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The Protection of Chinese's Investments in Africa: a Brief Overview of Investor-State Dispute Settlement Mechanisms

*Fatsah Ouguerouz**

According to some sources, the Peoples' Republic of China (hereinafter "China") is set to become one of the world's biggest overseas investor by the end of 2020.¹ In 2016, China held the fourth largest foreign direct investments (hereinafter "FDI") stock in Africa (40 billions US\$), after the United States of America (57 billions US\$), the United Kingdom (55 billions US\$) and France (49 billions US\$), but was actually the largest investor in the continent with its 39% share in global investment inflows. Further, in the recent years, China's investments in Africa have grown dramatically in comparison to other investor countries.² Yet, these rather late developments need to be assessed in the light of African States' historical positive political stance on the relevance of investment for their development.

At the very first Conference of Independent States held in Accra (Ghana) from 15 to 22 April 1958, to which China was invited as an international observer, the eight then independent African States (Egypt, Ethiopia, Ghana, Guinea, Liberia, Libya, Morocco and Tunisia) adopted a final declaration in which they declared themselves "*mindful of the urgent need to raise the living standards of [their] peoples by developing to the fullest possible advantage the great and varied resources of [their] land*", and pledged *inter alia* to "*encourage the investment of foreign capital and skills provided they do not compromise the independence, sovereignty and territorial integrity of [their] States*".³

* This note is based on a presentation made by the author at the First Annual Forum on China-Africa Law organized in Beijing (China) on 30–31 July 2019 by the African Institute of International Law (Arusha, Tanzania) and the School of Law of Beijing Foreign Studies University.

- 1 Jamil Anderlini, "China to become one of the world's biggest overseas investors by 2020", *Financial Times*, 26 June 2016, at <https://www.ft.com/content/5136953a-1b3d-11e5-8201-cbdb03d71480>.
- 2 "Does China dominate global investment ?" at <https://chinapower.csis.org/china-foreign-direct-investment/>. See also, *World Investment Report 2018 – Investment and New Industrial Policies*, UNCTAD; United Nations, New York and Geneva, 2018, pp. 38 and 42.
- 3 Text of the Resolution in Colin Legum, *Pan-Africanism, A Short Political Guide*, 1962, Annex 4, p. 139.

Sixty years later, on 3–4 September 2018 in Beijing, at the 7th Summit of the Forum on China-Africa Cooperation, organized on the theme “*China and Africa: Toward an Even Stronger Community with a Shared Future through Win-Win Cooperation*”, China and 53 African States found a renewed opportunity to describe their vision of their cooperative partnership to the benefit of the Chinese and African peoples.

At the close of the Summit, the 54 participating countries adopted a Declaration (hereinafter the “Beijing Declaration”),⁴ in which, believing “*that economic and trade cooperation remains the anchor and the propeller for China-Africa relations*” (para. 11), they notably called “*on the international community to join efforts in promoting trade and investment for development and making economic globalization more open, inclusive, balanced and beneficial to all*” (para. 12). China in particular pledged to “*strengthen cooperation with Africa in trade and investment facilitation*” (para. 13 (2)).

The concept of “*win-win cooperation*” being mentioned five times in the Beijing Declaration, its translation in the field of bilateral investment treaties (hereinafter “BITS”) concluded between China and African States, and in particular in their provisions relating to Investor-State Dispute Settlement (hereinafter “ISDS”), is worth the examination as a means, on the one hand, to assess the validity, if not to actually demystify the current “*Chinese economic invasion of Africa*”⁵ trope and, on the other hand, to take stocks of the alternative ways for Africa’s future development, outside of the historical and often problematic North-South relationships.

The purpose of the present brief overview is to examine how China,⁶ “*the world’s largest developing country*”, and Africa,⁷ “*the continent with the largest*

4 The text of the Declaration entitled “*Towards an Even Stronger China-Africa Community with a Shared Future*” is available at: <https://www.tralac.org/documents/resources/external-relations/china-africa/2148-focac-declaration-of-the-beijing-summit-4-september-2018/file.html>. For the French text of the Declaration, see <https://www.fmprc.gov.cn/fra/wjdt/gb/t1593692.shtml>.

5 See for example, Pádraig Carmody, *The New Scramble for Africa*, Cambridge: Polity Press, Second Edition, 2016, pp. §§. Xian Rice, “Chinese economic invasion of Africa”, *The Guardian*, 6 February 2011, <https://www.theguardian.com/world/2011/feb/06/chinas-economic-invasion-of-africa>., “China in Africa: win-win development, or a new colonialism?”, *The Guardian*, 31 July 2018, <https://www.theguardian.com/cities/2018/jul/31/china-in-africa-win-win-development-or-a-new-colonialism>.

6 According to the World Bank, China has a population of 1,397,715.00 inhabitants (as of 2019) for a surface of 9,562,910 km² (as of 2018). See <https://data.worldbank.org/>.

7 The African continent has an area of 30,365,000 square km² (see <https://www.britannica.com/place/Africa>), *i.e.* more than three times the size of China; it has an estimated population of 1 308 064 inhabitants (as of mid-2019; see United Nations World Population Prospects 2019: Data Booklet, p. 13).

number of developing countries”, as described by Chinese President Xi Jinping in his speech at the opening ceremony of the abovementioned 7th Summit,⁸ have devised their legal relationships in the field of FDI; or, in other words, to see to what extent the ISDS system provided by BITs concluded between China and African countries differs from the one provided by BITs concluded between the latter countries and developed countries.⁹

As at 31 December 2019, China has concluded 145 bilateral investment treaties,¹⁰ 35 of which with African States. China has signed its first BIT with Sweden on 29 March 1982.¹¹ While this agreement provides for the settlement of disputes between the two Contracting States concerning the interpretation or application of the agreement (Article 6), it does not provide for a dispute settlement mechanism between investors and the host-State. In a letter to the Chinese Vice-Minister for Economic Affairs and Trade, attached to the agreement, the Ambassador of Sweden explained that since China was not a party to the Washington Convention on the Settlement of Disputes between States and Nationals of Other States, of 18 March 1965, the two parties found it impossible to include in the agreement any provision covering the settlement of disputes between a Contracting State and an investor from the other Contracting State. The understanding was seemingly that in the event that China should in the future accede to the ICSID Convention, the agreement will be completed with a supplementary agreement providing for a binding system for the settlement of dispute under the ICSID framework. China became party to the ICSID Convention on 6 February 1993; yet, to this day, it seems that such a supplementary agreement remains to be concluded between the two countries.¹²

Incidentally, it should be recalled that, until the late 1980s, China was by and large only a recipient of FDI, and therefore historically suspicious regarding international investment law and arbitration. The first BIT signed by China with an African country, namely the Republic of Ghana, on 12 October 1989,¹³ illustrates its great reluctance to the ISDS. Article 10 of this agreement indeed

8 The full text of Chinese President Xi Jinping's speech is available at: <http://www.china-daily.com.cn/a/201809/04/WS5b8d5c25a310add14f389592.html>.

9 On these BITs, see Arnaud de Nanteuil, “*La protection de la liberté normative de l'État dans les traités africains récents relatifs à l'investissement : quelques réflexions*”, in this volume, pp. 14–35.

10 See <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china>.

11 Agreement on the Mutual protection of investment, signed on 29 March 1982 and entered into force on the same day, see <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/782/download>.

12 See for example: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/202/sweden>.

provides that only the amount of the compensation for expropriation may be submitted to arbitration by an investor.¹⁴

China has since then concluded thirty-four (34) more BITs with other African countries¹⁵ but most, if not all, of the twenty (20) agreements which have entered into force as at 31 December 2019 contain rather weak ISDS provisions.¹⁶ Indeed, only two (2) of these BITs provide for an ISDS system for any investment matters covered by the agreement.

Article 9 (2) of the 2004 China-Tunisia BIT thus provides that:

If the dispute cannot be settled amicably through negotiations within six months from the date it has been raised by either party to the dispute, it shall be submitted:

- to the competent court of the Contracting Party that is party to the dispute; or
- to the International Center for settlement of Investment Disputes (the Center) under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965.¹⁷

As to Article 9 (3) of the 2001 China-Nigeria BIT, it provides that

If a dispute 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.¹⁸

13 *Agreement Between the Government of the People's Republic of China and The Government of the Republic of Ghana Concerning The Encouragement and Reciprocal Protection of Investments*, of 12 October 1989 (entered into force on 22 November 1990), see <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/737/download>.

14 Article 10 "Settlement of Disputes on Quantum of Compensation": "(1) Any dispute between either Contracting State and the investor of the other Contracting State concerning the amount of compensation for expropriation may be submitted to an arbitral tribunal. [...]"

15 China signed two BITs with the Democratic Republic of Congo on 18 December 1997 and 11 August 2011, respectively, the latter one replacing the former one; neither of them is in force; China also signed two BITs with Nigeria, see footnote 18.

16 For a survey of the evolution of BITs concluded between African States and China, see Won Kidane, "China's Bilateral Investment Treaties with African States in Comparative Perspectives", *Cornell International Law Journal*, Volume 49, 2016, pp. 144–153; see also, Uche Ewelukwa Ofodile, "Africa-China Bilateral Investment Treaties: A Critique", *Michigan Journal of International Law*, Volume 35, Issue 1, 2013, pp. 131–211 (available at: <https://repository.law.umich.edu/mjil/vol35/iss1/5>).

17 See Article 9 of the *Agreement Between the People's Republic of China and the Republic of Tunisia Concerning the Reciprocal Encouragement and Protection of Investments*, of 21 June 2004 (entered into force on 1st July 2006).

18 See Article 9 of the *Agreement Between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and*

Seven other BITs include provisions for ISDS with regard to any investment matters covered by the BIT but with prior submission of the dispute to a national review procedure. For example, Article 9 of the 1997 China-South Africa BIT provides that:

1. Any dispute between an investor of the other Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
2. If the dispute cannot be settled through negotiations within six months, the either Party to the dispute shall be entitled to submit the dispute to an international arbitral tribunal *provided that the Contracting Party involved in the dispute may require the investor to initiate administrative review procedures in accordance with its laws and regulations*, and provided that the investor has not submitted the dispute to a domestic court of that Contracting Party.
[...]. (emphasis added)¹⁹

Protection of Investments, of 17 August 2001 (entered into force on 18 February 2010); this agreement replaced the China-Nigeria BIT which was signed on 12 May 1997 and terminated on 18 February 2010.

- 19 *Agreement Between the Government of the People's Republic of China and the Government of the Republic of South Africa Concerning the Reciprocal Promotion and Protection of Investments*, of 30 December 1997 (entered into force on 1st April 1998); see also, Article 9 (3) (b) of the *Accord de coopération entre le gouvernement de la République du Congo et le gouvernement de la République populaire de Chine sur la promotion et la protection des investissements*, of 20 March 2000 (entered into force on 1st July 2015); Article 7 (3) (b) of the *Agreement Between the Government of the People's Republic of China and the Government of the Republic of Mozambique on The Promotion and Reciprocal Protection of Investments*, of 10 July 2001 (entered into force on 26 February 2002); Article 9 (2) (b) of the *Agreement Between the Government of the People's Republic of China and the Government of the Republic of Equatorial Guinea on The Mutual Promotion and Protection of Investments*, of 20 October 2005 (entered into force on 15 November 2006); Article 10 (2) of the *Accord sur la promotion et la protection réciproques des investissements entre le gouvernement de la République de Madagascar et le gouvernement de la République populaire de Chine*, of 21 November 2005 (entered into force on 1st July 2007); Article 9 (3) (b) of the *Accord sur la promotion et la protection réciproques des investissements entre le gouvernement de la République du Mali et le gouvernement de la République populaire de Chine*, of 12 February 2009 (entered into force on 16 July 2009); and Article 13 (2) (d) of the *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*, 24 March 2013 (entered into force on 17 April 2014).

The last eleven BITS, including the very first BIT between China and Ghana,²⁰ provide for an ISDS only for disputes over the amount of the compensation in case of expropriation. Article 9 (“Settlement of Investment Disputes”) of the 1994 China-Egypt BIT thus provides what follows:

1. 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.
2. If the dispute cannot be settled through negotiations 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.
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.* The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article.
[...]. (emphasis added)²¹

²⁰ See above, footnote 13.

²¹ *Agreement Between the Government of the Arab Republic of Egypt and The Government of The People's Republic of China Concerning The Encouragement and Reciprocal Protection of Investments*, of 21 April 1994 (entered into force on 1st April 1996); see also Article 10 (2) (b) of the *Accord entre le gouvernement du royaume du Maroc et le gouvernement de la République populaire de Chine, concernant l'encouragement et la protection réciproques des investissements*, of 27 March 1995 (entered into force on 27 November 1999); Article 13 (3) of the *Agreement Between the Government of the Republic of Mauritius and the Government of the People's Republic of China for the Reciprocal Promotion and Protection of Investments*, of 4 May 1996 (entered into force on 8 June 1997); Article 9 of the *Agreement Between the Government of the People's Republic of China and the Government of the Republic of Zimbabwe on the Encouragement and Reciprocal Protection of Investments*, of 21 May 1996 (entered into force on 1st March 1998); Article 9 (3) de l'*Accord entre le Gouvernement de la République algérienne démocratique et populaire et le Gouvernement de la République populaire de Chine relatif à l'encouragement et à la protection réciproques des investissements*, of 17 October 1996 (entered into force on 28 January 2003); Article 10 (2) (b) de l'*Accord entre le gouvernement de la République populaire de Chine et le gouvernement de la République gabonaise sur la promotion et la protection réciproque des investissements*, of 9 May 1997 (entered into force on 16 February 2009); Article 9 (2) (b) of the *Accord entre le gouvernement de la République du Cameroun et le gouvernement de la République de Chine*

The ISDS provisions of all the abovementioned BITs signed by China and African countries are therefore far from being homogeneous and should not be compared with those inserted in BITs concluded between African States (Benin,²² Burkina-Faso,²³ Cameroon,²⁴ Côte d'Ivoire,²⁵ Egypt,²⁶ Guinea,²⁷

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- pour la promotion et la protection réciproques des investissements*, of 10 May 1997 (entered into force on 24 July 2014); Article 9 (3) of the *Agreement Between the Government of the Republic of Sudan and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments*, of 30 May 1997 (entered into force on 1st July 1998); Article 9 (3) of the *Agreement Between the Government of the People's Republic of China and the Government of the Republic of Cape Verde Concerning The Encouragement and Reciprocal Protection of Investments*, of 21 April 1998 (entered into force on 1st January 2001); Article 9 (3) of the *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*, of 11 May 1998 (entered into force on 1st May 2000).
- 22 *Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments*, of 9 January 2013 (entered into force on 12 May 2014); its Chapter III is devoted to "Settlement of disputes between an investor and the Host Party" (18 provisions) and its Chapter IV to "Settlement of disputes between Contracting States" (7 provisions); see https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/benin/fipa-apie/index.aspx?lang=eng&_ga=2.183237542.1075102983.1563452266-672032597.1563452266.
- 23 Articles 20–38 of the *Agreement Between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments*, of 20 April 2015 (entered into force on 11 October 2017), see https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/burkina_faso/fipa-apie/index.aspx?lang=eng&_ga=2.235912321.1075102983.1563452266-672032597.1563452266.
- 24 Articles 19–36 of the *Agreement Between Canada and the Republic of Cameroon for the Promotion and Protection of Investments*, of 3 March 2014 (entered into force on 16 December 2016), see https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cameroon-cameroun/fipa-apie/index.aspx?lang=eng&_ga=2.136376496.1075102983.1563452266-672032597.1563452266.
- 25 Articles 19–36 of the *Agreement Between the Government of Canada and the Government of the Republic of Côte d'Ivoire for the Promotion and Protection of Investments*, of 30 November 2014 (entered into force on 14 December 2015), see https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ivory_coast-cote_ivoire/fipa-apie/index.aspx?lang=eng&_ga=2.203030289.1075102983.1563452266-672032597.1563452266.
- 26 Article XI(1) of the *Agreement Between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments*, of 13 November 1996 (entered into force on 3 November 1997); see https://treaty-accord.gc.ca/text-texte.aspx?id=101524&lang=eng&_ga=2.237567744.1075102983.1563452266-672032597.1563452266.
- 27 *Agreement for the Promotion and reciprocal Protection of Investments Between Canada and the Republic of Guinea*, of 27 May 2015 (entered into force on 27 March 2017), see <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/>

Mali,²⁸ Senegal,²⁹ Tanzania³⁰) and Western industrialized countries such as Canada for example, or between African States and other developing countries,³¹ or else between African States themselves.³² All these BITs indeed provide for a rather robust ISDS system.

Signed in the mid-nineties, the Canada-Egypt BIT, for instance, does not provide for any condition to be fulfilled by the investor before submission of a claim to arbitration other than attempting at reaching an amicable settlement within a period of six months; indeed, its article XIII provides *inter alia* that:

1. Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in

agr-acc/guinea-guinee/fipa-apie/index.aspx?lang=eng&_ga=2.240390147.1075102983.1563452266-672032597.1563452266#art29.

- 28 Articles 19–36 of the *Agreement Between Canada and Mali for the Promotion and Protection of Investments*, of 28 November 2014 (entered into force on 8 June 2016), see https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/mali/fipa-apie/index.aspx?lang=eng&_ga=2.15250358.1075102983.1563452266-672032597.1563452266.
- 29 Articles 20–37 of the *Agreement Between the Government of Canada and the Government of the Federal Republic of Senegal for the Promotion and Protection of Investments*, of 27 November 2014 (entered into force on 5 August 2016), see https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/senegal/fipa-apie/index.aspx?lang=eng&_ga=2.182507558.1075102983.1563452266-672032597.1563452266.
- 30 Articles 19–35 of the *Agreement Between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments*, of 17 May 2013 (entered into force on 9 December 2013), see https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tanzania-tanzanie/fipa-apie/index.aspx?lang=eng&_ga=2.9510837.1075102983.1563452266-672032597.1563452266.
- 31 Articles 13 and 14 of the *Agreement between the Republic of Rwanda and the United Arab Emirates on the promotion and reciprocal protection of investments*, of 1st November 2017 (not yet in force), see <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5722/download>. Article 13 of the *Investment Promotion and Protection Agreement between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore*, of 4 November 2016 (not yet in force), see <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5410/download>.
- 32 Article 9 of the *Accord entre le Gouvernement du Royaume du Maroc et le Gouvernement de la République du Congo sur la promotion et la protection réciproques des investissements*, of 30 April 2018 (not yet in force), see <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5809/download>. See also Article 8 of the *Agreement between the Government of the Republic of Mauritius and the Government of the Republic of Kenya for the Reciprocal Promotion and Protection of Investments*, of 7 May 2012 (not yet in force), see <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5541/download>.

breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.

2. *If a dispute has not been settled amicably through consultations within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). For the purposes of this paragraph, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach. (emphasis added)*

Concluded some ten years later, the 2015 Canada-Burkina Faso BIT is just as liberal as the 1996 Canada-Egypt BIT, although it excludes some issues from arbitration (such as national treatment, transparency, health, safety and environmental measures). As to the 2018 Morocco-Congo BIT (Article 9) authorises the investor to resort to arbitration on the only condition that it has attempted to reach an amicable settlement and after the expiry of a period of six months.³³

The contrast is therefore striking with the BITs concluded by China with African States. Chinese FDI flows to Africa have particularly increased in recent years due to the China's *Going Global Strategy* and are expected to grow even more with its *Belt and Road Initiative*.³⁴ The growing trend in Chinese outward FDI in Africa is thus barely reflected in the ISDS provisions of the BITs

33 2. Si à l'expiration d'un délai de six (6) mois à compter de la date de la demande de règlement aucune solution n'a été trouvée, le différend est soumis, au choix de l'investisseur,

- (a) soit au tribunal compétent de la Partie Contractante sur le territoire de laquelle l'investissement a été effectué;
- (b) soit à l'arbitrage international, dans les conditions décrites au paragraphe (3) ci-dessous.

3. En cas de recours à l'arbitrage international, le différend peut être porté devant l'un des organes d'arbitrage désignés ci-après, au choix de l'investisseur:

- (a) au Centre International pour le Règlement des Différends relatifs aux Investissements (C.I.R.D.I.), créé par la "Convention pour le règlement des différends relatifs aux investissements entre États et ressortissants d'autres États", ouverte à la signature à Washington, le 18 Mars 1965 ; ou
- (b) à un tribunal d'arbitrage ad hoc établi selon les règles d'arbitrage de la Commission des Nations Unies pour le Droit Commercial International (C.N.U.D.C.I.).

34 On ISDS and the Belt and Road Initiative, see Ke Li, "A Chinese-African Cross Cultural Perspective on Dispute Settlement and the Belt and Road Initiative: Challenges and Risks Facing Chinese Investors", in Jean A. Berlie (Ed.), *China's Globalization and the Belt and Road Initiative*, Palgrave MacMillan, 2020, pp. 179–205.

concluded with African States, in particular in terms of effective protection of Chinese investors.

The three most recent BITs concluded by China are with Turkey (29 July 2015),³⁵ Tanzania (24 March 2013)³⁶ and Canada (9 September 2012).³⁷ As mentioned above, the China-Tanzania BIT, like six other BITs between China and African States,³⁸ requires the investor to exhaust the domestic administrative review procedures specified by the laws and regulations of the concerned contracting party before submitting its claim to international arbitration (Article 13 (2) *in fine*).³⁹ For its part, the China-Canada BIT provides for a more solid ISDS,⁴⁰ but with some limitations⁴¹ which cannot be found in the BITs concluded by Canada with African States.

As a country from the Global South traditionally opposed to any rigid ISDS system, but moving from recipient to sender of FDI, China will gradually be compelled to change its stance. This change will ensure better protection of its investors established in the African developing countries with which China has long maintained relations characterized more by solidarity than by immediate profits.

35 The author has not been able to access the text of this BIT.

36 *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*, 24 March 2013 (entered into force on 17 April 2014), see <https://investment-policy.unctad.org/international-investment-agreements/treaty-files/5488/download>.

37 *Agreement Between the Government of Canada and the Government of the Peoples' Republic of China for the Promotion and Reciprocal Protection of Investments*, of 9 September 2012 (entered into force on 1st October 2014), see <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3476/download>.

38 See above footnote 19.

39 "The other Contracting Party has the right to require the investor concerned to exhaust the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before submitting to international arbitration".

40 Articles 19–32.

41 Article 20 "Claim by an Investor of a Contracting Party": "2. (a) Where an investor submits a claim to arbitration under this Article, and the disputing Contracting Party invokes Article 33(3), the investor-State tribunal established pursuant to this Part may not decide whether and to what extent Article 33(3) is a valid defence to the claim of the investor. It shall seek a report in writing from the Contracting Parties on this issue. The investor-State tribunal may not proceed pending receipt of such a report or of a decision of a State-State arbitral tribunal, should such a State-State arbitral tribunal be established".

Article 33 "General Exceptions": "3. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining reasonable measures for prudential reasons, such as: (a) the protection of depositors, financial market participants and investors, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution; (b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and (c) ensuring the integrity and stability of a Contracting Party's financial system".

On the other hand, concerned by the dramatic rise in arbitration proceedings against them under investment protection agreements,⁴² African States are increasingly cautious about the content of these agreements. They have become aware that most BITs and investment contracts that they have concluded so far do not sufficiently take into account their own concerns and interests. For a long time confined to a passive attitude consisting in accepting the rules laid down by the countries of origin of investments, African States have gradually become aware of the need to draw up rules reflecting a balance between, on the one hand, the protection of foreign investments and, on the other, the protection of their fundamental interests in terms of economic development, respect for the environment, protection of human rights, the fight against corruption and the settlement of disputes, for example.

One of the most notable manifestations of this process of appropriation or “*Africanization*” of foreign investment law can be found in the adoption in 2016 of the *Pan-African Investment Code*⁴³. Although not legally binding, the *Pan-African Investment Code* reflects the particular concerns of African States with regard to the regulation of foreign investments and hence the trends emerging on the African continent in the field of international investment law, both in terms of its substantive content (rights and obligations of the parties) and its institutional content (dispute settlement mechanisms).

The difficult challenge currently facing China and African States is therefore to devise BITs and ISDS mechanisms that meet their respective concerns and interests. This can for example be done by building on each other’s experiences. The African regional and continental initiatives,⁴⁴ together with the ongoing discussions within UNCITRAL,⁴⁵ could thus help shape new models of ISDS;⁴⁶

42 As of 31 December 2019, 121 cases, that is more than 10% of the 1023 known treaty-based ISDS cases, were filed against African States; whereas China is respondent in only 3 cases, see <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/42/china>.

43 See https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf. On this instrument, see Makane M. Mbengue & Stephanie Schacherer, “Africa as an Investment Rules Maker: Decrypting the Pan-African Investment Code”, in this volume, pp. 81–121.

44 On these regional and continental initiatives, see my introduction to the Special Theme, in this volume, pp. 3–13.

45 See https://uncitral.un.org/en/working_groups/3/investor-state.

46 One may also draw inspiration from some existing BITs for devising an ISDS more adapted to the respective needs of China and the African States, such as the Mauritius-Egypt BIT, adopted on 25 June 2014 and entered into force on 17 October 2014; its Article 10 indeed provides for an incremental approach to the settlement of disputes between an investor and a State, and requires the consent of the parties for arbitration by specific arbitral institutions; see <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3285/download>.

one could also explore the potential that the three following recent initiatives could offer in this domain.⁴⁷

At the Johannesburg Summit and 6th Ministerial Conference of the Forum on China-Africa Cooperation (FOCAC), held in Johannesburg (South Africa) from 3 to 5 December 2015, China and fifty African States adopted the *Forum on China-Africa Cooperation Johannesburg Action Plan (2016–2018)* which, at its article 6.2.6, provides for the establishment of a China-Africa Joint Arbitration Centre (CAJAC).⁴⁸ The CAJAC⁴⁹ has already set up five regional centres: two in Africa (Nairobi, Johannesburg) and three in China (Shanghai, Shenzhen, Beijing).⁵⁰

In 2016, the Shenzhen Court of International Arbitration (SCIA) updated its arbitration rules to handle foreign investment disputes and take on investor-State claims. Article 2 of the 2016 SCIA Arbitration Rules as revised and as effective as from 21 February 2019 indeed provides that the “SCIA accepts arbitration cases related to investment disputes between states and nationals of other states”.⁵¹

On 12 September 2017, the CIETAC (China International Economic and Trade Arbitration Commission) adopted its International Investment Arbitration Rules,⁵² which are applicable to “cases involving international investment disputes arising out of contracts, treaties, laws and regulations, or other instruments between an investor and a State, an intergovernmental organization, any other organ, agency or entity authorized by the government or any other organ, agency or entity of which the conducts are attributable to a State”.⁵³

All the above developments, taken individually or in combination, can contribute to shaping a new approach to ISDS in the context of China's relations

47 On some of these initiatives, see Huiping Chen, “China's Innovative ISDS Mechanisms and their Implications”, *American Journal of International Law*, 2018, Volume 12, pp. 207–211.

48 Text of the Action Plan available at: https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1323159.shtml.

49 See http://www.shiac.org/CAJAC/index_E.aspx.

50 See <http://arbitrationblog.kluwerarbitration.com/2018/11/26/interviews-with-our-editors-interview-with-deline-beukes-ceo-of-the-china-africa-joint-arbitration-centre-johannesburg/>. See also <https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africanewsletter-january-edition/the-china-africa-joint-arbitration-centre>.

51 Text of the SCIA 2019 Arbitration Rules is available at http://www.sciat.org/web/doc/view_rules/914.html.

52 See <https://www.iisd.org/blog/china-s-largest-arbitration-institution-adopts-its-first-investment-arbitration-rules>.

53 Article 2; text of the Rules available at: <http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en>.

with African States, particularly in terms of legitimacy, transparency, efficiency and costs.⁵⁴ It should however be borne in mind that the search for the most adequate dispute settlement mechanism should go hand in hand with a greater consideration in the BITs for fundamental issues such as environmental protection, human rights and labour standards, corporate social responsibility and fight against corruption.⁵⁵ In this connection, the system which currently allows arbitration proceedings to be initiated by investors alone, must be revisited to allow Host States to lodge claims against investors for breaches of their own obligations under the BITs. This would bolster the Host States' confidence in the system of investment arbitration, which in turn would contribute to strengthening the system as a whole.⁵⁶

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- 54 On this matter, see Aïssatou Diop & Paul-Jean Le Cannu, "The Modernization of Rules for the Resolution of Investment Disputes: the First Proposals for Amendments of the ICSID Rules and their Relevance to the African States", in this volume, pp. 36–80.
- 55 See for example the rather detailed and comprehensive provisions of the *Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria*, of 3 December 2016 (not yet in force): Article 13: "Investment and environment", Article 14: "Impact Assessment" ("2) Investors or the investment shall conduct a social impact assessment of the potential investment"); Article 15: "Investment, Labour and Human Rights Protection"; Article 17: "Anti-corruption", Article 18: "Post Establishment Obligations"; Article 19 "Corporate Governance and Practices"; Article 20: "Investor Liability", Article 24: "Corporate Social Responsibility", see <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download>.
- 56 On this matter, see for example Gustavo Laborde, "The Case for Host States Claims in Investment Arbitration", *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), pp. 97–122.