

**Old Players, New Rules: A Critique of the China-Ethiopia and China-Tanzania
Bilateral Investment Treaties**

Keywords: Investment, sustainable development, China, Tanzania, Ethiopia

Abstract:

The rapprochement between China and African States is garnering much academic attention, particular in respect to China's investment activity in Africa. The objective of this chapter is to scrutinise an aspect of this relationship in the context of international investment law (IIL) by critiquing the China-Ethiopia and China-Tanzania BITs. Underlying the study of IIL, there is an implicit neo-liberal assumption that signing international investment agreements (IIAs) will promote economic development. By signing these agreements, these States integrate themselves into an existing system where the obligations constrain their ability to regulate in the public interest. As an interstitial tool, sustainable development not only serves to preserve the space of host States to regulate in the public interest. In that regard, China as an emerging actor, subtly adapts to the rules in IIL for its own benefit (for example, the China-Ethiopia BIT). In recent years, China has innovatively negotiated IIAs that explicitly recognise sustainable development (such as the, China-Tanzania BIT).

1. INTRODUCTION

Foreign direct investment (FDI) *should* have positive implications for development.¹ Indeed, according to neo-liberal theories encouraging capital flows (of any sort) will boost economic development.² Allegedly, as a further positive consequence, these increased capital flows will improve the standard of living in the host State³ by way of, for example, further employment opportunities, improvement of infrastructure, transfer of skills and knowledge.⁴

Since the 19th century, economic development has long been advocated by Western States as the main model for development.⁵ In contrast to economic development, sustainable development shifts the focus from capital as a catalyst for development to an inclusive

1 Olivier de Schutter, Johan Swinnen, Jan Wouters, 'Foreign Direct Investment and Human Development' in Olivier de Schutter, Johan Swinnen, Jan Wouters (eds), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge 2013) 1; David Aguirre, *The Human Right to Development* (Ashgate 2008) 19; Olivier de Schutter, 'Transnational Corporations as Instruments of Human Development' in Philip Alston, Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (OUP 2005) 403; Krista Nadakavukaren Schefer, 'Poverty and Investment Law: Starting the Discussion' (2014) 15 J. World Investment & Trade 908, 911; Stephan Schill, Christian Tams, Rainier Hofmann, *International Investment Law and Development: Bridging the Gap* (Edward Elgar 2015) 29.

2 Muthucumarswamy Sornarajah, 'The Clash of Globalizations and the International Law on Foreign Investment' (2003) 10(2) Canadian Foreign Policy Journal 1, 15; Luke Eric Peterson, 'Bilateral Investment Treaty and Development Policy-Marking' (IISD, November 2004) 9 <https://www.iisd.org/pdf/2004/trade_bits.pdf> accessed 1 February 2018; Howard Mann, 'Reconceptualizing International Investment Law: Its Role in Sustainable Development' (2013) 17 Lewis & Clark L.R. 521, 534.

3 Sornarajah (n 2) 15.

4 Sornarajah (n 2) 15; Liesbeth Colen, Miet Maertens, Johan Swinnen, 'Foreign Direct Investment as an Engine for Economic Growth and Human Development' in de Schutter, Swinnen, Wouters (eds) (n 1) 102.

5 Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 1995) 61;

Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (2nd edn, Reed Elsevier 2002) 41.

approach that is centred on equity – both inter-generational and intra-generational.⁶ The introduction of the concept of sustainable development within the investment framework reframes the focus of international investment agreements (IIAs). The reframing of the text allows for a shift in the discourse from a concentration on economic development to a more holistic approach that allows developing host States (for example, those located in Africa) to maintain a degree of flexibility and preserving their regulatory autonomy. The incorporation of this concept is a positive step in the right direction.

Despite the positive impact of embedding sustainable development in IIAs, very few States actually do so. One of the few exceptions is China which is increasingly incorporating sustainable development within its IIAs, especially in relation to its African partners. This chapter argues China's proactive tailoring of IIAs is an example to be followed because it cautiously weighs up how provisions will benefit its development. After exploring how the concept of sustainable development relates to international investment law, this chapter focuses on the experience of China. This assessment stems from two case studies: China-Ethiopia and China-Tanzania. The China-Ethiopia bilateral investment treaty (BIT) was concluded during a period when China was predominantly a capital-importing economy. The BIT in question bears the hallmarks of standards that are characteristic of IIAs, but on further analysis it also epitomises a cautious approach to other standards such as expropriation.⁷ In contrast, the China-Tanzania BIT signals a small but unique departure from the traditional content of IIAs, and has the potential to pave the way to more explicit provisions for sustainable development in future Chinese IIAs.⁸

2. SUSTAINABLE DEVELOPMENT AND INTERNATIONAL INVESTMENT LAW

Sustainable development is usually understood as development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.⁹ In that regard, sustainable development is premised on the notion of equity – on an intergenerational level and intragenerational level.¹⁰ On an intergenerational level, development must not come at the expense of future generations.¹¹ At the same time on the intragenerational level, development must be inclusive, so that there is an equitable distribution of the benefits of development within a given State (domestically) and also internationally (between States).¹² Although, sustainable development is not a legally binding concept, it possesses an aspirational value that serves to remind States that a holistic approach

6 Mann (n 2) 534; Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 EJIL 377, 380; Clair Gammage, *North-South Regional Trade Agreements as Legal Regimes: A Critical Assessment of the EU-SADC Economic Partnership Agreement* (Edward Elgar 2017) 112, 120.

7 Uche Ewelukwa Ofodile, 'Africa-China Bilateral Investment Treaties: A Critique' (2013) 35(1) Michigan J.I.L. 131, 183.

8 Won Kidane, 'China's Bilateral Investment Treaties with African States in Comparative Context' (2016) 49 Cornell I.L.J. 141, 164.

9 The Brundtland Report, see: United Nations, 'Report of the World Commission on Environment and Development: Our Common Future' (UN 1987) <<http://www.un-documents.net/our-common-future.pdf>> accessed 14 February 2018.

10 The Brundtland Report (n 9); Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' 23(2) EJIL 377, 380; Alan Boyle, David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999) 12, 15.

11 Edith Brown Weiss, 'In Fairness to Future Generations and Sustainable Development' (1992) 8 Am. U.I.L.R. 19.

12 Barral (n 10) 380; Gammage (n 6) 120.

to development can be achieved both as a process and outcome.¹³ Essentially, it is a policy goal that serves to highlight common values and commitments among States and their relationships not only to each other but also to respective individuals.¹⁴ Accordingly, sustainable development plays an important role in the creation and coordination of rules not only within specialised regimes of international law, such as IIL, but also in terms of the interaction between these regimes and societal values.¹⁵

The relationship between IIL and sustainable development is a complex one,¹⁶ although there is a general consensus that IIL needs to be reframed so that the obligations and rights of the host and home State are more equitable.¹⁷ One way to facilitate this reframing is through the wording of IIAs. Explicitly incorporating sustainable development within IIAs will serve as an interstitial tool – a tool that reminds both parties of their wider obligations to society.¹⁸ It also shifts the focus away from economic development, and provides a reminder to States that development should not be at the expense of society or the environment.¹⁹ Furthermore, sustainable development also reflects the underpinning function of the State as a governing entity. Essentially, the State is representative of the values and interests within a given society.²⁰ Accordingly, the State, regardless of whether it is a capital-importing or capital-exporting economy, must facilitate equitable gains from development, both domestically as well as internationally. Essentially, the State's underlying duty is to improve living standards as a means of enhancing the welfare of society – an integral aspect of the public interest.²¹ However, this requires a degree of flexibility which is not always available to developing host States that are parties to IIAs.

2.1. The Challenge: Host State Flexibility and the Right to Regulate

In theory, developing States do have the autonomy to implement these measures, while in practice this is not always possible.²² These public interest policies or regulations, if enacted,

13 Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Boyle, Freestone (eds) (n 10) 30; Gammage (n 6) 122; Upendra Baxi, 'Sovereign Rights, State Obligations and Natural Resources' in Shawkat Alam, Jahid Hossain Bhuiyan, Jona Razzaque (eds), *International Natural Resources Law, Investment and Sustainability* (Routledge 2017) 54.

14 Lowe (n 13) 31; Marie-Claire Cordonier Segger, Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (OUP 2004) 17.

15 Lowe (n 13) 37-38; Tarcisio Gazzini, 'Bilateral Investment Treaties and Sustainable Development' (2014) 15 J. World Investment & Trade 929, 944; Schill, Tams, Hofmann (n 1) 36.

16 Gazzini (n 15) 936; Mann (n 2) 537.

17 Mann (n 2) 537; Scheffe (n 1) 920; Gabriel Siles-Brugge, 'EU Trade and Investment Policies' (Trade, Policy and Europe: Clair Gammage's Book Launch, Bristol, 17 October 2017).

18 Gazzini (n 15) 944; Andreas Ziegler, 'Towards Better BITs? – Making International Investment Law Responsive to Sustainable Development Objectives' (2014) 15 J. World Investment & Trade 803, 805; Suzanne Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 14(4) JIEL 1037, 1070.

19 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia) [1997] ICJ Rep 7, para 140.

20 Jean-Jacques Rousseau, *The Social Contract* (Christopher Betts tr, OUP 2008) 135.

21 Rousseau (n 20) 135; Santos (n 5) 33; Aikaterini Titi, *The Right to Regulate in International Investment Law* (Bloomsbury 2014) 99; Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Routledge 2016) 9; Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Conflicting to the Democratic Deficit?' (2008) 41 Vanderbilt J. Transnat'l L. 775, 777.

22 Sornarajah (n 2) 15; 140.

potentially prevent foreign investors from fully enjoying their rights under IIAs.²³ By encroaching upon the rights of foreign investors, host States leave themselves vulnerable to investment dispute claims, with the associated exorbitant legal costs *and* potentially the award of compensation.²⁴ For developing host States, these costs are an additional and unwelcome strain on an already struggling economy.²⁵ The prime example of this is the 2001 Argentinean financial crisis.²⁶ Currently, the legal claims against Argentina are estimated at US\$17 billion, which is equivalent to half the annual government budget. In *CMS v. Argentina*,²⁷ the foreign investor was awarded US\$133.2 million.²⁸ Despite the economic problems that Argentina faced, which was arguably a public emergency, arbitrators determined that the host State was not absolved of its duty under IIL.²⁹ Arbitrators deemed that Argentina had an obligation under its IIAs to provide a stable environment for investment and that the investor's right to compensation still needed to be respected.³⁰ Notably, academics have saliently argued that in order to avoid these claims, many host States have simply eschewed enacting regulation – a trend sometimes termed 'the regulatory chill'.³¹ It is argued that this is not an adequate solution to a complex but real problem; it is tantamount to the proverbial ostrich burying its head in the sand. Ultimately, the host State still has an obligation to its population to protect the public interest and simply cannot avoid this duty indefinitely.³²

2.2. Sustainable Development: Positive Outcomes

Economic growth is not inherently negative and neither is foreign investment. Foreign investment is a major source of capital for developing States, which often lack the minimum financial resources to protect the public interest or foster the realisation of socio-economic rights. As a vital source of capital, foreign investment can have positive implications for development by reducing poverty and making strides towards fulfilling socio-economic rights.³³ However, not all investments are positive and it should not be assumed that they are. Sustainable development challenges this dominant manner of thinking; it requires governments to take into account socio-economic development factors which have not been

23 Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints From Alternative Evidence' (2011) 51 *Virginia J.L.L.* 397, 405.

24 Yackee (n 23) 405; Jona Razzaque, 'Sustainable Investment and Natural Resources' (The Impact of Armed Conflict on the Environment and Natural Resources: A Sustainable Development Goal (SDG) 16 Perspective Interactive Seminar, Bristol, 17 March 2017).

25 Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2008) 3; Somarajah (n 2) 15.

26 Van Harten (n 25) 1-2; Luke Eric Peterson, 'Bilateral Investment Treaties and Development Policy-Marking' (*IISD*, November 2004) 18-19 <http://www.iisd.org/sites/default/files/publications/trade_bits.pdf> accessed 26 February 2018.

27 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. Arb/01/8, Award.

28 *CMS Gas Transmission Company v. The Republic of Argentina* (n 27) para. 468.

29 *CMS Gas Transmission Company v. The Republic of Argentina* (n 27) para. 329.

30 *CMS Gas Transmission Company v. The Republic of Argentina* (n 27) para. 274.

31 Razzaque (n 24); Konrad von Moltke, Howard Mann, 'Towards a Southern Agenda on International Investment: Discussion Paper on the Role of International Investment Agreements' (*IISD*, May 2004) 29

<http://www.iisd.org/sites/default/files/publications/investment_sai.pdf> accessed 1 March 2018.

32 Aaron Cosbey, Howard Mann, Luke Eric Peterson, Konrad von Moltke, 'Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements' (*IISD*, 2004) 25 <https://www.iisd.org/pdf/2004/investment_invest_and_sd.pdf> accessed 3 March 2018.

33 Evadne Grant, 'Human Dignity and Socio-Economic Rights' (2012) 33(3) *Liverpool Law Review* 235, 243; Christof Heyns, Danie Brand, 'Introduction to Socio-Economic Rights in the South African Constitution' (1998) 2(2) *Law, Democracy & Development* 153, 154; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights* (2nd edition, Bloomsbury 2016) 253.

traditionally considered by the existing investment paradigm.³⁴ Home and host States will need to take considerable steps to reform the IIL regime. It is contended that this reform is necessary to ensure the benefits from investment are distributed equitably to ensure the well-being of society – a central tenet of sustainable development. Radical change is not possible due to entrenched rules within the IIL regime, but change can happen if it is incremental so as to influence the core.³⁵ One method of change is to incorporate sustainable development into IIAs as embedding the concept in IIAs serves as an explicit reminder to contracting parties that measures must be adopted in a sustainable and equitable manner.³⁶ It reconfigures IIL in order to reflect the bigger picture – that is, the fact that host States have policy goals that they need to realise in order to serve the public interest and ensure an adequate standard of life.³⁷

Contemporary IIAs are increasingly incorporating sustainable development within their preambles.³⁸ Since the preamble sets the context of the treaty, which can aid the interpretation of the substantive provisions within the given instrument, sustainable development would require that investment protection measures in IIAs are understood from a sustainable development perspective.³⁹ In that regard, sustainable development serves as a tool to maintain a degree of flexibility in regard to the substantive obligations in IIAs. This is particularly valuable in relation to developing host States because it gives them room to maintain their autonomy to regulate in the public interest without fear of claims from foreign investors. Whilst many States have been reluctant to adopt such an approach, as traditional IIAs seldom incorporate public interest issues, China has been particularly proactive in the field of IIL; it has also increasingly integrated sustainable development within its IIAs.

3. CHINA: AN EMERGING ACTOR

China has embedded itself within the complex framework of IIL, and has done so within the last few decades – a relatively short space of time. The transformation of the Chinese economy is remarkable, even more so given that it was once categorised solely as a capital-importing State. It is now also a major capital-exporting economy.⁴⁰ China is a notable addition to the existing network of capital-exporting States, which are chiefly located in the

34 Mann (n 2) 535.

35 Mann (n 2) 543.

36 Mann (n 2) 536; Aguirre (n 1) 124.

37 Mann (n 2) 543; Gazzini (n 15) 940.

38 For example: Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (signed 9 September 2012, entered into force 1 October 2014); Agreement Between Canada and Mongolia for the promotion and Protection of Investment (signed 8 September 2016, entered into force 24 February 2017).

39 Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(1).

Luigi Crema, 'Remarks on the Interpretation of Investment Treaties in Light of Other Rights' in Tulio Treves, Francesco Seatzu, Selina Trevisanut (eds), *Foreign Investment Law and Common Concerns* (Routledge 2014) 66; Yuliya Chernykh, 'Salt Is Salty: Chasing Sustainability in the Preambles of BITs and FTAs' (SMART Conference, Oslo, 9 May 2017).

40 In 2015, outward flows of Chinese FDI were estimated at US\$128 billion, ranking it third in terms of the amount of capital exported. The United States was ranked first with the exportation of capital estimated at US\$300 billion; Japan was ranked second with capital outflows of US\$129 billion. The Netherlands was ranked fourth, Ireland fifth and Germany was ranked fifth in terms of capital outflows. The respective FDI outflows respectively were estimated at US\$113 billion, US\$102 billion and US\$94 billion.

UNCTAD, 'World Investment Report 2016 – Investor Nationality: Policy Challenges' (UNCTAD, 21 June 2016) 5-6 <http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf> accessed 3 March 2018.

See also: Norah Gallagher, 'Role of China in Investment: BITs, SOEs, Private Enterprises, and the Evolution of Policy' (2016) 31(1) ICSID Review 88, 91.

West.⁴¹ An analysis of those Chinese IIAs still in force shows the majority of these agreements contain the usual IIL standards that are so commonly found within IIAs in general - for example, codification of the national treatment principle or fair and equitable treatment principle. Indeed, China's inclusion of hallmark IIL standards denotes a continuing support for the existing system and its associated deficiencies. That is, the existing IIL framework ensures a high degree of protection for foreign investors and, as an unwanted by-product, constrains sovereign behaviour and ultimately the ability of host states to regulate for the public interest.⁴²

Nevertheless, as China continues to integrate within this system, its approach to IIL rules is also evolving.⁴³ Indeed, there are indications of positive change within contemporary Sino-African IIAs which reflect China's changing attitude in relation to the regulation of capital flows. These changes seem insignificant at first glance. On further examination, it is striking that China, as an emerging actor, has introduced innovative changes. For example, China has led the way in terms of explicitly integrating the concept of *sustainable* development within the preambles of its more recent IIAs, whereas the preambles of earlier Chinese IIAs referred to *economic* development. Out of the 100 Chinese BITs (which were accessible and remain in force in 2018) surveyed: 4 BITs explicitly referred to economic development within the preambles.⁴⁴ Within 23 Chinese BITs, some ambiguous form of development can be inferred from the text in the preamble.⁴⁵ For example, investment should be conducted in a reciprocal manner that is conducive towards cooperative development.⁴⁶ Arguably, any reference to development, even framed from the perspective of economic development, is an important step towards reconfiguring the obligations under the agreement in a more balanced manner. Among the Chinese IIAs examined, only the preamble in the China-Canada BIT explicitly refers to sustainable development. Notably, the preambles in the China-Tanzania BIT and China-Uzbekistan BIT provide that cooperation between States should be conducted with sustainable economic development in mind.⁴⁷ This development needs to also contribute towards improving the standard of living or welfare of nationals within the respective States - both the home and host economy. On further examination of the China-Tanzania BIT, it is striking that China, as an emerging actor, has introduced innovative changes in this IIA – to be analysed in section 5 of this chapter.

41 Gallagher (n 40) 90; Karl Sauvant, Michael Nolan, 'China's Outward Foreign Direct Investment and International Investment Law' (2015) JIEL 1.

42 Van Harten (n 25) 180.

43 Gallagher (n 40) 93-94; Won Kidane, *China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration* (Kluwer 2011) 180-181.

44 UNCTAD, 'Investment Policy Hub: International Investment Agreement' (UNCTAD, 2017)

<<http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu>> accessed 10 March 2018.

45 For example, Agreement between the People's Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investment (signed 12 October 1989, entered into force 22 November 1990); Agreement between the People's Republic of China and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investments (signed 8 May 1992, entered into force 1 September 1996); Agreement between the People's Republic of China and the Government of the Republic of Croatia Concerning the Encouragement and Reciprocal Protection of Investments (signed 7 June 1993, entered into force 1 July 1994).

See: UNCTAD (n 44).

46 UNCTAD (n 44).

47 See: Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments (China-Tanzania BIT) (adopted 24 March 2013, entered into force 17 April 2014), preamble; Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments (adopted 19 April 2011, entered into force 1 September 2011), preamble.

As Braithwaite and Drahos argue, economically powerful home States dominate regimes such as IIL.⁴⁸ However, they contend that other States must do their part to convincingly evoke regulatory change.⁴⁹ Undoubtedly, one method that has the potential to bring about change is the incorporation of non-investment related issues within IIAs or at least some level of deference for fundamental norms, such as human rights.⁵⁰ Furthermore, IIAs *should* be amended to better reflect the regulatory and public interest concerns of the host State.⁵¹ There are indications that this is beginning to be the case with regards to the China-Tanzania BIT. To highlight and fully understand the significance of the changes in the China-Tanzania BIT the China-Ethiopia BIT, as an early Chinese IIA, will be examined first.

4. CHINA-ETHIOPIA

The China-Ethiopia BIT was concluded in 1998; it is one of China's second-generation IIAs which still remain in force.⁵² As such, agreements like the China-Ethiopia BIT reflect a period when China was primarily a capital-importing State⁵³ and was just beginning to integrate within the global economy with the launch of its outward investment, or 'Go-Out' policy.⁵⁴ This BIT is an example of China's tentative approach to the IIL regime and more liberal policies.⁵⁵ There is little tailoring of the text within the BIT, unlike its Tanzanian counterpart. Many of the iconic substantive provisions on the rights of foreign investors remain present in this agreement.⁵⁶ Arguably, this reflects China's use of the established rules within the existing IIL framework.⁵⁷ That is to say, that there is nothing distinctively 'Chinese' about the China-Ethiopia BIT:⁵⁸ it does not have any specific provisions that are characteristically different to many existing IIAs involving the traditional

48 John Braithwaite, Peter Drahos, *Global Business Regulation* (CUP 2001) 34.

49 Braithwaite, Drahos (n 48) 36.

50 For further details, see: Muthucumarswamy Sornarajah (n 2) 13; Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60(3) ICLQ 573, 595; Clara Reiner, Christoph Schreuer, 'Human Rights and International Investment Arbitration' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, Francesco Francioni (eds), *Human Rights in International Investment Arbitration* (OUP 2009) 84; Howard Mann, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities' (*IISD*, February 2008) 12 <<http://www.oecd.org/investment/globalforum/40311282.pdf>> accessed 5 March 2018; Patrick Dumberry, Gabrielle Dumas Aubin, 'How to Incorporate Human Rights Obligations in Bilateral Investment Treaties' (*IISD Investment Treaty News*, 22 March 2013) <<https://www.iisd.org/itn/2013/03/22/how-to-incorporate-human-rights-obligations-in-bilateral-investment-treaties/>> accessed 23 February 2018.

51 Reiner, Schreuer (n 50) 84.

52 Norah Gallagher, Wenhua Shan, *Chinese Investment Treaties: Policies and Practices* (OUP 2009) 6; Kidane (n 43) 166; Ofodile (n 7) 138.

53 Gallagher, Shan (n 52) 4;

54 Ofodile (n 7) 159; Kidane (n 43) 166; Gallagher (n 40) 90, 93-94.

55 Ofodile (n 7) 156.

56 These include standards of treatment, *inter alia*, national treatment, MFN, fair and equitable treatment. In addition to measures, such as, protection from expropriation, as well as, State-to-State dispute resolution measures and investor-State dispute resolution mechanisms. Ofodile (n 7) 159-160. See also: Kidane (n 43) 180-182.

57 In that regard, China's approach to IIL and its corresponding investment policy have become evolved. Accordingly, China's level of sophistication in using the available mechanisms are becoming ever more sophisticated.

See: Gallagher (n 40) 95.

58 The China-Ethiopia BIT is characteristic to many of the agreements China concluded during the 1990s.

For further details, see: Kidane (n 8) 147; Gallagher, Shan (n 52) 6.

capital-exporting States from the West.⁵⁹ For example, the definition of ‘investment’ or ‘investor’ in the China-Ethiopia BIT is widely asset-based, and it is not particularly noteworthy.⁶⁰ Also, the usual provisions on the relative treatment of foreign investments are present.⁶¹

The slight amendments made by China relate to expropriation clauses and the national treatment principle. These have been devised in a restrictive manner, as they reflect China’s interests (as an emerging economy) at the time.⁶² First, while China has incorporated a provision to protect foreign investments from expropriation, which is frequently found in IIAs, it has also done so cautiously. In fact, by limiting the expropriation clause in the China-Ethiopia BIT, China has attempted to incorporate an established principle of IIL but not to its fullest extent.⁶³ When the China-Ethiopia BIT was concluded, limiting expropriation would not have been a priority for China.⁶⁴ After all, at the time the Chinese economy was still emerging on the global scale. This tentative approach is arguably an attempt to limit the possibilities by which foreign investors can invoke the relevant clause.⁶⁵ In the sense that it does not refer to indirect expropriation unlike its Tanzanian counterpart or more recent Chinese BITs.⁶⁶ Generally, it must be noted that older Chinese BITs, such as the China-Ethiopia BIT, generally contain fewer provisions on the standard treatment of foreign investment and restrict investment protection, which marginally differs from the classical content found within traditional IIAs.⁶⁷ This was not a significant factor in the China-Ethiopian context, but under the MFN, an expansive expropriation clause could arguably have been invoked by other foreign investors pursuant to other IIAs with China.⁶⁸ This would have rendered China vulnerable to investment-related claims at a time when, as recipient of foreign investment, it would have wanted to avoid claims from foreign investors and the associated potential compensation.⁶⁹ As the existing economic paradigm has shifted, China’s BITs have included measures that are more expansive.⁷⁰ This is an indication of Chinese sophistication when it comes to the development of IIAs, even if these changes are slight.⁷¹

Second, the principle of national treatment that is conspicuously absent from the China-Ethiopia BIT.⁷² It reflects China’s desire to protect its interests. Indeed, it should be borne in mind that during this period, China was primarily a capital-importing State and that the principle would have afforded equivalent treatment to foreign investors as to domestic

59 Ofodile (n 7) 159-160.

60 Ofodile (n 7) 162.

61 Peter Muchlinkski, ‘The Framework of Investment Protection: The Content of BITs’ in Karl Sauvant, Lisa Sachs (eds) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP 2009) 50.

62 Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People’s Republic of China Concerning the Encouragement and Reciprocal Protection of Investments (China-Ethiopia BIT) (adopted 11 May 1998, entry into force 1 May 2000) art 4(1).

63 Ofodile (n 7) 156; Wenhua Shan, ‘China and International Investment Law’ in Leon Trakman, Nicola Ranieri (eds), *Regionalism in International Investment Law* (OUP 2013) 224-225.

64 Kidane (n 43) 181-182.

65 Ofodile (n 7) 156.

66 Ofodile (n 7) 168.

67 Kidane (n 6) 167; Ofodile (n 7) 168.

68 Kidane (n 43) 97; 233.

69 Kidane (n 43) 97; Shan (n 63) 233, 238; Gallagher (n 40) 93.

70 Gallagher (n 40) 93; Sauvant, Nolan (n 41) 23; Ofodile (n 7) 156; Kidane (n 43) 167.

71 Gallagher (n 40) 93; Sauvant, Nolan (n 41) 23; Ofodile (n 7) 156.

72 Ofodile (n 7) 166-167.

ones.⁷³ Not all domestic companies or industries are able to cope with the additional competition from foreign investors.⁷⁴ As a result, host States often desire to insulate these aspects of the economy, and this explains the rationale for the absence of the national treatment standard in earlier Chinese BITs.⁷⁵ In other words, despite national treatment being an established principle within IIL, it would not have been a priority for China to include such a measure within its IIAs.⁷⁶ When this IIA was signed in 1998, China had yet to develop policies on outward investment; it was still making inroads with regards to IIL and even with regards to international trade.⁷⁷ Put simply, as an example of an older Chinese BIT, the China-Ethiopia BIT epitomises China's position as a recipient of foreign capital.⁷⁸ Since then, as China is now a major capital-exporting State, including the national treatment provision would be in its interest, which can be seen from the China-Tanzania BIT.⁷⁹ As a result of this economic shift, China will have different interests to protect, and these relate to the protection of its own investors. Accordingly, the substantive provisions in recent Chinese BITs have been expanded to reflect this change and the China-Tanzania BIT is a prime example of these developments.

The provisions of the China-Ethiopia BIT generally do not reflect sustainable development. That being said, the preamble of this agreement provides that 'investments should be based on cooperation, equality and mutual benefit'. Although the preamble does not explicitly refer to sustainable development, it does suggest that investment protection should be interpreted expansively and with reciprocity in mind.⁸⁰ This suggests that both home and host State should equitably benefit from the relationship, which is one aspect of sustainable development – intergenerational equity, but formulation does not refer to intragenerational equity. Preambles of IIAs should be formulated by expressly referring to sustainable development as this would allow for greater flexibility for the respective host State (Ethiopia). This flexibility, arguably allows for the public interest. Nonetheless, the formulation of the preamble of the China-Ethiopia BIT is a slightly divergent approach from the content of traditional IIAs.

5. CHINA-TANZANIA

The China-Tanzania BIT,⁸¹ categorised as one of China's third-generation IIAs, is one of its most recent.⁸² It reflects China's position as a major capital-exporting State, as well as being a significant recipient of foreign investment.⁸³ The China-Tanzania BIT is distinctive owing to some notable substantive additions which have not traditionally been found in

73 Ofodile (n 7) 166-167.

74 This is analogous to the unique prescription of the national treatment clause in the China-Tanzania BIT, where it is evident that the host State (Tanzania) seeks to protect, or at least, shield domestic investors from excessive external competition.

See: Kidane (n 8) 166-167.

75 Kidane (n 8) 166-167; Wenhua Shan, 'China and International Investment Law' in Leon Trakman, Nicola Ranieri (eds), *Regionalism in International Investment Law* (OUP 2013) 288.

76 Kidane (n 43) 165.

77 Kidane (n 43) 166-167; Gallagher (n 40) 93.

78 Sauvant, Nolan (n 41) 21; Kidane (n 43) 180.

79 Sauvant, Nolan (n 41) 23; Gallagher (n 40) 93; Gallagher, Shan (n 52) 4.

80 Alison Giest, 'Interpreting Public Interest Provisions in International Investment Treaties' (2017) Chicago JIL 321, 338.

81 China-Tanzania BIT (n 47).

82 UNCTAD, 'Investment Policy Hub: International Investment Agreement – China' (UNCTAD, 2017)

<<http://investmentpolicyhub.unctad.org/IIA/CountryBits/42>> accessed 11 March 2018; Kidane (n 8) 164.

83 Kidane (n 8) 164, 167; Gallagher, Shan (n 52) 5-8.

previous Chinese IIAs, or even BITs in the wider context.⁸⁴ For example, there is the inclusion of Article 10 which specifically recognises that abiding by investment obligations should not come at the expense of other societal obligations. Given the economic resources of Tanzania, the flow of capital will be mainly one-way – from China to Tanzania.⁸⁵ Despite this one-sided relationship, it would be wrong to assume that the IIA between these two parties only reflects the home State's interests.⁸⁶ This agreement has some innovative additions that reflect the divergent interests of both parties, and which will be examined now in more detail.

Within this particular BIT, the usual definitions of 'investment' and 'investor' have not changed substantially from that of the Ethiopian BIT or any other Chinese IIA, and remain widely asset-based.⁸⁷ In that respect the definitions of 'investment' or 'investor' provided for under the China-Tanzania BIT are unremarkable, and resemble any other IIA.⁸⁸ Equally, the China-Tanzania BIT contains a number of substantive provisions that are characteristic of any IIA - for example, clauses on the standard of treatment of foreign investors, including national treatment, most favoured nation (MFN) and fair and equitable treatment (FET). At first sight this indicates that China has fully accepted the key features of IIAs, yet on second reading it is clear that China is paving a new way forward, which reflects incremental change.

The provision on national treatment which affords foreign investors the same treatment as national ones was not included in previous Chinese IIAs. It is however found under Article 3(2) of the China-Tanzania BIT: 'each Contracting Party shall accord... treatment no less favourable than that accorded to its own investors and associated investments'.⁸⁹ Remarkably though and in apparent contradiction to a traditional understanding of the principle of national treatment,⁹⁰ parties are permitted to 'grant incentives or preferences to its nationals' on the basis of promoting local entrepreneurship within the host State.⁹¹ This provision thus allows Tanzania (as the host economy) to adopt measures to support national industries and thereby boosts economic development. This has the potential to improve the societal wellbeing (by way of improving the standard of living), which is a vital aspect of protecting the public interest.

Article 3(2) has however been so designed as to ensure that this differentiation in national treatment must not have an adverse effect on foreign investment or investors.⁹² It is noteworthy because it has been designed in a manner reflects intergenerational equity between China and Tanzania, which is an important aspect of sustainable development. It is striking that China agreed to concede such a compromise to Tanzania.⁹³ As already stated, there is an asymmetry in the capital flows between China and Tanzania. Since Tanzania is the recipient of capital in that particular relationship, the inclusion of such a clause that

84 This is compared to IIAs involving the United States, as a leading capital-exporting State. Additionally, it has been advocated that IIAs need to include provisions in recognition of human rights. For further details, see: Won Kidane, Weidong Zhu 'China-Africa Investment Treaties: Old Rules, New Challenges' (2014) 37(4) *Fordham I.L.J.* 1035, 1069.

85 Ali Zafar, 'The Growing Relationship Between China and Sub-Saharan Africa: Macroeconomic Trade, Investment, and Aid Links' (2007) 22(1) *World Bank Research Observer* 103, 123; Won Kidane (n 8) 164.

86 Kidane (n 8) 166.

87 Kidane (n 8) 165.

88 Kidane (n 8) 165.

89 China-Tanzania BIT (n 47) art 3; Kidane (n 8) 164.

90 Kidane (n 8) 166.

91 China-Tanzania BIT (n 47) art 3(2).

92 China-Tanzania BIT (n 47) art 3(2).

93 Kidane (n 8) 166.

incorporates its interests as a host is a distinctive and extraordinary addition.⁹⁴ This highlights the fact that, although the text within IIAs follow a traditional pattern, it means there is still scope to include additional or more nuanced provisions.⁹⁵ These provisions can even be tailored in recognition of the specific needs of the host State.⁹⁶ Indeed, this author positively advocates that these provisions need to be tailored further to expressly incorporate sustainable development. This allow the host State to maintain greater regulatory autonomy, especially in matters relating to the sustainable development and the public interest. This should be done to allow a degree of flexibility for capital-importing States to act in the public interest without the fear of investment disputes and the associated costs.

On another note, it is argued that the investment relationship between China and Tanzania is much subtler than much of the current literature on Sino-African relations surmises.⁹⁷ It is indicative of change, even if slight. Furthermore, this IIA is an example of the way in which developing States are trying to adapt to the IIL framework and system, although progress is slow, since the traditional rules are entrenched. There are further substantive provisions within the China-Tanzania BIT that reflect an element of change (for example Article 10(1)) whilst others are a mere reflection of the *status quo*. Take, for example, the provision codifying the MFN principle. The MFN provision in the China-Tanzania BIT is unremarkable.⁹⁸ It is identical to that contained within the China-Ethiopia BIT or any other Chinese IIA.⁹⁹ This provision is merely a replication of the expected content within IIAs, which have not traditionally accommodated for societal well-being or the public interest.

As emerging players, both China and Tanzania still lack the legal expertise needed to navigate the complexities of IIL. This is evident on examination of the incorporation of the FET standard within the China-Tanzania BIT. Provisions on FET are commonplace in IIAs; it is not surprising that it has been included in the China-Tanzanian instrument. What is curious about the FET standard in this context is its peculiar formulation. Article 5(1) stipulates that ‘full and equitable treatment and full protection and security’ will be afforded to foreign investors and their investments. This is further qualified by Article 5(2), which specifically defines FET as ‘fair judicial proceedings’. Given that there already are substantial procedural mechanisms provided in the event of disputes between the investor and the State within the BIT, the incorporation of this FET definition is nothing if not odd.¹⁰⁰ It is particularly so, given that in investor-State disputes, judicial proceedings will only be instigated if the investor initiates a claim.¹⁰¹ As a result, this extended definition of the FET is puzzling. It is even more so considering that the treaty does not provide any further explanation or clarification of what is meant, nor whether it is a complementary aspect of the existing procedural mechanisms within the agreement. Article 5(3) does not shed light on the matter. Instead it further provides that full protection and security are significant aspects of the FET principle. The definition provided is very literal however; it requires the host to implement police measures to physically safeguard investment assets.¹⁰² In that respect, this additional paragraph signals Chinese interests as the home State and, arguably, its concerns for its workers and assets, especially since so many Chinese workers in Africa have been

94 Kidane (n 8) 166.

95 Kidane, Zhu (n 84) 1064-5, 1067.

96 Kidane, Zhu (n 84) 1064-5, 1067.

97 Kidane, Zhu (n 84) 1040.

98 Kidane (n 8) 166.

99 Kidane (n 8) 166.

100 Kidane (n 8) 166.

101 Kidane (n 8) 166.

102 China-Tanzania BIT (n 81) art 5(3).

kidnapped.¹⁰³ It is submitted that the FET standard has been formulated alludes to broader security concerns, which are part of the wider public interest,¹⁰⁴ even though it predominantly relates to China's needs. China's stance is however not remarkable. After all, all BITs reflect the interests of the contracting parties.¹⁰⁵ Nevertheless, IIAs need to provide a more equitable balance between the interests of host and home States if they are to contribute to sustainable development.¹⁰⁶

6. Integrating Sustainable Development and the Public Interest in IIAs

It is clear that traditional as well as more modern IIAs generally do not cater (or at least not appropriately) for wider interests such as sustainable development.¹⁰⁷ This merely reaffirms the argument that there needs to be a fundamental shift within the wider context of IIL, one that goes beyond just economic and investment-related interests.¹⁰⁸ Given that IIL obligations curb the autonomy of a host to regulate in the public interest, States and arbitrators need to acknowledge this and also make a concentrated effort to protect wider interests, such as sustainable development and the public interest (including human rights), by adopting an expansive reading of investment obligations and avoiding the neo-liberal assumption that increased capital flows equate to improved development.¹⁰⁹

One method to facilitate this would be to expressly recognise rights within IIAs, because many are currently silent on the matter.¹¹⁰ On that note, Article 10(1) of the China-Tanzania BIT is a remarkable development, since it represents a departure from the conventional text within IIAs that predominantly focuses on investment-related issues. Accordingly, this provision formally recognises duties outside the traditional IIL regime. It specifies that '... it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures... [i]n the pursuit of FDI'.¹¹¹ This provision is a step in the right direction; it formally recognises the regulatory autonomy of the host State. This is unique provision in an IIA, which involves two emerging actors, and demonstrates where China is tailoring its IIAs, not only to meet its own needs but also of its respective partner.

However, it is not a complete solution in regard to IIL, as IIAs will continue to constrain the ability of host states to regulate in the public interest if they continue to follow the dominant model or status quo. This means that when drafting further IIAs with a view to incorporating elements of sustainable development and public interests, not only China, but also other States must be mindful of the weaknesses of such a provision. Firstly, there is no

103 Steve Hess, Richard Aidoo, *Charting the Roots of Anti-Chinese Populism in Africa* (Springer 2015) 3.

See also: Ulf Laessing, Sui-Lee Wee, 'Kidnapped Chinese Workers Freed in Sudan Oil State' Reuters (Khartoum/Beijing, 7 February 2012) <<http://www.reuters.com/article/us-china-sudan-workers-idUSTRE8160UU20120207>> accessed 15 February 2018; Barney Jopson, 'Chinese Oil Workers Kidnapped in Sudan' (Khartoum, 19 October 2008) <<https://www.ft.com/content/d92e9a62-9dfb-11dd-bdde-000077b07658>> accessed 20 February 2018; Sui-Lee Wee, 'Chinese Factory Workers Kidnapped in Egypt Freed' (Beijing, 2 January 2012) <http://www.huffingtonpost.com/2012/02/01/chinese-factory-workers-kidnapped-egypt-freed_n_1246063.html> accessed 19 February 2018; Andrew Jacobs, Jeffrey Gettleman, 'Kidnappings of Workers Put Pressure on China' (Beijing, 31 January 2012) <<http://www.nytimes.com/2012/02/01/world/africa/china-says-29-workers-still-missing-in-sudan.html>> accessed 23 February 2018.

104 Titi (n 21) 100.

105 Kidane, Zhu (n 84) 1039.

106 Titi (n 21) 72; Mouyal (n 21) 113.

107 Mouyal (n 21) 113-114; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017) 267.

108 Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 322.

109 Andreas Kulick, *Global Public Interest in International Investment Law* (CUP 2012) 169-170; Sornarajah (n 108) 322.

110 Mouyal (n 21) 8.

111 China-Tanzania BIT (n 81) art 10(1).

direct reference to the link between investment, socio-economic development or even human rights. As a result, the provision does not specifically use the language of rights; it merely refers to human health, safety and the environment, which limits the coverage of the article.¹¹² In that regard, the focus of this provision is on labour and the environment, rather than the full spectrum of human rights and sustainable development. This is problematic because the construction of this provision means that it only reflects a narrow conception of the public interest. Scholars have rightly argued that the public interest must be framed so that it incorporates sustainable development, as well as, wider social and human rights issues.¹¹³ Otherwise the public interest discourse will fail to account for wider socio-economic rights.¹¹⁴ After all, the public interest is concerned with all matters that relate to the society and ensuring public welfare, which if adopting a wide interpretation of the concept, includes an adequate standard of living.¹¹⁵ Accordingly, an expansive understanding of the public interest needs to be incorporated expressly in IIAs. This will act as a reminder to States (both home State and host State alike) of their wider obligations to society, which includes sustainable development, in addition to their binding legal obligations in relation to international human rights law. By doing so, this gives greater flexibility to ensure regulatory autonomy to host States to regulate in a wider range of matters that are incorporated under the public interest.¹¹⁶

Secondly, the conditional language of Article 10(1) emphasises that it is of persuasive value, rather than a legally binding obligation.¹¹⁷ In other words, the formulation of the provision which uses the word ‘inappropriate’ does not establish a legal duty to abide by the terms.¹¹⁸ Although the author recognises the positive value of including such terms within a given IIA, it must be noted that it does not establish a binding duty on parties. However, the inclusion of the provision is a step in the right direction, since it reflects the wider public interest. To that end, the host State (Tanzania) will simply be unable to invoke Article 10(1) to derogate from its duties under the BIT, even in the public interest.¹¹⁹ Thus, the provision, albeit an admirable development, lacks the legal substance to be of real benefit to the host State. It highlights that, as an emerging player, China is using many of the existing rules, but is also attempting to carve out an interesting normative niche, which is not always considered by the current literature. Ultimately, IIL rules need to evolve but China is incrementally adapting these rules in a positive manner.¹²⁰

In that regard, there needs to be a concentrated effort, not only within Sino-African IIAs but also IIAs in a wider context. Standards beyond orthodox investment-related matters need to be incorporated within IIAs, which arguably need to be legally binding rather than of a persuasive value.¹²¹ As previously discussed, IIL is a site of law, which increasingly encroaches on, and impedes, the ability of host states to regulate in the public interest. By

112 Kidane (n 8) 167.

113 Titi (n 21) 100; Howard Mann, ‘The New Frontier: Economic Rights of Foreign Investors Versus Government Policy Space for Economic Development’ in Chin Leng Lim (ed), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (CUP 2016) 290, 292.

114 Philip Alston, Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 HRQ 157,198.

115 Alston, Quinn (n) 198.

116 Titi (n 21) 298.

117 Kidane (n 8) 167.

118 Kidane (n 8) 167.

119 Kidane (n 8) 167.

120 Kidane, Zhu (n 84) 1040.

121 Sornarajah (n 108) 322.

integrating standards as in the China-Tanzania BIT, China has taken a positive step in the right direction. However, emerging actors within IIL (including China) need to take a more proactive role in tailoring IIAs if the overall system is to be reformatted in a more credible manner that initiates real change.¹²²

This change will also need to be adopted by the classical actors in IIL, if the overall framework is to be reformed. IIAs need to be reconfigured in order to balance investment protection measures vis-à-vis the public interest.¹²³ One method would be to construct preambles to not only expressly recognise sustainable development but also wider international human rights obligations.¹²⁴ These provisions must establish legal obligations, so as to set a mandatory minimum standard.¹²⁵ Only then will it be possible to make headway to ensure the IIL framework meets sustainable development.¹²⁶ With that in mind, emerging actors cannot leave the developing discourse of sustainable development and the public interest within the IIL framework in the hands of the dominant classical actors. Emerging actors must actively participate in constructing the discourse, so that they not only lead the way but also ensure that they truly benefit from FDI.

7. CONCLUSION

A recurring theme within the discourse of IIL is that FDI has a positive influence over development. As a result, developing States have signed IIAs in order to benefit from the capital inflows which are much needed for their economies. However, by consenting to IIAs, host States also inadvertently limit their ability to regulate in the public interest. This also renders them vulnerable to claims by foreign investors, which will take their toll on the struggling economies of developing host States. The emergence of new players - in this case, China - does not substantially change the game; in the past, they have participated using the existing rules. More recently, China has begun changing the existing rules to reflect the wider public interest. Indeed, China is increasingly incorporating references to sustainable development within its IIAs. This is most notable in the China-Tanzania BIT. The China-Tanzania BIT demonstrates that parties *can* and *should* amend IIAs to reflect their wider socio-economic interests – incorporating sustainable development is one such method. While this is a welcome indication of positive change, there is still room for improvement particularly in relation to binding substantive provisions on sustainable development, human rights and the environment.

122 Braithwaite, Drahos (n 48) 36.

123 Sornarajah (n 107) 262.

124 Cosby, Mann, Peterson, von Moltke (n 32) 34.

125 Cosby, Mann, Peterson, von Moltke (n 32) 34.

126 Mann (n 113) 292.