1043] *Ibid*.

By adopting the investment control model, China-Africa BITs preserve full state control over entry and establishment.[1044] Under such model, "admission and establishment of investment is subject to the domestic laws of the host country and investors do not enjoy any right of establishment."[1045] It affirms that the host country maintains the right to make regulations to govern investment admission, and does not have the obligation to offer non-discriminatory treatment to investors with regard to market access. "[H]ost countries have sought to control the entry and establishment of foreign investors as a means of preserving national economic policy goals, national security, public health and safety, public morals and serving other important issues of public policy (Dunning, 1993, ch. 20; Muchlinski, 1995, ch. 6). Such controls represent an expression of sovereignty and of economic self-determination, whereby Governments judge FDI in the light of the developmental priorities of their countries rather than on the basis of the perceived interests of foreign investors."[1046]

5.2.4 Encouragement of domestic remedies in the host country

Foreign investors can seek domestic remedies in the host country to solve investment disputes, however, "alternative means of dispute settlement are preferable and help better to protect investments, because of a number of possible considerations: the mistrust towards foreign investment prevalent in many host countries, combined with the high political importance of some of the disputes, which gives rise to fears that no neutral national decision makers can be found; the lack of judicial expertise in modern financial and other issues in some developing countries; and a desire for speedier resolution of possible conflicts. All these arguments militate in favour of a recourse to special dispute-settlement procedures, on the basis of existing international commercial

[1044] *Ibid* at 143.
[1045] Ofodile Uche Ewelukwa, *Supra* note 597 at 164.
[1046] *Supra* note 608 at 146.

arbitration mechanisms."[1047] As foreign investors seek to ensure that particular disputes can be settled "in fair and mutually acceptable manner",[1048] in the pursuit of free access to international arbitration, the value of the ISDS provision in BITs is the rate at which foreign investors have the freedom to access to international arbitration: whether the ISDS provision includes the ICSID arbitration or merely makes reference to its standardised rules as guidance; whether the investor is able to make the choice of dispute-settlement method alone or the pre-consent of host state is required; and whether the investor has to go through local remedies before initiating international arbitration.

Unfortunately, the China-Africa BITs do not guarantee investors free access to international arbitration. Contrarily, they intend to encourage the application of domestic remedies in the host country. Many China-Africa BITs grant the host country the same choice of dispute-settlement method. When the choice is given to investors, it usually requires foreign investors to go through the domestic administrative review procedures in the host state before initiating international arbitration and, unless stated otherwise, the investor has submitted the dispute to the competent court of the host contracting party. Moreover, the China-Africa BITs do not place any time limit on the domestic administrative review procedure. "[O]nce the investor has chosen to access the host country's domestic judiciary", they will not be able to access to international arbitration.[1049] Many BITs stipulate that once the investor has submitted the dispute to the competent court of the Contracting Party which is the party to the dispute, the choice of procedure shall be final.[1050]

There seems to be a strong fear of losing control over the ISDS procedure. The China-Africa BITs require the exhaustion of the domestic administrative review procedure to be the precondition for

[1047] *Ibid* at 36
[1048] *Ibid.*
[1049] *Supra* note 72 at 610.
[1050] Article 9.2 of China-Equatorial Guinea BIT.

initiating international arbitration. The only way to exclude such local remedies is to choose the domestic court of the host state for dispute settlement. Thus, no matter what, the China-Africa BITs leave the host states certain discretion to control the ISDS procedure.

To conclude, it is clear that the China-Africa BITs are geared towards providing protection to investors.[1051] They seek to promote and protect investments, or in broader context, to promote investments by protecting the interests of investors. The China-Africa BITs include an encouraging and hortatory preamble; adopt a broad asset-based, open-ended definition of "investment" and a catch-all definition of "investor" to extend protection to every type of assets invested by various forms of investors; provide the guiding principles for the protection and promotion of investments to encourage host countries to admit foreign investments and to provide such investments with full or constant protection and security, non-discrimination and fair and equal treatment; offer national and MFN treatment standards to accord to investments treatment no less favourable than that which is accorded to the investments by its nationals or other foreign investments; , provide for protective provisions in matters of expropriation, compensation against wars, free transfer of funds and subrogation; as well as provide for investor-state dispute settlements to deal with disputes raised therein.

However, the BITs, when analysed in more depth tend to preserve the discretion of the host state rather than provide investors with protection over their investments. They merely provide simple and generalised principles and standards of investment promotion and protection, as the more specific binding obligations in BITs, the less freedom the host state may enjoy. Furthermore, all the China-Africa BITs do not address the issue of admission and establishment of foreign investments and leave the matter to the discretion of host country. The national treatment in the

[1051] Ofodile Uche Ewelukwa, *Supra* note 597 at 206.

China-Africa BITs is qualified in accordance with the laws and regulations of the host states. Foreign investors can enjoy national treatment only if the law of host country so grants it. Expropriation is required to be taken under the "domestic" not "fair" procedure, and the fund transfer will be made in accordance with the laws of the host country. Moreover, the exhaustion of local administrative review procedures is required before access to international arbitration. Generally, the China-Africa BITs "make the rights accorded investors subject to the laws and regulations of the host country."[1052] The China-Africa BIT regime sends out a clear message that investments are welcome but remain subject to the laws and regulations of the host states. Except for according rights necessary for investment protection to investors, the China-Africa BITs seek to preserve the host state discretion to the maximum extent possible.

5.3 Investment climate under the Sino-Africa BIT context

As the China-Africa BITs leave a large margin of discretion and make the rights accorded to investors subject to the laws of the host states which are different and changeable, this is likely to bring about separate, different, small and unstable Sino-Africa investment markets, even though all the BITs essentially look alike.

In the context of China-Africa BITs, only the obligations related to investment protection are locked into the treaties, all the others are left to the discretion of the host state. Particularly, all the China-Africa BITs leave the matter of investment admission to the host state's discretion, where the host State preserves the power to decide whether and under what conditions to permit the entry of foreign investors (Wallace, 1983, pp. 84-85).[1053] In practice, China is usually the capital-export country and the African countries are the host countries. The African countries may take different

[1052] *Ibid* at 172.
[1053] *Supra* note 608 at 144.

approaches to economic and social policies in the field of investment admission[1054] and put different types of restrictions on the entry of investments: prohibitions of investment in different activities or industries; different foreign ownership limits in specific activities or industries; and different screening procedures based on different economic and social criteria.[1055] Additionally, as the China-Africa BITs allow the host state to reserve the right to differentiate between domestic and foreign investments under its laws; the African countries may exclude different types of enterprises, activities or industries from the national treatment based on their own economic policies. Furthermore, the BITs leave the host state an open backdoor to control the ISDS procedure by employing domestic administrative review procedure as a precondition for initiating international arbitration. Thus, except for obligations related to investment protection, the China-Africa BITs do not impose any other obligations on the host contracting parties. The entry, establishment and operation of foreign investments and even dispute settlements are governed by the laws of the host state. As the China-Africa BITs subject investors to the domestic laws of host state in the majority of areas, it may not help to create a uniform investment climate, even though the objectives, structure, subject-matter and even the wording of China-Africa BITs are similar or even identical. As the domestic laws can be easily changed, under the China-Africa BIT regime, the investment climate is unstable.

BITs are attractive for potential investors because they can release restrictions and other requirements established by national laws of the host country. By locking in some obligations by making commitments to take or not to take some measures, the host country is prohibited to certain extent from making restrictions or requirements on foreign investments. One value of BITs is to guarantee the interests of foreign investors by limiting the discretion of host state on foreign

[1054] *Ibid* at 147-148.
[1055] *Ibid* at 147.

investments. Existing China-Africa BITs, however, leave host contracting parties a large margin of discretion.

No provisions that focus on the gradual decrease or elimination of measures and restrictions on the admission and operations of firms, or "the implementation of measures and policies seeking to promote the proper functioning of markets (UNCTAD, 1994, ch. VII)"[1056] are found in the China-Africa BITs. The BITs have no transparency provisions, provisions regarding prohibition of performance requirements[1057] or employment of foreign managerial and specialised personnel.[1058] The only protective provisions included that concern the types of action detrimental to foreign investments are of little significance, as "the actual likelihood of large-scale action of this sort is today rather unlikely"[1059] and protection over foreign investments are increasingly incorporated into the domestic laws of the African countries. On the other hand, the BITs do not impose any obligations on investors. "Noticeably absent from China-Africa BITs are provisions pertaining to human rights, labour rights, environmental protection and sustainable development"[1060]that are crucial to African development. As such, some studies consider such post-entry, protection-oriented China-Africa BITs "sporadic, outdated, uninformed by recent developments, incoherent, and even purposeless."[1061] But this may not be true if put into a historical context.

The negotiation of a BIT is usually based on the model of the party with stronger bargaining power. The China-Africa BITs follow the China BIT model which stems from the European model. The China BIT model "was developed in the political context of the 1950s and 1960s—a period characterized by fear of the spread of communism and concern for the impacts of decolonization

[1056] *Ibid* at 22.
[1057] Ofodile Uche Ewelukwa, *Supra* note 597 at 177.
[1058] *Supra* note 608 at 34.
[1059] *Ibid* at 32.
[1060] Ofodile Uche Ewelukwa, *Supra* note 597 at 158.
[1061] *Supra* note 152 at 175-176.

on business interests in newly independent developing countries";[1062] where the investors from capital-export countries sought protection against national actions detrimental to their private properties. "[T]he first post-war decades saw many instances of large-scale action of this kind."[1063] As China was a large capital-import country receiving investments from developed countries, "with a view to protecting the national economy from excessive foreign influence or domination and supporting local firms against powerful foreign competitors",[1064] this BIT model was designed to leave the host country large policy space so as retain control over their internal economy. Given this origin, the China BIT model focuses on the protection of foreign investments and the preservation of state discretion.

Such China BIT model is welcome and broadly used in the negotiation with the African countries. The reason could be that the African countries have the same fear of losing control over their economies "through restrictions on their employment and development policies as well as through challenges to national industries."[1065] Actually, the China-Africa BITs "are not markedly different from those of Africa-North BITs in terms of their objectives, coverage of investment issues, and development dimension." [1066] China, as the capital-export country, seeks protection against measures detrimental to the interests of its investors such as "expropriations, nationalizations and other major cases of deprivation of property and infringement of property rights of investors."[1067] But, except for the obligations related to investment protection, existing China-Africa BITs leave all other matters to host state's discretion. As previously mentioned, such a model will lead to a

[1062] *Supra* note 567.
[1063] *Supra* note 608 at 32.
[1064] *Ibid* at 25.
[1065] *Supra* note 570 at 8.
[1066] Ofodile Uche Ewelukwa, *Supra* note 597 at 206.
[1067] *Supra* note 608 at 32.

separate and instable Sino-Africa investment climate. The reason that both sides are willing to tolerate this is that the model does not harm investments.

Chinese investment in Africa stems from its aid projects in the 1960s and 70s. It has for a long time focused on infrastructure development through free- or low-interest loans and construction contracts between Chinese SOEs and African governments. The investment projects of building railways, bridges, dams, water pipelines, etc. are huge and feature similar government-to-government deals. In the 1980s and 90s, these investment projects were dominated by Chinese SOEs and the only fear was that Chinese SOEs might face was expropriation or nationalisation of the investment projects. BITs that provided for measures against expropriation, nationalisation or other measures detrimental to investment projects were enough for protecting the interest of Chinese investors. Thus, China was willing to adopt the protective model of BITs. In the 1980s and 90s, 17 BITs following the protective model were signed between China and the African countries. The China-Africa BITs continuously followed the model, even after Chinese investments in Africa evolved after 2000. To date, 34 BITs have been signed. Except for the China-Tanzania BIT, all other China-Africa BITs followed the protective model. These protection-oriented BITs left the African countries great discretion over areas in which they did not want to lose control and met Chinese investors' needs for protection against nationalisation and other measures detrimental to their investments. However, such a model of BITs leads to a separate and instable investment climate. It cannot provide for the open, stable and predictable investment climate that market-oriented investments look for.

Chapter 6 How does a single BIT with the OHADA build a more open, steady, secure and transparent environment for Chinese investments in Africa?

The previous China-Africa BITs are simple and short, only two to three pages with no more than 20 provisions. Many significant issues addressed are unclearly or even missed. The "do-nothing" BITs leave the host state a large space for policy discretion and result is an unstable, unpredictable and in transparent investment environment. It is, therefore, understandable that any future China-Africa BITs must become more detailed, nuanced and refined to clearly address and balance the host state and investor interests which, Chinese private investors, in particular, are looking for.

One option is to follow some advanced, liberalisation-oriented BIT model and conclude new generation of BITs which guarantee investment access and provide more precise investment protection and more transparent dispute settlement, to ensure a more open, stable and predictable investment climate for investors. This seems to be the regime that China and Africa are currently adopting. Recently, both China and Africa are beginning their own practice of signing Canadian-modelled BITs. China singed a BIT based on the Canada Model with Canada on 9 September 2012, which entered into force on 1 October 2014. Since 2013, nine African countries – Benin, Tanzania, Cameroon, Cote d'Ivoire, Mali, Senegal, Nigeria, Burkina Faso and Guinea–signed BITs with Canada, based on the Canada Model BIT as well. The China-Tanzania BIT signed right after the China-Canada BIT, while much less ambitious than recent BITs that China and Africa have concluded with Canada, is the first such elaborate BIT between China and Africa. This signals China's and Africa's willingness to move towards a new generation of liberalisation-oriented BITs. The new BITs, either adopting the Canadian BIT model or incorporating some Canadian-modelled

elements, open market to investors, offer precise and important protections, contain advanced dispute settlement mechanism and, therefore, create an open, predicable and secure investment environment.

Another option is to conclude a single BIT with Africa at regional or sub-regional level, such as the China-OHADA BIT, as my dissertation proposes. The idea originates from the CETA and the negotiation of China-EU BIT. In August 2014, "Canada and the European Union concluded negotiations on the Comprehensive Economic and Trade Agreement (CETA), a 'mega- treaty' on which the parties began working in 2009." [1068] Following the signature, the consent by the European Parliament and the ratification by Canada, the CETA has entered into force provisionally since 21 September 2017, with most of the agreement now in force. The CETA includes an investment chapter which provides clearer and more precise investment protection standards and the most progressive system of ISDS,[1069] uniformly applicable to all the member states of EU and Canada. The CETA represents a new regime that offers concrete criteria for market access, uniformed investment protection standards and refined ISDS mechanism applicable to both the state as one contracting party, and a group of states as the other contracting party. It thus, creates a more open, stable and predictable investment climate.

One may argue that China can simply make full use of some latest model BITs and conclude new, precise, content-rich BITs with African states. This seems to be what China and African states are doing nowadays. The recent BITs signed by China and the African countries follow the advanced Canada BIT Model. The China-Tanzania BIT, while less ambitious, is a step in this direction. As such, it might be unnecessary to conclude a single BIT with Africa or African grouping as an entity.

[1068] Lise Johnson, Lisa Sachs & Jesse Coleman, "International Investment Agreements, 2014: A Review of Trends and New Approaches" in Andrea K Bjorklund, ed, *Yearbook on International Investment Law & Policy 2014-2015* (Oxford: Oxford University Press, 2016) 15 at 15-16.

[1069] *Ibid* at 19.

However, my dissertation proposes that the latter is more appropriate that a new round of Sino-Africa talks. To sign a standalone BIT with African states at regional or sub-regional level is necessary and more effective in building a more conducive investment environment. This section will compare these two different BIT regimes and explain why a standalone BIT with Africa at regional or sub-regional level could create a more open, stable, secure and transparent investment climate.

In assessing how the prospective China-OHADA BIT contributes to a more open, stable, predicable and transparent investment climate, this section compares the important differences of the pre-mentioned regimes and analyses their impacts on building an investment climate. As such, the recent Canadian-modelled BITs concluded by China and the African countries that represent the "BIT 2.0" regime and the investment chapter of the CETA that represents the one-standalone-BIT regime are used as reference.

The China-Canada BIT was signed on 9 September 2012 and entered into force on 1 October 2014. As noted, the China-Canada BIT follows the Canadian model, not the Chinese model. Canada has also successfully imposed its model investment treaty on its African partners.[1070] Canada signed nine BITs with countries in Africa between 2013 and 2015. The Benin-Canada BIT (January 2013), United Republic of Tanzania-Canada BIT (May 2013), Cameroon-Canada BIT (March 2014), Senegal-Canada BIT (November 2014), Mali-Canada BIT (November 2014) and Cote d'Ivoire-Canada BIT (November 2014) have been entered into force. The Nigeria-Canada BIT (May 2014), Burkina Faso-Canada BIT (April 2015) and Guinea-Canada BIT (May 2015) were signed but not currently in force. These BITs concluded with Canada in recent Chinese and African BIT practice

[1070] ***Working Papers*** Society of International Economic Law (SIEL), 5th Biennial Global Conference, *Canadian Investment Treaties with African Countries: What do They Tell Us about Investment Treaty Making in Africa?*, Working Paper No 2016/23 (2016).

are not only the most recent, but also the most comprehensive which provide perspective on China and Africa's new approaches to investment protection and liberalisation. No other Chinese or African BITs contain more comprehensive elements than these BITs.[1071] These Canadian-modelled BITs represent the extent of China and Africa's acceptance of interest-balancing in their current treaty-making practice.[1072]

The China-Tanzania BIT is the most recent BIT that China has signed with an African state, the one concluded right after the China-Canada BIT. It is, so far, the most comprehensive BIT between China and Africa. The China-Tanzania BIT is a result of China's and Africa's flexibility and adaptation to the Canadian model; because, while it seems more consistent with the China model BIT, it employs some Canadian-modelled elements that do not appear in the previous China-Africa BIT practice. The China-Tanzania BIT represents to what extent China and Africa have accepted these elements in their recent BITs which, therefore, could also be included in a new BIT regime. The CETA is currently the only bilateral investment instrument between a state and a group of states. It provides a new approach to investment protection and liberalisation. The investment chapter of the CETA shows the extent to which greater evolution may be necessary or expected in the China-OHADA BIT, a treaty of a similar type.[1073]

This section gives an overview of the substantive provisions of recent BITs signed by China and Africa and of the investment chapter of the CETA. This section compares the substantive provisions of the Canadian-modelled BITs concluded by China and Africa with that of the CETA, sums up the similarities and differences and summarises the features of different regimes. It is

[1071] Jun Xiao, "How can a Prospective China–EU BIT Contribute to Sustainable Investment: In Light of the UNCTAD Investment Policy Framework for Sustainable Development" (2015) 8:6 Journal of World Energy Law & Business 521 at 530.
[1072] *Ibid* at 541.
[1073] *Supra* note 1068 at 60.

understandable that the commonalities of these investment treaties could easily be included in the prospective China–OHADA BIT because the current China's and Africa's treaty practice constitutes the basis for any prognosis of the possible provisions of the prospective China–OHADA BIT. The newly concluded BITs represent to what extent China and Africa have accepted these elements in BITs already, which could also be included in the prospective China-OHADA BIT. The novel features of the CETA can also be incorporated into the prospective China-OHADA BIT, a treaty of a similar type. In this way, the possible content of the prospective China–OHADA BIT with respect to building a positive investment environment can be predicted. However, shaping concrete provisions of the China-OHADA BIT is neither possible nor necessary in this dissertation. Theoretically, there are different approaches on the design of China-OHADA BIT, from a standalone investment protection agreement to a standalone investment agreement combining market access and investment protection. What China and OHADA would pick and choose, if a negotiation were carried out someday, can be predicted on their position in current BIT, which represent their needs, preference and objectives.[1074]

This section aims to explain how the prospective China-OHADA BIT would build a conducive investment environment by briefly summarising the features of some key provisions including definition, market access, non-discrimination clauses, fair and equitable treatment, expropriation and ISDS provision that it might employ. The pre-mentioned BITs signal what the prospective China-OHADA BIT might look like because both China and Africa seem to have accepted many of the standard Canadian provisions. In comparison, a brief prognosis of the content of the prospective China-OHADA BIT can be made. However, as noted, it is neither possible nor necessary to shape the concrete provisions in this section. The analysis of commonalities aims to

[1074] *Supra* note 1071 at 525.

show how the new generation of BITs informs or should inform their approaches to investment protection and liberalisation in the prospective China-OHADA BIT.

The important differences between these two regimes will be analysed, and their impact on investment climate will be clarified. The CETA is the only instrument containing a bilateral investment arrangement between a state and a group of states. The China-OHADA BIT would definitely refer to the investment chapter of the CETA. In comparison with the new Canadian-modelled BITs, the "CETA goes a step further and contains more clarifications of substantive rules of investment protection, as well as new procedures and clearer rules of ISDS."[1075] Almost all of them have been suggested as means to improve the current investment climate. If they could be incorporated into the China–OHADA BIT to the largest extent, the China-OHADA BIT would make a greater contribution to a conducive investment climate in comparison with old Chinese BITs with African states, or even with the new ones. This could become reality because of China's and Africa's pragmatic and flexible approaches that adapt to the BIT regime,[1076] as well as their acceptance of limiting domestic discretion in general. The differences show how a standalone BIT at regional or sub-regional level contributes to a more open, steady, transparent and predictable environment for Chinese investments in Africa.

From which perspective does this section study the substantive rules of recent Canadian-modelled BITs, the China-Tanzania BIT and the CETA? In the perspective of balancing interests of the host state and investor, this section assesses the level at which these treaties focus on such an aspect and how it the impacts on and contributes to the investment environment. By analysing the host state-investor interest-balance in their recently concluded BITs and a concluded treaty of a similar type, we might define the positions of China and the OHADA on the particulars of the prospective

[1075] *Ibid* at 541.
[1076] *Ibid.*

China-OHADA BIT[1077] and, therefore, the impact of one single BIT with Africa at regional or sub-regional level.

6.1 Access to an open and broad investment market

"There are several scenarios possible in terms of ambition on market access related provisions",[1078] the investment control model, the selective opt-in model, the mutual national treatment model, the MFN model, the combined NT and MFN model and the absolute criteria model, etc. These models have different impacts on the ability of host state to restrict and govern the terms of market access.[1079] They reflect the extent to which the provisions "prevent the host state from according disparate treatment to foreign investors and investments in its territory - the texts reflect different levels of concern about restricting their policy space in this area, and different approaches for addressing that concern."[1080]

The old China-Africa BITs adopt the investment control model. They "expressly preserve [] the host State's discretion through a clause encouraging the contracting parties to promote favourable investment conditions between themselves but leaving the precise conditions of entry and establishment to the laws and regulations of each party." [1081] These treaties affirm that the host state "maintains the right to make regulations to govern the admission of foreign investments."[1082] "They do not accord positive rights or entry and establishment to foreign investors."[1083] Investors achieve no guarantees on investment admission under the old China-Africa BITs, as the host state

[1077] *Ibid* at 525.
[1078] *Supra* note 155.
[1079] *Supra* note 1068 at 40.
[1080] *Ibid* at 41.
[1081] *Supra* note 608 at 148-149.
[1082] *Ibid* at 149.
[1083] *Ibid* at 148.

may easily change its domestic laws that determine the procedures, terms and limits with respect to investment access.

The recent Canada-Africa BITs follow the Canada Model FIPA 2012 closely and apply national and MFN treatment in both the post-establishment and pre-establishment phases of the investment. Establishing a pre-establishment protection commitment under the Canadian model does not require much drafting.[1084] In most cases, it is done simply by including the additional term "establishment, acquisition" in the provisions of national and MFN treatment to apply the non-discriminatory treatment to both foreign investors and their investment. This combined NT and MFN model has its origins in US BIT practice.[1085] "In the 1990s, the United States (US) – followed by Canada, Japan and, more recently, the European Union (EU) and China – started negotiating a new type of bilateral investment treaty (BIT) with third countries. This new type of BIT does not only comprise post-establishment treatment and investment protection provisions like traditional BITs, but also contains substantive investment liberalization commitments. It grants foreign investors national and most-favoured-nation (MFN) treatment at the pre-establishment stage. So whereas traditional BITs merely create a secure business environment for established foreign investors in a host economy, this new type of BIT also seeks to reduce market entry barriers and to liberalize investment flows arguably on a preferential basis."[1086] The same as the Canada Model FIPA 2012, the Canada-Africa BITs, through the use of terms "establishment" and "acquisition" in the national and MFN treatment provisions, apply national and MFN treatment to investors as well as their investments.[1087] (See Table 23)

[1084] SADC Model Bilateral Investment Treaty with Commentary, July 2012, online: IISD <http://www.iisd.org> at 16.
[1085] *Supra* note 608 at 152.
[1086] Robert Basedow, "Preferential Investment Liberalization under Bilateral Investment Treaties: How to Ensure Compliance with WTO Law?" (2015) Columbia FDI Perspectives 162 at 162.
[1087] Chester Brown, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) at 74.

These provisions make establishment in the host state subject to the NT/MFN principle. The combined NT/MFN model creates a level playing field between nationals and foreign investors, foreign investors and third country investors.[1088] It widens entry and establishment rights by enabling investors to obtain the same rights of access as the national and the most favoured third country investor,[1089] "that is to say, for removal of all discrimination in matters of admission." "To that extent, the host State accepts to limit its sovereign power to regulate the entry of foreign investors."[1090] "The implication of this provision is clear: In deciding on admission of a foreign investment project, the host country must treat applications by investors of its treaty partner the same as it treats applications by its own national investors or those from other countries."[1091]

Usually, the general commitment of National and MFN treatment on the entry into the host state "is made subject to the right of each party to adopt or maintain exceptions".[1092] A country-specific schedule is often annexed to the BIT, "creating a negative list of protected activities or industries."[1093]

It is unfortunate, however, that in contrast with the other Canadian BITs, such as the Canada-Africa BITs, the pre-establishment protections in the China-Canada BIT against discrimination are rather circumscribed.[1094] "A typical Canadian FIPA extends national treatment (the obligation of the host state to treat the other Party's investors and their investments no less favourably than it treats its own investors and investments) to investors seeking to make an investment. This is known as the pre-establishment model. The Canada-China FIPA does not offer this pre-establishment

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[1088] *Ibid.*
[1089] *Supra* note 608 at 148.
[1090] *Ibid* at 153.
[1091] *Supra* note 625 at 666.
[1092] *Supra* note 608 at 153.
[1093] *Ibid* at 148.
[1094] Matthew S Kronby &Bennett Jones, "The Promise and Limitations of the New Canada-China Investment Treaty" (2 October 2014), online: Canada China Business Council <https://ccbc.com>.

protection."[1095] "There is a key difference in the protections offered by the MFN provisions in Article 5 and the National Treatment provisions in Article 6. The MFN applies to the 'establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory'. The national treatment provision makes no mention of 'establishment' or 'acquisition'. Thus, while MFN applies both pre- and post-establishment, National Treatment is only accorded to post-establishment investors and covered investments."[1096] "The absence of these words in the national treatment provision of the Canada-China BIT significantly limits the protections offered by that clause and excludes any protection whatsoever at the establishment phase." [1097] "The Canada-China BIT is weak in establishment-phase protection because it does not provide national treatment protection at that phase."[1098] Neither does the China-Tanzania BIT, which merely provides MFN treatment to foreign investors and investments on the matter of investment admission. National treatment protection does not apply to "establishment" or "acquisition" of an investment in the China-Tanzania BIT (see Table 23).

Notably, the weak pre-establishment protection in the China-Canada BIT and the China-Tanzania BIT follows the Chinese practice. China does not want to provide national treatment to foreign investors, especially in the service and financial sectors. This is because China is not only a large capital-export country but at the same time a large capital-import country. The concern is that its national investors may not be able to "compete on an equal footing with foreign firms," [1099] and takes the position "that the treaty applies only to investments that have been duly approved in

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[1095] *Ibid*.

[1096] John W Boscariol & Simon V Potter, "A Primer on the New China-Canada Bilateral Investment Treaty" (3 October 2012), online: Mccarthy tetralt <https://www.mccarthy.ca>.

[1097] Catherine H Gibson, "Canada, China, and the Anti-BIT" (9 April 2015), online: Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com>.

[1098] *Ibid.*

[1099] *Supra* note 625 at 666-667.

accordance with host country legislation." [1100] Therefore, instead of national treatment, China "find[s] it easier to grant most-favored-nation treatment on the entry of foreign investment than to grant national treatment."[1101] However, its attitude is changing in that the national treatment is being pursued, found in recent China-EU and China-US BIT negotiations.

"In April 2010 the European Commission President José Manuel Barroso and Chinese Premier Wen Jiabao agreed to look into ways of deepening and enhancing the EU-China bilateral investment relationship. European Trade Commissioner Karel De Gucht and the Chinese Minister for Trade, Chen Deming agreed at the EU-China Joint Committee in May 2010 to launch a Joint EU-China Investment Taskforce to study the options for enhancing bilateral investment and evaluate the desirability and feasibility of potential negotiations of an EU-China investment agreement."[1102] In February 2012, China and EU announced their decision to negotiate a bilateral investment treaty at the 14th China–EU Summit.[1103] "In the context of the China–EU BIT talks, the EU Trade Commissioner De Gucht has made clear that 'the EU–China investment agreement is not about investment protection only, but also about market access for European companies'. The European Parliament has likewise emphasized that the China–EU BIT negotiations would be opened only on condition that formal approval has been given by China for market access."[1104] China committed to undertake pre-establishment protection, and in November 2013, the 16th EU–China Summit announced the launch of negotiations.

"Another good example is the evolvement of the China–US BIT negotiation, in particular regarding the pre-establishment issue. The negotiations have been failing for decades since the

[1100] *Ibid* at 666.
[1101] *Ibid* at 666-667.
[1102] *Supra* note 155 at 2.
[1103] Shan Wenhua & Wang Lu, "The China-EU BIT and the Emerging 'Global BIT 2.0'" (2015) 30:1 ICSID Review: Foreign Investment Law Journal 260 at 260.
[1104] *Ibid* at 261.

start of 1983 while pre-establishment national treatment was the most important obstacle. For a long time, China categorically refused to undertake the pre-establishment national treatment commitment in BITs, which means to liberalize the domestic market to foreign investment. Like many developing countries, China wanted to reserve the right to decide freely which domestic sectors would be open to international competition. Moreover, the application of that commitment was practically difficult in China, because different Chinese entities, state-owned enterprises and privately-owned businesses, had been treated in different ways.

The current leadership of Xi is pursuing a more active and open policy in international economic affairs. The Decision on Some Major Issues Concerning Comprehensively Deepening the Reform, issued by the Third Plenary Session of the 18th CPC Central Committee in November 2013, reiterated that China would build a new open economic system to adapt to the new trend of economic globalizing. With regard to international investments, the Decision declared, China would ease control over investment access, including application of the same laws and regulations on Chinese and foreign investment, and expediting the signing of investment agreements with relevant countries and regions. This decision has been effectively implemented. At the international level, China accepted the pre-establishment national treatment on the basis of a negative list approach in the China–US BIT negotiations. At the national level, in January 2015, the Ministry of Commerce issued a comprehensive draft Foreign Investment Law for public comment, which will abolish the current approval system and grant national treatment to foreign investments, except the measures listed in a Special Administration Measure Catalogue, ie a negative list. Therefore, the acceptance of pre-establishment national treatment in the China–US BIT is not expediency, but rather an active and fundamental change of China's position."[1105]

[1105] *Supra* note 1071 at 526.

Importantly, "China may grant pre-establishment protections that are absent in the Canada-China FIPA in BITs it is now negotiating with the European Union and the United States. If so, those protections will accrue to Canadian investors too, by virtue of the most-favoured nation (MFN) obligation in the FIPA, which requires each Party to treat foreign investors and their investments no less favourably than investors and investments of third countries."[1106]

We can conclude that China and Africa might not hesitate to include pre-establishment commitments in the China-OHADA BIT. As they have commonly employed MFN treatment in their recent BIT practices, there would be no reason to exclude it from the China-OHADA BIT. They might also be willing to apply National Treatment to pre-entry protections, as Africa having accepted it in the BITs with Canada and China, is currently changing its position on this issue under the BIT negotiations with EU and US. However, the combined NT/MFN model cannot preclude the host state from later changing its admission arrangement by altering its domestic law.[1107]

The national treatment and the MFN treatment are relative standards. The national and MFN treatment model implies that the access to foreign investment is subject to domestic regulations on terms and limits applied to national or a third country investment. It provides that it should treat the application by foreign investors the same as applications by its own national investors or investors from a third state as bound in the particular domestic law of the host state. The manner and the level of access are thus expected to be changeable and vary among different host states. This may cause problem when signing a single BIT at regional or sub-regional level with a group of states. The NT/MFN model implies the individual treatment of different member state and market access to each member state is subject to the changeable and different domestic laws of

[1106] *Supra* note 1094.
[1107] *Supra* note 597 at 47.

that particular member state. However, this does not comply with the spirit of regionalism. To sign one single BIT with a regional group aims at pursuing secured access to the entire region, and thus, the group of states should be treated as a whole. It, therefore, inherently calls for a set of uniformed and absolute standards for market access, applicable to both the group of states as one side of contracting party and the signatory state as the other. This is exemplified by the CETA.

Instead of adopting the combined NT/MFN model to eliminate potentially discriminatory regulation of the host state which affects the establishment of foreign investment, the CETA develops some newly legislative technology. It defines the restrictive nature of measures that are prohibited from being adopted or maintained by contracting parties with respect to investment access. It also lists some measures as exceptions to leave contracting parties some policy space for their own strategic purposes.[1108] This type of provision expressly provides that a foreign investor

[1108] Article 8.4 of CETA, "ARTICLE 8.4 Market access

1. A Party shall not adopt or maintain with respect to market access through establishment by an investor of the other Party, on the basis of its entire territory or on the basis of the territory of a national, provincial, territorial, regional or local level of government, a measure that:

(a) imposes limitations on:

(i) the number of enterprises that may carry out a specific economic activity whether in the form of numerical quotas, monopolies, exclusive suppliers or the requirement of aneconomic needs test;

(ii) the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(iii) the total number of operations or the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

(iv) the participation of foreign capital in terms of maximum percentage limit on foreignshareholding or the total value of individual or aggregate foreign investment; or

(v) the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and directly related to, the performance of economic activity in the form of numerical quotas or the requirement of an economic needs test; or

(b) restricts or requires specific types of legal entity or joint venture through which an enterprise may carry out an economic activity.

2. For greater certainty, the following are consistent with paragraph 1:

(a) a measure concerning zoning and planning regulations affecting the development or use of land, or another analogous measure;

(b) a measure requiring the separation of the ownership of infrastructure from the ownership of the goods or services provided through that infrastructure to ensure fair competition, for example, in the fields of energy, transportation and telecommunications;

(c) a measure restricting the concentration of ownership to ensure fair competition;

is not subject to some types of regulation.[1109] Stability and predictability are thus achieved, as contracting parties are forbidden to make legislations to take any measure with restrictive natures, defined in the market access provision of the CETA, and the restrictive standards are uniformly provided for and applicable to the entire region of the EU as well as Canada.

It is important to note that "investment liberalization decisions take place through a State's domestic law and policy, and not, as is often suggested, in a treaty."[1110] To achieve stability and predictability of the investment climate, it has to create some binding obligations in the treaties, making policy reversals less likely.[1111] However, even including national and/or MFN treatment in investment access cannot completely preclude a state from later changing its admission arrangement by altering its domestic law.[1112] Thus, not including a binding, absolute provision in a treaty "does not in any way prevent a State from taking any and all measures to fully or partially open its investment markets, as it so wishes."[1113] The China-OHADA BIT could and should provide for a uniformed and absolute standard for investment access to attract more foreign investments.

However, it is questionable whether China and the African countries will accept the free admission of investments; as both China and the African countries "used to follow the traditional 'European' approach to BITs, focusing on investment 'protection' without including concrete undertakings in

(d) a measure seeking to ensure the conservation and protection of natural resources and the environment, including a limitation on the availability, number and scope of concessions granted, and the imposition of a moratorium or ban;

(e) a measure limiting the number of authorisations granted because of technical or physical constraints, for example, telecommunications spectrum and frequencies; or

(f) a measure requiring that a certain percentage of the shareholders, owners, partners, or directors of an enterprise be qualified or practice a certain profession such as lawyers or accountants."

[1109] *Supra* note 1084 at 15.

[1110] *Supra* note 597 at 47.

[1111] *Ibid.*

[1112] *Ibid.*

[1113] *Ibid.*

investment market access or liberalization."[1114] One may worry that the loss of sovereignty over investment admission may be too high a burden for China and the African countries, and lead to a failure of a BIT concluded between China and Africa at regional or sub-regional level.[1115]

But this approach seems to have undergone drastic changes on both sides in recent years.[1116] Africa, on the one hand, has been very keen to promote investment market access as well as investment protection, as demonstrated by the latest BITs between Canada and the African countries, including Benin, Burkina Faso, Cameroon, Cote d'Ivoire, Mali, Nigeria, Senegal and Tanzania.[1117] On the other hand, China also seems to have accepted market access obligations in BITs, as it has announced acceptance of pre-establishment MFN treatment obligations, to the surprise of many observers and commentators.[1118] Given the insistence of the African countries on market access and China's recent move to accept such obligations in BIT negotiations, it is likely that the China-OHADA BIT would contain concrete market access commitments.[1119] Flexibility can also be introduced for the African countries by allowing them to shelter infant industries and selected sectors from competition with Chinese firms.[1120] The China-OHADA BIT can include specific negative lists for each party to exclude some industries and sectors where foreign investments are prohibited. "A schedule of liberalization commitments could be required for each party to the agreement."[1121]

[1114] *Supra* note 1103 at 261.
[1115] *Supra* note 570 at 8.
[1116] *Supra* note 1103 at 261.
[1117] *Ibid.*
[1118] *Ibid.*
[1119] *Ibid.*
[1120] Ofodile Uche Ewelukwa, *Supra* note 597 at 179.
[1121] *Supra* note 1084 at 16.

"This is, nevertheless, much easier to be said than realized."[1122] Both China and the African countries have had little experience in making specific market access commitments in their investment treaty practice.[1123] "As a result, the preparations and negotiations for market access commitments are likely to take significant time, since both sides have to assess whether, and to what extent, each sector and each industry are internationally competitive and should be opened up to international investors."[1124]

The Canadian model extends national and MFN treatment to investors seeking to make an investment. It limits the policy space by imposing obligation on the host state to treat the other Party's investors and their investments no more favourably than it treats its own and third state's investors and investments. There is a trend showing that China and the African countries are following this model. However, even if China accepted the national treatment, the combined NT/MFN treatment is not an appropriate standard of investment access in the China-OHADA BIT because the national treatment and the MFN treatment are relative standards. The national and MFN treatment model implies that the access of foreign investment is subject to domestic regulations on terms applied to national or a third country investment. As domestic laws of OHADA member states vary, the access will still be on a state-base instead of regional base. This does not comply with the spirit of Africa's regionalism. It cannot preclude the host state from later changing its admission arrangement by altering its domestic law. [1125] To sign a BIT at regional or sub-regional level calls for free admission to the entire region based on some uniformed standards. This is exemplified by the CETA in that it provides for a set of uniformed standards on market access. It defines the restrictive nature of measures that are prohibited from being adopted or

[1122] Ofodile Uche Ewelukwa, *Supra* note 597 at 179.
[1123] *Ibid.*
[1124] *Supra* note 1103 at 261-262.
[1125] *Supra* note 597 at 47.

maintained by contracting parties with respect to investment access.[1126] Such restrictive standards are uniformly provided for and applicable to the entire region of the EU as well as Canada. The CETA directly limits a host state's legislative discretion, as contracting parties are forbidden to make legislations to take any measure with restrictive natures, defined in the market access provision of the CETA. The prospective China-OHADA BIT, a treaty of similar type, should embrace the same features and incorporate some uniformed standard of market access and it would thus contribute to an open and broad investment market where Chinese investors could access the entire region of the OHADA.

[1126] Article 8.4 of CETA, "ARTICLE 8.4 Market access

1. A Party shall not adopt or maintain with respect to market access through establishment by an investor of the other Party, on the basis of its entire territory or on the basis of the territory of a national, provincial, territorial, regional or local level of government, a measure that:

(a) imposes limitations on:

(i) the number of enterprises that may carry out a specific economic activity whether in the form of numerical quotas, monopolies, exclusive suppliers or the requirement of aneconomic needs test;

(ii) the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(iii) the total number of operations or the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

(iv) the participation of foreign capital in terms of maximum percentage limit on foreignshareholding or the total value of individual or aggregate foreign investment; or

(v) the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and directly related to, the performance of economic activity in the form of numerical quotas or the requirement of an economic needs test; or

(b) restricts or requires specific types of legal entity or joint venture through which an enterprise may carry out an economic activity.

2. For greater certainty, the following are consistent with paragraph 1:

(a) a measure concerning zoning and planning regulations affecting the development or use of land, or another analogous measure;

(b) a measure requiring the separation of the ownership of infrastructure from the ownership of the goods or services provided through that infrastructure to ensure fair competition, for example, in the fields of energy, transportation and telecommunications;

(c) a measure restricting the concentration of ownership to ensure fair competition;

(d) a measure seeking to ensure the conservation and protection of natural resources and the environment, including a limitation on the availability, number and scope of concessions granted, and the imposition of a moratorium or ban;

(e) a measure limiting the number of authorisations granted because of technical or physical constraints, for example, telecommunications spectrum and frequencies; or

(f) a measure requiring that a certain percentage of the shareholders, owners, partners, or directors of an enterprise be qualified or practice a certain profession such as lawyers or accountants."

6.2 Clear and absolute rules of investment protection

The existing BITs between China and the African countries "have established substantive rules of investment protection, but they would have to be clarified and updated to reflect the latest developments in this respect."[1127] In other words, the substantive rules are likely to be 'recalibrated' by the prospective China–OHADA BIT.[1128] "As a result, the traditional issues - such as post-establishment national treatment, standards of compensation and transfer - might cause little difficulty, as both sides have already adopted the fairly standardized formats in their recent treaty practices."[1129] "The more controversial issues might be related to the specific ways of wording to be adopted to further define certain critical terms such as 'investment' (eg whether or not to include reference to the 'characteristics of investment' and if so, which characteristics should be included), 'indirect expropriation' (eg which guiding principles should be considered in its determination) and 'fair and equitable treatment' (eg which aspects should be specified to establish an irreducible core of the concept). Further, it remains to be seen whether there should be any reference to 'customary international law' or the 'international minimum standard' in defining Fair and Equitable Treatment (FET) given that it was absent from existing [China - Africa BITs,] but both sides have adopted it in certain recent investment treaty practices."[1130] In short, this section will focus on the selected elaborated provisions of "investment", "fair and equitable treatment" and "indirect expropriation" to examine how these progressive formulations contribute to a more stable, secure and predicable investment climate by providing for clear and absolute rules on investment protection.

[1127] *Supra* note 1103 at 262.
[1128] *Ibid.*
[1129] *Ibid.*
[1130] *Ibid.*

6.2.1 Definition of investment

"The need to define investment flows from the necessity of knowing what kind of activities are (and should be) protected under international investment law."[1131] Defining investment, therefore, involves not only the interest of foreign investor but also significant policy considerations; as the definition of investment determines the scope *ratione materiae* of the protection,[1132] where investors seek for a broad and open-ended definition to expand the range of assets protected and the host state might narrow down the scope of investment by restricting certain sectors in foreign investment or forms of investment for development strategy.

The definition of investment in both China-Canada BIT and recent Africa-Canada BITs resembles the definition contained in the Canada Model BIT 2014 which originally stemmed from NAFTA Chapter 11. Different from the China-Africa BITs which adopt the asset-based definition, these Canadian-modelled BITs adopt an enterprise-based definition of investment. That provision defines an investment in terms of a list of assets, most of which are related to an enterprise.[1133] It provides that "investment includes an enterprise, an equity or debt security of an enterprise, a loan to an enterprise, and an interest in an enterprise that entitles the owner to share in income or profits of the enterprise or the assets of the enterprise upon dissolution. It also includes real estate or other property acquired or used for economic benefit or other business purposes and interests arising from the commitment of capital or other resources to economic activity."[1134] "The enterprise-

[1131] Marek Jeżewski, "Development Considerations in Defining Investment" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Rijn: Kluwer Law International, 2011) 211 at 215.
[1132] *Ibid.*
[1133] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (New York: Oxford Press, 2010) at 125.
[1134] *Ibid.*

based definition thus defines investment essentially as an interest in an enterprise, although such definitions typically include at least some other assets as well."[1135]

The coverage of the enterprise-based definition of investment in recent China's and Africa's BITs is very broad. In addition to the assets in the list, it provides that "investment" also covers "any other tangible or intangible, moveable or immovable property and related property rights acquired or used for business purposes",[1136] making this definition an open-ended one. As such, an asset while not included in the list could also fall within the scope of investment. This wide definition of investment in the Canadian-modelled BITs "ensures that all essential rights and interests necessary for engaging in economic activities in a host State are covered by the substantive protection of the relevant investment treaty."[1137]

China and Africa, however, do not employ the enterprise-based definition in their BIT regime. The definition of investment in the China-Tanzania BIT is essentially taken from the old Chinese BITs.[1138] Similar to the old BITs, it adopts an asset-based, open-ended definition and defines investment as "every kind of asset" with an illustrative list. The list commonly includes all the categories of assets contained in previous China-Africa BITs: 1) movable and immovable property and rights, 2) all kinds of participations in company, 3) claims to money or any performances with an economic value, 4) intellectual and industrial property rights, and 5) business concessions. In addition to these classical property rights, the definition also includes protection for investor-State contracts, government bonds, as well as investments in locally incorporated companies which is provided for in a separate paragraph.[1139] Thus, the definition of investment in the China-Tanzania

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[1135] *Ibid*.

[1136] See Article 1.1 (j) of China-Canada BIT and Article 1 investment (j) of Benin-Canada BIT.

[1137] Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge, UK: Cambridge University Press, 2009) at 72.

[1138] *Supra* note 152 at 165.

[1139] *Supra* note 1137 at 72; see also Article 1.1 of China-Tanzania BIT.

BIT "is basically an elaboration of the notion contained in the previous BIT models". [1140] However, this elaboration, compared with the definition in previous China-Africa BITs, "does not seem to make the kind of difference that the addition of so much text would otherwise suggest." [1141] The China-Tanzania BIT also states that any change in the form of an investment shall not affect its character as investment. "Thus, for example, a change in the organizational form or corporate structure of an investment would not affect its character as an investment."[1142] This also seems to follow the old Chinese model, as similar clauses may be found in some previous China-Africa BITs.

The CETA also adopts the enterprise-based definition and it looks quite similar to the definition in China's and Africa's recent Canadian-modelled BITs, if not completely taken verbatim. The definition is open-ended, as it uses the word of "every kind of asset" and "forms that an investment *may* take …", which means the list of several types of assets is non-exhaustive. "Because the list is illustrative, an asset need not be included in the list to be considered an investment." [1143] From this perspective, the coverage of investment in the China-Canada BIT, the Africa-Canada BITs, the China-Tanzania BIT is as extensive as the one in the CETA or even as in old China-Africa BITs. This broad and open-ended definition is in the interest of investors because it expands the range of assets protected. Such emphasis in these BITs reflects the focus on the economic rights of investors,[1144] whether in the old China-Africa BITs which represent the investment-protection perspective or in those Canadian-modelled BITs with the purpose of promoting a liberal

[1140] *Supra* note 152 at 155.
[1141] *Ibid.*
[1142] *Supra* note 1137 at 131.
[1143] *Ibid* at 122.
[1144] *Supra* note 1131 at 212.

investment regime. Then, has the provision of the definition of "investment" in recent BITs not made any progress?

The old China-Africa BITs provide for an asset-based definition of investment but did not set out criteria for whether an asset is an investment.[1145] This is unclear, as with respect to the jurisdiction question of the scope *ratione materiae*, the asset-based approach yields two possible results: either one would accept that all activities of an investor that are considered assets under the BIT are investments or the tribunal would be left with discretion to make the determination on its own.[1146] This "would be unacceptable from the certainty and predictability of law perspective, as each tribunal would be able to adopt a different interpretation even if the terms of the treaty were virtually identical. This danger is further enhanced by the lack of an appeal mechanism to correct errors of law."[1147] As such, it is necessary, for the sake of clarity and predictability, to embrace a more concrete, detailed and refined definition of investment in the BIT. The pre-mentioned investment agreements adopt two different ways to elaborate the definition: to include a very detailed list covering all kinds of investment, and to employ some common features in defining the term of investment.

Definition of investment in the China-Canada BIT and recent Canada-Africa BITs does not establish any general characteristics but is very detailed in terms of the kinds of investment covered. It includes a detailed and clear enterprise-based list of investment forms. It clearly excludes "claims to money from (i) commercial contracts for the sale of goods or services, or (ii) the extension of credit in connection with a commercial transaction" from the scope of protected investment (see Table 23). The provisions of investment in these BITs follow the Canada Model

[1145] *Ibid* at 217.

[1146] *Ibid* at 217-218.

[1147] *Ibid* at 218.

BIT, which Canada calls the "Model Foreign Investment Protection and Promotion Agreement" or "FIPA". The Canada Model FIPA 2004 provides a detailed, exhaustive list of covered investments. It includes a detailed and inclusive list of all the types of investment protected. Investment that does not fall within one of the exhaustive categories cannot be protected under this model. In this way the model provides a clear and predictable term for investment.[1148] In 2012, Canada revised the old Model FIPA and released a new one. The Canada Model FIPA 2012 keeps the detailed list but adds an open-ended clause at the end stipulating that in addition to the illustrative investment forms, "any other tangible or intangible, moveable or immovable, property and related property rights in the expectation of or used for the purpose of economic benefit or other business purpose" are investments, to cover any new forms of investment created over time. In this way, the notion of investment is not only clear and detailed enough to ensure certainty and predictability but also flexible enough to cover all rights and interests that have a monetary value.[1149]

The China-Tanzania BIT adopts a different approach to an elaborate definition of investment. As noted, the China-Tanzania BIT employs an asset-based, open-ended definition of investment. The definition includes a more comprehensive list of assets covering all the five classical categories that exist in the old China-Africa BITs and three more new types of investment forms: investor-State contracts, government bonds and enterprises. Also, it has a notable elaboration on claims to money:

> For the avoidance of doubt, claims to money in Paragraph 1(c) of this Article does not include (a) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of the

[1148] Due to its exhaustiveness, the list of covered investment forms in the Canada Model FIPA 2004 can be as extensive as an open-ended definition, as the list is truly inclusive and indeed one can hardly find an asset form outside this list.

[1149] *Supra* note 1137 at 72.

> other Contracting Party; or (b) claims to money that arise from marriage or inheritance and that have no characteristics of an investment.[1150]

"The rule under subsection (a) that expressly excludes claims to money from purely commercial sales of goods is a common rule enshrined in the China-Canada BIT" and recent Canada-Africa BITs, as well as other investment treaties like the CETA.[1151] "The rules under subsection (b) on marriage and inheritance are fairly new, however, and are perhaps peculiar to China-Tanzania relations. It would be interesting to examine whether it is a growing phenomenon signaling significant people-to-people relations to the point where such issues are deserving of particular mention in treaties."[1152]

Uncommonly, the China-Tanzania BIT adds a criteria of investment characteristics to further clarify the definition of investment. It widens the definition of investment to assets that have the characteristics of an investment. Such characteristics include the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.[1153] The inclusion of investment characteristics is a typical US approach to define the term investment. This was not present in the traditional China-Africa BIT practice. It is a progressive change "from stating that all kinds of assets qualify as investment, through providing examples or lists of activities covered by the definition, to establishing a group of characteristics that focus strictly on the economic aspects of investment."[1154]

It is good to see that the CETA also "opts for requiring covered investments to have specific characteristics, including certain duration, commitment of capital or other resources, expectation

[1150] See Article 1.1 of China-Tanzania BIT.
[1151] *Supra* note 152 at 165.
[1152] *Ibid.*
[1153] See Article 1.1 of China-Tanzania BIT.
[1154] *Supra* note 1131 at 219.

of gain or profit or the assumption of risk."[1155] The CETA defines investment as every kind of asset with a detailed, inclusive enterprise-based list, illustrative but limited to a set of investment characteristics. It combines the Canadian and US approaches to take the advantages of both models and provide an inclusive but clear and secure definition of investment. The CETA adopts the strictest and most comprehensive approach and thus provides a high level of clarity and predictability. The illustrative list is almost the same as that in the Canadian-modelled BITs. The reason some common features were added to the term "investment" is to ensure a clear and uniform definition for the tribunal to follow. The tribunal has to strictly follow these uniform criteria when it decides whether an asset or an activity falls into any category of the protected investments. This is helpful to ensure that the host states and investors from the home states are happy with, or at least accept the decision of tribunal, as it was previously agreed. The one-standalone-BIT regime inherently calls for uniformity to limit the discretion of interpretation, and thus, contributes to a more stable, secure and predictable investment climate. A standard criteria for market access in the CETA also proves this point of view. Given the recent China-Africa BIT practice, it might not be difficult for the China-OHADA BIT to include some common features for defining investment, as in the China-Tanzania BIT.

The old China-Africa BITs contain a "in accordance with law" clause and so does the China-Tanzania BIT. This provision complies with the "access control" model with respect to the investment admission. Article 1.1 of the China-Tanzania BIT stipulates that "the term 'investment' means any kind of asset that has the characteristics of an investment, invested by an investor of one Contracting Party in accordance with the laws and regulations of the other Contracting party

[1155] *Supra* note 1071 at 531.

in the territory of the latter". That is to say, the protection under the China-Tanzania BIT applies to investment only if it is established in accordance with local law.

"This type of clause, however, raises important potential concerns. Foreign investments operate in an environment that is, by definition, alien to them. Especially in developing countries, local laws can be notoriously nontrasparent. Even in a country where the text of laws is easily obtainable, the wide range of national, regional, and local laws applicable to a major enterprise creates numerous opportunities for a foreign investment to violate unwittingly some applicable requirement. The danger, then, is that the failure of an investment to comply with an obscure or poorly understood regulation could result in a forfeiture of treaty protection, on the ground that the investment was not established in accordance with host-state law. These clauses never provide for repose of any kind and thus an investment that was in place for decades in theory could be denied treaty protection based on an infraction that occurred at the investment inception. Indeed, such a clause creates an incentive to limit transparency so as to provide opportunities for legal errors by foreign investments that can supply a basis of a denial of treaty protection, should the host state wish in its discretion to deny protection later. This is precisely the kind of investment climate the BITs are intended to prevent."[1156] "Host states have the power to prescribe and enforce civil and criminal penalties on foreign investments and investors" who launch investments in its territory. [1157] "Thus, host states even without this clause have the means to prevent or discourage the unlawful establishment of investments." [1158] The prospective China-OHADA BIT need not include the "in accordance with law" clause. The China-Canada BIT and the recent Canada-Africa BITs have

[1156] *Supra* note 1137 at 130-131.
[1157] *Ibid* at 131.
[1158] *Ibid.*

excluded the "in accordance with law" provision. So, it would be acceptable for China and Africa to follow this model in the China-OHADA BIT.

6.2.2 Fair and equitable treatment (FET)

"The FET obligation has evolved over roughly the past 15 years into one of the most controversial, frequently invoked, and frequently successful bases for investor claims."[1159] "The notions of 'fairness' and 'equity' do not connote a clear set of legal prescriptions and are open to subjective interpretations, which is why there has been a great deal of uncertainty concerning the precise meaning of FET. Arbitral tribunals have broadly interpreted an unqualified version of these principles and given them an all-compassing nature. Accordingly, FET has been invoked in almost all ISDS cases by investors."[1160] "One categorization of the FET obligation breaks it down into two main types.

The first standard is a view of the FET obligation are tied, and limited to, the obligations required by states under the customary international law minimum standard of treatment (MST). The method for identifying the contents of customary international law requires tribunals to identify, based on an assessment of state practice and *opinio juris*, whether there is a relevant rule of customary international law and then to identify whether the state has breached that rule through its treatment of the foreign investor or investment."[1161]

The minimum standard treatment was firstly included in the NAFTA, when "the broad interpretation of FET by some arbitral tribunals under the framework of NAFTA caused concerns by NAFTA Member States. For the first time, states intervened with a Note of Interpretation, issued in 2001 by the NAFTA Free Trade Commission, representing the three State Parties to the

[1159] *Supra* note 1068 at 27.
[1160] *Supra* note 1071 at 532.
[1161] *Supra* note 1068 at 27.

agreement. The Note was intended to reduce any space for interpretation of tribunals, even in an ongoing case, namely *Pope & Talbot v Canada*. The Note constrains FET with a reference to customary international law, minimum standards for treatment of aliens and proscribes tribunals to establish a breach of FET on the basis of a breach of another provision of the NAFTA or other international agreements. This Note is not only an antecedent effort to qualify FET but also an intervention in arbitral proceedings by the adoption of binding interpretations of a relevant agreement, as also provided for in ISDS of the CETA and the China–Canada BIT. Thereafter, the same qualification of FET has been incorporated into American and Canadian BITs. However, this approach has its own deficiencies: the contemporary content of the minimum standard remains elusive; developing countries are traditionally skeptical about it."[1162]

"The second [standard] considers the FET obligation to be an 'autonomous' standard capable of and, in fact, imposing a higher duty of care on states toward investors and their investments. In contrast to the method for identifying whether there is a relevant rule under the customary international law minimum standard of treatment, tribunals interpret the standard by applying the Vienna Convention on the Law of Treaties, and/or any other rule of interpretation specified in the treaty."[1163]

According to some tribunals and commentators, the two standards are now effectively one, as customary international law has evolved over time to enshrine the autonomous standard. The diverse approaches highlighted by the China-Canada BIT, the Canada-Africa BITs, the China-Tanzania BIT and the CETA illustrate states' attempts to respond to these trends in interpretation

[1162] *Supra* note 1071 at 532-533.
[1163] *Supra* note 1068 at 28.

and to more clearly identify the types of conduct that will trigger liability and the method for identifying whether there has been a breach.[1164]

Recent Canada-Africa BITs following the Canada approach and equating "fair and equitable treatment" with the customary international minimum standard. These BITs include a "Minimum Standard of Treatment" provision, stipulating that fair and equitable treatment and full protection and security are to be "limited to treatment accorded to covered investments in accordance with the 'customary international law minimum standard of treatment of aliens'."[1165] "In view of the little specific obligation to accord fair and equitable treatment and to provide full protection and security," the fair and equitable treatment might primarily protect the investor against interferences by the host state, such as the misuse of administrative authority, the refusal to grant an operating license, the unpredictable, frequent, and conflicting changes in domestic laws, etc.;[1166] and full protection and security might require "positive action by the host State in establishing and enforcing a legal framework for the protection of foreign investment".[1167] However, "the exact content of both standards has not been authoritatively determined and remains contested. In particular, a vivid debate has developed as to whether both standards are equivalent to the international minimum standard of treatment under customary international law or whether they constitute a free-standing treaty obligation that can be interpreted and applied autonomously. In practice, however, this debate seems to have little impact on the interpretation of fair and equitable treatment and the actual application of this standard to specific cases. In general, arbitral tribunals only rarely take a principled approach to interpretation of fair and equitable treatment. They regularly apply fair and equitable treatment in a broad manner, using it as a yardstick for the

[1164] *Ibid.*
[1165] *Supra* note 1096.
[1166] *Supra* note 1137 at 80.
[1167] *Ibid* at 81.

conduct of national legislator, of domestic administrations, and of domestic courts. They do tackle it, however, primarily on a case-by-case basis." [1168]

The FET "incorporates into a BIT all the obligations with respect to covered investment or investors imposed on host states by customary international law."[1169] "It establishes a set of norms applicable to every instance of host-state treatment of covered investment."[1170] "The benefit to the investor of the incorporation into the BIT of the international minimum standard is that it ensures that violations of that standard may be the basis of a claim under the investor-state or state-state disputes provision." [1171] To avoid the abuse of FET, the minimum standard of treatment provision in the Canada-Africa BITs also clarify that it does not include an obligation of fair and equitable treatment that goes beyond customary international law minimum standard. Thus, the FET under the customary international law minimum standard limits the ability of investors to address the host government behaviour "that may be considered unfair or inequitable but which may be permissible under the historic customary international law minimum standard of treatment of aliens."[1172] The Canada-Africa BITs, as did the Canada Model FIPA 2012, also provide "that a breach of another international obligation does not establish a breach of MST."[1173] This text closely follows the language contained in the Canada Model FIPA 2012, sourcing from NAFTA Free Trade Commission's 2001 interpretive statement on Article 1105 of the NAFTA.[1174]

[1168] *Ibid* at 79.
[1169] *Supra* note 1137 at 226.
[1170] *Ibid* at 190.
[1171] *Ibid* at 226.
[1172] *Supra* note 1096.
[1173] Andrew Newcombe, "Canada's New Model Foreign Investment Protection Agreement" (August 2004), online: international arbitration attorney <https://www.international-arbitration-attorney.com>.
[1174] *Supra* note 1096.

"The China-Canada BIT also includes a separate provision for fair and equitable treatment, linking it to international law and, in particular, state practice."[1175] The FET standard in the China–Canada BIT has pursued the Canadian approach by and large. Similarly, it takes the position that FET equates to the customary international law minimum standard of treatment of aliens, "but it confines the minimum standard with the phrase 'as evidenced by general state practice accepted as law'. This illustrates China's skepticism to this standard to a certain extent."[1176] (See Table 26). "Given the contentious nature of the specific standards under customary international law, the parties' decision to word it [FET] so simply is indicative of the difficulty of agreeing on more concrete standards even with growing maturity of the jurisprudence in this area."[1177] In comparison with the previous model BITs, the Canadian approach is clearer than the "say-nothing" FET provision in the old China-Africa BITs. It refers to fair and equitable treatment in conjunction with the customary international law minimum standard of treatment of aliens. "This solution can lead to mixed results, however, as it leaves the interpretation of content of the customary international law minimum standard of treatment of aliens to tribunals."[1178]

In comparison with the Canadian approach, the CETA goes one step further and introduces a precise and specific standard of treatment. "CETA represents a third, distinct approach. It includes an FET obligation that, in contrast to the approach taken by Canada over roughly the previous 15 years, eschews any reference to customary international law. Instead, CETA strives to define the FET obligation by identifying the types of conduct that will constitute a breach of that standard. It states:

[1175] *Supra* note 152 at 156.
[1176] *Supra* note 1071 at 533.
[1177] *Supra* note 152 at 156.
[1178] *Supra* note 1087 at 79.

> Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 6.
> A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:
> (a) Denial of justice in criminal, civil or administrative proceedings;
> (b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
> (c) Manifest arbitrariness;
> (d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
> (e) Abusive treatment of investors, such as coercion, duress and harassment; or
> (f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties.

The list of conduct that can constitute a violation of the FET obligation is exhaustive". [1179] It means that a breach of the fair and equitable treatment obligation can only arise when there exists a conduct in the list. [1180] "Unlike other agreements, the standard of 'fair and equitable treatment' in CETA is neither a floor or a minimum standard nor an evolving concept. Rather, a clear, closed text defines precisely the standard of treatment without leaving unwelcome discretion to arbitrators." [1181]

This violation standard comes from the interpretation of FET in conjunction with the rule of law. From a conceptual perspective, "fair and equitable treatment can be understood as embodying the concept of the rule of law as it is widely recognized as an administrative or constitutional law concept in most liberal legal systems. As such it imposes certain procedural and substantive standards on all branches of domestic government. In fact, the jurisprudence of investment tribunals interpreting fair and equitable treatment regularly has recourse to certain sub-elements that run parallel to the concept of the rule of law in domestic legal systems. In this context, fair

[1179] *Supra* note 1068 at 29-30.
[1180] European Commission, "Investment Provisions in the EU-Canada Free Trade Agreement (CETA)" (29 February 2016), online: EC < https://trade.ec.europa.eu >.
[1181] *Ibid*.

and equitable treatment is interpreted to include the requirement stability and predictability of the legal framework, consistency in the host State's decision-making, the principle of legality, the protection of confidence or legitimate expectations, procedural due process and the prohibition of denial of justice, the protection against discrimination and arbitrariness, the requirement of transparency, and the concept of reasonableness and proportionality."[1182] Therefore, the CETA concludes the violation of FET if the host state commits: (1) denial of justice in criminal, civil or administrative proceedings; (2) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (3) manifest arbitrariness; (4) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or (5) abusive treatment of investors, such as coercion, duress and harassment.

The FET provision in the CETA also contains an opening clause following the list of violation conduct in the Paragraph 3, "making it possible for parties to review and possibly adapt the content of FET."[1183] It provides that the FET "can be expanded by agreement of the state parties and approval by a 'Trade Committee' established by CETA."[1184] "This clause can potentially make FET a moving target."[1185]

"In addition to this list, the FET of CETA includes the concept of investor's 'legitimate expectations' separately limiting it to situations where a specific representation was made by the state to an investor to induce a covered investment."[1186] This "gives tribunals considerable

[1182] *Supra* note 1137 at 79-80.
[1183] Nils Meyer-Ohlendorf, *Comments on Investment Protection under CETA: Good or Bad; New or Old?*, online: ecologic <https://www.ecologic.eu>.
[1184] *Supra* note 1068 at 30, see Article 8.10, 3 of CETA.
[1185] *Supra* note 1183.
[1186] *Supra* note 1071 at 533, see Article 8.10, 4 of CETA.

discretion in determining which state action has frustrated legitimate expectations of an investor. Practically, this could become a catch-all provision." [1187]

"For greater certainty," FET provision in CETA also provides examples of what fair and equitable treatment should not cover, including "a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article",[1188] and a measure that breaches domestic law.[1189]

The Canadian approach takes the position that the fair and equitable treatment equates customary international law minimum standard of treatment of aliens. While it is clearer than the "say-nothing" FET provision in the old China-Africa BITs, the term remains ambiguous, as it does not define the content of minimum standard.[1190] The CETA goes further than the Canadian approach in that it clarifies FET with an exhaustive list of violation acts. "This list defines FET more narrowly than older treaties, accounting for comparatively high levels of legal certainty." [1191] "As declared by the European Commission, the FET of the CETA is a precise and specific standard without leaving unwelcomed discretion to arbitrators. Its text is clear and closed; moreover, it is neither a floor or a minimum standard nor an evolving concept. In addition, the regular review by State Parties could further restrain the discretion of arbitrators."[1192] Due to the fact that the list in the FET of the CETA is more precise and specific, it should prevail and be incorporated into the China–OHADA BIT.

A positive aspect is that similar elaborations have been found in the China-Tanzania BIT. The fair and equitable treatment provision in the China-Tanzania BIT gives FET a very narrow and specific definition. It reads in part:

[1187] *Supra* note 1183.
[1188] See Article 8.10, 6 of CETA.
[1189] See Article 8.10, 7 of CETA.
[1190] *Supra* note 1137 at 192.
[1191] *Supra* note 1183.
[1192] *Supra* note 1071 at 533.

> 1. Each Contracting Party shall ensure that it accords to investors of the other Contracting Party and associated investments in its territory fair and equitable treatment and full protection and security.
> 2. "Fair and equitable treatment" means that investors of one Contracting Party shall not be denied fair judicial proceedings by the other Contracting Party or be treated with obvious discriminatory or arbitrary measures.
> 3. "Full protection and security" requires that Contracting Parties take reasonable and necessary police measures when performing the duty of ensuring investment protection and security. However, it does not mean, under any circumstances, that investors shall be accorded treatment more favourable than nationals of the Contracting Party in whose territory the investment has been made.[1193]

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

The definition of full protection and security also appears to be very literal because it limits the meaning to physical protection and security. It is a provision clearly negotiated for specific concerns - most likely concerns of physical security of Chinese operations in Tanzania. That the clause purports to equalize protection and security to nationals is doubly odd, though it is clearly a result of political compromise."[1194]

"The China-Tanzania BIT's fair and equitable treatment provision makes no reference to international standards and limits it to physical protection by linking it to police action. It seems to be unique in that sense." [1195]

[1193] See Article 5.1, 5.2 & 5.3 of China-Tanzania BIT.
[1194] *Supra* note 152 at 166-167.
[1195] *Ibid* at 167.

The contents of FET "are notoriously difficult to pin down, as they have been described and applied in myriad ways by states, claimants, tribunals, and commentators."[1196] However, the CETA makes an effort to give a clear scope of FET standards applicable to all the member states of EU and Canada. This reflects the feature of a BIT at regional or sub-regional level inherently embraces – providing uniformed criteria to reduce the discretion of interpretation. The China-Tanzania BIT enjoys a similar feature, as it defines FET specially and specifically. It signals that China and Africa might accept a clear and specific definition of FET in the prospective China-OHADA BIT.

6.2.3 Indirect expropriation

"An expropriation is the single greatest impairment of the security of an investment. It is an act that eliminates all or substantially all of the value of the investment to the investor. The threat of expropriation was a principal motivating factor in the origin of the BITs. Accordingly, BITs universally include a provision restricting the right of the host state to expropriate covered investment."[1197]

"The formulations concerning the prohibition of expropriation in the various BITs are very similar, if not identical."[1198] All the selected treaties "consistently provided that investments or returns of investors of another Contracting Party shall not be expropriated or subjected to measures having equivalent effect unless conditions of legality were met." [1199] They provide for the same conditions on the exercise of expropriation: for a public purpose, under due process of law, in a non-discriminatory manner and against compensation. All these treaties also provide that compensation shall amount to the fair and market value of the investment expropriated, be effectively realizable,

[1196] *Supra* note 1068 at 27.
[1197] *Supra* note 1137 at 271.
[1198] *Supra* note 1137 at 81.
[1199] *Supra* note 1087 at 94.

freely transferable, and made without delay. But variations exist with respect to payment of compensation, the determination of the value of compensation, the time in which the value of compensation is determined, and the interest of payment.

The Canada-Africa BITs follow the Canada Model FIPA 2012 and stipulate that compensation shall be paid **without delay** and shall be **fully realizable** and **freely transferable** in a **freely convertible** currency. This, while not explicitly expresses as the CETA does, actually accepts the Hull formula of "prompt, adequate and effective" compensation as applicable. The China-Canada BIT requires compensation to be **"effectively"** instead of "fully" realizable, freely transferable, and made without delay. It looks weaker than the Canadian approach on the face. The China-Tanzania BIT seems much weaker as it provides that the compensation shall be effectively realizable, freely realizable, and made without **"unreasonable"** delay. The other treaties do not allow any delay of payment, but the China-Tanzania BIT allows delay only if such delay is reasonable. In addition, while the China-Canada BIT and the China-Tanzania BIT adopt fair market value to confirm the payment of compensation, they do not go into the details of how valuation should be conducted. Both recent Canada-Africa BITs and the CETA follow the Canadian approach and include valuation criteria to determine fair market value. They stipulate that "valuation criteria must include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value." With respect to the time in which the payment is valued, the China-Canada BIT, the China-Tanzania BIT and the CETA provide that compensation shall be the fair market value of the expropriated investments *immediately before the expropriation is taken or when the impending expropriation becomes public knowledge, whichever is earlier*; while the Canada-Africa BITs compensation must be equivalent to the fair market value of the expropriated investment *immediately before the*

expropriation took place ("date of expropriation"). As for the interest of payment, the CETA and the China-Canada BIT adopt the "normal" commercial rate; while the Canada-Africa BITs and the China-Tanzania BIT adopt the "reasonable" commercial rate. The differences between a "normal" and "reasonable" commercial rate are not clarified.

We can see that the expropriation provision in China-Tanzania BIT is similar to, but weaker than the expropriation provision found in the Canada Model FIPA 2012 and in the CETA. "It thus preserves the old rule and does not shed any additional light. In effect, if a controversy arises with respect to an expropriated investment, this BIT provides no better guidance than the previous [China-Africa] models, which is somewhat surprising." [1200] However, the parties have agreed to add a modern indirect expropriation clause "registering their common understanding on what might constitute an indirect expropriation." [1201] This indirect expropriation follows the Canadian approach and never exists in the previous China-Africa BITs.

"Expropriation does not comprise only direct expropriations or nationalizations that involve the transfer of title from the foreign investor to the State or a third party."[1202] It also covers so-called indirect expropriations "involving State measures that do not interfere with the owner's title, but negatively affect the property's substance or void the owner's control over it."[1203] "A direct expropriation occurs where the host state takes title to, or possession of, the investment, either for its own use or for the use of a third party. An indirect expropriation occurs where the host state deprives the investor of the economic benefit of the investment. In the case of an indirect expropriation, the investor may continue to have title to and possession of the investment, but the value of the investment to the investor has been destroyed, often as the result of regulatory activity

[1200] *Supra* note 152 at 158.
[1201] *Ibid.*
[1202] *Supra* note 1137 at 82.
[1203] *Ibid.*

by the host state. For this reason, indirect expropriations sometimes have been described as 'regulatory expropriations' or 'regulatory takings,' although an indirect expropriation may occur through actions that, strictly speaking, may not be considered regulatory actions."[1204]

"In light of receding numbers of direct expropriations, the protection against indirect expropriations is an important instrument that enables foreign investors to challenge not only disguised expropriations, that is, measures taken with the intention of making an investor abandon its investment in order to avoid the financial consequences of a direct expropriation, but also 'regulatory takings,' that is, measures taken in the context of the modern regulatory State, such as strangulating taxation, overly burdensome measures protecting the environment, disproportionate zoning restrictions, etc."[1205] Thus, from the perspective of investor-host state interest balance, the inclusion of indirect expropriation is in the interest of investor, which enables investor to "challenge general regulations pursing legitimate public policy goals but with an alleged negative impact on the value of an investment." [1206] "[T]o avoid undue constraints on a state's prerogative to regulate in the public interest on one hand and to better balance investor and a state interests on the other hand," [1207] it is, therefore, of great significance to set out general criteria and draw "the line between an indirect expropriation and a legitimate regulatory distinction". [1208]

The China-Canada BIT, the Canada-Africa BITs, the China-Tanzania BIT and the CETA set out some criteria with minor differences. The indirect expropriation provisions in these BITs adopt the Canadian approach which "follows closely (almost word for word in the operative sections) the new US model."[1209] The Annex of Canada Model FIPA 2012 "states that the determination of an

[1204] *Supra* note 1137 at 278.
[1205] *Supra* note 1137 at 82.
[1206] *Supra* note 1071 at 535.
[1207] *Ibid.*
[1208] *Supra* note 1068 at 34.
[1209] *Supra* note 1173.

indirect expropriation is a case-by-case, fact-based inquiry that considers, among other factors, the economic impact of the government measure, the extent to which the measure interferes with distinct, reasonable investment-backed expectations and the character of the government measure. This is essentially a codification of the US regulatory takings test as set out in Penn Central Transportation Co. v. City of New York. The Annex then states that non-discriminatory measure taken to protect legitimate public welfare objective such as health, safety and the environment will not constitute indirect expropriation, except in rare circumstances."[1210]

All these treaties "require the determination of an indirect expropriation based on a case-by-case, fact-based inquiry" that considers among a list of factors.[1211] The list in the China-Canada BIT and recent Canada-Africa BITs follows strictly the list contained in the Canada Model FIPA 2012, which includes:

> (i) the economic impact of the measure or the series of measures, although the sole fact that a measure or a series of measures of a Contracting Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,
> (ii) the extent to which the measure or the series of measures interferes with distinct, reasonable investment-backed expectations, and
> (iii) the character of the measure or the series of measures.[1212]

The list in the China-Tanzania BIT includes:

> (a) the economic effect of a measure or a series of measures, although the fact that a measure or a series of measures of the Contracting Party has an adverse effect on the economic value of investments does not in itself establish that indirect expropriation occurred;
> (b) the extent to which the measure or the series of measures discriminates, in scope or application, against investors and associated investments of the other Contracting Party;
> (c) the extent to which the measure or the series of measures interferes with the clear and reasonable investment expectations of investors of the other Contracting Party; where such expectations arise from specific commitments made by one Contracting Party to the investors of the other Contracting Party;

[1210] *Ibid*.
[1211] *Supra* note 1071 at 535.
[1212] See Annex I: Expropriation (b) of China-Benin BIT.

> (d) the character and purpose of a measure or a series of measures, whether the measure or series of measures was adopted in the public interest and in good faith, and whether the expropriation was proportionate to its purpose.[1213]

The CETA's list includes:

> (i) the economic impact of the measure—it has to be clarified that the sole fact of the measure having an adverse effect on the economic value of an investment in itself does not give rise to a finding of indirect expropriation;
> (ii) the duration of the measure;
> (iii) the extent to which the measure interferes with distinct, reasonable, investment-backed expectations; and
> (iv) the character of the measure, notably its object, context and intent.[1214]

The list in the China–Canada BIT and recent Canada-Africa BITs is somewhat shorter, "but due to its illustrative nature, these lists are essentially the same."[1215]

These treaties also "provide that a non-discriminatory measure protecting the legitimate public welfare objectives, such as health, safety and environment, does not constitute indirect expropriation," except in rare circumstances where the measures are manifestly excessive (CETA), or substantially excessive (China-Tanzania BIT) or not adopted or applied in good faith [the China–Canada BIT and the Canada-Africa BITs] in the light of its purpose.[1216] "This clause introduces a proportionality test which weakens the general exception of public policy measures."[1217]

The clarification contained in Annex X.11 indirect expropriation of the CETA provides important guidance, "but it is not a completely new concept."[1218] The Canada-China BIT, the Canada-Africa BITs and the China-Tanzania BIT contain similar clarifications, often using similar or even identical language. Accordingly, it may not be difficult for the China–OHADA BIT to provide

[1213] See Article 6.2 of China-Tanzania BIT.
[1214] See Annex 8-A 2 of CETA.
[1215] *Supra* note 1071 at 535.
[1216] *Ibid.*
[1217] *Supra* note 1183.
[1218] *Ibid*.

some similar criteria for determination of indirect expropriation. If it does so, it will offer investors more protection by providing wide guarantees against expropriation.

If the China-OHADA BIT adopts the CETA rule in expropriation to the maximum, it will provide wide protection to investors. Because, the typical clause on expropriation in the high protection for investor model includes a broadly defined expropriation, both direct and indirect takings, and a stringent requirement of prompt, adequate and effective payment of compensation.[1219] The protective effect will be enhanced if, in the other provisions of the China-OHADA BIT, "the initial definition of investment is very wide, covering not only physical property but intangible property like patents and knowhow, shares in stocks of companies, contracts like concession agreements in the natural resources sector and the new type of 'property' brought about by regulatory controls - licences and permits necessary for a foreign investor to operate;"[1220] and "dispute resolution provisions give standing to a foreign investor to invoke arbitration against a host country at its option."[1221] In this way, the China-OHADA BIT would "restrict[s] sovereign control over foreign investment to the extent that a host State not only is not free to take at will property belonging to foreign investors but must conform to severe limitations on its ability to regulate foreign investments."[1222] As such the China-OHADA BIT forms the basis that seek primarily to further the goal of protection of investors.

6.3 Specialized ISDS mechanism

Many BITs employ institutional or ad hoc arbitration provisions to allow foreign investors to challenge "government measures that relate to regulation, judicial enforcement, administrative

[1219] *Supra* note 608 at 252.
[1220] *Ibid.*
[1221] *Ibid.*
[1222] *Ibid.*

determinations, and other core government functions." [1223] As a result, arbitrators review "government actions to determine the legitimacy of these measures, and in particular whether they give rise to liability under the broad protections of various investment agreements."[1224] In this way, arbitration reaches into the policy space of host jurisdictions.[1225] Host countries do not want to lose control over the dispute settlement, and usually limit investor's access to international arbitration. In contrast, home countries expect to include a mechanism in the BIT for their investors "to pursue damages claims directly against host states through independent international arbitration." [1226]

The old China-Africa BITs provide four options for resolving the investor-state disputes: "domestic court litigation in the host state, ICSID arbitration, ad hoc arbitration under UNCITRAL Rules, and ad hoc arbitration under any other agreed rules."[1227] Foreign investors may either resort to national litigation of host state or international arbitration. But the BITs provide that "the host state retains the right to require the exhaustion of local administrative remedies before the investor can exercise the right to resort to international arbitration."[1228] That is to say, the old China-Africa BITs do not guarantee an unconditional access to independent international arbitration. The old treaties reserve the policy space of host jurisdictions by using exhaustion requirement of limiting the scope of arbitral review. Relative to what China and the African countries have provided under their BITs to date, recent China's and Africa's BITs with Canada, however, are cutting-edge. Both China and Africa employ the ISDS provisions contained in the Canadian Model FIPA in their recent BIT practices and provide an international mechanism that structurally limits the host state's ability to pursue domestic process. The ISDS provisions in the China-Canada BIT and Canada-

[1223] *Supra* note 1068 at 43.
[1224] *Ibid* at 44.
[1225] *Ibid.*
[1226] *Ibid.*
[1227] *Supra* note 152 at 168.
[1228] *Ibid.*

Africa BITs are quite similar. The Canada-Africa BITs directly use the Canadian ISDS mechanism, while the China-Canada BIT is a flexible application to the mechanism. Below will take the China-Canada BIT as an example to analyse the features of this new ISDS mechanism.

6.3.1 The Canadian model

"By far the most significant change that the China-Canada BIT introduces pertains to the unusually elaborate investor-state dispute settlement provision. It not only commits the parties to arbitrate in very specific ways under very specific procedures. The dispute settlement provision comprises Articles 19 through 32, and covers almost all aspects of the process in unusual detail, down to rules of procedure."[1229] "Part C of the China–Canada BIT includes 14 articles on ISDS, from Article 19 'Purpose' to Article 32 'Finality and Enforcement of an Award'," [1230] addressing issues with respect to conditions for initiating an arbitration, who has the right to choose dispute settlement, consent to arbitration, composition of arbitral tribunal, procedure rule, governing law, special rules regarding financial services, submission by interested third parties, public access to hearings and documents, consolidation, interim measures, finality and enforcement of award. These detailed and inclusive ISDS provisions establish a comprehensive mechanism allowing investor to submit investment disputes against the government of host state to international arbitration.

6.3.1.1 Strict and short time limit for initiating arbitration

The first noteworthy aspect of the provision is that it provides for strict time limit for initiating arbitration. "Before a complaint can be submitted to arbitration, the disputing parties must first hold consultations in the capital of the defendant Contracting Party, to attempt an amicable settlement. These consultations must be held within 30 days of submission of the notice of intent to submit a claim to arbitration. Even after such consultations, a claim may only be submitted if at

[1229] *Ibid* at 160.
[1230] *Supra* note 1071 at 536.

least six months have elapsed since the alleged breach and at least four months have elapsed since the notice of intent. If the dispute relates to a Chinese measure, a four-month internal administrative process is also required. Thus, it would be advisable to begin the administrative reconsideration procedure immediately so after four months, the dispute may be brought to arbitration without further waiting."[1231] Similar provisions are in Canada-Africa BITs. But there is no requirement on the exhaustion of domestic review procedure and the time limit for consultation is 60 days. The old China-Africa BITs merely provide a six-month time limit for consultation, without clarifying within which time such consultation should begin. Additionally, most of the old China-Africa BITs require the exhaustion of domestic administrate review procedure, and they do not impose time limit on the review procedure. The new ISDS mechanism in the China-Canada BIT and Canada-Africa BITs impose short and strict time limit on every pre-phase before initiating arbitration to eliminate any process delay.

6.3.1.2 Investor has the right to choose dispute settlement

The second feature relates to who has the right to choose dispute settlement. "In any case, the choice of whether to submit a claim for arbitration and under what rules remains that of the investor." [1232] Both the China-Canada BIT and the Canada-Africa BITs provide that "the investor may initiate arbitration while the host state may not." [1233] This is a progressive change in comparison with old China-Africa BITs, some of which give host state the same right to choose dispute settlement.

6.3.1.3 No requirement on the exhaustion of domestic remedies

[1231] *Supra* note 1096.
[1232] *Supra* note 152 at 160.
[1233] *Ibid.*

"An additional issue during the negotiations leading up to the BIT was whether investors would be made to choose between domestic proceedings or claim arbitration. The final result can be found in Annex C.21 and is something of a mixed bag. If the claim concerns a Canadian measure, an investor who seeks arbitration because of an alleged breach waives any right to initiate or continue actions for that breach before any court or any other dispute settlement body. The only exceptions are for injunctive, declaratory or other extraordinary relief under the laws of Canada. If the measure is a Chinese measure, then an investor is required to first make use of the Chinese administrative reconsideration procedure. If, after four months of trying to resolve the case, there is still an issue, it may be submitted to arbitration. However, doing so requires an investor to withdraw any case on that alleged breach from the national court before judgment has been made."[1234] One big difference between China and Africa BIT practice is that the Canada-Africa BITs do not require the use of domestic remedies. There should be no requirement on the exhaustion of domestic remedies under the new ISDS mechanism. While China insists on the use of its domestic administrative review procedure, the BIT puts a four-month time limit on such procedure.

6.3.1.4 BIT and international law as governing Law

The fourth feature is about the governing substantive law. "In a significant departure from the traditional BITs that select the host state's laws as the rule of decision, the China-Canada BIT expressly selects international law as the rule of decision. It states in particular:

> 1. A Tribunal established under this Part shall decide the issues in dispute in accordance with this Agreement, and applicable rules of international law, and where relevant and as appropriate, take into consideration the law of the host Contracting Party. An interpretation by the Contracting Parties of a provision of

[1234] *Supra* note 1096.

> this Agreement shall be binding on a Tribunal established under this Part, and any award under this Part shall be consistent with such interpretation.[1235]

Hence, the application of the laws of the host state is ancillary and supplemental. The China-Canada BIT thus reverses the roles that international and domestic law play in the traditional BIT models, including the various generations of Chinese BITs. In fact, the China-Canada BIT does more than place international law above domestic law; it reduces the application of domestic law to a merely informational role. Given the unending controversy on the exact prescriptions of customary international law in the area of international investment, this choice of law rule is sure to add to the complexity of arbitral decision-making."[1236] To conclude, "Article 30 of the China-Canada BIT provides that any Tribunal shall decide the dispute in accordance with the BIT and international law; while taking the laws of the host Contracting Party into consideration where appropriate."[1237] The Canada-Africa BITs go further and select the BIT and international law as government substantive law.

6.3.1.5 Clear procedure rules

Regarding the procedure rule, both the China-Canada BIT and Canada-Africa BITs provide that "a claim to arbitration may be submitted under the ICSID Convention provided that both States are parties to that convention. If only one party is a party to the ICSID claim may be submitted under the Additional Facility Rules of the ICSID. Regardless of other circumstances, claims may always be submitted under the UNCITRAL Arbitration Rules."[1238] "The China-Canada BIT was signed before Canada's ratification of the ICSID Convention explains the redundancy". [1239] The

[1235] See Article 30 of China-Canada BIT.
[1236] *Supra* note 152 at 162.
[1237] *Supra* note 1096.
[1238] *Ibid*.
[1239] *Supra* note 152 at 160.

inclusion of the Additional Facilities in the China-Canada BIT has now become redundant "by virtue of Canada's ratification of the ICSID Convention on December 1, 2013."[1240]

Deep rules on the selection, qualification and appointment of arbitrator

The sixth notable feature of the dispute settlement mechanism set up by the China-Canada BIT "is the depth of the rules on the selection, qualification, and appointment of arbitrators. It covers such areas as required subject matter-specific expertise and remuneration and bestows the default appointment authority on the Secretary General of ICSID." [1241] The Canada-Africa BITs contain similar, if not identical, provisions.

6.3.1.6 High arbitration transparency

The Canada-Africa BITs follow strictly the Canadian Model FIPA and provide that hearings shall be open to the public. However, the China-Canada BIT adopts a considerably weaker type. "On the one hand, the BIT requires that the parties adapt their laws and regulations affecting covered investments and do so in a transparent manner. They also require that the enforcement and administration of those laws be done in a manner that enables investors of the other Party to become acquainted with them.

On the other hand, the transparency of the arbitration process is more restricted. The ultimate decision of the any Tribunal shall be made publicly available; subject to the redaction of confidential information. However, the arbitral proceedings themselves will only be open to the public if the investor claimant and the State agree. This is a significant reduction in transparency compared to an open Tribunal process. This is also a significant deviation from the Model FIPA

[1240] *Ibid.*

[1241] *Ibid* at 161, see art. 24

which requires hearings to be open to the public unless the Tribunal decides to move in camera to protect confidential information."[1242]

6.3.1.7 Finality and Enforcement

"Article 23 provides that both countries consent to arbitration provided the rules for applying for arbitration have been followed. Further, both countries are required to provide for the enforcement of an award in their territories. This is in line with Canada's Model FIPA and it effectively ensures that a Canadian investor will not face a Chinese refusal to submit to arbitration."[1243] Article 32 clarifies that the award has no binding force except between the disputing parties and in respect of that particular case.

6.3.1.8 Other issues

The China-Canada BIT and Canada-Africa BITs also have "detailed provisions on procedural matters that are ordinarily left for institutional rules, for instance on the consolidation of cases, on third-party participation,[1244] and on interim measures of preservation."[1245] "It also contains detailed rules on public access to information about the proceedings and awards",[1246] and "a unique dispute settlement mechanism for the financial sector embedded within the main dispute settlement mechanism."[1247]

[1242] *Supra* note 1096.

[1243] *Ibid*.

[1244] Regarding the third-party participation, "the China-Canada BIT adds an elaborate annex to the dispute resolution rule. This is undoubtedly a response to the recent backlash against investor-state arbitration because of the perceived impact on public interest and the desire by non-profit advocacy groups to submit amicus briefs on matters they consider important, such as the environment, labor and employment standards, corporate social responsibility, and corruption." See *Supra* note 152 at 162.

[1245] *Supra* note 152 at 61.

[1246] *Ibid.*

[1247] *Ibid* at 160. "The new mechanism relative to the financial sector is significant. It combines state-to-state arbitration with investor-state arbitration whereby proceedings of one inform or even control the other. When the subject matter of the dispute pertains to reasonable measures that one of the parties has taken relative to the following items, the state may raise a defense against an investor's claims on the basis of these measures:

(a) the protection of depositors, financial market participants and investors, policyholders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;

To conclude, both the China-Canada BIT and the Canada-Africa BITs follow the complicated and comprehensive ISDS provisions contained in the Canadian Model FIPA to establish a mechanism for investors to submit their disputes against host state to arbitration. Their ISDS provisions are similar. The difference is that Africa copies the Canadian ISDS model, while China leaves more policy space of host jurisdiction by requiring the exhaustion of domestic administrative review procedure, taking domestic laws as supplemental governing laws, and requiring pre-consents of investor and host state as condition for the arbitral hearing to be opened to the public.

6.3.2 The CETA approach

"In comparison to CETA, however, the ISDS in the China–Canada BIT is still 'too simple'."[1248] Section F "Resolution of investment disputes between investors and states" of the CETA includes 28 articles, from Article 8.18 "Scope" to Article 8.45 "Exclusion". [1249] These provisions create a permanent investment tribunal and an appellate tribunal to resolve investment disputes between investor and host state. The CETA replaces the Canadian ISDS mechanism with a new and more comprehensive court-like system.[1250] "An overall comparison shows that all issues in ISDS of the China–Canada BIT have been regulated in the CETA. The counterpart for each rule in the former, except Article 19, can be found in CETA."[1251] Reversely, there are 14 provisions in Section F of

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(b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and

(c) ensuring the integrity and stability of a Contracting Party's financial system.

In that case, the investor-state tribunal must defer the decision on whether such measures qualify as a defense to a different process. First, under Article 20, the tribunal must seek a report from the contracting parties' financial services authorities. If they agree on the matter and write a report, that report binds the tribunal on whether the defense under Article 33(3) is valid. If the authorities do not agree, the parties could set up a state-to-state tribunal to determine that particular issue, which would bind the investor-state tribunal. This system integrates the state-to-state and investor-state arbitral processes in a unique way. The recent financial crisis appears to have informed this formulation." See also *Supra* note 152 at 161.

[1248] *Supra* note 1071 at 536.

[1249] *Ibid.*

[1250] European Commission, "CETA explained" (21 September 2017), online: EC <http://ec.europa.eu>.

[1251] *Supra* note 1071 at 536.

the CETA, which are absent in the China–Canada BIT, regarding issues of mediation, proceedings under different international agreements", appeal mechanism and etc. [1252] "Among provisions concerning the same issue, only a few have approximately the same wording, eg Article 23 of the China–Canada BIT and [Article 8.25] of the CETA about consent to arbitration. In most cases, the CETA has more precise rules concerning the same issue," [1253] for example, Article 8.36 "transparency of proceedings" in comparison with Article 28 of the China–Canada BIT.

The CETA creates a permanent court-like system with an appeal mechanism. The new system will be public, "work transparently by opening up hearings to the public and publishing documents submitted during cases," and "have professional and independent judges held to the highest ethical standards through a strict code of conduct."[1254]

Contrary to the old ISDS system, the new system in the CETA is not based on temporary tribunals. "The Tribunal will be composed of fifteen members nominated in advance by the Union and Canada and not by arbitrators nominated by the investor and the defending state. The tribunal will hear cases in divisions of three members appointed via a randomised procedure."[1255] "CETA also creates an appeal system comparable to what is found in domestic legal systems, meaning that decisions of the tribunal will be checked and reversed in case of a legal error."[1256]

"CETA introduces full transparency in ISDS disputes: all documents (submissions by the parties, decisions of the tribunal) will be publicly available on a website which the EU will finance. All hearings will be open to the public. Interested parties (NGO's, trade unions) will be able to make submissions. This will be binding and cannot be waived by the tribunal or the parties to a dispute.

[1252] *Ibid.*
[1253] *Ibid.*
[1254] *Supra* note 1250.
[1255] *Supra* note 1180.
[1256] EC, "CETA: Summary of the Final Negotiating Result" (29 February 2016), online: EC <https://trade.ec.europa.eu>.

As is also the practice in national/local courts in the Union and Canada, information can potentially be withheld in case of business secrets and information considered confidential under the national laws of the responding state. These instances are clearly defined." [1257]

"CETA applies the UNCITRAL Transparency Rules to all investor- state disputes conducted under the agreement."[1258] "Accordingly, a number of documents must be made public, including, for example, orders, decisions and awards of the arbitral tribunal or expert statements. Confidential information, however, may not be made public. Confidential information includes 'confidential business information', or information which with 'disclosure would impede law enforcement'. Information that a state considers to be contrary to its essential security interests may not be made public either.

Furthermore, the CETA stipulates that hearings are open to the public. Where the tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection. Importantly, the CETA determines that 'nothing in this (c)hapter requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should endeavour to apply such laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information'."[1259]

"In addition, CETA makes some advancements with regard to the conduct of arbitrators by requiring compliance with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines). CETA's Committee on Services and Investment also has the discretion to adopt supplemental rules, to be applied in addition to the IBA Guidelines."[1260]

[1257] *Supra* note 1180.
[1258] *Supra* note 1068 at 21, see Article X.33 of CETA.
[1259] *Supra* note 1183.
[1260] *Supra* note 1068 at 20.

"CETA is the first agreement that has a binding code of conduct for arbitrators acting in an ISDS dispute." [1261] "It prevents conflicts of interest. In case an arbitrator is found not to comply with the code, he/she will be replaced. That decision is taken by an outside party (the Secretary General of the International Centre for the Settlement of Investment Disputes (ICSID) and not by the fellow arbitrators. This is important, because the fellow arbitrators risk being perceived as being more lax on possible conflicts of interest. (NB ICSID is a World Bank body, and the Secretary General is elected by 2/3rds majority of the 150 countries which are party to the Convention)." [1262] "CETA's approach to regulation of the conduct of arbitrators differs from that adopted in the China-Canada BIT or Canada-Africa BITs, "into which a treaty-specific code has been incorporated."[1263]

"CETA also defines the process for the appointment of arbitrators in some detail, providing for selection of arbitrators from a list agreed upon by states parties."[1264] "In case of disagreement between the disputing parties (i.e. investor -Canada or investor –Union/Member State), the arbitrator will be selected from this list. This ensures that the Union or Canada have always agreed to at least two of the three arbitrators that will act under CETA and will have vetted them to ensure that they live up to the highest standards." [1265] And CETA provides that arbitrators must "be independent of, and not be affiliated with or take instructions from, a disputing party or the government of a party with regard to trade and investment matters." [1266]

"CETA prohibits parallel proceedings: investors cannot seek remedies in domestic courts (or other international tribunals) and through ISDS at the same time. The aim is to avoid double

[1261] *Supra* note 1180.
[1262] *Ibid*.
[1263] *Supra* note 1068 at 20-21.
[1264] *Ibid*.
[1265] *Supra* note 1180.
[1266] *Supra* note 1183.

compensation and divergent verdicts."[1267] Similar with the Canada-Africa BITs, "CETA does not require exhaustion of local remedies. An investor is entitled to file for arbitration without seeking legal redress in domestic courts. The CETA only requires investors to seek consultation. Only if a dispute has not been resolved through consultations, a claim may be submitted to arbitration."[1268] the CETA also introduces the possibility of mediation. It contains specific provisions on mediation to provide another option of amicable solution.[1269] These are also firsts.

To conclude, the CETA includes all the innovations of the EU's new approach on investment dispute settlement.[1270] It represents a clear break from the current ISDS system. The CETA "demonstrates the shared determination of the EU and Canada to replace the current ISDS system with a new dispute settlement mechanism and move towards establishing a permanent multilateral investment court."[1271] It "creates an independent investment court system, consisting of a permanent tribunal and an appeal tribunal that will conduct dispute settlement proceedings in a transparent and impartial manner."[1272] The CETA "removes ambiguities that made the old system open to abuses or excessive interpretations".[1273] It contains "more comprehensive language (including a series of interpretative declarations) that seeks to clarify the scope of the agreement's provisions, preserve the regulatory powers of states parties, and thereby reduce the discretion of investment tribunals."[1274] "The European Commission declared that the ISDS of the CETA is the

[1267] *Supra* note 1180.
[1268] *Supra* note 1183.
[1269] *Supra* note 1180.
[1270] *Supra* note 1256.
[1271] European Commission, Press Release, "CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement" (29 February 2016) online: <http://europa.eu>.
[1272] *Supra* note *1256*.
[1273] *Ibid.*
[1274] *Supra* note 1068 at 20.

most progressive system to date, and that new and clearer rules on the conduct of procedures in arbitration tribunals represent a significant break with the past."[1275]

China and Africa would have the opportunity in the China-OHADA BIT to significantly reform their ISDS system. How ISDS provisions in the China–OHADA BIT would contribute to an efficient and effective dispute settlement mechanism would depend on the extent to which China and Africa could accept the new procedures and rules in the CETA. [1276] However, the prospect is not in the least cheerful, because the recent China-Tanzania BIT, instead of establishing a comprehensive ISDS mechanism, follow the old ISDS model that either renders investor-state dispute to ready-made dispute settlement mechanisms such as the competent court or international institutional arbitration, or leaves it to disputed parties establishing ad hoc arbitration. It does not eliminate the use of domestic administrative review procedure. Except for the inclusion of governing law provision,[1277] the ISDS provisions in the China-Tanzania BIT are unremarkable.

6.3.3 Conclusion

To which extent China and Africa would employ Canada Model FIPA or the CETA provisions in the prospective China-OHADA BIT depends on the release of policy space on host jurisdiction. Because of the perceived deficiencies of domestic courts in China and the African countries, often considered corrupt, biased, inefficient, or dependent on the executive,[1278] the China-OHADA BIT

[1275] *Supra* note 1071 at 536.

[1276] *Ibid* at 537.

[1277] "The choice of substantive law provision is important to highlight. With one exception, the provisions of the BIT and rules of international law govern. The exception relates to contractual commitments. It reads in part: 'Each Contracting Party shall observe any written commitments in the form of agreement or contract it may have entered into with the investors of the other Contracting Party with regard to their investments.' Disputes relating to written commitments are subject to (a) the rules of law as may be agreed by the disputing parties; or (b) if the rules of law have not been agreed: (i) the law of the Contracting Party where the investment has been made, including its rules on the conflict of laws; and (ii) such rules of international law as may be applicable. The only conceivable way that this exception would have meaning is if the investor choses to bring a treaty action rather than a contract action for breach of contract or perhaps both, if it makes sense under the circumstances. In any case, the default choice is international law with the exception of contract claims." See *Supra* note 152 at 168.

[1278] *Supra* note 152 at 173.

should create a mechanism "subject to strict transparency criteria, in order to prevent frivolous claims leading to unjustified arbitration, and to ensure that all investors have access to a fair trial."[1279]

The importance of ISDS is that "it allows foreign investors to sue national governments for regulating and pursuing policy objectives if they negatively affect investors. In fact, investment protections do not preclude governments from acting as they see fit in all areas of public policy; they merely require that investors be fairly compensated if their existing investments are expropriated or severely damaged by such activities. Nor does ISDS create a wide-ranging general right to challenge rules or regulations; it simply provides for compensation if certain minimum levels of protection are not provided to investors and their investments."[1280]

BITs are accustomed to render investor-state dispute to ready-made dispute settlement mechanisms such as the competent court, ICSID arbitration, or leave it to disputed parties establishing ad hoc arbitration based on UNCITRAL rules or any other arbitral tribunal agreed by disputed parties. Foreign investors usually do not resort to domestic remedies in host state, "because of the suspicion that domestic legal process would be inadequate or unfair to the investor."[1281] The ICSID arbitration has broadly employed in BITs. But claims can only be brought under the ICSID arbitration where the dispute arises between a state that is a party to the ICSID Convention and an investor. The improvised ad hoc arbitration, in another say, may leave too much space of a tribunal to determine the dispute and lead to unjustified arbitration. Thus, the China-OHADA BIT should include some new ISDS mechanism subject to strict transparency criteria to settle disputes through a fairer, more transparent and institutionalised system that fits the common

[1279] *Supra* note 1103 at 264.
[1280] *Supra* note 565 at 204.
[1281] *Supra* note 152 at 173.

concern of all the contracting parties. Both the Canadian model and the CETA create transparent and comprehensive ISDS mechanism to varying extents. While it might be too difficult for China and OHADA member states to create a CETA-like ISDS mechanism, due to poor legislative technologies on both sides, more progress can still be expected from the China-OHADA BIT.

6.4 Investor obligation provisions

The prospective China-OHADA BIT may remove barriers for Chinese companies wanting to invest in Africa, offer Chinese investors more certainty and predictability through clearer substantive protection provisions, and guarantee such liberalization and protection by a comprehensive ISDS system. As the BIT is mutually beneficial, it will also protect and benefit Africa's investors who launch investments in China. But given the degree of asymmetry between China and Africa in terms of FDI inflows, these scenarios of investment liberalisation and protection means less to the African countries. There are other innovations that the prospective China-OHADA BIT should contain to better meet Africa's needs.

"To date, BITs have been decidedly one-sided treaties – foreign investors are guaranteed investment protections by the host state, which the foreign investor can enforce through investor-state arbitration. There are no corresponding obligations on foreign investors or the home state of the foreign investor."[1282] "The evolution of BITs should nevertheless continue. Investment treaties have shown the power of binding international dispute settlement. The problem that now exists is not that BITs go too far, it is in the unwillingness of government to extend international responsibilities to other actors, namely, transnational corporations (TNCs) and the foreign investor's home state. At the very least, a new generation of investment treaties could make TNCs accountable for violations of basic international human rights and international environmental law,

[1282] *Supra* note 1173.

through a binding and enforceable dispute settlement process. That would be an international legal development to cheer." [1283]

Investor obligations included in BITs often refer to corporate social responsibility (CSR), environmental protection and human rights. Some improvements were made with regard to the inclusion of investor obligations[1284] "Nonetheless, divergences are apparent in the extent to which states have chosen to bind investors by means of these obligations: inclusion of specific, binding obligations in IIAs remains uncommon, and references to existing soft law standards continue to be made in the context of encouraged, voluntary compliance with these standards." [1285] Both the Canada Model and the CETA adopt the "voluntary approach" with respect to CSR and environmental protection. The CETA also incorporates language on human rights. However, the China-Canada BIT is silent on all these issues. A good news is that the China-Tanzania BIT at least includes a provision of health, safety and environmental measures.

6.4.1 Corporate Social Responsibility

"To date, CSR [Corporate Social Responsibility] standards as they relate to international investment have generally developed as soft law principles and guidelines. Recent efforts to rebalance the asymmetric nature of investment agreements have seen the inclusion of provisions encouraging the voluntary adoption of these soft law standards, in addition to the inclusion of suggested bespoke CSR practices in the text of certain agreements." [1286] New Canada-Africa BITs based on Canada Model adopt this "voluntary approach".[1287] "Nonetheless, the provision's content remains limited in terms of substance, providing only that states should encourage investors 'to

[1283] *Ibid*.
[1284] *Supra* note 1068 at 51.
[1285] *Ibid.*
[1286] *Ibid* at 54.
[1287] *Ibid.*

voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies', including those that address issues such as labor and the environment." [1288]

"CETA similarly adopts a voluntary approach to CSR by encouraging investors 'to respect internationally recognized standards and principles of corporate social responsibility, notably the OECD Guidelines for multinational enterprises and to pursue best practices of responsible business conduct'." [1289] But the CSR provision is missing in the China-Canada BIT and the China-Tanzania BIT.

6.4.2 Environment protection

"The current state of the economic relations between China and Africa appears to mirror the relationship between the United States and China over the past three to four decades, which was characterized by the relocation of environmentally sensitive manufacturing industries to China. With Chinese attainment of immense economic progress, which raised the living standards of its population, the trend now seems to be for the relocation of environmentally sensitive manufacturing industries from China to Africa."[1290] "Although the relocation of any industries to Africa represents positive development for Africa, provisions in investment treaties could be used to minimize the adverse environmental impacts thereof."[1291]

One notable addition to the new generation BIT based on Canadian model is a provision on health and environment. [1292] All of recent Canada-Africa BITs include a "Health, Safety and Environmental Measures" provision not to encourage investment that may relax domestic health,

[1288] *Ibid* at 56.
[1289] *Ibid* at 55. See Article 25.4(c) of CETA.
[1290] *Supra* note 152 at 170.
[1291] *Ibid.*
[1292] *Ibid* at 167.

safety or environmental measures. Similar provision is found in the China-Tanzania BIT. "It is a very weak formulation as far as protection of the environment is concerned because it uses terms such as 'it is inappropriate,' rather than mandatory language. Similarly, the second provision replaces mandatory language with the term 'unjustifiable."[1293] "Regardless, given the absence of any mention of the environment in the previous Chinese BIT models, this is a step forward."[1294] The China-Canada BIT, however, retreated to domestic laws without either suggesting common standards or even prescribing minimum standards.[1295] The CETA is a little bit different that it considers environment protection as part of sustainable development and provides for it in Chapter 22 Trade and Sustainable Development. "For China and Africa, it is important to agree on certain fundamental environmental standards that investors must respect in the host country."[1296]

6.4.3 Human rights

"While several investment agreements had incorporated language on human rights, no existing agreement contained a binding obligation on investors to respect human rights."[1297] "With regard to the CETA, the treaty includes a cryptic reference to the protection of human rights in its denial of benefits clause."[1298] Article 8.16 of the investment chapter provides:

> A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if:
>
> (a) an investor of a third country owns or controls the enterprise; and
>
> (b) the denying Party adopts or maintains a measure with respect to the third country that:
>
> (i) relates to the maintenance of international peace and security; and
>
> (ii) prohibits transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

[1293] *Ibid* at 167-168.
[1294] *Ibid.*
[1295] *Ibid* at 170.
[1296] *Ibid.*
[1297] *Supra* note 1068 at 58.
[1298] *Ibid* at 59.

A Joint Declaration attached by Canada and the European Union to this provision provides:

> With respect to Articles 8.16, 9.7 (Denial of benefits) and 29.6 (National security), the Parties confirm their understanding that measures that are "related to the maintenance of international peace and security" include the protection of human rights.

"While consideration of the protection of human rights in a denial of benefits clause certainly constitutes a new development in IIA drafting, the extent to which this provision will prove capable of being applied by the parties for the purpose of improving the protection of human rights appears limited. The structure of the provision implies that parties will only be able to deny the benefits of the investment chapter to an investor (and their investments) where all of cumulative conditions established by [Article 8.16] are met. The policy objective of this provision is thus unclear." [1299]

6.4.4 Corruption

The CETA also includes provisions regarding corruption. Article 8.18 3 provides that an investor may not submit claims to investor- state arbitration under the CETA "if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process". "While this may motivate investors to comply with host state laws and avoid engagement in corrupt practices, the provision falls far short of placing a specific, binding obligation on investors." [1300]

"Corruption is a serious problem in China as well as in many African countries. There are now defined legal standards common to China and Africa. These standards are incorporated in the *United Nations Convention against Corruption*. It is important that investment treaties make reference to these universally agreed principles with due regard to the specific circumstances of

[1299] *Ibid*.
[1300] *Ibid* at 54.

each contracting party. Guidance could also be sought from the *African Union Convention on Preventing and Combatting Corruption* and the domestic laws of the contracting parties."[1301]

6.4.5 Labor standards

"One of the competitive advantages of Africa, which is a draw to Chinese companies, is the cost of labor. By default, the kinds of industries that China sets up in Africa are labor-intensive. The management of labor relations is key for the success of the investment. Provisions for common labor standards are very useful." [1302] "Agreeing on minimum labor standards is essential especially for Africa because of the states of economic development and labor conditions in many of its countries." [1303] Thus, it is also important for the prospective China-OHADA BIT to incorporate some international labor standards.

The most recent China-Africa BIT, the China-Tanzania BIT, merely contains one soft investor obligation provision of environment protection. OHADA may have stronger bargaining power against China to include more investor obligation provisions in the China-OHADA BIT. Given the one-way investment inflows from China into Africa, to include investor obligations in the treaty is of greater significance to the African countries.

[1301] *Supra* note 152 at 172.
[1302] *Ibid* at 171.
[1303] *Ibid.*

Chapter 7 Conclusion

"As Chinese investment in Africa increases in scale and complexity, and as some African states also consider investing in China, or at least in Chinese interests, refining the investment regime is key in growing enterprise" and achieving the desired objective of economy development both in China and in Africa.[1304] China has to date concluded BITs with 35 African states. A look at the concrete contents of these BITs shows that they do not achieve any of the specific and operational objectives since they are only framework agreements that fail to make any specific design toward market access and improvement of investment conditions. [1305] The BITs signed between China and the African countries in the past are outdated, "lagging behind with the development of international investment regulations." [1306] Moreover, the BITs concluded by China with different African States, "although quite similar, may result in large differences in specific content such as standards of treatment, currency exchange and different provisions with regard to dispute settlement. After all, these differences in practice will inevitably bring great distress and headaches to the investors."[1307] "The reality is that today's China-Africa BIT regime is sporadic, outdated, uninformed by recent development". [1308] "In any case, the existing China-Africa BITs do not appear to be serving any meaningful purpose at the moment." [1309] China and African states need to consider renegotiating all previous BITs as well as the latest generation ones. [1310]

[1304] *Ibid* at 176.
[1305] ***Conference Documents*** Institute of European Studies of Chinese Academy of Social Sciences, *How to Understand the China-EU Bilateral Investment Treaty Negotiation* (8 July 2017) at 4.
[1306] *Ibid* at 2.
[1307] *Ibid* at 4.
[1308] *Supra* note 152 at 175.
[1309] *Ibid* at 176.
[1310] *Ibid.*

Recent BIT practices show traces of Canadian-style characteristics. The Canadian model has changed both the Chinese and the African perception and understanding of international trade and investment rules. [1311] Their acceptance of these rules are steadily rising, whose active conclusion of China-Canada BIT, Tanzania-Canada BIT, Cameroon-Canada BIT, Senegal-Canada BIT, Mali-Canada BIT, Cote d'Ivoire-Canada BIT, Nigeria-Canada BIT, Burkina Faso-Canada BIT and China-Tanzania BIT, is a case in point. [1312] Although it is insufficient to conclude that "China is purposefully attempting to mimic Africa's traditional Northern partners", if anything, the China-Tanzania BIT would appear to "be a simple, benign, and convenient replication of existing text",[1313] we still have reason to believe that the BIT with Canada is a new model that China is willing to use in its relations with the African countries.[1314]

The Canadian style will contribute to non-discriminatory market access, high level of investment protection, and a ISDS mechanism with limited space of tribunal interpretation. But, in comparison with the CETA, the shortcomings explained with regard to market access, investment protection and dispute settlement indicate that the Canada Model is sub-optimal.

This dissertation proposes to sign a standalone BIT with Africa at regional or sub-regional level. The China-OHADA BIT is currently with the most possibility. This option would make significant break with the past, at three different levels: 1) expanded market access to the entire region, 2) clearer and more precise investment protection standards, for example, the definition of investment, fair and equal treatment, indirect expropriation etc., and 3) a most progressive dispute settlement mechanism.

[1311] *Supra* note 1305 at 14.
[1312] *Ibid*.
[1313] *Supra* note 152 at 176.
[1314] *Ibid* at 170.

First, the China-OHADA BIT is expected to enjoy a higher standard of liberalization compared with separate BITs.[1315] It would undoubtedly benefits Chinese investors by ensuring an improved market access to the entire region of OHADA.[1316] The treaty would introduce the entire OHADA region to Chinese investors by adopting uniformed standards of market access. The treaty covers all 17 OHADA Member States, including those currently sign no BITs with China. It would "establish a liberal regime for entry and establishment in an international framework for investment."[1317] Second, the China-OHADA BIT would provide a stable, secure and predictable legal framework to investors in the long term by including clearer and absolute investment protections in the treaty. The China-OHADA BIT could provide a uniformed investment scheme at the OHADA level which will create an equal level playing field for Chinese investors in every member state of OHADA.[1318] As the treaty could provide a set of uniformed principles and rules which would replace the existing BITs between China and OHADA member states, and also extend its coverage to OHADA states have no BITs with China, it would thus reduce distorted treatment on Chinese investors between OHADA member states and remedy a comparative advantage which the Chinese investor may enjoy in a few OHADA member states rather than in others. Third, the China-OHADA BIT would elaborate the ISDS mechanism to enforce host state's obligations. The China-OHADA BIT could also allow to address investor obligation issues not sufficiently addressed under existing BITs such as CSR, environment protection and human rights. In this respect this option "could also be seen to have a neutral to positive effect on certain aspects

[1315] *Supra* note 1305 at 6.
[1316] *Supra* note 1103 at 265.
[1317] *Supra* note 608 at 144.
[1318] *Supra* note 154.

of environmental, social and labour standards as well as on fundamental rights and on the right of States to regulate in order to pursue legitimate policy objectives."[1319]

The China-OHADA BIT option "is the only one that can address all the objectives identified" and thus help resolve the main problems of the current China-Africa investment relationship. [1320] The China-OHADA BIT option goes furthest to achieving a more stable, secured and predictable investment climate. To conclude, the preferred option for China and Africa should be to pursue a standalone investment agreement at regional or sub-regional level seeking to combine both investment protection with market access elements.

[1319] *Supra* note 155 at 54.
[1320] *Ibid* at 54-55.

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APPENDIX D: TABLES

Table 1 China's diplomatic relations with African countries

country	date of diplomatic establishment
Algeria	1958.12.20
Angola	1983.1.12
Benin	1964.11.12
Botswana	1975.1.6
Burundi	1963.12.21
Cameroon	1971.3.26
Cape Verde	1976.4.25
Central African Republic	1964.9.29
Chad	1972.11.28
Comoros	1975.11.13
Congo-Kinshasa	1961.2.20
Congo-Brazzaville	1964.2.22
Côte d'Ivoire	1983.3.2
Djibouti	1979.1.8
Egypt	1956.5.30
Equatorial Guinea	1970.10.15
Eritrea	1993.5.24
Ethiopia	1970.11.24
Gabon	1974.4.20
Ghana	1960.7.5
Guinea	1959.10.4
Guinea-Bissau	1974.3.15
Kenya	1963.12.14
Lesotho	1983.4.30
Liberia	1977.2.17
Libya	1978.8.9
Madagascar	1972.11.6
Malawi	2007.12.28

Mali	1960.10.25
Mauritania	1965.7.19
Mauritius	1972.4.15
Morocco	1958.11.1
Mozambique	1975.6.25
Namibia	1990.3.22
Niger	1974.7.20
Nigeria	1971.2.10
Rwanda	1971.11.12
Senegal	1971.12.7
Seychelles	1976.6.30
Sierra Leone	1971.7.29
Somalia	1960.12.14
South Africa	1998.1.1
South Sudan	2011.7.9
Sudan	1959.2.4
Tanzania	1964.4.26
Togo	1972.9.19
Tunisia	1964.1.10
Uganda	1962.10.18
Zambia	1964.10.29
Zimbabwe	1980.4.18

Table 2: China’s Outward FDI stocks, by million US dollars

China's outward FDI stocks, millions of US dollars											
Year	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
China	75 026	117 911	183 971	245 755	317 211	424 781	531 941	660 478	882 642	1 097 865	1 280 975

Table 3 selected Chinese aid and investment projects in Africa, 2008

Selected Chinese aid and investment projects in Africa in 2008				
Country	Type of assistance or investment	Funding source	Description	Value in $US
Angola	development	Govt-sponsored investment	housing and related infrastructure	$3.5 billion
Congo	Infrastructure/ public works	Concessional loan	optical cable network	$35 million
Congo	Infrastructure/ public works; natural resources	Govt-sponsored investment	transportation, mining sector	$9 billion
Ethiopia	Infrastructure/ public works	Grant/donation	construction of African Union Hall	$150 million
Ethiopia	Infrastructure/ public works	In-kind	vehicles and office equipment	Not specified
Ethiopia	Infrastructure; development	Govt-sponsored investment	industrial park	$713 million
Gabon	Infrastructure/ public works	Concessional loan	hydroelectric dam	$83 million
Kenya	Infrastructure/ public works	Concessional loan	road construction	$120 million
Liberia	Infrastructure/ public works	Grant; in-kind	hospital and medical supplies	$10 million
Madagascar	Humanitarian; developmnet	Grant	medical aid team	Not specified
Niger	Natural resources	Govt-sponsored investment	oil drilling, refinery	$5 billion
Nigeria	Infrastructure/ public works	Govt-sponsored investment	road construction	$1 billion
Nigeria	Infrastructure/ public works	Govt-sponsored investment	power plant	$2.4 billion
Rwanda	Infrastructure/ public works	Grant	Hospitals	$1.5 million
Sierra Leone	Infrastructure/ public works	Concessional loan	Telecom network	$20 million
Sudan	Humanitarian	Grant; in-kind	de-mining training, mine sweeping equipment	Not specified
Sudan	Humanitarian	Humanitarian grant; in-kind	housing shelters, health equipment	$11 million
Uganda	Military	Grant; in-kind	military training, trucks and equipment	Not specified
Uganda	development	Grant	upgrade health centers	$15 million
Uganda	Infrastructure/ public works	Grant/donation	government office complex	$20 million
Uganda	Infrastructure/ public works	Grant/donation	government office complex	$20 million
Zambia	Infrastructure/ public works	Govt-sponsored investment concessional loan	power station expansion	$400 million
Zambia	Infrastructure/ public works	Grant/donation	sports stadium	$65 million

Quoted from Ian Taylor, *The Forum on China-Africa Cooperation (FOCAC)* (Oxon: Routledge, 2011) at 75-76.
Source: Thomas Lum, Hannah Fischer, Julissa Gomez-Granger, and Anne Leland, *China's Foreign Aid Activities in Afirca, Latin America, and Southeast Asia* (Washington DC: Congressional Research Service, February 2009): 19-20

Table 4 China's FDI flows inward Africa by countries, by million US dollars

China's FDI flows inward Africa by countries (millions of US dollars)																				
	2003		2004		2005		2006		2007		2008		2009		2010		2011		2012	
Africa	75	100.00%	317	100.00%	392	100.00%	520	100.00%	1 574	100.00%	5 491	100.00%	1 439	100.00%	2 112	100.00%	3 173	100.00%	2 517	100.00%
North Africa	5	6.50%	166	52.20%	190	48.61%	154	29.54%	281	17.84%	11	0.20%	358	24.91%	260	12.29%	1 153	36.35%	365	14.51%
Algeria	2	3.30%	11	3.53%	85	21.67%	99	19.03%	146	9.27%	42	0.77%	229	15.90%	186	8.81%	114	3.60%	246	9.77%
Egypt	2	2.81%	6	1.80%	13	3.40%	9	1.70%	25	1.59%	15	0.27%	134	9.30%	52	2.45%	66	2.09%	119	4.74%
Libya	-	0.00%	-	0.00%	-	0.00%	- 9	-1.64%	42	2.68%	11	0.19%	- 39	-2.68%	- 11	-0.50%	48	1.51%	- 7	-0.27%
Morocco	-	0.00%	2	0.57%	1	0.22%	2	0.34%	3	0.17%	7	0.13%	16	1.14%	2	0.08%	9	0.29%	1	0.04%
Sudan	-	0.00%	147	46.21%	91	23.27%	51	9.77%	65	4.15%	- 63	-1.15%	19	1.34%	31	1.47%	912	28.74%	- 2	-0.07%
Tunisia	-	0.00%	-	0.00%	-	0.00%	2	0.33%	-	0.00%	-	0.00%	- 1	-0.09%	-	0.00%	4	0.12%	- 1	-0.03%
Other Africa	70	93.50%	152	47.80%	201	51.39%	366	70.46%	1 293	82.16%	5 479	99.80%	1 080	75.09%	1 852	87.71%	2 020	63.65%	2 152	85.49%
Angola	-	0.00%	-	0.00%	-	0.00%	22	4.31%	41	2.62%	- 10	-0.17%	8	0.58%	101	4.79%	73	2.29%	392	15.58%
Botswana	1	1.07%	-	0.00%	4	0.94%	3	0.53%	2	0.12%	14	0.26%	18	1.28%	44	2.08%	22	0.69%	21	0.84%
Cameroon	-	0.00%	-	0.00%	-	0.00%	1	0.14%	2	0.13%	2	0.03%	1	0.06%	15	0.70%	2	0.06%	18	0.70%
Congo	-	0.00%	1	0.16%	8	2.07%	13	2.55%	3	0.16%	10	0.18%	28	1.95%	34	1.63%	7	0.21%	99	3.93%
Congo, Democratic Rep. of	-	0.00%	12	3.75%	5	1.29%	37	7.07%	57	3.64%	24	0.44%	227	15.79%	236	11.18%	75	2.37%	344	13.68%
Côte d' Ivoire	1	0.83%	7	2.13%	9	2.23%	- 3	-0.56%	2	0.11%	- 7	-0.13%	2	0.10%	- 5	-0.24%	1	0.03%	4	0.14%
Equatorial Guinea	-	0.00%	2	0.53%	6	1.62%	10	1.96%	13	0.81%	- 5	-0.09%	21	1.45%	22	1.05%	12	0.39%	139	5.52%
Eritrea	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%	- 0	-0.01%	-	0.00%	3	0.14%	3	0.10%	2	0.08%
Ethiopia	1	1.31%	-	0.00%	5	1.26%	24	4.61%	13	0.84%	10	0.18%	74	5.16%	59	2.77%	72	2.28%	122	4.83%
Gabon	-	0.00%	6	1.76%	2	0.53%	6	1.06%	3	0.21%	32	0.58%	12	0.83%	23	1.11%	2	0.06%	31	1.22%
Ghana	3	3.86%	-	0.00%	3	0.66%	1	0.10%	2	0.12%	11	0.20%	49	3.43%	56	2.65%	40	1.26%	208	8.28%
Guinea	1	1.60%	14	4.55%	16	4.17%	1	0.14%	13	0.84%	8	0.15%	27	1.88%	10	0.46%	25	0.77%	64	2.56%
Kenya	1	0.99%	3	0.84%	2	0.52%	-	0.00%	9	0.57%	23	0.42%	28	1.95%	101	4.79%	68	2.15%	79	3.13%
Liberia	-	0.00%	1	0.18%	9	2.21%	- 7	-1.35%	-	0.00%	3	0.05%	1	0.08%	30	1.42%	21	0.66%	12	0.48%
Madagascar	1	0.91%	14	4.30%	-	0.00%	1	0.23%	13	0.84%	61	1.11%	43	2.96%	34	1.59%	23	0.73%	8	0.33%
Malawi	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%	5	0.10%	-	0.00%	10	0.47%	1	0.04%	10	0.41%
Mali	5	7.23%	-	0.00%	-	0.00%	3	0.50%	7	0.43%	- 1	-0.02%	8	0.56%	3	0.14%	48	1.50%	44	1.77%
Mauritania	2	2.27%	-	0.00%	-	0.00%	5	0.92%	- 5	-0.32%	- 1	-0.01%	7	0.45%	6	0.27%	20	0.62%	31	1.23%
Mauritius	10	13.73%	-	0.00%	2	0.52%	17	3.19%	16	0.99%	34	0.63%	14	0.98%	22	1.04%	419	13.22%	58	2.30%
Mozambique	-	0.00%	1	0.21%	3	0.74%	-	0.00%	10	0.64%	6	0.11%	16	1.10%	-	0.00%	20	0.64%	231	9.16%
Namibia	1	0.83%	-	0.00%	-	0.00%	1	0.16%	1	0.06%	8	0.14%	12	0.81%	6	0.26%	5	0.16%	25	1.00%
Niger	-	0.00%	2	0.48%	6	1.47%	8	1.53%	101	6.40%	-	0.00%	40	2.77%	196	9.29%	52	1.63%	- 196	-7.79%
Nigeria	24	32.62%	46	14.34%	53	13.61%	68	13.04%	390	24.79%	163	2.96%	172	11.94%	185	8.75%	197	6.22%	333	13.23%
Rwanda	-	0.00%	-	0.00%	1	0.36%	3	0.58%	-	0.00%	13	0.23%	9	0.60%	13	0.60%	10	0.31%	5	0.20%
Senegal	1	0.87%	-	0.00%	-	0.00%	-	0.00%	-	0.00%	4	0.07%	11	0.77%	19	0.90%	-	0.00%	4	0.18%
Seychelles	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%	12	0.58%	4	0.14%	53	2.12%
Sierra Leone	-	0.00%	6	1.86%	0	0.13%	4	0.71%	3	0.18%	11	0.21%	1	0.06%	-	0.00%	11	0.34%	8	0.31%
South Africa	9	11.84%	18	5.61%	47	12.12%	41	7.84%	454	28.86%	4 808	87.57%	42	2.89%	411	19.47%	- 14	-0.45%	- 815	-32.38%
Togo	-	0.00%	2	0.58%	-	0.00%	5	0.88%	3	0.17%	4	0.08%	9	0.62%	12	0.56%	9	0.28%	21	0.82%
Uganda	1	1.34%	-	0.00%	-	0.00%	-	0.00%	4	0.25%	- 7	-0.12%	1	0.09%	27	1.25%	10	0.31%	10	0.39%
United Rep. of Tanzania	-	0.00%	2	0.51%	1	0.25%	13	2.41%	- 4	-0.24%	18	0.33%	22	1.50%	26	1.22%	53	1.67%	120	4.76%
Zambia	6	7.39%	2	0.70%	10	2.58%	87	16.82%	119	7.58%	214	3.90%	112	7.77%	75	3.55%	292	9.20%	292	11.58%
Zimbabwe	-	0.00%	1	0.22%	1	0.38%	3	0.66%	13	0.80%	- 1	-0.01%	11	0.78%	34	1.60%	440	13.87%	287	11.42%

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Data from UNCTAD, bilateral FDI statistics

Table 5 Proportion of Chinese enterprises that invest abroad, by type, 2006-2016

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Proportion of Chinese enterprises that invest abroad, by type, 2006-2016									
	state-owned enterprise (SOE)	limited liability company (LLC)	corporation limited (Co. Ltd)	joint-equity cooperative enterprise	private-owned company	foreign-capital enterprise	Hong Kong/ Macau/Taiwan -capital enterprise	collective enterprise	others
2006	26.0%	33.0%	11.0%	9.0%	12.0%	4.0%	2.0%	2.0%	1.0%
2007	19.7%	43.3%	10.2%	7.8%	11.0%	3.7%	1.8%	1.8%	0.7%
2008	16.1%	50.2%	8.8%	6.5%	9.4%	3.5%	1.8%	1.5%	2.2%
2009	13.4%	57.7%	7.2%	4.9%	7.5%	3.1%	1.8%	1.2%	3.2%
2010	10.2%	57.1%	7.0%	4.6%	8.2%	3.2%	2.0%	1.1%	6.6%
2011	11.1%	60.4%	7.7%	4.0%	8.3%	3.6%	2.4%	1.0%	1.5%
2012	9.1%	62.5%	7.4%	3.4%	8.3%	3.4%	2.2%	0.8%	2.9%
2013	8.0%	66.1%	7.1%	3.1%	8.4%	3.0%	2.0%	0.6%	1.7%
2014	6.7%	67.2%	6.7%	2.5%	8.2%	2.6%	1.8%	0.5%	3.8%
2015	5.8%	67.4%	7.7%	2.3%	9.3%	2.8%	1.9%	0.4%	2.4%
2016	5.2%	43.2%	10.1%	2.0%	26.2%	4.8%	3.2%	0.5%	4.8%

Table 6 Selected investment projects launched by Chinese SOEs and NSOEs in Africa

Country	Proportion of China's FDI stocks outward in 2012 (%), by geographical destination	Number of investment projects by Chinese NSOEs	Number of investment projects by Chinese SOEs	NSOE/SOE rate
US	3.21	4282	110	97.50/2.50
UK	1.68	396	23	94.51/5.49
Australia	2.61	830	77	91.51/8.49
Singapore	2.33	728	77	90.55/9.45
Luxembourg	1.69	42	2	95.45/4.55
Kazakhstan	1.18	261	39	87.00/13.00
Cayman Islands	5.65	211	35	85.77/14.23
Africa				
South Africa	0.90	201	43	82.38/17.62
Zambia	0.38	165	36	82.09/17.91
Algeria	0.25	72	26	73.47/26.53
Angola	0.23	95	34	73.64/26.36
Sudan	0.23	103	54	65.1/34.39
Egypt	0.09	113	11	91.13/8.87
Guinea	0.04	72	26	73.47/26.53
Mali	0.04	34	11	75.56/24.44
Niger	0.02	10	13	43.4/56.52
Tunisia	-	4	5	44.44/55.56
Central Africa	-	3	3	50.00/50.00

Data from Ministry of Commerce of People's Republic of China, Outbound Investment Companies List[1321]

Numbers of investment projects by NSOEs = B1

Numbers of investment projects by SOEs = B2

$$\text{NSOE/SOE Rate} = \frac{B1/(B1+B2) * 100\%}{B2/(B1+B2) * 100\%}$$

[1321] Nearly half of China's FDIs flow into Hong Kong every year. FDI inflow from Mainland of China to Hong Kong takes the proportion of 58.36% in 2012. As the particular economic reliance on Mainland of China, Hong Kong is an exception. Here we take Hong Kong as a special FDI market and put Hong Kong aside from the comparative analysis.

Table 7 BITs signed between China and African countries[1322]

No.	Partners	Status	Date of signature	Date of entry into force	availability
1	Algeria	In force	17/10/1996	28/01/2003	FR
2	Benin	Signed not in force	18/02/2004		EN
3	Botswana	Signed not in force	12/06/2000		EN
4	Cameroon	In force	10/09/1997	24/07/2014	CN
5	Cape Verde	In force	21/04/1998	01/01/2001	EN
6	Chad	Signed not in force	26/04/2010		N
7	Congo DR	Signed not in force	18/12/1997		CN
8	Congo	In force	20/03/2000	01/07/2015	FR
9	Cote d'Ivoire	Signed not in force	30/09/2002		EN
10	Djibouti	Signed not in force	18/08/2003		EN
11	Egypt	In force	21/04/1994	01/04/1996	EN
12	Equatorial Guinea	In force	20/10/2005	15/11/2006	EN
13	Ethiopia	In force	11/05/1998	01/05/2000	EN
14	Gabon	In force	09/05/1997	16/02/2009	EN
15	Ghana	In force	12/10/1989	22/11/1990	EN
16	Guinea	Signed not in force	18/11/2005		N
17	Kenya	Signed not in force	16/07/2001		EN
18	Libya	Signed not in force	04/08/2010		N
19	Madagascar	In force	21/11/2005	01/07/2007	FR
20	Mali	In force	12/02/2009	16/07/2009	FR
21	Mauritius	In force	04/05/1996	08/06/1997	EN
22	Morocco	In force	27/03/1995	27/11/1999	FR
23	Mozambique	In force	10/07/2001	26/02/2002	EN
24	Namibia	Signed not in force	17/11/2005		N

[1322] UNCTAD, http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu

25	Nigeria	Terminated In force	12/05/1997 27/08/2001	18/02/2010	EN
26	Seychelles	Signed not in force	10/02/2007		CN
27	Sierra Leone	Signed not in force	16/05/2001		EN
28	South Africa	In force	30/12/1997	01/04/1998	EN
29	Sudan	In force	30/05/1997	01/07/1998	EN
30	Tanzania	In force	24/03/2013	17/04/2014	EN
31	Tunisia	In force	21/06/2004	01/07/2006	EN
32	Uganda	Signed not in force	27/05/2004		EN
33	Zambia	Signed not in force	21/06/1996		EN
34	Zimbabwe	In force	21/05/1996	01/03/1998	EN

*Stated number of BITs/TIPs does not include treaties that have been denounced, terminated by mutual consent or renegotiated

Table 8 Chronological timeline for the ratification and entry into force of the OHADA Treaty in the State Parties

State Parties	Ratification/Membership	Deposit instruments of ratification	Entry into force
1.Guinea-Bissau	January 15, 1994	December 26, 1995	February 20, 1996
2.Senegal	June 14, 1994	June 14, 1994	September 18, 1995
3.Central African Republic	January 13, 1995	January 13, 1995	September 18, 1995
4.Mali	February 7, 1995	March 23, 1995	September 18, 1995
5.Comoros	February 20, 1995	April 10, 1995	September 18, 1995
6.Burkina Faso	March 6, 1995	April 16, 1995	September 18, 1995
7.Benin	March 8, 1995	March 10, 1995	September 18, 1995
8.Niger	June 5, 1995	July 18, 1995	September 18, 1995
9.Côte d'Ivoire	September 29, 1995	December 13, 1995	February 11, 1996
10.Cameroon	October 20, 1995	October 4, 1996	December 3, 1995
11.Togo	October 27, 1995	November 20, 1995	January 19, 1996
12.Chad	April 13, 1996	May 3, 1996	July 2, 1996
13.Congo	May 28, 1997	May 18, 1999	July 17, 1999
14.Gabon	February 2, 1998	February 4, 1998	April 5, 1998
15.Equatorial Guinea	April 16, 1999	June 15, 1999	August 13, 1999
16.Guinea	May 5, 2000	September 22, 2000	November 21, 2000
17.DR Congo	February 2004?	July 13, 2012	September 12, 2012

Table 9 Chronological timeline for the adoption of the OHADA Uniform Acts by the Council of Ministers of Justice and Finance

Uniform Acts	Adoption date	Publication
1.Uniform Act relating to general commercial law	April 17, 1997	October 1, 1997
2.Uniform Act relating to commercial companies and economic interest group	April 17, 1997	October 1, 1997
3.Uniform Act organizing securities	April 17, 1997	July 1, 1998
4.Uniform Act organizing simplified recovery procedures and measures of execution	April 10, 1998	June 1, 1998
5.Uniform Act organizing collective proceedings for wiping off debts	April 10, 1998	July 1, 1998
6.Uniform Act on arbitration	March 11, 1999	May 15, 1999
7.Uniform Act organizing and harmonizing undertakings' accounting systems in the signatory states to the treaty on the harmonization of business law in Africa	March 23, 2000	November 20, 2000
8.Uniform Act relating to contracts of the Carriage of Goods by Road	March 22, 2003	
9.Uniform Act relating to co-operative societies law	December 15, 2010	February 15, 2011
Revised Uniform Act relating to the General Commercial Law	December 15, 2010	February 15, 2011
Revised Uniform Act Establishing the Organisation of Security	December 15, 2010	February 15, 2011

Table 10a: Preamble

China-Gabon BIT	China-Mozambique BIT
The Government of the People's Republic of China and the Government of the Republic of Gabon (hereinafter referred to as "the Contracting Parties"), Intending to create favorable conditions for investment by investors of each State within the territory of the other State, and Recognizing that the encouragement and reciprocal protection of investment will stimulate business communication of investors and will increase prosperity in both States; Desiring to intensify the cooperation of both States on the basis of equality and mutual benefits; Have agreed as follows: …	The Government of the People's Republic of China and the Government of the Republic of Mozambique (hereinafter referred to as the "Contracting Parties"), Desiring to create favorable conditions for greater flow of investment made by investors of one Contracting Party in the territory of the other Contracting Party; and Recognizing that the encouragement and reciprocal protection of such investment will stimulate the development of business initiatives and will increase prosperity in the territories of both Countries; Have agreed as follows: …

Table 10b: Preamble

China-Ghana BIT	China-Nigeria BIT
The Government of the People's Republic of China and the Government of the Republic of Ghana. Desiring to encourage, protect and create favourable conditions for investment by investors of one Contracting State in the territory of the other Contracting State **based on the principles of mutual respect for sovereignty**, equality and mutual benefit and for the purpose of the development of economic cooperation between both States. Have agreed as follows: …	The Government of the People's Republic of China and the Government of the Federal Republic of Nigeria (hereinafter referred to as "the Contracting Parties"), Recognizing that the reciprocal encouragement, promotion, and protection of such investments will be conducive to stimulating business initiative of the investors and will increase prosperity in both States, **Recognizing investor's duty to respect the host country's sovereignty and laws;** Desiring to intensify the cooperation of both States on the basis of equality and mutual benefits; Determined to create favourable conditions for greater investment by investors of one Contracting Party in the territory of the other Contracting Party; Have agreed as follows:

	…
China-Benin BIT	China-Mali BIT
The Government of the People's Republic of China and the Government of the Republic of Benin (hereinafter referred to as the Contracting Parties), Desiring to create favorable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party; Recognizing that the reciprocal encouragement, promotion and protection of such investment on the basis of equality and mutual benefits will be conducive to stimulating business initiative of the investors and will increase prosperity in both States; Convinced that the promotion and protection of these investments would succeed in stimulating transfers of capital and technology between the two States in the interest of their economic development; **Aware that each Contracting Party is entitled to stipulate the laws on the establishment and administration of the investment in its territory;** Have agreed as follows: …	Le Gouvernement de la Republique Republique Populaire de Chine Contractantes）， du Mali et Ie Gouvernement de la (ci-apres d白10mm己s les Parties Desireux de cr己er les conditions favorables d'investissements pour les investisseurs d'une Partie Contractante sur Ie territoire de l'autre Partie Contractante ; Conscients que I' encouragement， la promotion et la protection reciproques des investissements sur la base de I'egalit 己et des ben 己fices mutuels sont de nature a stimuler les initiatives commerciales des investisseurs et a accroltre la prosperit 己dans les deux Etats ; Convaincus que la promotion et la protection de ces investissements favorisent les transferts de capitaux et de technologies entre les Parties Contractantes dans 1'int 己n~t de leur developpement economique ; Conscients que chaque Partie Contractante a Ie droit d 毛laborer les lois sur l'acces et la realisation de l'investissement sur son territoire; Sont convenus de ce qui suit:

Table 11a: Investment

China-Congo BIT	China-Gabon BIT	China-Uganda BIT
Art.1	Art.1	Art.1

For the purpose of this Agreement, 1. The term 'investment' means **every kind of asset** invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting party in the territory of the latter, and in particularly, though not exclusively, includes: (a)…	For the purpose of this Agreement, 1. The term "investment" means **every kind of assets or capital contribution** *invested directly or indirectly by investors* of one Contracting Party of the in the territory of the other Contracting Party in accordance with its laws and regulations, and shall include in particular, though not exclusively: (a) **…**	For the purpose of this Agreement, 1. The term "investment" means **every kind of property, such as goods, rights and interests of whatever nature,** and in particularly though not exclusively, includes: (a) **…**

Table 11b: Investment

China-Cote d'Ivoire BIT	China-Gabon BIT	China-Uganda BIT	China-Ghana BIT
Art.1 For the purpose of this Agreement, 1, The term "investment" means every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, and in particularly, though not exclusively, includes: (a) **movable and immovable property and other property rights such as mortgages and pledges**; (b) shares, debentures, stock and any other kind of participation in companies;	Art.1 For the purpose of this Agreement, 1. The term "investment" means every kind of assets or capital contribution invested directly or indirectly by investors of one Contracting Party of the in the territory of the other Contracting Party in accordance with its laws and regulations, and shall include in particular, though not exclusively: (a) **movable and immovable property as well as any property rights in rem such as mortgages, pledges, real securities, usufructs and similar rights**;	Art.1 For the purpose of this Agreement, 1. The term "investment" means every kind of property, such as goods, rights and interests of whatever nature, and in particularly though not exclusively, includes: (a) **tangible, intangible, movable and immovable property as well as any other right in rem such as mortgages, liens, usufructs, pledges, and similar rights**; (b) shares, debentures, stock and any other kind of participation in companies; (c) claims to money or to any other performance having an	Art.1 For the purpose of this Agreement, (a) The term "investment" means every kind of assets made as investment in accordance with the laws and regulations of the Contracting State accepting the investment in its territory, including mainly: (a) **movable and immovable property and other property rights**; (b) shares in companies or other forms of interest in such companies; (c) a claim to money or to any performance having an economic value;

(c) claims to performance having an economic value associated with an investment; (d) **intellectual property rights, in particularly copyrights, patents, trademarks, trade-names, technical process, know-how and good-will**; (e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources. Any change in the amount and any change in the legal form in which assets are invested or reinvested does not affect their character as investments stipulated by this Agreement.	(b) shares, stocks and any other kind of participation in companies; (c) claims to money or to any performance having an economic value associated with an investment; (d)**copyrights, trademarks, patents, trade name and as well as all industrial properties, know-how and technologies**; (e) concessions of public interests conferred by law, including concessions to search for, cultivate, extract or exploit natural resources. Any alteration of the form in which assests are invested or reinvested shall not affect their classification as investments provided in this Agreement.	economic value associated with an investment; (d) intellectual and industrial property rights such as **copyrights, patents, trademarks, industrial models and mockups, technical processes, know-how, trade name and goodwill, and any other similar rights;** (e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources. Any change in the form in which properties are invested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the Contracting Party in whose territory the investment has been made.	(d)**copyrights, industrial property, know-how and technological process;** (e) concessions conferred by law, including concessions to search for or exploit natural resources.

Table 11c: Temporal scope of investments

China-Congo BIT	China-Equatorial Guinea BIT	China-Gabon BIT	China-Kenya BIT
Art.11 This Agreement shall apply to investment, which are *made* **prior to or after its entry into**	Art.11 This Agreement shall apply to *investments made* in the territory of either Contracting Party *in*	Art. 11 As for matters in the future where this Agreement may be applicable, **shall include**	Art.11 The agreement, under this clause, **presupposes to apply**

force by investors of either Contracting Party *in accordance with the laws and regulations of the other Contracting Party* in the territory of the latter.	*accordance with its legislation or rules or regulations* by investors of the other Contracting Party **prior to as well as after the entry into force of this Agreement**. The Agreement shall not apply to disputes arising before the entry into force of this Agreement.	**investments by means of foreign currencies made by investors** of one Contracting Party in the territory of the other Contracting Party subject to laws and regulations of the other Contracting Party	**retrospectively to investors of either Contracting Parties.**

Table 11d: Temporal scope of investments

China-Djibouti BIT	China-Tunisia BIT
Art. 11 This Agreement shall apply to investment, which are made after its entry into force by investors of either Contracting Party in accordance with the Laws and regulations of the other Contracting Party in the territory of the latter.	Art.12 This Agreement shall apply to investments, which are made by investors of either Contracting Party in the territory of the other Contracting Party after 8th of Jly in 1979 in the People's Republic of China and after 1st January 1957 in the Republic of Tunisia. However the Agreement shall not apply to any dispute concerning an investment which arose before its entry into force.

Table 11e: Temporal scope of investments

China-Equatorial Guinea BIT	China-Mauritius BIT	China-Mozambique BIT
Art.11 This Agreement shall apply to *investments made* in the territory of either Contracting Party *in accordance with its legislation or rules or regulations* by investors of the other Contracting Party prior to as well as after the entry into force of this Agreement. The Agreement shall not apply to disputes arising before the entry into force of this Agreement.	Art. 2 (1)This Agreement shall only apply (a)In respect of investments in the territory of the People's Republic of China, to all investments made by nationals and/or companies of the Republic of Mauritius which are specifically approved in writing by the competent authority designated by the Government of the People's Republic of China and upon such conditions, if any, as it shall deem fit;	Art. 11 This Agreement shall apply: 1. In the case of People's Republic of China, to all investments made whether before or after the entry into force of this Agreement; and 2. In the case of the Republic of Mozambique, to all investments made whether before or after the entry into force of this Agreement in conformity with the law n 4/84, of the 18th of August, 1984, or

	(b)In respect of investments in the territory of Mauritius, to all investments made by nationals and/or companies of the People's Republic of China which are specifically approved in writing by the competent authority designated by the Government of the Republic of Mauritius and upon such conditions, if any, as it shall deem fit. (2)This Agreement shall apply to *investments made* by nationals and/or companies of either Contracting Party in the territory of the other Contracting Party, whether made before or after the coming into force of this Agreement.	under the investment law n 3/93 of the 24th of June, 1993, or under any other subsequent legislation in force on investments in the Republic of Mozambique.

Table 12a: relationship between investment and investor

China-Congo BIT	China-Gabon BIT	China-Mauritius BIT
Art.1 For the purpose of this Agreement, 1. The term 'investment' means every kind of asset **invested by investors** of one Contracting Party *in accordance with the laws and regulations of the other Contracting party* in the territory of the latter, and in particularly, though not exclusively, includes:…	Art.1 For the purpose of this Agreement, 1. The term "investment" means every kind of assets or capital contribution **invested directly or indirectly by investors** of one Contracting Party in the territory of the other Contracting Party *in accordance with its laws and regulations*, and shall include in particular, though not exclusively:…	Art.1 For the purpose of this Agreement, The term "investment" means every kind of asset **invested by nationals and/or companies** of one Contracting Party *in accordance with the laws and regulations of the other Contracting Party* in the territory of the latter, and in particular, though not exclusively, includes:…

Table 12b: relationship between investment and investor

China-Uganda BIT	China-Ghana BIT	China-Mozambique BIT	China-Seychelles BIT
Art.1 For the purpose of this Agreement,	Art.1 For the purpose of this Agreement,	Art.1 1. In this Agreement, (1) "investment" means every kind of asset invested *according*	Art.1 1."investment" means every kind of asset invested, directly or indirectly, though

1. The term "investment" means every kind of property, such as goods, rights and interests of whatever nature, and in particularly though not exclusively, includes: **…**	(a) The term "investment" means every kind of assets *made as investment in accordance with the laws and regulations of the Contracting State accepting the investment* in its territory, including mainly:…	*to the laws and regulations of the Contracting Party in whose territory the respective business undertaking is made*, and in particular, though not exclusively, includes:…	not exclusively, includes:… “投资”一词系指直接或间接投入的各种财产，包括但不限于： …

Table 12c: Investors

China-Botswana BIT	China-Equatorial Guinea BIT	China-Mauritius BIT
Art.1 2, The term "investors" mean, (a) **natural persons who are nationals of** either Contracting Party in accordance with the laws of that Contracting Party;	Art.1 2. The term “ investor ” means: (a) **natural persons who have nationality of** either Contracting Party in accordance with its laws.	Art. 1 "national" means (a) in respect of the People's Republic of China, a natural person who is a citizen of the People's Republic of China according to its laws; (b) in respect of Mauritius, a natural person who is a citizen of the Republic of Mauritius according to its laws.

Table 12d: Investors

China-Equatorial Guinea BIT	China-Botswana BIT	China-Ethiopia BIT
Art.1 2. The term “ investor ” means: … (b) legal entities, include companies, associations, partnerships or organizations, with or without legal personality **incorporated or constituted** under the laws and regulations of either Contracting Party.	Art.1 2, The term "investors" mean, … (b) economic entities, including companies, corporations, associations, partnerships and other organizations, **incorporated and constituted** under the laws and regulations of either Contracting Party **and have their seats** in that Contracting Party, irrespective of whether	Art. 1 2. The term “investors” means with regard to either Contracting Party: … (b) economic entities **established** in accordance with the laws of that Contracting Party **and domiciled** in its territory.

	or not for profit and whether their liabilities are limited or not.	

Table 12e: Investors

China-Benin BIT	China-Uganda BIT	China-Zambia BIT
Art. 1 2. The term "investor" means, … (b) legal entity, including company, association, partnership and other organizations, **incorporated or constituted** under the laws and regulations of the People's Republic of China or of the Republic of Benin and **having its registered office** in the territory of the People's Republic of China and the Republic of Benin respectively.	Art. 1 2. The term "investors" means: … (2) legal entities, including company, association, partnership and other organization, **incorporated or constituted** under the laws and regulations of either Contracting Party and **have their headquarters** in that Contracting Party.	Art. 1 2. The term "investor" means: **…** ii) company, corporation, firm or association **incorporated or constituted** in accordance with the law of that Contacting Party and **having its principal place of business** in that Contracting Party.

Table 12f: Investors

China- Cote D'Ivoire BIT	China-Ghana BIT	China-Zimbabwe BIT
Art. 1 2, The term "investor" means, (a) in respect of the People's Republic of China; (1)natural persons … (2)Economic entities, including companies, corporations, associations, partnerships, and other organizations, **incorporated or constituted** under the laws and regulations of the People's Republic of China, **and having their seats** in the territory of the People's Republic of China, irrespective whether	Art. 1 (b)The term "investor" means: in respect of the People's Republic of China: (i)Natural persons… (ii)Economic entities **established in accordance with the laws of the People's Republic of China and domiciled** in the territory of the People's Republic of China; In respect of the Republic of Chana: (i)Natural persons…	Art. 1 2. The term "investors" means: In respect of the People's Republic of China: (a) natural persons … (b) economic entities **established** in accordance with the laws of the People's Republic of China and **domiciled** in the territory of the People's Republic of China; In respect of the Republic of Zimbabwe: (a) natural persons …

or not they are for pecuniary profit or with limited liability. (b) in respect of the Republic of Cote d'Ivoire; (1)natural persons … (2)**Legal entities, including public organizations, partnerships, holding companies, company groups and subsidiary companies, irrespective whether or not they are for pecuniary profit or with limited liability.**	(ii)State corporations and agencies and companies **registered under the laws of Ghana** which invest or trade abroad.	(b) corporations, firms and associations **incorporated or constituted** under the laws in force in Zimbabwe and **having their principal place of business** in Zimbabwe;

Table 12g: Investors

China-Ghana BIT	China-Egypt BIT	China-Gabon BIT
Art. 1 (b)The term "investor" means: in respect of the People's Republic of China: (i)Natural persons… (ii)Economic entities established in accordance with the laws of the People's Republic of China and domiciled in the territory of the People's Republic of China; **In respect of the Republic of Chana**: (i)Natural persons… **State corporations and agencies and companies** registered under the laws of Ghana which invest or trade abroad.	Art. 1 2. The term "investors" means, with respect to either Contracting Party: … (b) **economic entities** established in accordance with the laws of that Contracting Party and domiciled in its territory.	Art. 1 2. The term "investors" means, In respect of the People's Republic of China … (b)**Legal persons** established in accordance with the laws of the People's Republic of China and having their seats in the territory of the People's Republic of China and invest in territory of the Republic of Gabon. In respect of the Republic of Gabon, … (b) **Legal persons** established in accordance with the laws of the Republic of Gabon and having their seats in the territory of the Republic of Gabon and invest in territory of the People's Republic of China.

China-Zambia BIT	China-Equatorial Guinea BIT	China-Congo BIT
Art. 1 2. The term "investor" means: … ii) **company, corporation, firm or association** incorporated or constituted in accordance with the law of that Contacting Party and having its principal place of business in that Contracting Party.	Art. 1 2. The term "investor" means: … (b) **legal entities, include companies, associations, partnerships or organizations, with or without legal personality** incorporated or constituted under the laws and regulations of either Contracting Party.	Art. 1 2. The term "investor" means: … (b) **economic entities, include companies, corporations, associations, partnerships and other organizations,** incorporated and constituted under the laws and regulations of either Contracting Party and have their seats in that Contracting Party, **irrespective of whether or not for profit and whether their liabilities are limited or not**.

Table 13: Admission (Investment)

China-Equatorial Guinea BIT	China-Egypt BIT	China Mauritius BIT	China-Tanzania BIT
Art.2 1. Each Contracting Party shall encourage investors of the other Party to make investments in its territory and **shall admit such investments in accordance with its laws and regulations**. **…**	Art.2 1. Each Contracting Party shall encourage and create favorable conditions for investors of the other Contracting Party for investments in its territory and, subject to its right to exercise powers conferred by its laws, **shall admit such investments**. …	Art. 3 (1) Each Contracting Party shall encourage and create favourable conditions for nationals and/or companies of the other Contracting Party **to make in its territory investments that are in line with its general economic policy.** ...	Art.2 2. Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and **shall accept and protect such investments in accordance with its laws and regulations**. …

Table 14a: Promotion and protection of investment

China-Benin BIT	China-South Africa BIT	China-Gabon BIT
Art. 2 1, Each Contracting Party **shall endeavor to promote investments made by**	Art.2 1. Each Contracting Party **shall encourage investors of the other Contracting Party**	Art.2 1. Each Contracting Party **shall encourage investors of the other**

investors of the other Contracting Party in its territory and, shall admit and protect such investments in accordance with its laws and regulations. 2, Investments of the investors of either Contracting Party shall enjoy the **full and complete protection and safety** in the territory of the other Contracting Party. 3, 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. 4, Without prejudice to its laws and regulations, **neither Contracting party shall take any unreasonable or discriminatory measures against** the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party. 5, Subject to its laws and regulations, one Contracting Party **shall provide assistance and facilities for obtaining visas and working permit** to nationals of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party.	**to make investments in its territory and admit such investments** in accordance with its laws and regulations. 2. Each Contracting Party shall grant assistance in and **provide facilities for obtaining visas and working permits** to nationals of the other Contracting Party to or in the territory of the Former in connection with activities associated with such investments. 3. **Each Contracting Party shall grant**, subject to its laws and regulations, **the necessary permits in connection with such investments and with carting out of licensing agreements and contracts for technical, commercial or administrative assistance.**	**Contracting Party to make investments in its territory and admit such investments** in accordance with its laws and regulations. Any expansion, change or transformation of investments in accordance with the effective laws and regulations of the hosting State shall be regarded as investments. 2. Investments of investors of either Contracting Party shall be accorded fair and equitable treatment and protection, and shall enjoy adequate and full protection in the territory of the other Contracting Party. Each Contracting Party shall ensure the management, maintenance, using, procession or assignment of investments of the other Contracting Party shall in no way be subject to unjustified or discriminatory measures within its territory, without prejudice to its domestic laws or regulations. Profits of investment and re-investment in accordance with laws of the other Contracting Party shall enjoy the equivalent protection with respect to initial investment.

Table 14b: Promotion and protection of investment

China-Benin BIT	China-Egypt BIT	China-Cote d'Ivoire
Art. 2 1, Each Contracting Party shall endeavor to promote investments made by investors of the other Contracting Party in its territory and, shall admit and protect such	Art.2 1. Each Contracting Party shall encourage and create favorable conditions for investors of the other Contracting Party for investments in its territory and, subject to its	Art. 2 1, Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and admit

investments in accordance with its laws and regulations. 2, Investments of the investors of either Contracting Party shall enjoy the **full and complete protection and safety** in the territory of the other Contracting Party. 3, 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. 4, Without prejudice to its laws and regulations, **neither Contracting party shall take any unreasonable or discriminatory measures against** the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party. 5, Subject to its laws and regulations, one Contracting Party shall provide assistance and facilities for obtaining visas and working permit to nationals of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party.	right to exercise powers conferred by its laws, shall admit such investments. 2. Investments of investors of either Contracting Party shall at all times **be accorded fair and equitable treatment** and **shall enjoy the most constant protection and security** in the territory of the other Contracting Party. Each Contracting Party agrees that without prejudice to its laws and regulations it **shall not take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment or disposal of investments** in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.	such investments in accordance with its laws and regulations. 2, Investments of the investors of either Contracting Party shall enjoy the **constant protection and security** in the territory of the other Contracting Party. 3, Without prejudice to its laws and regulations, **neither Contracting Party shall take any unreasonable or discriminatory measures against** the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party. 4, Subject to its laws and regulations, one Contracting Party shall provide assistance in and facilities for obtaining visas and working permit to nationals of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party.
China-Equatorial Guinea BIT	China-Uganda BIT	China-Zimbabwe BIT
Art. 2 1. Each Contracting Party shall encourage investors of the other Party to make investments in its territory and shall admit such investments in accordance with its laws and regulations. 2. Investments of investors of either Contracting Party shall at all times **be accorded fair and equitable treatment** in the territory of the other Contracting Party.	Art. 2 1. Each Contracting Party shall encourage and promote investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and regulations. 2. The investments made by investors of one contracting party **shall enjoy full and complete protection and safety** in the territory of the other Contracting Party.	Art. 2 1. Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws. 2. Each Contracting Party shall grant assistance in and provide facilities for obtaining visa and working permit to nationals of the other Contracting Party to

3. Without prejudice to its laws and regulations, **neither Contracting Party shall in any way impair by unjustified or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments** in its territory of investors of the other Contracting Party. 4. Each Contracting Party shall grant assistance in and provide facilities for obtaining visa and working permit to nationals of the other Contracting Party to work in the territory of the former in connection with activities associated with such investments.	3. Without prejudice to its laws and regulations, **neither Contracting Party shall take any discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments** by the investors of the other Contracting Party. 4. Subject to its laws and regulations, one Contracting Party shall provide assistance in and facilities for obtaining visas and working permit to nationals of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party.	or in the territory of the former in connection with activities associated with such investments.

Table 15a: National treatment – country-specific exceptions

China-Congo BIT	China-Gabon BIT	China-Morocco BIT
Art. 3 2, **Without prejudice to its laws and regulations**, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors.	Art. 3 1. Either Contracting Party shall ensure the fair and justice treatment for the investment of the other Contracting Party in its territory , such treatment shall not be less than the treatment provided to domestic investors **subject to its laws** and regulations or not less than the most favourable treatment where the latter is more favourable.	Art. 3 1. Chaque Partie Contractante assure sur son territoire aux investissements de l'autre Partie Contractante un traitement juste et equitable, qui n'est pas moins favorable que celui qu'elle accorde aux investissements de ses propres investisseurs, **conformément à ses lois et règlements,** ou aux investissements de la nation la plus favorisée, si ce dernier est plus favorable.

Table 15b: National treatment - exceptions

China-Congo BIT	China-Seychelles BIT	China-Mozambique BIT

Art. 3 2, **Without prejudice to its laws and regulations**, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors.	Article 5 National treatment and Most Favored Treatment The Contracting Party gives investors of the other Contracting Party the investment and investment-related activities in its territory no less favourable than the treatment it gives to its domestic investors or MFN investors, if the latter is more favourable. … **The provisions shall not be construed so as to oblige either Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege arising from international agreement or domestic law II, wholly or mainly related to taxation.**	Article 3 Treatment of Investments 2. Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and returns from such investments by the investors of the other Contracting Party treatment not less favourable than that it accords to the investments and returns of its own investors. 3. Neither Contracting Party shall subject investments and returns from such investments by the investors of the other Contracting Party to treatment less favourable than that it accords to the investments and returns of the investors of any third State. 4. **The provisions of Paragraph 2 and Paragraph 3 shall not be construed so as to oblige either Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:** **(1) any customs union, free trade area, common market or any similar international agreement or interim arrangement leading up to such customs union, free trade area or common market of which either the Contracting Party is a member;** **(2) any international agreement or arrangement relating wholly or mainly to the taxation or any domestic**

		legislation relating wholly or mainly to taxation; **(3) any international agreement or arrangement for facilitating frontier trade.**

Table 15c: national treatment - combination with MFN

China-Tanzania BIT	China-Gabon BIT	China-Djibouti BIT
Article 3 National Treatment 1. Without prejudice to its applicable laws and regulations, with respect to the operation, management, maintenance, use, enjoyment, sale or disposition of the investments in its territory, each Contracting Party shall accord to investors of the other Contracting Party and their associated investments treatment no less favourable than that accorded to its own investors and associated investment sin like circumstances. 2. …	Article 3 Investment Treatment 1.Either Contracting Party shall ensure the fair and justice treatment for the investment of the other Contracting Party in its territory, such treatment shall be no less than the treatment provided to domestic investors subject to its laws and regulations or no less than the most favourable treatment, **such treatment mentioned above shall be applied with priority**. …	Article 3 Treatment of Investment 2. 2, Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors. 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.

Table 15d: Most-favorable treatment

China-Ghana BIT	China-Gabon BIT	China-South Africa BIT
Art. 3 Protection of investments and Most Favoured Nation Treatment …	Art. 3 … 2. The most favourable treatment shall not be applied to the preferable treatment provided by virtue of participating or joining	Art. 3 … 4. the provisions of paragraph (1) and (2) shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:

3.The treatment and protection referred to in Paragraph 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.**	**free trade zone, economic or taxation union, common market or any other forms of area economic organizations, or any preferable treatment provided to investors of the third State in accordance with similar international agreement, or avoiding double taxation agreement or any other taxation agreements.**	(a) any customs union, free trade area, common market, any similar international agreement or any interim arrangement leading up to such customs union, free trade area, or common market to which either of the Contracting Parties is or may become a party. (b) any international agreement or arrangement relating wholly or mainly to taxations, or; (c) any special arrangement to facilitate frontier trade. **5. If a Contracting Party accords special advantages to development finance institutions with foreign participation and established for the exclusive purpose of development assistance through mainly non-profit activities, that Contracting Party shall not be obliged to accord such advantages to development finance institutions or to her investors of the other Contracting Party.**

Table 15e: Fair and equitable treatment

China-Ghana BIT	China-Gabon BIT	China- Equatorial Guinea BIT
Article 3 Protection of investments and Most Favoured Nation Treatment 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 favourable than that accorded to investments and activities associated with such**	Article 3 Investment Treatment 1. Either Contracting Party shall ensure the fair and justice treatment for the investment of the other Contracting Party in its territory, such treatment shall be no less than the treatment provided to domestic investors subject to its laws and regulations or no less than the most favourable treatment, such treatment mentioned above shall be applied with priority. …	Article 3 Treatment of Investments 1. Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party. 2. The treatment and protection accorded by either Contracting Party within the territory to investors of the other Contracting Party with respect to investments, returns and business activities in connection with investment shall be no less favorable than that accorded to its own investors. 3. The treatment and protection accorded by either Contracting Party within the territory to investors of the other Contracting Party with

investments of investors of a third State. …		respect to investments, returns and business activities in connection with investment shall be no less favorable than that accorded to investors of any third State. …

Table 16a: Transfer of funds – types of payments

China-Benin BIT	China-Gabon BIT	China-Kenya BIT
Article 6 TRANSFERS 1, Each Contracting Party shall, subject to its laws and regulations, guarantee to the investors of the other Contracting Party the transfer of their **investments and returns** held in its territory, including: (a) profits, dividends, interests and other legitimate income; (b) proceeds obtained from the total or partial sale or liquidation of investments; (c) payments pursuant to a loan agreement in connection with investments; (d) royalties or fees in relation to intellectual and industrial property rights referred to in Paragraph 1 (d) of Article 1; (e) payments of technical assistance or technical service fee, management fee; (f) payments in connection with contracting projects; (g) earnings of nationals of the other Contracting Party who work in connection with an investment in its	Article 6 **TRANSFERS** 1.Each Contracting Party shall, subject to its foreign exchange laws and regulations, guarantee to the investors of the other Contracting Party the free transfer of **investment and net cash profit** into **convertible currencies** in its territory, include, especially: (a) assets or supplement money for the purpose of maintaining or increasing investment; (b) profits, dividends, interests, loyalties and any other daily income; (c) payments pursuant to loan in connection with investments; (d) total or partial sale or liquidation of investments; (e) compensation for enforcement of Article 4, Article 5 (f) the earnings or other compensations of nationals of the other Contracting Party who are allowed to work in connection with an investment in its territory;	Article 6 REPATRIATION OF INVESTMENTS AND RETURNS 1. Each Contracting Party shall, subject to its laws and regulations, **guarantee** to the investors of the other Contracting Party **the free transfer of payment** in connection with an investment, **in particular:** (a) the principal and additional amounts to maintain or increase the investment; (b) the returns; (c) the repayment of loans; (d) the proceeds from the liquidation or the sale of the whole or any part of the investment; (e) the compensation provided for in Article 4. **…**

territory.		

Table 16b: Transfer of funds – exchange rate

China-Cote d'Ivoire BIT	China-Mauritius BIT	China-Benin BIT
Article 6 TRANSFER OF PAYMENT AND CAPITAL 3, The transfer mentioned above shall be made in a freely convertible currency and **at the prevailing market rate** of exchange applicable within the Contracting Party accepting the investments and on the date of transfer.	Art. 9 The transfers referred to in Articles 6 to 8 of this Agreement shall be effected **at the prevailing market rate** in freely convertible currency on the date of transfer. In the absence of such a market rate **the official rate of exchange** shall apply.	Article 6 TRANSFERS 3, The transfer mentioned above shall be made in a freely convertible currency and **at the prevailing market rate** of exchange applicable within the Contracting Party accepting the investments and on the date of transfer. 4, In the absence of a market for foreign exchange, the rate to be used shall be **the most recent exchange rate for the conversions of currencies into Special Drawing Rights.**
China-Madagascar BIT	China-Gabon BIT	China-Ghana BIT
Article 7 Free Transfer 2. The transfers referred to in paragraph 1 of this Article shall be made in a freely convertible currency and **at the prevailing market rate** of exchange applicable of the Contracting Party accepting the investment on the date of transfer. 3. Where there is no prevailing market exchange rate, the applicable exchange rate shall be **the rate between the most recent rate between the relating currency and the special drawing right**.	Article 6 TRANSFERS 1.Each Contracting Party shall, subject to its foreign exchange laws and regulations, guarantee to the investors of the other Contracting Party the free transfer of investment and net cash profit into convertible currencies in its territory, include, especially: … 2. The transfer mentioned in Para.1 shall be made **at the effective rate of exchange applicable** on the date of transfer.	ARTICLE 6 – TRANSFER OF CURRENCY 1. The transfer mentioned in Article 4 and 5 of this Agreement shall be made **at the official exchange rate as determined by the Central Bank of the Contracting State** accepting investment on the date of transfer. **2. Market rate shall be applicable if no official exchange rate is available.**

Table 16c: Fund transfer

China-South Africa BIT	China-Gabon BIT	China-Uganda BIT
Article 6 2. All transfers shall be effected **without delay** in any convertible currency at the market rate of exchange applicable on the date of transfer.	Article 6 TRANSFERS 3. Treatment provided in this Article shall at least be equivalent to the treatment accorded to investors of the **most-favored nation** where under similar circumstances.	Article 7 4. In case of a serious **balance of payments difficulties and external financial difficulties or the threat** thereof, each contracting party may temporarily restrict transfers, provided that this restriction: i) shall be promptly notified to the other party; ii) shall be consistent with the articles of agreement with the International Monetary Fund; iii) shall be within an agreed period; iv) would be imposed in an equitable, non-discriminatory and in good faith basis. 5. A Contracting Party may require that, prior to the transfer of payments, formalities arising from the relevant laws and regulations are fulfilled by the investors, provided that those shall not be used to frustrate the purpose of paragraph 1 of this article.

Table 16d: Fund transfer

China-Egypt BIT	China-Mauritius BIT	China-Madagascar BIT	China-Uganda BIT
Article 6 1. Each Contracting Party shall, **subject to its laws and regulations**, guarantee investors of the other Contracting Party the transfer of their investments and returns held in the territory of	Article 8 Repatriation (1) Each Contracting Party shall guarantee to nationals and/or companies of the other Contracting Party the free transfer, **in accordance with its laws and regulations** and on a non-discriminatory	Article 7 Free transfer Investment made by investors of one Contracting Party in the other Contracting Party, the latter Contracting Party shall guarantee to an investor of the former Contracting Party that all payments related to an investment	Article 7 Transfers 5. A Contracting Party may require that, **prior to the transfer of payments, formalities arising from the relevant laws and regulations are fulfilled** by the investors, provided that those **shall not be**

the one Contracting Party, including: …	basis, of their investment and the returns from any investments, including - …	in its territory may be freely transferred. **The transfer shall be subject to laws and regulations of the Contracting Parties, and fulfill the procedure and obligation requirements by the laws and regulations provided in these laws and regulations**. The transfers shall mainly include, but not be limited to: …	**used to frustrate the purpose of paragraph 1** of this article.

Table 17: Subrogation

China-Congo BIT	China-Ethiopia BIT	China-Benin BIT
Article 7 If **one Contracting Party or its designated agency** makes a payment to its investor **under an indemnity** given in respect of an investment made in the territory of the other Contracting Party, the latter Contracting Party *shall recognize the assignment of all the rights and claims* of the indemnified investor to the former Contracting Party or its designated agency, by law or by legal transactions, *and the right* of the former Contracting Party or its designated agency *to exercise by virtue of subrogation any such right* **to same extent** as the investor.	Article 7 If **a Contracting Party or its Agency** makes payment to an investor **under a guarantee** it has granted to an investment of such investor in the territory of the other Contracting Party, such other Contracting Party *shall recognize the transfer of any right or claim* of such investor to the former Contracting Party or its Agency and *recognize the subrogation* of the former Contracting Party or its Agency to such right or claim. The subrogated right or claim **shall not be greater than the original right or claim** of the said investor.	Article 7 If **one Contracting Party or its designated agency** makes a payment to its investors **under a guarantee or a contract of insurance against non-commercial risks** it has accorded in respect of an investment made in the territory of the other Contracting Party, the latter Contracting Party shall recognize: (a) *the assignment*, whether under the law or pursuant to a legal transaction in the former Contracting Party, of any rights or claims by the investors to the former Contracting Party or to its designated agency, as well as, (b) that the former Contracting Party or its designated agency *is entitled by virtue of subrogation to exercise the rights and enforce the claims* of that investor and assume the obligations related to the

		investment **to the same extent** as the investor.
China-Gabon BIT	China-Mauritius BIT	China-Tunisia BIT
Article 7 1. Where **one Contracting Party or any of its institution** has granted **any guarantee against non-commercial risks** in respect of an investment by its investor and has made payment to such investor under that guarantee, the other Contracting Party *shall recognize subrogation* of the rights of the insured investor. 2. As for any investment under security, the guarantor *may enjoy all rights* owned by the investor where the guarantor does not exercise the right of subrogation.	Article 12 Subrogation (1) In the event that **either Contracting Party (or any agency, institution, statutory body or corporation designated by it)** as a result of an indemnity it has given in respect of an investment or any part thereof **makes payment** to its own nationals and/or companies in respect of any of their claims **under this Agreement**, the Contracting Party (or any agency, institution, statutory body or corporation designated by it) *is entitled by virtue of subrogation to exercise the rights and assert the claims* of its own nationals and/or companies. The subrogated right or claim **shall not be greater than the original right or claim** of the said investor. (2) Any payment made by one Contracting Party (or any agency, institution, statutory body or corporation designated by it) to its nationals and/or companies shall not affect the right of such nationals and/or companies to make their claims against the other Contracting Party in accordance with Article 13 provided that the exercise of such a right does not overlap, or is not in conflict, with the exercise of a right in virtue of subrogation under paragraph (1).	Article 7 Subrogation If **a Contracting Party or its Agency makes a payment** to its investor in the territory of the other Contracting Party, such other Contracting Party *shall recognise the transfer of any right or claim* of such investor to the former Contracting Party or its Agency, and *recognise the subrogation* of the former Contracting Party or its Agency to such right or claim. The subrogated right or claim **shall not be greater than the original right or claim** of the said investor.

Table 18a: ISDS – ICSID jurisdiction

China-Ethiopia BIT	China-Equatorial Guinea BIT	China-Nigeria BIT

Article 9 3. If a dispute involving the amount of compensation for expropriation can not be settled within six months after resort to negotiations as specified in Paragraph I of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal or arbitration under the auspices of the International Center for Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investments Disputes between States and Nationals of Other States opened for signature in Washington on March 18, 1965 **once both Contracting Parties become member States thereof**.	Article 9 Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party 2. If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within six months of the date when the request for the settlement has been submitted, the investor shall be entitled to submit the case, at his choice, for settlement to: (a) the competent court of the Contracting Party which is the party to the dispute; or (b) **the International Centre for Settlement of Investment Disputes (ICSID)** having regard to the applicable a provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965. Provided that the Contracting Party involved in the dispute may require the investor concerned to exhaust the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before submission of the dispute to the aforementioned arbitration procedure.	Article 9 Settlement of Disputes between Investors of One Contracting Party and the Other Contracting Party 3. If the dispute has not been settled after it has been submitted to the procedure under Paragraph 1 of this Article for six months, it shall be submitted to the arbitral tribunal at the request of either Contracting Party. ... 5. The arbitral tribunal shall establish its own rules of arbitration procedure. Nevertheless, while establishing its rules of procedure, **the arbitral tribunal may refer to the arbitration rules of the "International Centre for Settlement of Investment Disputes"**.

Table 18b: ISDS – domestic administrative review procedure

China-Djibouti BIT	China-Equatorial Guinea BIT	China-Cote d'Ivoire BIT

Article 9 Settlement of Disputes between Investors and One Contracting Party 2, If the dispute cannot be settled through negotiations within six months, the investor of one Contracting Party may submit the dispute to the competent court of the other Contracting Party. 3, Any dispute, if unable to be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, shall be submitted at the request of either party to (1) International center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965; or (2) an ad hoc arbitral tribunal Provided that the Contracting Party involved in the dispute **may require the investor concerned to exhaust the domestic administrative review procedure** specified by the laws and regulations of that Contracting Party before submission of the dispute the aforementioned arbitration procedure. **However, if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article, the provisions of this Paragraph shall not apply.**	Article 9 Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party 2. If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within six months of the date when the request for the settlement has been submitted, the investor shall be entitled to submit the case, at his choice, for settlement to: (a) the competent court of the Contracting Party which is the party to the dispute; or (b) the International Centre for Settlement of Investment Disputes (ICSID) having regard to the applicable a provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965. Provided that the Contracting Party involved in the dispute may require the investor concerned to exhaust the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before submission of the dispute to the aforementioned arbitration procedure. **Once the investor has submitted the dispute to the competent court of the Contracting Party** which is the party to the dispute or the ICSID, **the choice of procedure shall be final.**	Article 9 Settlement of disputes between investors and one Contracting Party 3. If such dispute cannot settled amicably through negotiations, **any legal dispute** between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party **shall be exhausted the domestic administrative review procedure** specified by the laws and regulations of that Contracting Party, before submission of the dispute the aforementioned arbitration procedure. **However, if the investor concerned has resorted to the competent court of the other Contracting Party specified in Paragraph 2 of this Article, the provisions of this Paragraph shall not apply.**

Table 18c: ISDS – Choice of method

China-Congo BIT	China-Benin BIT
Article 9 Settlement of Disputes between Investors and One Contracting Party 2, If the dispute cannot be settled through consultations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment.	Article 9 Settlement of Disputes between Investors and One Contracting Party 2, If the dispute cannot be settled through consultations within six (6) months from the date it has been raised by either party to the dispute, it shall be submitted **by the choice of the investor**, either to the competent court of the State where the investment was made, or to international arbitration.

Table 18d: ISDS – strictness of the choice of international arbitration

China-Benin BIT	China-Gabon BIT	China-Cote d'Ivoire BIT	China-Egypt BIT
Article 9 Settlement of Disputes between Investors and One Contracting Party 3, In case of international arbitration, the dispute shall be submitted, **at the option of the investor**, to: (a) International Center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965; or (b) An ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on	Article 10 Settlement of Disputes between One Contracting Party and Investors of the Other Contracting Party 2. if the dispute cannot be settled through negotiations within six months, **the investor may choose and submit the dispute to**: (a) the competent court of the Contracting Party in the territory of which the investment has been made; or (b) the International Centre for the Settlement of Investment Disputes (ICSID) which established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States	Article 9 SETTLEMENT OF DISPUTES BETWEEN INVESTORS AND ONE CONTRACTING PARTY 2, If the dispute cannot be settled through negotiations within six months, the investor of one Contracting Party may submit the dispute to the competent court of the other Contracting Party, or **at the request of either party** to: (a) International Center for Settlement of Investment Disputes (ICSID) under the convention on the Settlement of Disputes between States and Nationals Other States, done at Washington on March 18, 1965; or	Article 9 Settlement of Investment Disputes 3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal…..

International Trade Law (UNCITRAL); Provided that **the Contracting Party involved in the dispute may require the investor concerned to go through the domestic administrative review procedures** specified by the laws and regulations of that Contracting Party before the submission to international arbitration.	opened for signature at Washington DC on March 18, 1965, for arbitration. For this purpose, **consent of any dispute with respect to the amount of compensation in the case of expropriation submitted to this tribunal procedure by either Contracting Party shall be non-withdrawal consent. Other disputes submitted to his tribunal procedure shall be under mutual consent of both Contracting Parties.**	(b) An ad hoc arbitral tribunal. 3, Provided that **the Contracting Party involved in the dispute may require the investor concerned to exhaust the domestic administrative review procedure** specified by the laws and regulations of that Contracting Party, before submission of the dispute the aforementioned arbitration procedure.	

Table 18e: ISDS – ad hoc arbitration, "tribunal choice model" or "UNCTRAL model"

China-South Africa BIT	China-Benin BIT	China-Tanzania BIT
Article 9 4. The tribunal shall determine its own procedure. However, the tribunal may, in the course of determination of procedure, **take as guidance the Arbitration Rules of International Center for Settlement of Investment Disputes.**	Article 9 Settlement of Disputes between Investors and One Contracting Party 3, In case of international arbitration, the dispute shall be submitted, at the option of the investor, to: (a) International Center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965; or (b) **An ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL);**	Article 13 SETTLEMENT OF DISPUTES BETWEEN INVESTORS AND ONE CONTRACTING PARTY 2. if a dispute in which an investor of one Contracting Party claims that the other Contracting Party has breached an obligation under Article 2 through 9, or Paragraph 2 of Article 14, cannot be settled through negotiations within six months from the date negotiations were initiated by either party to the dispute, the disputing investor who incurred loss or damage from that breach may, at his option, submit the claim: (a) …

		(b) … (c) **to an ad-hoc arbitral tribunal to be established under the Arbitration Rules of the United Nations Commission on the International Trade Law (UNCITRAL);** or (d) **to any other arbitration institution or ad-hoc arbitral tribunal agreed to by the disputing parties**.

Table 18f: ISDS – the constitution of ad hoc arbitral tribunal

China-Mauritius BIT	China-Madagascar BIT	China-Benin BIT	China-South Africa BIT
Article 13 Investment Disputes (3) If a dispute involving the amount of compensation resulting from any measure referred to in paragraph (1) of Article 6 cannot be settled within six months after resort to negotiation as specified in paragraph (1) of this Article by the national and/or company concerned, it may be submitted to **an international arbitral tribunal** established by both parties.	Article 10 REGLEMENT DES DIFFERENDS ENTRE UN INVESTISSEUR ET UNE PARTIE CONTRACTANTE 2. Si le différend ne peut être réglée dans un délai de 6 mois à compter de la date à laquelle l'une des deux Parties au différend l'aura soulevée par écrit, elle sera soumise au choix, et sur demande l'investisseur de l'autre Partie Contractante: - **à un organe d'arbitrage existant sur le territoire de la Partie Contractante**; - à une procédure judiciaire sur le territoire de la Partie Contractante; - à une procédure d'arbitrage du Centre International pour le Règlement des Différends	Article 9 Settlement of Disputes between Investors and One Contracting Party 3, In case of international arbitration, the dispute shall be submitted, at the option of the investor, to: (a) International Center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965; or (b) **An ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL);**	Article 9 3. Such an arbitral tribunal shall be constituted for each individual case in the following way: **each Party to the dispute shall appoint one arbitrator, and these two shall select a national of a third State which has diplomatic relations with the two Contracting Parties as the Chairman.** The first two arbitrators shall be appointed within two months of the written notice for arbitration by either party to the dispute to the other, and the Chairman shall be selected within four months. If within the period specified above, the tribunal has not been constituted, either Party to the dispute may invite the Secretary

	relatifs aux Investissements (CIRDI), en vue d'un règlement par arbitrage conformemente à la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Dtats ouverte à la signature le 18 mars 1965 à Washington, pourvue que l'investisseur concerne ait déjà épuisé les procédures de révision administrative interne stipulée par des lois et règlements de cette Partie Contractante avant recours à un tribunal d'arbitrage international.		General of the International Center for Settlement of Investment Disputes to make the necessary appointments.

Table 19: Umbrella clause

China-Botswana BIT	China-Ethiopia BIT	China-Madagascar BIT
Article 10 other obligations Nothing in this Agreement shall be construed as affecting **any rights and obligations arising from any international Agreement or treaty already entered into by the Contracting Parties.**	Article 10 application of other rules If the treatment to be accorded by one Contracting Party **in accordance with its laws and regulations** to investments or activities associated with such investments of investors of the other Contracting Party is more favorable than the treatment provided for in this Agreement, the more favorable treatment shall be applicable.	Article 9 Specific Provision If the provisions of **domestic law of either Contracting Party or international obligations** existing at present or established thereafter between the Contracting Parties in addition to the present Agreement, contain a rule, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rule shall to the extent that it is more favourable prevail over the present Agreement.

China-Benin BIT	China-Tanzania BIT	
Article 10 1, If **the legislation of either Contracting Party or international obligations existing at present or established** hereafter between the Contracting Parties result in a position entitling investments by investors of the other Contracting Party to a treatment more favorable than is provided for by the Agreement, such position shall not be affected by this Agreement. 2, Each Contracting Party **shall observe any commitments** it may have entered into with the investors of the other Contracting Party as regards to their investments.	Article 14 Other Obligations 1, If the **legislation of either Contracting Party or international obligations existing at present or established** hereafter between the Contracting Parties result in a position entitling investments by investors of the other Contracting Party to a treatment more favorable than is provided for by the Agreement, such position shall not be affected by this Agreement. 2, Each Contracting Party shall observe **any written commitments in the form of agreement or contract** it may have entered into with the investors of the other Contracting Party with regard to their investments.	

Table 20: Duration

China-Cote d'Ivoire BIT	China-Benin BIT	China-Seychelles BIT	China-Zambia BIT
Article 14 ENTRY INTO FORCE, DURATION AND TERMINATION 1, This Agreement shall enter into force on the first day of the following month after the date on which both Contracting Parties have notified each other in writing that their respective internal legal procedures therefore have been fulfilled and remain **in force for a period of ten years**.	Article 13 Entry into Force, Duration and Termination 1, This Agreement shall enter into force on the thirtieth (30) day following the date on which both Contracting Parties have notified each other in writing that their respective internal legal procedures necessary therefor have been fulfilled. 2, This Agreement **shall remain in force for a period of ten (10) years** and **shall thereafter**	Article 13 Entry into Force and Termination … After the termination of this Agreement, **investments made during its effective period shall continue to enjoy the protection of this Agreement for a period of twenty (20) years** …	Article 13 1. This Agreement shall enter into force on the first day of the following month after the date on which both Contracting Parties have notified each other in writing that their respective internal legal procedures have been fulfilled, and shall remain in force for a period of **five years**. 2. This Agreement shall continue in force for a further

2, This Agreement **shall continue in force if either Contracting Party fails to give a written notice** to the other Contracting Party **to terminate this Agreement one year before** the expiration of the period specified in Paragraph 1 of this Article. 3, After the expiration of initial ten years period, *either Contracting Party may terminate at any time* thereafter this Agreement by giving *at least one year's written notice* to the other Contracting Party. 4, With respect to investments made prior to the date of termination of this Agreement, the provisions of Article 1 to 13 ***shall continue to be effective for a further period of ten years*** from such date of termination.	**remain in force for the same term** until either Contracting Party notifies the other in writing to terminate it **six (6) months before** the expiration of such a period. 3, With respect to investments made prior to the date of termination of this Agreement, the provisions of this Agreement shall continue to be effective for a further period of ten (10) years from such date of termination.	本协定终止后，在其有效期间所作的投资继续享受本协定 20 年的保护。 …	period of **five years** subject to paragraph 3 of this article, if either Contracting Party fails to give a written notice to the other Contracting Party to terminate this Agreement one year before the expiration specified in Paragraph 1 of this Article.

Table 21: List of Contracting States and other signatories of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (as of April 12, 2016)
The States listed below merely contain China and African countries who have signed a BIT with China.

State	Signature	Deposit of Ratification
China	Feb. 9, 1990	Jan. 7, 1993
Algeria	Apr. 17, 1995	Feb. 21, 1996
Benin	Sep. 10, 1965	Sep. 6, 1966
Botswana	Jan. 15, 1970	Jan. 15, 1970
Cameroon	Sep. 23, 1965	Jan. 3, 1967
Cape Verde		
Chad	May 12, 1966	Aug. 29, 1966
Congo DR	Oct. 29, 1968	Apr. 29, 1970
Congo	Dec. 27, 1965	June 23, 1966
Cote d'Ivoire	June 30, 1965	Feb. 16, 1966
Djibouti		
Egypt	Feb. 11, 1972	May 3, 1972
Equatorial Guinea		
Ethiopia	Sep. 21, 1965	
Gabon	Sep. 21, 1965	Aug. 21, 1967
Guinea	Aug. 27, 1968	Nov. 4, 1968
Kenya	May 24, 1966	Jan. 3, 1967
Libya		
Madagascar	June 1, 1966	Sep. 6, 1966
Mali	Apr. 9, 1976	Jan. 3, 1978
Mauritius	June 2, 1969	June 2, 1969
Morocco	Oct. 11, 1965	May 11, 1967
Mozambique	Apr. 4, 1995	June 7, 1995

Namibia	Oct. 26, 1998	
Nigeria	July 13, 1965	Aug. 23, 1965
Seychelles	Feb. 16, 1978	Mar. 20, 1978
Sierra Leone	Sep. 27, 1965	Aug. 2, 1966
South Africa		
Sudan	Mar. 15, 1967	Apr. 9, 1973
Tanzania	Jan. 10, 1992	May 18, 1992
Tunisia	May 5, 1965	June 22, 1966
Uganda	June 7, 1966	June 7, 1966
Zambia	June 17, 1970	June 17, 1970
Zimbabwe	Mar. 25, 1991	May 20, 1994

* Resources are from the ICSID, https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx

Table 22: List of the most recent BITs signed by China and Africa

BIT	Status	Date of signature	Date of entry into force
China-Tanzania BIT	In force	24 March 2013	17 April 2014
China-Canada BIT	In force	09 September 2012	01 October 2014
Tanzania-Canada BIT	In force	17 May 2013	09 December 2013
Benin-Canada BIT	In force	09 January 2013	12 May 2014
Cameroon-Canada BIT	In force	03 March 2014	16 December 2016
Cote d'Ivoire-Canada BIT	In force	30 November 2014	14 December 2015
Mali-Canada BIT	In force	28 November 2014	08 June 2016
Senegal-Canada BIT	In force	27 November 2014	05 August 2016
Nigeria-Canada BIT	Signed (not in force)	06 May 2014	
Burkina Faso-Canada BIT	Signed (not in force)	20 April 2015	
Guinea-Canada BIT	Signed (not in force)	27 May 2015	

Table 23: Market Access

China-Canada BIT	Benin-Canada BIT	China-Tanzania BIT	CETA
Article 3 Promotion and Admission of Investment Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws, regulations and rules. **Article 5 Most-Favoured-Nation Treatment** 1. Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Contracting Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. 2. Each Contracting Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Contracting Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other	**Article 5: National Treatment:** 1. Each Contracting Party shall accord to an investor of the other Contracting Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory. 2. Each Contracting Party shall accord to a covered investment treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory. **Article 6: Most-Favoured-Nation Treatment:** 1. Each Contracting Party shall accord to an investor of the other Contracting Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory. 2. Each Contracting Party shall accord to a covered investment treatment no less favourable than that it accords, in like	**ARTICLE 2 PROMOTION AND PROTECTION OF INVESTMENT** 1. Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and shall accept and protect such investments in accordance with its laws and regulations. **ARTICLE 4 MOST FAVOURED NATION TREATMENT** 1. Each Contracting Party shall accord to investors of the other Contracting Party and the investments thereof treatment no less favourable than that it accords, in like circumstances, to investors and the investments thereof of any third State with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, sale or disposition of investments.	**Article 8.4 Market access** 1. A Party shall not adopt or maintain with respect to market access through establishment by an investor of the other Party, on the basis of its entire territory or on the basis of the territory of a national, provincial, territorial, regional or local level of government, a measure that: (a) imposes limitations on: (i) the number of enterprises that may carry out a specific economic activity whether in the form of numerical quotas, monopolies, exclusive suppliers or the requirement of an economic needs test; (ii) the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test; (iii) the total number of operations or the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; (iv) the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; or (v) the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and directly related to, the performance of economic activity in the form of numerical quotas or the requirement of an economic needs test; or

disposition of investments in its territory.	circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory.		(b) restricts or requires specific types of legal entity or joint venture through which an enterprise may carry out an economic activity. 2. For greater certainty, the following are consistent with paragraph 1: (a) a measure concerning zoning and planning regulations affecting the development or use of land, or another analogous measure; (b) a measure requiring the separation of the ownership of infrastructure from the ownership of the goods or services provided through that infrastructure to ensure fair competition, for example in the fields of energy, transportation and telecommunications; (c) a measure restricting the concentration of ownership to ensure fair competition; (d) a measure seeking to ensure the conservation and protection of natural resources and the environment, including a limitation on the availability, number and scope of concessions granted, and the imposition of a moratorium or ban; (e) a measure limiting the number of authorisations granted because of technical or physical constraints, for example telecommunications spectrum and frequencies; or (f) a measure requiring that a certain percentage of the shareholders, owners, partners, or directors of an enterprise be qualified or practice a certain profession such as lawyers or accountants.

Table 24: Investment

China-Canada BIT	Benin-Canada BIT	China-Tanzania BIT	CETA
Article 1 Definitions 1. "**investment**" means: (a) an enterprise; (b) shares, stocks and other forms of equity participation in an enterprise; (c) bonds, debentures, and other debt instruments of an enterprise; (d) a loan to an enterprise □ (i) where the enterprise is an affiliate of the investor, or □(ii) where the original maturity of the loan is at least three years; (e) notwithstanding sub-paragraphs (c) and (d) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Contracting Party in whose territory the financial institution is located; (f) an interest in an enterprise that entitles the owner to share in the income or profits of the enterprise; (g) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution; (h) interests arising from the commitment of capital or other resources in the territory of a Contracting Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Contracting Party,	**Article 1: Definitions** "**investment**" means: (a) an enterprise; (b) a share, stock or other form of equity participation in an enterprise; (c) a bond, debenture or other debt instrument of an enterprise; (d) a loan to an enterprise; (e)notwithstanding subparagraphs (c) and (d) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Contracting Party in whose territory the financial institution is located; (f) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (g) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution; (h) an interest arising from the commitment of capital or other resources in the territory of a Contracting Party to economic activity in that territory, such as under: (i) a contract involving the presence of an investor's property in the territory of the Contracting Party, including a turnkey or construction contract, or a concession, or (ii) a contract where remuneration depends	**ARTICLE 1 DEFINITIONS** For the purpose of this Agreement, 1. The term "investment" means **any kind of asset** that <u>has the characteristics of an investment</u>, invested by an investor of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, **including but not limited to**: (a) movable and immovable property and other property rights such as mortgages, pledges and similar rights; (b) shares, debentures, stock and any other kind of equity participation in companies; (c) claims to money or to any other performance having an economic value associated with an investment; (d) intellectual property rights, in particular copyrights, patents, trade-marks, trade-names, technical processes, know-how and goodwill; (e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources; (f) bonds, including government issued bonds, debentures, loans and other forms of debt, and rights derived therefrom; (g) rights under contracts, including turnkey, construction, management, production, or revenue sharing contracts. <u>An investment has the following characteristics: the commitment of capital</u>	**Article 8.1 Definitions** **investment** means **every kind of asset** that an investor owns or controls, directly or indirectly, that <u>has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk</u>. **Forms that an investment may take include**: (a) an enterprise; (b) shares, stocks and other forms of equity participation in an enterprise; (c) bonds, debentures and other debt instruments of an enterprise; (d) a loan to an enterprise; (e) any other kind of interest in an enterprise; (f) an interest arising from: (i) a concession conferred pursuant to the law of a Party or under a contract, including to search for, cultivate, extract or exploit natural resources, (ii) a turnkey, construction, production or revenue-sharing contract; or (iii) other similar contracts; (g) intellectual property rights; (h) other moveable property, tangible or intangible, or

including turnkey or construction contracts, or concessions to search for and extract oil and other natural resources, or (ii) contracts where remuneration depends substantially on the production, revenue or profits of an enterprise; (i) intellectual property rights; and (j) **any other tangible or intangible, moveable or immovable, property and related property rights acquired or used for business purposes;** but "**investment**" does not mean: (k) claims to money that arise solely from (i) commercial contracts for the sale of goods or services, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by sub-paragraph (d); or (l) any other claims to money, that do not involve the kinds of interests set out in sub-paragraphs (a) to (j);	substantially on the production, revenues or profits of an enterprise; (i) intellectual property rights; and (j) **any other tangible or intangible, moveable or immovable, property and related property rights acquired in the expectation of or used for the purpose of economic benefit or other business purpose;** but "**investment**" does not mean: (k) a claim to money that arises solely from: (i) a commercial contract for the sale of a good or service by a national or enterprise in the territory of a Contracting Party to an enterprise in the territory of the other Contracting Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing; or (l) any other claim to money, that does not involve the kinds of interests set out in subparagraphs (a) to (j);	or other resources, the expectation of gain or profit, or the assumption of risk. Any change in the form in which assets are invested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the Contracting Party in whose territory the investment has been made. An investment made by an investor of one Contracting Party through an enterprise which is wholly or partially owned by the investor and having its seat in the territory of the other Contracting Party is also deemed as an investment for the purposes of this paragraph. For the avoidance of doubt, claims to money in Paragraph 1(c) of this Article does not include (a) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of the other Contracting Party; or (b) claims to money that arise from marriage or inheritance and that have no characteristics of an investment. Bonds, debentures and loans with an original maturity of less than 3 years shall not be deemed as investments under this Agreement.	immovable property and related rights; (i) claims to money or claims to performance under a contract. For greater certainty, **claims to money** does not include: (i) claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party. (ii) the domestic financing of such contracts; or (iii) any order, judgment, or arbitral award related to sub-subparagraph (i) or (ii). Returns that are invested shall be treated as investments. Any alteration of the form in which assets are invested or reinvested does not affect their qualification as investment;

Table 25: Fair and Equal Treatment

China-Canada BIT	Benin-Canada BIT	China-Tanzania BIT	CETA

Article 4 Minimum Standard of Treatment □	**Article 7: Minimum Standard of Treatment:**	**ARTICLE 5 FAIR AND EQUITABLE TREATMENT**	**Article 8.10 Treatment of investors and of covered investments**
1. Each Contracting Party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with international law. □ 2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the international law minimum standard of treatment of aliens as evidenced by general State practice accepted as law. □ 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.	1. Each Contracting Party shall accord to a covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. 2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. 3. A breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.	1. Each Contracting Party shall ensure that it accords to investors of the other Contracting Party and associated investments in its territory fair and equitable treatment and full protection and security. 2. "Fair and equitable treatment" means that investors of one Contracting Party shall not be denied fair judicial proceedings by the other Contracting Party or be treated with obvious discriminatory or arbitrary measures. 3. "Full protection and security" requires that Contracting Parties take reasonable and necessary police measures when performing the duty of ensuring investment protection and security. However, it does not mean, under any circumstances, that investors shall be accorded treatment more favourable than nationals of the Contracting Party in whose territory the investment has been made. 4. A determination that there has been a breach of another article of this Agreement, or an article of another agreement, does not constitute a breach of this article.	1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 6. 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article. 3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision. 4. When applying the above fair and equitable treatment obligation, a Tribunal

			may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated. 5. For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments. 6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article. 7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, a Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.

Table 26: Expropriation

China-Canada BIT	Benin-Canada BIT	China-Tanzania BIT	CETA
Article 10 Expropriation 1. Covered investments or returns of investors of either Contracting Party shall not be expropriated, nationalized or subjected to measures having an effect equivalent to expropriation or nationalization in the territory of the other Contracting Party (hereinafter referred to as "expropriation"), except for a public purpose, under domestic	**Article 11: Expropriation** 1. A Contracting Party may not nationalize or expropriate a covered investment either directly or indirectly through measures having an effect equivalent to nationalization or expropriation ("expropriation"), except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and	**ARTICLE** 6 EXPROPRIATION 1. Neither Contracting Party shall expropriate, nationalize or take any other measure, the effects of which would be equivalent to expropriation or nationalization against the investments of the investors of the other Contracting Party in its territory (hereinafter referred to as expropriation), unless the	**Article 8.12 Expropriation** 1. A Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation ("expropriation"), except: (a) for a public purpose; (b) under due process of law;

due procedures of law, in a non-discriminatory manner and against compensation.6 Such compensation shall amount to the fair market value of the investment expropriated immediately before the expropriation, or before the impending expropriation became public knowledge, whichever is earlier, shall include interest at a normal commercial rate until the date of payment, and shall be effectively realizable, freely transferable, and made without delay. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.	on payment of compensation in accordance with paragraphs 2 and 3. For greater certainty, this paragraph shall be interpreted in accordance with Annex I. 2. The compensation referred to in paragraph 1 must be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and must not reflect a change in value occurring because the intended expropriation had become known earlier. Valuation criteria must include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value. 3. Compensation shall be paid without delay and shall be fully realizable and freely transferable. Compensation shall be paid in a freely convertible currency and shall include interest at a commercially reasonable rate for that currency accrued from the date of expropriation until the date of payment.	expropriation meets all of the following conditions: (a) it was in the public interest; (b) it was in accordance with domestic legal procedure and relevant due process; (c) it was non-discriminatory; (d) compensation was given. … 4. The compensation mentioned in Paragraph 1 of this Article shall be equivalent to the fair market value of the expropriated investments immediately before the expropriation is taken or when the impending expropriation becomes public knowledge, whichever is earlier. The compensation shall also include interest at a reasonable commercial rate until the date of payment. The compensation shall be made without unreasonable delay, be effectively realizable and freely transferable.	(c) in a non-discriminatory manner; and (d) on payment of prompt, adequate and effective compensation. For greater certainty, this paragraph shall be interpreted in accordance with Annex 8-A. 2. The compensation referred to in paragraph 1 shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value. 3. The compensation shall also include interest at a normal commercial rate from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be paid and made transferable, without delay, to the country designated by the investor and in the currency of the country of which the investor

Table 27: Indirect Expropriation

China-Canada BIT	Benin-Canada BIT	China-Tanzania BIT	CETA
Annex B.10 Expropriation	**Annex I: Expropriation** The Contracting Parties confirm their shared understanding that:	**ARTICLE** 6 EXPROPRIATION 1. …	**Article 8.12 Expropriation** **ANNEX 8-A** **EXPROPRIATION**

The Contracting Parties confirm their shared understanding that: □ 1. Indirect expropriation results from a measure or series of measures of a Contracting Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. 2. The determination of whether a measure or series of measures of a Contracting Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Contracting Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; (b) the extent to which the measure or series of measures interferes with distinct, reasonable, investment-backed expectations; and (c) the character of the measure or series of measures. □ 3. Except in rare circumstances, such as if a measure or series of measures is so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory	(a) indirect expropriation results from a measure or a series of measures of a Contracting Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure; (b) the determination of whether a measure or a series of measures of a Contracting Party constitutes an indirect expropriation requires a case by case, fact based inquiry that considers, among other factors: (i) the economic impact of the measure or the series of measures, although the sole fact that a measure or a series of measures of a Contracting Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred, (ii) the extent to which the measure or the series of measures interferes with distinct, reasonable investment-backed expectations, and (iii) the character of the measure or the series of measures; (c) except in rare circumstances, such as when a measure or a series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory measure of a Contracting Party that is designed and applied to protect legitimate public welfare objectives, such as	"Other measures, the effects of which would be equivalent to expropriation or nationalization" means indirect expropriation. 2. The determination of whether a measure or a series of measures of one Contracting Party constitutes indirect expropriation in Paragraph 1 requires a case-by-case, fact-based inquiry that takes into consideration, among other factors: (a) the economic effect of a measure or a series of measures, although the fact that a measure or a series of measures of the Contracting Party has an adverse effect on the economic value of investments does not in itself establish that indirect expropriation occurred; (b) the extent to which the measure or the series of measures discriminates, in scope or application, against investors and associated investments of the other Contracting Party; (c) the extent to which the measure or the series of measures interferes with the clear and reasonable investment expectations of investors of the other Contracting Party; where such expectations arise from specific commitments made by one Contracting Party to the investors of the other Contracting Party; (d) the character and purpose of a measure or a series of measures, whether the measure or series of measures was adopted in the public interest and in good faith, and whether the expropriation was proportionate to its purpose. 3. Except in rare circumstances, such as where the measures adopted substantially	The Parties confirm their shared understanding that: 1. Expropriation may be direct or indirect: (a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and (b) indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure. 2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors: (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; (b) the duration of the measure or series of measures of a Party; (c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and (d) the character of the measure or series of measures, notably their object, context and intent. 3. For greater certainty, except in the rare circumstance when the impact of a

measure or series of measures of a Contracting Party that is designed and applied to protect the legitimate public objectives for the well-being of citizens, such as health, safety and the environment, does not constitute indirect expropriation.	health, safety and the environment, does not constitute indirect expropriation.	exceed the measures necessary for maintaining reasonable public welfare, legitimate regulatory measures adopted by one Contracting Party for the purpose of protecting public health, safety and the environment, and that are for the public welfare and are non-discriminatory, do not constitute indirect expropriation.	measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

APPENDIX E: CHARTS

Chart 1-1 China's FDI stocks inward Africa by industries, 2014, by million US dollars

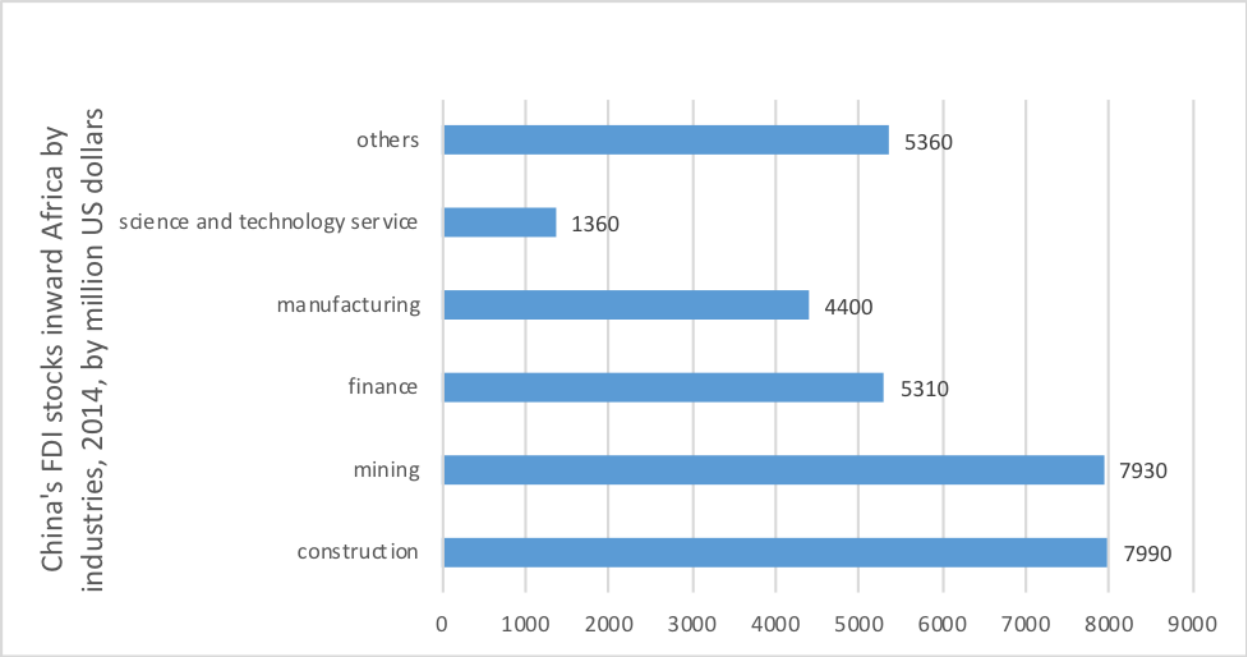


Chart 1-2 China's FDI stocks inward Africa by industries, 2014

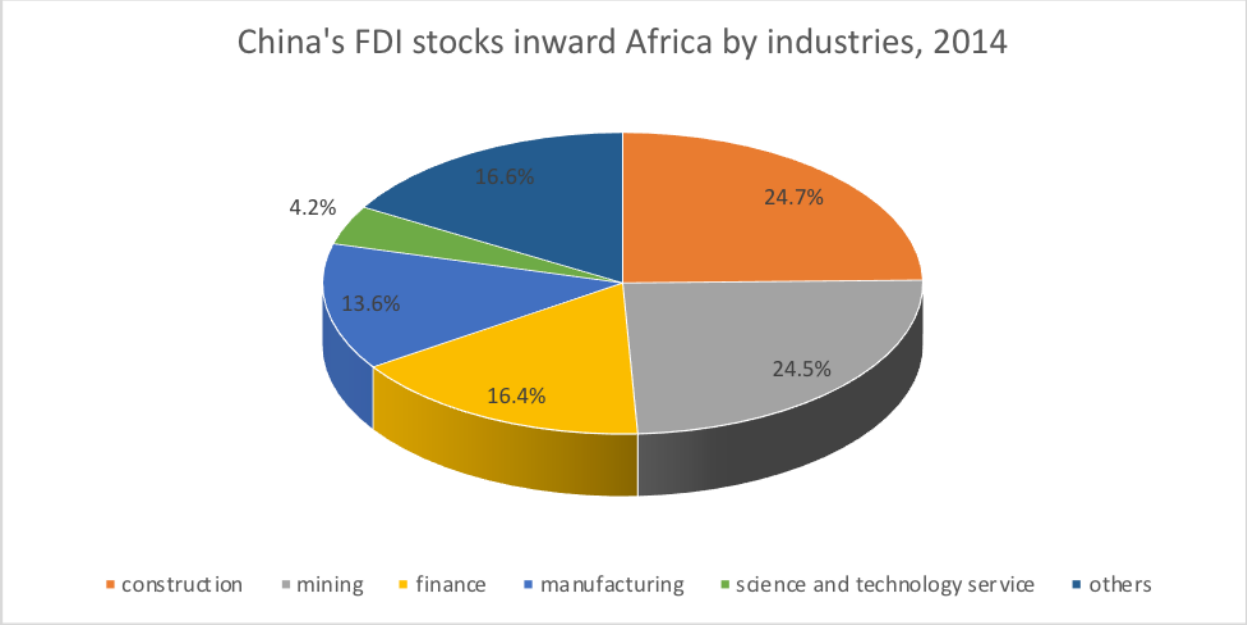


Chart 2-1 China's FDI stocks inward Africa by industries, 2015, by million US dollars

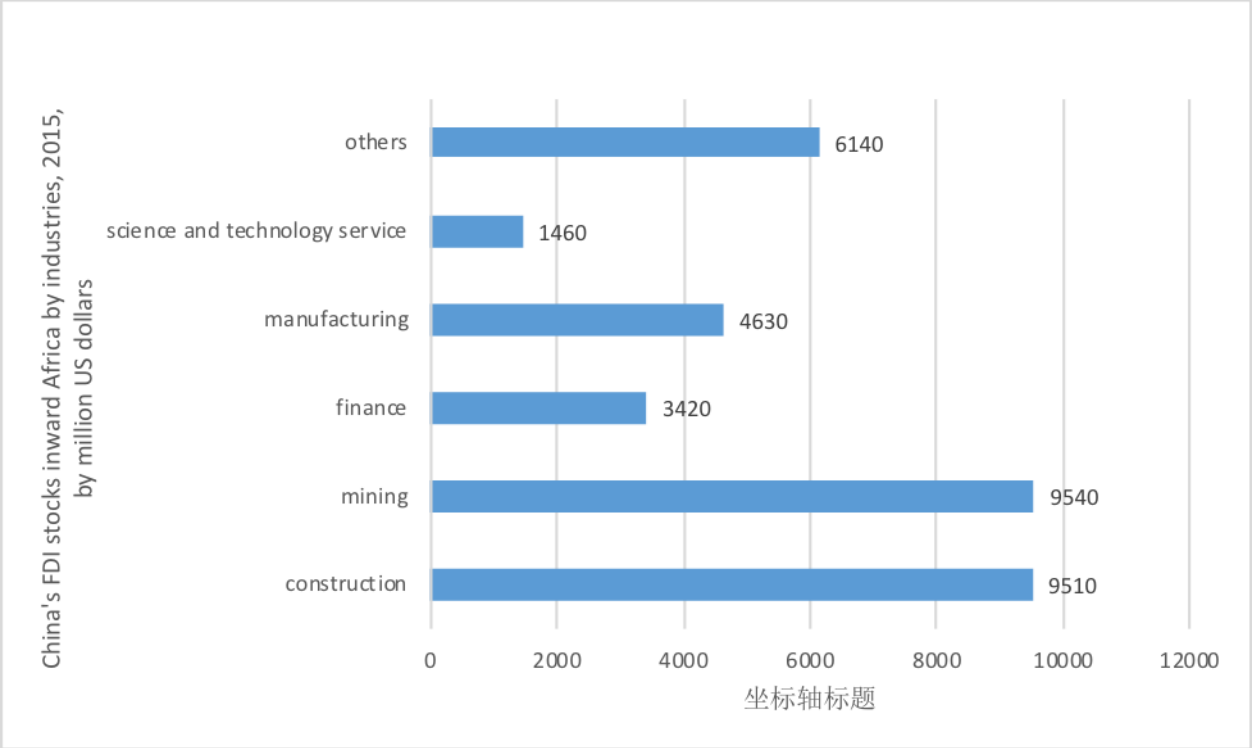


Chart 2-2 China’s FDI stocks inward Africa by industries, 2015

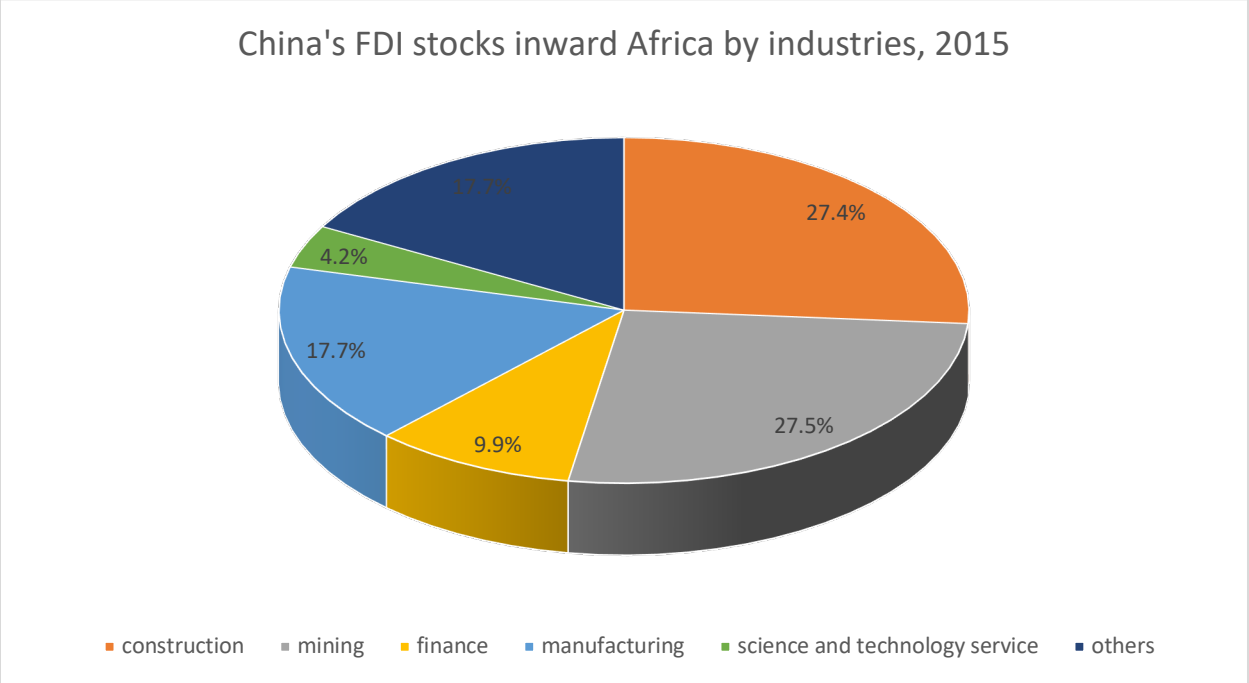


Chart 3-1 China’s FDI stocks inward Africa by industries, 2016, by million US dollars

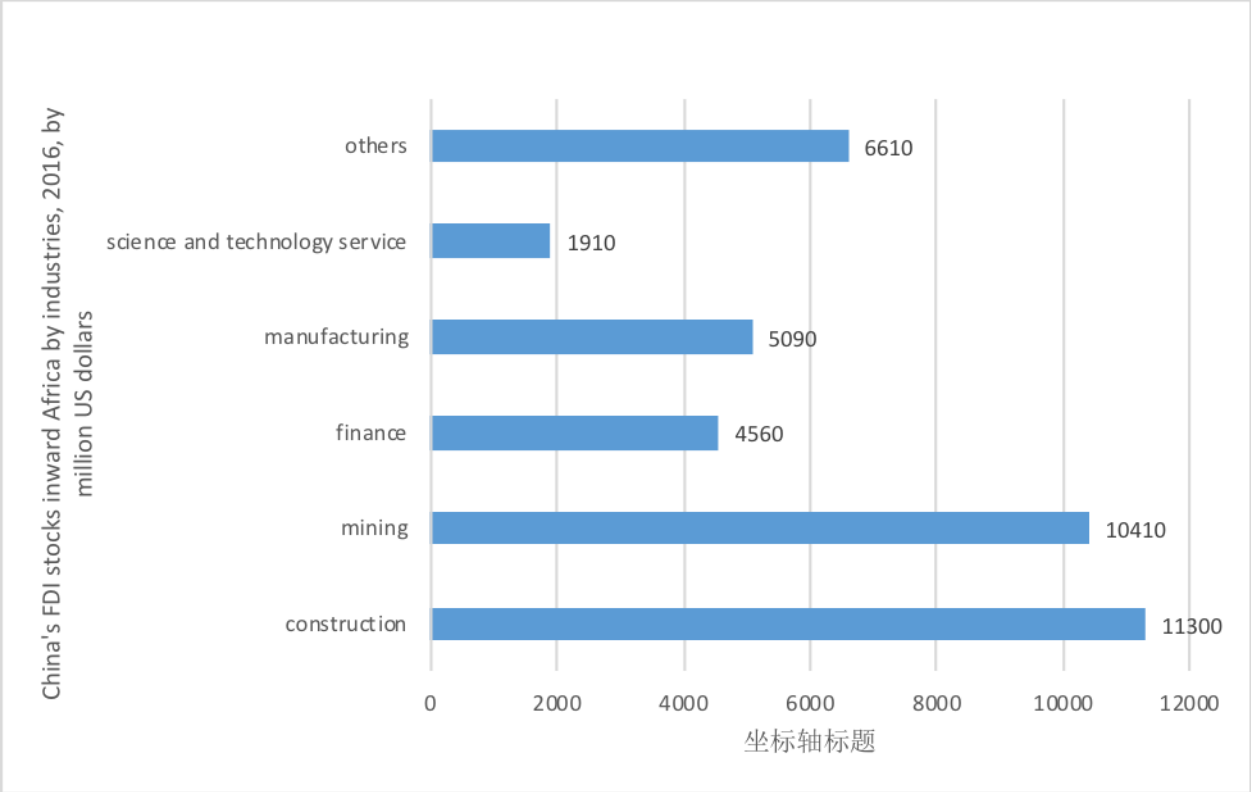


Chart 3-2 China’s FDI stocks inward Africa by industries, 2016

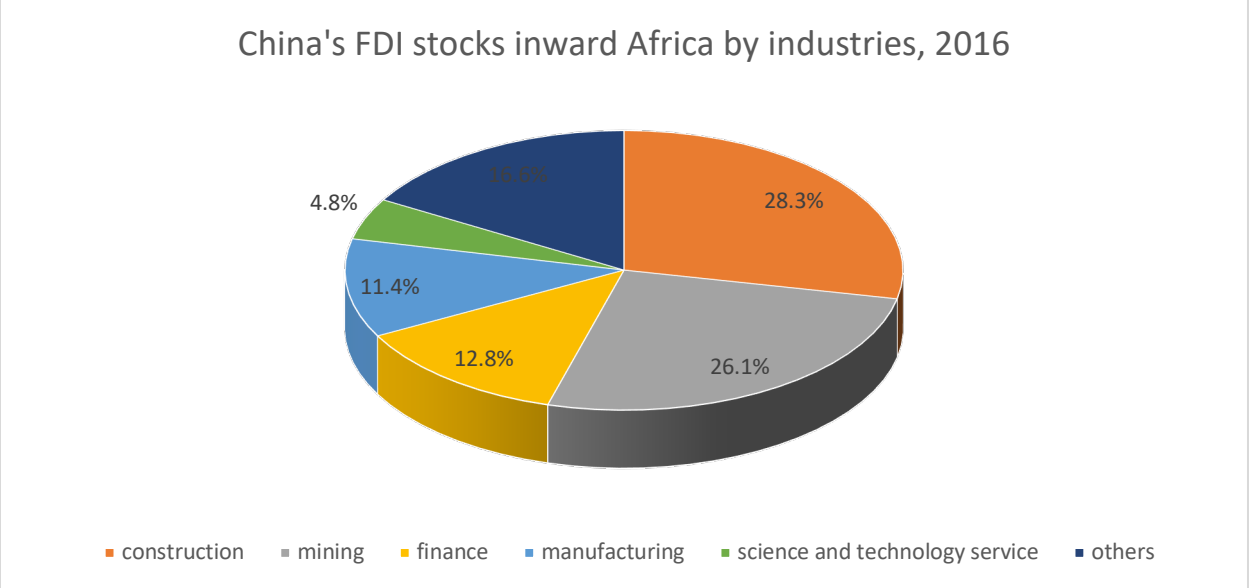


Chart 4 China's FDI flows inward Africa by industries, in 2013, by million US dollars

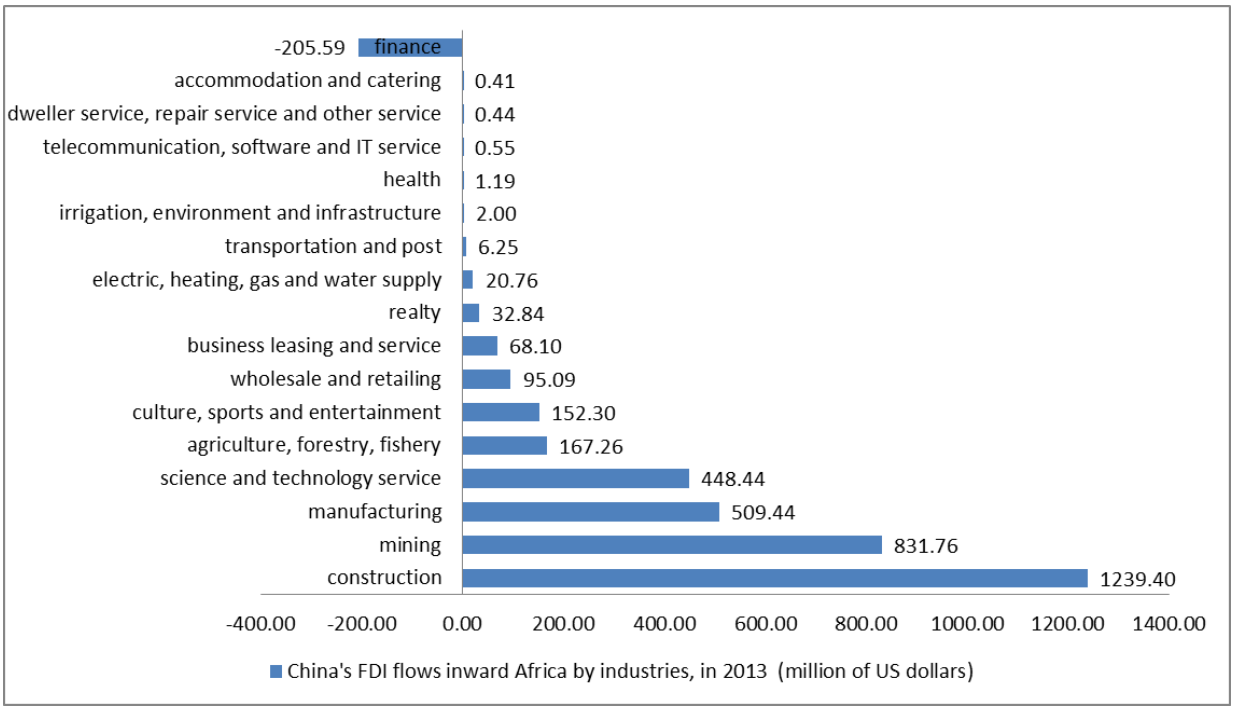
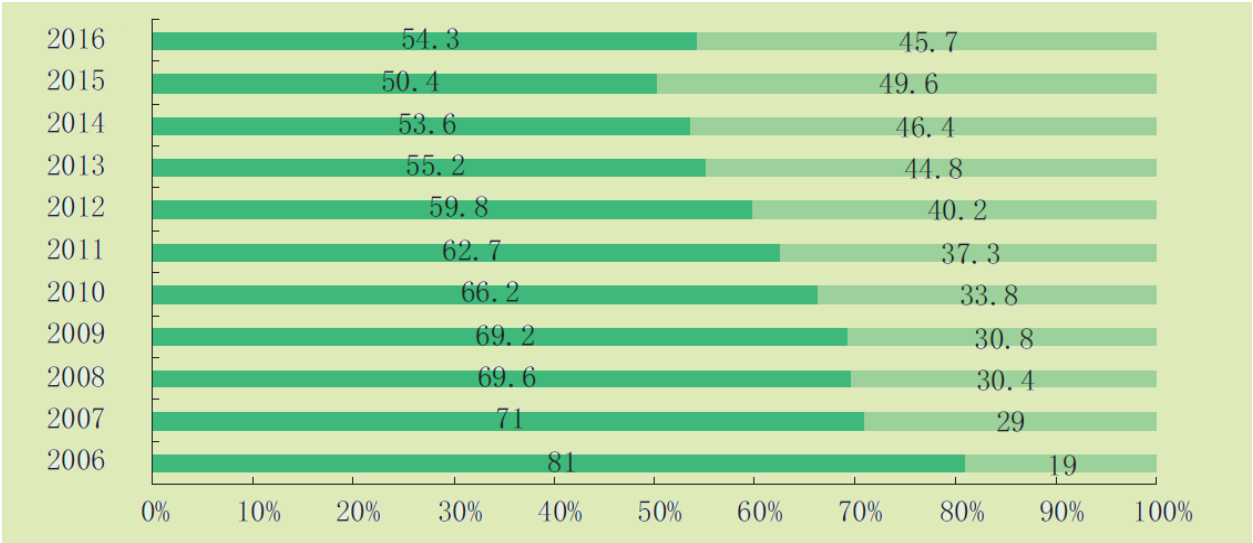


Chart 5 Proportion of China's FDI stocks abroad by SOEs and NSOEs, 2006-2016



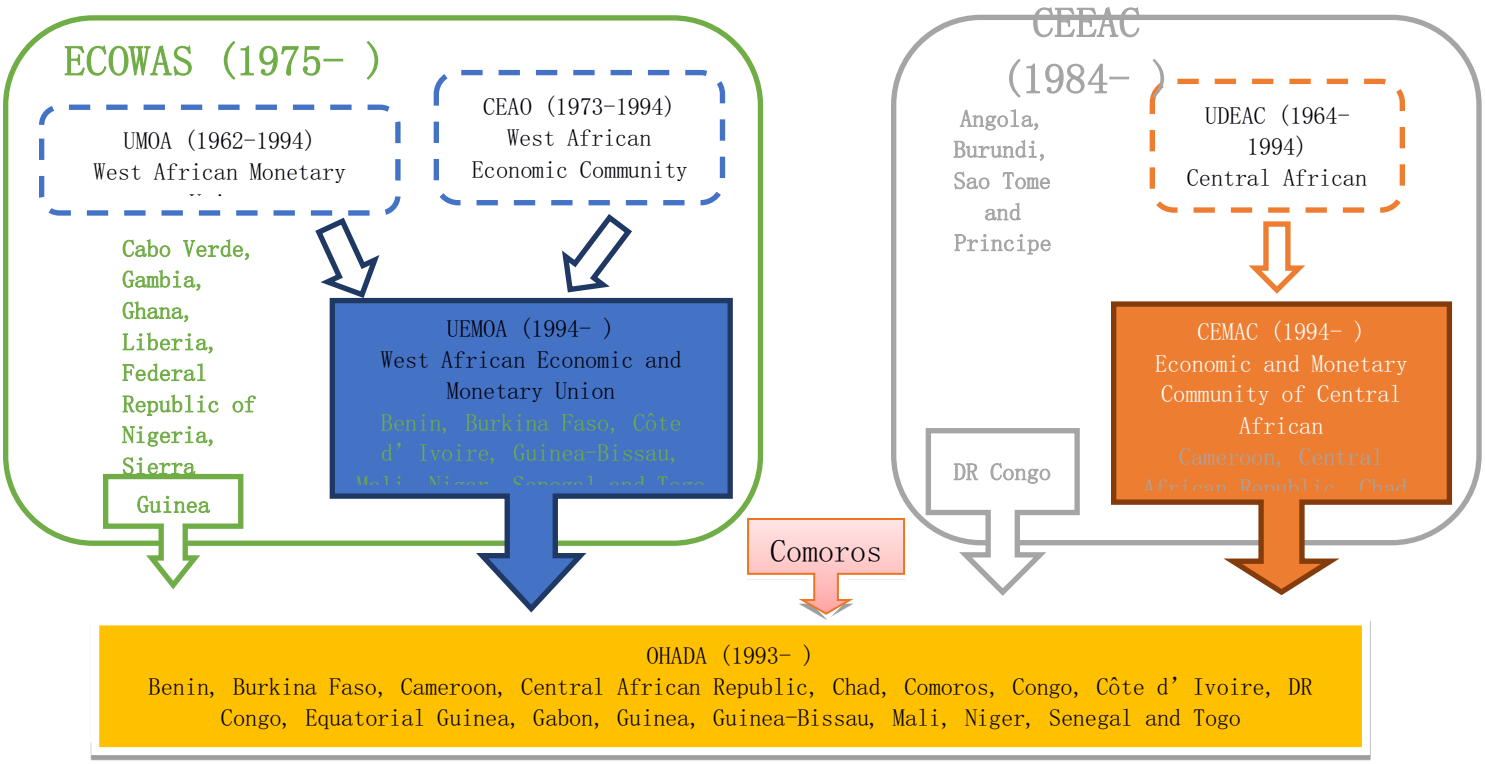
Proportion of China's FDI stocks abroad by SOEs and NSOEs, 2006-2016[1323]

SOE NSOE

[1323] The figure is from *Report on Development of China's outward Investment and Economic Cooperation 2016*, MOFCOM

APPENDIX F: GRAPHICS

Graphic 1: historical development and member subsistence of sub-Saharan African organizations



Quoted from Ian Taylor, The Forum on China-Africa Cooperation (FOCAC) (Oxon: Routledge, 2011) at 75-76. Source: Thomas Lum, Hannah Fischer, Julissa Gomez-Granger, and Anne Leland, China's Foreign Aid Activities in Afirca, Latin America, and Southeast Asia (Washington DC: Congressional Research Service, February 2009): 19-20

Graphic 2: adoption procedure of Uniform Acts