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Erika George & Elizabeth Thomas, Bringing Human Rights into Bilateral Investment Treaties: South Africa and a Different Approach to International Investment Disputes, 27 TRANSNAT'L L. & CONTEMP. PROBS. 403 (2018).

ALWD 7th ed.

Erika George & Elizabeth Thomas, Bringing Human Rights into Bilateral Investment Treaties: South Africa and a Different Approach to International Investment Disputes, 27 Transnat'l L. & Contemp. Probs. 403 (2018).

APA 7th ed.

George, Erika, & Thomas, Elizabeth. (2018). Bringing human rights into bilateral investment treaties: south africa and different approach to international investment disputes. Transnational Law and Contemporary Problems, 27(2), 403-450.

Chicago 17th ed.

Erika George; Elizabeth Thomas, "Bringing Human Rights into Bilateral Investment Treaties: South Africa and a Different Approach to International Investment Disputes," Transnational Law and Contemporary Problems 27, no. 2 (Winter 2018): 403-450

McGill Guide 9th ed.

Erika George & Elizabeth Thomas, "Bringing Human Rights into Bilateral Investment Treaties: South Africa and a Different Approach to International Investment Disputes" (2018) 27:2 Transnat'l L & Contemp Probs 403.

AGLC 4th ed.

Erika George and Elizabeth Thomas, 'Bringing Human Rights into Bilateral Investment Treaties: South Africa and a Different Approach to International Investment Disputes' (2018) 27(2) Transnational Law and Contemporary Problems 403

MLA 9th ed.

George, Erika, and Elizabeth Thomas. "Bringing Human Rights into Bilateral Investment Treaties: South Africa and a Different Approach to International Investment Disputes." Transnational Law and Contemporary Problems, vol. 27, no. 2, Winter 2018, pp. 403-450. HeinOnline.

OSCOLA 4th ed.

Erika George & Elizabeth Thomas, 'Bringing Human Rights into Bilateral Investment Treaties: South Africa and a Different Approach to International Investment Disputes' (2018) 27 Transnat'l L & Contemp Probs 403

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Bringing Human Rights into Bilateral Investment Treaties: South Africa and a Different Approach to International Investment Disputes

Erika George & Elizabeth Thomas**

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* © 2017 Erika George B.A., University of Chicago; M.A. University of Chicago; J.D., Harvard Law School is the Samuel D. Thurman Professor of Law at the University of Utah S.J. Quinney College of Law. She extends her appreciation to Victoria Shannon Sahani, Muna Ndulo, and Cathy Hwang for their helpful insights. She thanks Dean Penelope Andrews and participants in the 2016 University of Cape Town Law School's symposium on South African Constitutional Law for their comments on an earlier draft of this article. Kerry Lohmeier, Max Williams, Tyler Hubbard and Megan Crehan provided research assistance. This research was made possible, in part, through generous support from the Albert and Elaine Borchard Fund for Faculty Excellence.

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I. INTRODUCTION

In *Foresti v. Republic of South Africa*, Italian investors challenged South Africa's implementation of national mining legislation such as the Mining Charter, which required that all mining companies be at least twenty-six percent owned by "Historically Disadvantaged South Africans" by the end of 2014.¹ The investors also challenged South Africa's Mineral and Petroleum Resources Development Act ("MPRDA"), introduced to allow South Africa "to fulfil its constitutional role as the 'custodian' of the nation's mineral wealth on behalf of the people of South Africa."² The MPRDA also supported South Africa's Broad-Based Black Economic Empowerment Policy ("BEE Policy").³ This legislation attempted to atone for marginalized South Africans' experiences during the apartheid era, yet investors in the mining sector called the state regulation an expropriation of their mineral holdings in the country.⁴

Soon thereafter, those same investors brought suit against South Africa before a Tribunal at the International Centre for Settlement of Investment Disputes ("ICSID"), as required by the bilateral investment treaty ("BIT") between the investors and the nation of South Africa.⁵ South Africa's Department of Mining and Resources ("DMR") then began negotiating a new agreement regarding the BEE Policy between the operating companies, the investors, and the state which only recently reached a conclusion after a bitter court battle.⁶ Concurrent to those negotiations, a number of human rights non-

¹ See *Foresti v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award, ¶ 56 (Aug. 4, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C90/DC1651_En.pdf.

² *Bilateral Investment Treaties in South Africa*, NORTON ROSE FULBRIGHT (July 2014), <http://www.nortonrosefulbright.com/knowledge/publications/118456/bilateral-investment-treaties-in-south-africa>.

³ *Id.*; see also *South Africa Amends Empowerment Bill to Keep Black Ownership at 26 Percent*, REUTERS (Apr. 15, 2016, 9:57 AM), <https://af.reuters.com/article/southAfricaNews/idAFL5N17I3NA>.

⁴ *Foresti*, ARB(AF)/07/1 ¶¶ 59–66, 69; see also Elizabeth Whitsitt, *An ICSID Tribunal Introduces Innovative Steps Into Non-Disputing Party Procedure*, INV. TREATY NEWS (Oct. 11, 2009), <https://www.iisd.org/itn/2009/10/10/an-icsid-tribunal-introduces-innovative-steps-into-non-disputing-party-procedure/>.

⁵ *Foresti*, ARB(AF)/07/1 ¶ 1.

⁶ See Felix Nijni, *South African Miners Win Court Fight on Black Ownership Rule*, BLOOMBERG (Apr. 4, 2018), <https://www.bloomberg.com/news/articles/2018-04-04/south-africa-court-backs-mining-industry-on-black-ownership-rule>; Neil Hume, *South Africa Miners Call Truce in Battle*

governmental organizations (“NGOs”), including the Centre for Applied Legal Studies (“CALS”), first submitted an amicus curiae brief to the Constitutional Court of South Africa, later submitting that same brief to the ICSID Tribunal to intervene in the case and submit evidence in support of South Africa’s public interest-based legislation.⁷

The Tribunal accepted CALS’ submission alongside that of the International Commission of Jurists, marking the first instance where ICSID accepted any petition from a non-disputing party.⁸ This acceptance led to the creation of novel procedures within ICSID allowing third-party participation in investment disputes.⁹ Although the Tribunal accepted CALS’ submission, ultimately, the Constitutional Court of South Africa dismissed the appeal after issuing a ruling on the merits while ICSID allowed for a discontinuance in its ruling because the claimants asserted they received partial relief due to the “offset agreement” negotiated between the DMR and the investors.¹⁰ Despite South Africa’s argument that their national policy was not an expropriation of the Italian investors’ rights because it was in support of public policy and human rights, the Constitutional Court was unable to make a determination in the matter due to the discontinuance of the case.¹¹ Further, it appears that arbitrators in the ICSID system, while willing to hear human rights claims,

with Government, FIN. TIMES (Feb. 19, 2018), <https://www.ft.com/content/7ec2d55e-155e-11e8-9376-4a6390addb44>.

⁷ See Application for Admission as an Amicus Curiae for Center for Applied Legal Studies ¶ 7, *Agri South Africa v. Minister of Minerals and Energy*, Case Nos. 55896/2007, 10235/2008 (July 1, 2009) [hereinafter CALS Amicus Curiae Submission]. Other non-governmental organizations that submitted briefs included: the Center for International Environmental Law (CIEL), the International Centre for the Legal Protection of Human Rights (INTERIGHTS), the Legal Resources Centre (LRC), and the International Commission of Jurists. Whitsitt, *supra* note 4.

⁸ See Whitsitt, *supra* note 4.

⁹ For further information regarding the process for ICSID and UNCITRAL to accept amici curiae briefs, see Inu Manak, *Public Participation: Amicus Curiae in International Investment Arbitration*, TRADELAB (Mar. 2, 2018), <https://www.tradelab.org/single-post/2018/03/02/Public-Participation-Amicus-Curiae-in-International-Investment-Arbitration>; ICSID first began accepting amicus curiae briefs in 2005, see *ICSID Tribunal Affirms its Power to Admit Amicus Curiae Participation*, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL) (June 1, 2005), <http://www.ciel.org/news/icsid-tribunal-affirms-its-power-to-admit-amicus-curiae-participation/>, ICSID then heard a total of 8 cases with amicus curiae briefs between 2005 and 2012, see Lucas Bastin, *The Amicus Curiae in Investor-State Arbitration*, 1 CAMBRIDGE J. INT’L & COMP. L. 3, 208, 215.

¹⁰ See *Agri South Africa v. Minister of Minerals and Energy* 2013 (4) SA 1 (CC) at 37 ¶ 76 (S. Afr.); see also *Agri South Africa v. Minister for Minerals and Energy* (CCT 51/12) [2013] ZACC 9, POLITY (Apr. 22, 2013), <http://www.polity.org.za/article/agri-south-africa-v-minister-for-minerals-and-energy-cct-5112-2013-zacc-9-2013-04-22>.

¹¹ Foresti, ARB(AF)/07/1 ¶ 80.

have yet to decide a single case for a host state that argues in favor of the host state's right to regulate in the public interest for the purpose of human rights.¹²

In support of the same human rights-based concerns raised in *Foresti*, South Africa began an unprecedented mass termination of long-standing European BITs that were signed during South Africa's pre-Constitutional era beginning in 2010.¹³ The Department of Trade and Industry's review of BIT policies concluded that the public interest, social, and economic priorities were being undermined by BITs, citing the treaties' penchant towards the protection of investors over the protections afforded to individuals under the South African Constitution.¹⁴

The Promotion and Protection of Investment Bill ("the Bill") was approved in November 2015 and gave the South African government the ability to set policies within BITs, thereby placing international investors on the same playing field as domestic ones, as well as allowing dispute resolution to go to arbitration domestically.¹⁵ While foreign investors criticized the Bill and

¹² See A. Saravanan & S.R. Subramanian, *The Participation of Amicus Curiae in Investment Treaty Arbitration*, 5 J. CIV. & LEGAL SCI. 4, 5. (2016) (providing a list of all existing cases with amicus curiae briefs accepted before ICSID, this author notes that none of these listed cases were decided in favor of the host' state's right to regulate for the protection of human rights).

¹³ See *South Africa Bilateral Investment Treaties (BITs)*, U.N. CONF. ON TRADE & DEV., <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195> (last visited Mar. 30, 2018) [hereinafter UNCTAD Investment Hub]; see also Adam Green, *South Africa: BITs in Pieces*, FIN. TIMES (Oct. 19, 2012), <https://www.ft.com/content/b0eec497-5123-3939-92f7-a5fbc73dd33>; Adam Green, *Bilateral Investment Treaties Coming Back to Bite*, THIS IS AFR. (Mar. 5, 2012), <http://www.thisisafricaonline.com/Business/Legal-Bulletin/Bilateral-investment-treaties-coming-back-to-bite?ct=true>; Nicholas Peacock & Hannah Ambrose, *South Africa Terminates Its Bilateral Investment Treaty with Spain: Second BIT Terminated, as Part of South Africa's Planned Review of Its Investment Treaties*, LEXOLOGY (Aug. 21, 2013), <http://www.lexology.com/library/detail.aspx?g=daf93855-71f9-425e-92d3-5368d104f8ff>.

¹⁴ See S. AFR. CONST., 1996; DEP'T OF TRADE & INDUSTRY, *BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW* (2009) at 24, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf> ("A large number of participants concluded that BITs should be reviewed with a view to establishing clearer and more explicit drafting modalities, more balanced rights and obligations between parties and the adherence to standards that would not undermine national development policies."); Damon Vis-Dunbar, *South African Trade Department Critical of Approach Taken to BIT-Making*, INV. TREATY NEWS (July 15, 2009), <https://www.iisd.org/itn/2009/07/15/south-african-trade-department-critical-of-approach-taken-to-bit-making>; see also UNCTAD Investment Hub, *supra* note 13.

¹⁵ Protection of Investment Act 22 of 2015 §4, 13 (S. Afr.) (confirming that investor disputes may be submitted to the South African Courts for resolution by either party under Section 13(4)-(5) of the act):

The purpose of this Act is to—(a) protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors; (b) affirm the Republic's sovereign right to regulate investments in the public interest; and (c) confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.

warned that it would “deter foreign investment” in the country,¹⁶ South Africa’s government remained vigilant, stating that the Bill would be used for “redressing historical, social and economic inequalities and injustices.”¹⁷ Despite the introduction of the Bill, remaining BITs between South Africa and other global South nations, such as China, have somehow skirted this re-negotiation and termination process.

While investors criticized South Africa’s move towards the termination of its BITs with global North nations, neighboring nations followed South Africa’s example. The termination of BITs with powerful countries perceived to exercise influence over other nations has proven appealing to certain Asian nations interested in contesting neo-colonialism.¹⁸ Although termination of a treaty is an extreme policy option, there are other alternatives for addressing investment-based issues. BITs can theoretically be re-negotiated while still in effect, but in practice this rarely happens due to uneven or ever-shifting power dynamics that exist between the state parties within a BIT. States can additionally refuse to renew a BIT after it expires, but this is also rare.¹⁹ If a state refuses to renew the treaty or pulls out of a treaty before expiry, such actions risk potential diplomatic repercussions. However, South Africa decided to take this risk by terminating BITs signed during the Apartheid era to move

See also Paul Vecchiatto, *South African Lawmakers Approve Foreign Investment Bill*, BLOOMBERG (Nov. 17, 2015, 9:33 AM), <http://www.bloomberg.com/news/articles/2015-11-17/south-african-lawmakers-approve-foreign-investment-bill>.

¹⁶ Michael Webb, *New Treatment of Foreign Investors in South Africa*, LEXOLOGY (Mar. 26, 2016), <http://www.lexology.com/library/detail.aspx?g=d4b6fc79-d34a-4581-8e9a-6511bcb3b8ad>; see Niel Joubert, *New Protection of Investment Act – The Implications For Foreign Investors*, CAVEAT LEGAL, <http://www.caveatlegal.com/new-protection-of-investment-act-the-implications-for-foreign-investors/> (last visited July 15, 2018); Jeffrey Kron & Matthew Clark, *South Africa’s Changing Approach to Investment Protection*, NORTON ROSE FULBRIGHT (Apr. 2015), <http://www.nortonrosefulbright.com/knowledge/publications/127737/south-africas-changing-approach-to-investment-protection>.

¹⁷ Protection of Investment Act 22 of 2015, § 12(1)(a) (S. Afr.).

¹⁸ See *After South Africa, Indonesia Takes a Brave Decision to Terminate Its Bilateral Investment Treaty with the Netherlands*, CTR. FOR RES. ON MULTINATIONAL CORP. (SOMO) (Mar. 24, 2014), <https://www.somo.nl/after-south-africa-indonesia-takes-a-brave-decision-to-terminate-its-bilateral-investment-treaty-with-the-netherlands>; Nicholas Peacock & Nihal Joseph, *Mixed Messages to Investors as India Quietly Terminates Bilateral Investment Treaties with 58 Countries*, HERBERT SMITH & FREEHILLS (Mar. 16, 2017, 2:42 PM), <https://hsfnnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries>; Craig Tevendale & Vanessa Naish, *Indonesia Indicates Intention to Terminate All of Its Bilateral Investment Treaties?*, LEXOLOGY (Mar. 20, 2014), <http://www.lexology.com/library/detail.aspx?g=96317cf9-e366-4877-b00c-a997ed3389c5>.

¹⁹ See Hannah Ambrose & Vanessa Naish, *A New Approach to Investment Protection? Recent Developments in Africa*, THOMSON REUTERS: PRAC. L. ARB. BLOG (Nov. 9, 2017), <http://arbitrationblog.practicallaw.com/a-new-approach-to-investment-protection-recent-developments-in-africa> (“South Africa’s view notwithstanding, BITs continue to be entered into across the continent . . . A few of Africa’s recent BITs resemble the old generation treaties.”).

the country towards the greater protection of human rights. By calculating the risks associated with terminating trade agreements, South Africa took a chance that it could better promote national legislation in the public interest and protect human rights throughout the nation.

Despite its actions to promote human rights considerations, South Africa has kept its BITs with China—a country frequently condemned for its poor human rights record.²⁰ As the time for South Africa's re-negotiation with China over its 1997 BIT draws near, this paper will address the possible implications of including the human rights policies laid out by the South African Government within a South African-Chinese BIT.

The vast majority of BITs worldwide, including the Chinese-South African BIT, are generally aimed at investor protection, rather than on investor obligations. This must change. With over 36 BITs between China and African nations, 22 of which are currently in force,²¹ the time is ripe for a change of perspective on what responsible investment in Africa should look like. Now is the time to integrate new standards for responsible investment practices and corporate social responsibility ("CSR") expectations through BITs. As the tides of economic influence and power continue to rise within Africa and China, now is the time to set a precedent for the protection of human rights in all international investment agreements ("IIAs") throughout Africa. Especially as the current China-South Africa BIT reached the point for treaty termination or renegotiation in 2017, South Africa must weigh its commitment to public policy and human rights alongside its desires to continue its existing economic relationship with China. South Africa must determine whether it can adequately legislate its national public policies regarding human rights under its existing BIT with China. We argue that it cannot. If South Africa becomes the leader in the creation of a new generation of BITs, it must ensure that investors meet their obligations to respect human rights under the United Nations Guiding Principles on Business and Human Rights ("UNGPs").

We propose that these new age South African BITs include clauses based on the UNGPs to create grievance mechanisms for victims of human rights abuse related to international investments within the existing international investor state dispute resolution system ("ISDS"). The inclusion of new grievance mechanisms into BITs, especially a counter-claim mechanism option for states, would provide victims of investment related human rights violations the opportunity to seek redress through the existing international investment system. This action will reaffirm the South African government's constitutional position on human rights within all future BITs. South Africa

²⁰ See UNCTAD Investment Hub, *supra* note 13; Morgan Chalfant, *China's Human Rights Violations Grow Increasingly Severe*, WASH. FREE BEACON (Oct. 10, 2016, 5:00 AM), <http://freebeacon.com/national-security/chinas-human-rights-violations-grow-increasingly-severe/>; *China: Events of 2015*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2016/country-chapters/china-and-tibet> (last visited July 15, 2018).

²¹ See UNCTAD Investment Hub, *supra* note 13.

could become a model for other developing African nations to adapt human rights grievance mechanisms for use in the African context to ensure that states can attract investment while minimizing adverse impacts on human rights. In conclusion, this Article will suggest a human rights dispute resolution mechanism under the South African BIT framework to allow victims of investment abuse to access remedies, which could be implemented in all future African BITs and within the greater international investment dispute resolution system generally.

This Article therefore begins with a discussion of the Western imperialist history underlying the pasts of China and Africa, discussing the evolution of a Chinese-African economic alliance. Next, this Article discusses the broader roles of BITs in the ISDS system within the context of Chinese and South Africa BITs. It continues with a discussion on the Southern African Development Community's Model BIT, explaining why this particular model is a step in the right direction towards the protection of human rights in all IIAs. This Article highlights the relationship between international investment law, foreign direct investment ("FDI"), BITs, and human rights, illuminating the positive and negative impacts of investment on human rights in the African continent. This Article advocates the modification of ISDS systems to mediate human rights conflicts because of the consequences of a gap for human rights protection in investment decisions. This Article further advocates amending BITs to include a human rights approach to international investment law, consistent with state obligations put forth in the UNGPs. In conclusion, this Article applies these recommendations to the Chinese-South African context, calling upon the two nations to re-negotiate their BITs in accordance with human rights standards and to support human rights concerns within the ISDS system as a way to further their goals against colonial and imperialist tendencies within international investment law generally. Due to the fact that China-African BITs have historically been aimed at the protection of investor rights, now is the time when investor obligations should include the recognition of and for respect human rights.

II. GLOBAL SOUTH-SOUTH COOPERATION: THE EVOLUTION OF AN AFRICAN-ASIAN ALLIANCE

A. The Emergence of an African-Asian Economic Alliance

Twenty-nine different African and Asian states met on April 18–24, 1955, at the Bandung Conference in Indonesia to discuss an array of issues tied to

Northern colonialism in Africa and Asia.²² The Conference was also intended to promote economic and cultural relations between Africa and Asia.²³ Asia and Africa have a shared history of colonial rule, as well as general dominance by Northern nations in Europe and the United States from an economic perspective.²⁴ When these nations gathered at Bandung, they created a coalition of newly independent and developing countries in the global South, which desired greater cooperation and aid amongst themselves in order to develop outside the constraints of Northern colonialism.²⁵ Stemming from the Conference, the countries then adopted ten principles codified within the Declaration on Promotion of World Peace and Cooperation (“Declaration”).²⁶ These principles laid the groundwork for future cooperation between China and Africa as part of a joint effort to promote anti-imperialism and anti-colonialism.²⁷ The Declaration’s goals included the promotion of economic and cultural cooperation, a reiteration of the importance of peaceful coexistence, and the protection of human rights.²⁸ From this meeting, the Bandung States laid the foundations of the Non-Aligned Movement during the Cold War, although the eventual result was the dissolution of much of the alliances forged during the Conference, including those between a number of South-East Asian nations.²⁹ This, however, was not the case for Chinese-African relations. Instead, those relations became more economic in nature after the reinvention of the Non-Aligned Movement. Scholars have come to recognize that China and

²² See *Bandung Conference: Asia-Africa 1955*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Bandung-Conference> (last visited July 15, 2018) [hereinafter *Bandung Conference*].

²³ See Office of the Historian, *Bandung Conference (Asian-African Conference), 1955*, U. S. DEP’T ST., <https://history.state.gov/milestones/1953-1960/bandung-conf> (last visited July 15, 2018).

²⁴ See Gao Jinyuan, *China and Africa: The Development of Relations Over Many Centuries*, 83 AFR. AFF. 241, 247 (1984).

²⁵ See Office of the Historian, *supra* note 23.

²⁶ See Asian-African Conference, *Final Communiqué of the Asian-African Conference of Bandung* (Apr. 24, 1955), http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf. [hereinafter *The Bandung Declaration*].

²⁷ *Id.* para. D(1)(a) (“[D]eclaring that colonialism in all its manifestations is an evil which should speedily be brought to an end.”).

²⁸ See *id.* ¶ C(1), G(9)–(10) (providing that human rights, self-determination, and cooperative development be listed as part of the goals of the Bandung countries post-conference).

²⁹ S.I. Keethaponcalan, *Reshaping the Non-Aligned Movement: Challenges and Vision*, 3 BANDUNG J. GLOBAL SOUTH 1, 4–5 (2016) (“The states that came together to form an organization decided not to get involved in the Cold War rivalry and demanded the dissolution of the Cold War military alliances. It was against this backdrop that non-alignment turned into one of the primary objectives of the organization.”); See *Bandung Conference*, *supra* note 22; Oscar de los Reyes Ramos & Justo A. Quintero Méndez, *The Non-Aligned Movement (NAM) and China in the Context of the OPCW and the Second Review Conference*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (June 4, 2008), <https://www.opcw.org/news/article/the-non-aligned-movement-nam-and-china-in-the-context-of-the-opcw-and-the-second-review-conference>. China remains one of the fifteen observing, non-member states of the Non-Aligned Movement (NAM), thus, its relationship with most nations in NAM remain at an arm’s length as far as the goals of NAM are concerned. See *id.*

Africa's relationship still relies upon shared philosophies about colonialism and economic development policies created during the Bandung Conference by tracing the relationship between China and Africa back to pre-investment times.³⁰

Since the 1950s, China has distinguished itself from its European counterparts by painting its relationship with Africa as equal, made in solidarity as developing nations, and anti-colonial in nature.³¹ China's interests in Africa are subsequently seen by both Africa and Asia to be from a more equal-footed, cooperative economic standpoint.³² From the 1950s to the 1970s, China supported revolutionary movements in Africa by providing access to technology and information.³³ It was this support that allowed China to further gain a foothold for international relations across the African continent.

After a shift towards the Cultural Revolution in the early 1960s, China's interest in Africa regained traction during the early 1970s. From 1967–76, China aided Zimbabwe and Tanzania in constructing the TAZARA railway, supporting economic and cultural ties between the three nations that led to further connections amongst multiple Southern African states and China.³⁴ The project was referred to as the "friendship railway," solidifying China's relationship with Africa by providing a no-strings attached economic investment aimed at supporting Africa's emergence into post-colonial rule.³⁵ After the construction of the railway, China's involvement in Africa temporarily stagnated, until 1978, at which point China opened its economy to the world in an attempt to "modernize" China via international investment and

³⁰ See Won Kidane & Weidong Zhu, *China-Africa Investment Treaties: Old Rules, New Challenges*, 37 *FORDHAM INT'L L.J.* 1035, 1051–52 (2014) ("China and Africa share similar philosophical viewpoints, not only regarding the function of property, but also concerning negotiated investment treaties with their wealthier Northern partners from the standpoint of maintaining the broadest possible regulatory authority for decades."); see also Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 *MICH. J. INT'L L.* 131, 138 n.25 (2013) (noting that China and Africa share similar philosophies about colonial rule).

³¹ See YUN SUN, *AFRICA IN CHINA'S FOREIGN POLICY* 2 (2014), https://www.wlv.ac.uk/media/departments/faculty-of-socialsciences/documents/Africa_in_China_Brookings_report.pdf ("Sino-African relations have been relatively smooth and free of major disturbances, thanks to a shared sense of historical victimization by Western colonial powers and a common identity/affinity as developing countries. The nature of Sino-African ties is largely transactional and reciprocal.").

³² See *id.*; Julia C. Strauss, *The Past in the Present: Historical and Rhetorical Lineages in China's Relations with Africa*, 2009 *CHINA Q.* 777, 778 (stating that China's involvement in Africa is framed as, "positive, progressive and grounded in the eternal principled truths of non-interference, mutual benefit, unconditionality, and special friendship and understanding towards Africa.").

³³ See Olufunmilayo B. Arewa, *Constructing Africa: Chinese Investment, Infrastructure Deficits, and Development*, 49 *CORNELL INT'L L.J.* 101, 109 (2016); Jinyuan, *supra* note 24, at 247–50 (noting the history of developing relations between China and African nations within the later half of the 20th Century).

³⁴ See Strauss, *supra* note 32, at 781.

³⁵ See *id.* at 785.

increased trade relations.³⁶ China then began to re-integrate investment-based support specifically to Southern Africa, encouraging the multiple countries to continue their fights against imperialism.³⁷

More than fifty years later, China still bases its continued economic cooperation with African countries on the same principles it spoke of during the Bandung Conference: the protection of sovereignty, mutual benefit, and an understanding and respect for the South-South relationship.³⁸ Each of these principles is still considered foundational for Chinese-African investment relations today.³⁹

It was not until the 1990s that China's approach to Africa dramatically shifted to its current form. China began promoting economic relations by signing treaties that require building infrastructure and providing monetary aid for development projects, rather than supporting international relations through simple meetings between the two parties.⁴⁰ This change in policy led to the signing of the first China-Africa BIT with Ghana in 1989.⁴¹ The Chinese-Ghana BIT was the first step in further opening economic relations between China and the African continent.⁴² Thus, the China-Ghana BIT was the start of a massive investment push into the African continent from a global economic perspective.

³⁶ See Judith van de Looy, *Africa and China: A Strategic Partnership?* 4 (Leiden Univ. Afr. Studies Ctr., Working Paper No. 67, 2006) ("Starting in 1978, the post-Maoist era was characterized by new investments in the economic sector in order to modernize China. The country's foreign policy was therefore mainly focused on economic modernization and increased trade relations.").

³⁷ See *id.* at 4–5.

³⁸ See generally The Bandung Declaration, *supra* note 22, at 2–4 (stating that "mutual interest and respect for national sovereignty" was a goal of co-operation, as well as "provid[ing] technical assistance to one another," and generally supporting trade through bilateral agreements amongst the participating nations).

³⁹ See Strauss, *supra* note 32, at 791.

⁴⁰ See *id.*; Thompson Ayodele & Olusegun Sotola, *China in Africa: An Evaluation of Chinese Investment* (Initiative for Public Policy Analysis, IPPA Working Paper Series 2014), http://www.ippanigeria.org/articles/China%20-Africa%20relation_Workingpaper_final.pdf; Wayne Ma, *China Offers Africa Billions in New Loans*, WALL STREET J. (July 20, 2012, 1:33 PM), <http://www.wsj.com/articles/SB10000872396390444464304577536140647257710>.

⁴¹ 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, China-Ghana, Oct. 12, 1989, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/737>.

⁴² Won Kidane, *China's Bilateral Investment Treaties with African States in Comparative Context*, 49 CORNELL INT'L L.J. 141, 146 (2016) ("If anything, it appears that the China-Ghana BIT may be less protective than the China-Sweden BIT."). Interestingly, this scholar has noted that the China-Ghana BIT was less protective of Chinese investors than other Chinese-EU BITs signed during that same period. Perhaps this decision was made to show good will between China and Africa given the previous forty years of South-South cooperation, or perhaps it was because China did not have a model BIT to base this agreement upon.

In 2001, the fastest growing economies in the world (i.e., Brazil, Russia, India, and China), were combined by a former Goldman Sachs economist, Jim O'Neill, to create the "BRIC" acronym.⁴³ South Africa later joined the list, in 2010, to reform the acronym: BRICS.⁴⁴ BRICS countries are a coalition of rapidly developing nations that banded together to compete with the primarily westernized international landscape by creating a new global reserve currency and establishing what is known as the New Development Bank ("NDB").⁴⁵ BRICS countries established the NDB to ensure greater economic engagement among developing nations by offering loans, guarantees, and equity to financial entities that engage in development projects for the establishing nations.⁴⁶ The NDB system also works as an alternative to the Western IMF/World Bank system by offering loans from BRICS countries that have a better understanding of what it means to escape imperialism. The NDB also provides global South-South cooperation without the need for aid from their former colonial keepers. The foundations that led to the creation of the BRICS Bank, which stem from the Bandung Conference, are the same ties that continue to strengthen today's Chinese-African relations.⁴⁷ Global South-South cooperation has also led to further investment throughout Africa through the use of BITs.⁴⁸

From 1992–2000, China signed BITs with fourteen African countries.⁴⁹ This eventually led to the development of a tri-annual meeting called the Forum on China-Africa Co-operation ("FOCAC"), held in 2000, 2003, 2006,

⁴³ Jim Yardley, *For Group of 5 Nations, Acronym is Easy, but Common Ground Is Hard*, NY TIMES (Mar 28, 2012) <https://www.nytimes.com/2012/03/29/world/asia/plan-of-action-proves-elusive-for-emerging-economies-in-brics.html>.

⁴⁴ Alex Tuai, *Introduction to BRICS*, AMP GLOBAL YOUTH, <http://ampglobalyouth.org/students/introduction-to-brics/> (last visited July 15, 2018).

⁴⁵ Raj M. Desai & James Raymond Vreeland, *What the New Bank of BRICS Is All About*, WASH. POST (July 17, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/07/17/what-the-new-bank-of-brics-is-all-about/>.

⁴⁶ *Id.*

⁴⁷ Uche Ewelukwa Ofodile, *Trade, Empires and Subjects – China-Africa Trade: A New Fair Trade Arrangement, or the Third Scramble for Africa?*, 41 VAND. J. TRANSN'T'L L. 505, 511–521 (2008) (describing China-Africa trade relations stemming from the Bandung Conference); Kevin Gray & Barry K. Gills, *South-South cooperation and the Rise of the Global South*, 37 THIRD WORLD Q., 4, 558–562 (2016) (discussing how the Bandung Conference made way for the BRICS bank to create space for further South-South cooperation).

⁴⁸ UNCTAD, *South-South Cooperation in International Investment Agreements*, UNCTAD Series on International Investment Policies for Development 9 UNCTAD/ITE/IIT/2005/3 (2005), http://unctad.org/en/docs/iteiit20053_en.pdf. ("A broad look at geographical patterns suggests that those regions accounting for most FDI outflows are also those with the highest number of South-South BITs. Asia, home to the largest and fastest growing outward investors, accounts for the majority of economies that are most active in South-South BIT cooperation.")

⁴⁹ Won Kidane, *China-Africa Investment Treaties: Old Rules, New Challenges*, 37 FORDHAM INT'L L.J. 1035, 1053 (2014) ("From 1992 to 2000 . . . China signed BITs with fourteen African countries: Egypt, Morocco, Mauritius, Zimbabwe, Zambia, Algeria, Cameroon, Nigeria, Sudan, Congo (Dem. Rep.), South Africa, Cape Verde, and Ethiopia.")

2009, 2012, and 2015—with another planned for 2018.⁵⁰ The FOCAC meetings call for intensifying Chinese investment in Africa through bilateral agreements and international aid.⁵¹ China claims that this supports the traditional “no-ties assistance” between China and Africa, as opposed to the Global North’s “ties-attached” assistance.⁵²

When the United States provides aid to developing nations, it must follow the World Bank’s, and the IMF’s, rules, which require extensive vetting of financial projects with no expectation of increased foreign policy support between the host country and the United States.⁵³ In contrast, a “no strings attached” process requires much less red-tape.⁵⁴ This allows for easier acceptance of aid with fewer expectations. FOCAC’s most recent official statements from China show further support for: larger infrastructure projects; increases in bilateral trade; promotion of Chinese State owned enterprises in Africa; pledges to increase monetary assistance and human development; and a commitment from China to train African professionals through educational exchanges and technical training programs.⁵⁵ The 2000 and 2003 FOCAC meetings focused prominently on the development of trade and investment strategies for the protection of investors, avoidance of double

⁵⁰ See *FOCAC Archives*, FORUM ON CHINA-AFRICA COOPERATION, <http://www.focac.org/eng/lttda/> (last visited July 15, 2018).

⁵¹ Strauss, *supra* note 32, at 791.

⁵² Priyanka Boghani and Erin Conway-Smith, *China Will Offer Africa Aid with ‘No Political Strings Attached’ Says Xi*, GLOBALPOST (March 25, 2013), <https://www.pri.org/stories/2013-03-25/china-will-offer-africa-aid-no-political-strings-attached-says-xi>; William Gallo, *Xi: Rich Nations Should Offer Aid with ‘No Strings Attached’*, VOICE AM. (Apr. 22, 2015, 6:32 AM), <http://www.voanews.com/a/xi-rich-nations-should-offer-aid-with-no-strings-attached/2729832.html>; *But see*, Jonathan Glennie, *Wikileaks Cables: China’s Aid to Africa Has Strings Attached*, GUARDIAN (Dec. 10, 2010, 6:00 AM), <https://www.theguardian.com/global-development/poverty-matters/2010/dec/10/wikileaks-cables-china-aid-africa>.

⁵³ See for example: *World Bank Project Cycle*, WORLD BANK (July 18, 2017), <http://www.worldbank.org/en/projects-operations/products-and-services/brief/projectcycle>.

⁵⁴ See Huan Kai Tseung & Ryan Krog, *No Strings Attached: Chinese Foreign Aid and Regime Stability in Resource-Rich Recipient Countries*, GEO. WASH. U., DEPT. POL. SCI., <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwjYvIf8sKjaAhXQs1kKHUi0Cz8QFgg4MAI&url=https%3A%2F%2Fwww.aeaweb.org%2Fconference%2F2017%2Fpreliminary%2Fpaper%2FZKsQeFh2&usg=AOvVaw3MTFZbWPNOv5cnqgNPpflp> (Last visited July 15, 2018) (detailing the Chinese-African relationship as being called “no strings attached” regarding the international aid process, which includes investment relations); *See also*, Sarah E. Kreps and Gustavo A. Flores-Macias, *No Strings Attached? Evaluating China’s Trade Relations Abroad*, THE DIPLOMAT (May 17, 2013) <https://thediplomat.com/2013/05/no-strings-attached-evaluating-chinas-trade-relations-abroad/> (describing what “no strings attached” means for trade and international relations between Africa and China).

⁵⁵ Hu Jintao, President of China, Address at the Opening Ceremony of the Beijing Summit of The Forum on China-Africa Cooperation (Nov. 4, 2006).

taxation, and encouragement for African states to sign BITs with China.⁵⁶ At the most recent FOCAC meeting in 2015, China committed \$60 billion in investments to Africa.⁵⁷ This tripled FOCAC's 2012 promise of twenty billion and showed China's confidence in the economic future of the African continent.⁵⁸ As the FOCAC meetings continue, the changes in Chinese-African economic policies have led some scholars to view Chinese-African BITs as a second wave of colonization of Africa's natural resources.⁵⁹ However, other scholars treat the economic policies as nothing more than a natural progression of the Chinese-African relationship.⁶⁰

Given the conflicting views of China's economic involvement in Africa, this Article discusses the role of BITs within the broader international investment system. Then it compares the roles of BITs internationally to their current uses in China and South Africa. These sections compare BITs in these contexts to assess the considerations that influence the substantive content of today's BITs.

⁵⁶ See Programme for China-Africa Cooperation in Economic and Social Development, Oct. 12, 2000, CLI.T.8080; Forum on China-Africa Cooperation-Addis Ababa Action Plan (2004–2006), Dec. 16, 2003, CLI.T.8512; Forum on China-Africa Cooperation Beijing Action Plan (2007–2009), Dec. 31, 2006, CLI.T.7265.

⁵⁷ Winslow Robertson & Lina Benabdallah, *China Pledged to Invest \$60 Billion in Africa. Here's What That Means*, WASH. POST (Jan. 7, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/07/china-pledged-to-invest-60-billion-in-africa-heres-what-that-means/?utm_term=.28b5e0977b74.

⁵⁸ Yun Sun, *Xi and the 6th Forum on China-Africa Cooperation: Major Commitments, but with Questions*, BROOKINGS INST. (Dec. 7, 2015), <https://www.brookings.edu/blog/africa-in-focus/2015/12/07/xi-and-the-6th-forum-on-china-africa-cooperation-major-commitments-but-with-questions/>.

⁵⁹ See Herbert Jauch, *Chinese Investments in Africa: Twenty-First Century Colonialism?*, NEW LAB. F. (May 2011), <http://newlaborforum.cuny.edu/2011/05/17/chinese-investments-in-africa-twenty-first-century-colonialism/>; Barry Sautman & Hairong Yan, *East Mountain Tiger, West Mountain Tiger: China, the West, and "Colonialism" in Africa*, 3 MD. SERIES CONTEMP. ASIAN STUD. 1 (2006). These critiques also come from international NGOs including Global Witness, which called the Chinese "resource colonialists," and journalists such as Dianna Games, *Globalization with a Third-World Face*, ECONOMIST (Apr. 7, 2005), <http://www.economist.com/node/3841114>; Dianna Games, *Africa: Chinese the New Economic Imperialists in Africa*, ALLAFRICA (Feb. 21, 2005), <http://allafrica.com/stories/200502210104.html>.

⁶⁰ See Yun Sun, *Africa in China's Foreign Policy*, BROOKINGS (2014) https://www.brookings.edu/wp-content/uploads/2016/06/Africa-in-China-web_CMG7.pdf (discussing China's incentives to trade and invest in Africa as part of its foreign policy structure); Axel Berger, *China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making*, GER. DEV. INST. 7 (2008), https://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf.

B. *The Role of BITs in International Investment Systems*

First, one must understand where BITs fit, in broad terms, within the international investment system. When investors or companies decide to invest abroad they frequently must consent with the “host nation” (the investment’s destination) regarding the terms of their investments including taxation, protection from expropriation, and consideration of the laws of the host nation.⁶¹ The “home nation” (the investment’s place of origin) negotiates with potential host states to create IIAs. IIAs are essentially treaties that determine the amount of FDI the investor plans to put into the host nation and the terms of the investment.⁶² BITs are the primary IIAs employed to ensure investments will be protected abroad.⁶³ Investments are, therefore, subject to the terms contained within the treaties between home and host governments. For example, if a BIT negotiation between nations does not include human rights as an incentive for FDI, the terms of investment will also fail to support human rights. While investors are not parties to investment treaties, treaties are crafted to protect investors and to provide incentives for FDIs.⁶⁴

The purpose of BITs is to stimulate economic growth through FDI in the host state, while reducing the political, social, and economic risks to the investor.⁶⁵ Thus, BITs provide protection for both investors and states. Most BITs include three major host state obligations to achieve sufficient economic support for the host state and to provide adequate investor protection. These obligations typically require: (1) foreign investors be treated fairly and equitably; (2) host states to agree not to nationalize or expropriate investor’s investments unless the measures are in the public interest, non-discriminatory, and the host state agrees to pay compensation; and (3) host states allow for the free transfer of funds without foreign exchange restrictions.⁶⁶ If any of these obligations are not met, investors can request the interpretation of a BIT through a tribunal under investor-state dispute

⁶¹ Helena Sprenger & Bouke Boersma, *The Importance of Bilateral Investment Treaties (BITs) When Investing in Emerging Markets*, AM. BAR ASS’N. (Mar. 2014), http://www.americanbar.org/publications/blt/2014/03/01_sprenger.html.

⁶² See *International Investment Agreements (IIAs)*, UNCTAD, [http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/International-Investment-Agreements-\(IIAs\).aspx](http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/International-Investment-Agreements-(IIAs).aspx) (last visited July 15, 2018); *International Investment Agreements*, INV. POL’Y HUB, <http://investmentpolicyhub.unctad.org/IIA> (last visited July 15, 2018).

⁶³ BILATERAL INVESTMENT TREATIES: WHAT THEY ARE AND WHY THEY MATTER, U.S.-CHINA BUS. COUNCIL 1–3 (2014).

⁶⁴ Nathalie Bernasconi-Osterwalder et al., INVESTMENT TREATIES & WHY THEY MATTER TO SUSTAINABLE DEVELOPMENT: QUESTIONS & ANSWERS 8–12(2012)(discussing whether investment treaties have actually been effective in increasing FDI and describing who investors are in BITs, what investments BITs cover, and the guarantees provided to investors in BITs.).

⁶⁵ *Id.*, Sprenger & Boersma, *supra* note 61.

⁶⁶ Bilateral Investment Treaties: What They Are and Why They Matter, *supra* note 63.

settlement ("ISDS") systems such as the ICSID or through private ad hoc tribunals that engage the use of United Nations Commission on International Trade Law ("UNCITRAL") arbitration rules.⁶⁷

BITs are the backbone of the ISDS system. Without a treaty to interpret, the ISDS system would not exist, and no protections for investors or states could be agreed to.⁶⁸ Thus, BITs are essential for investors and states alike.

C. China's Evolving Approach to BITs

China sees itself as having suffered, analogously, with Africa through major periods of underdevelopment and colonialism. This has supported their continued relationship.⁶⁹ During the 1960s and 1970s, China both criticized and rejected the use of BITs in its national plans.⁷⁰ China noted that international investment was neither welcome in China, nor encouraged outside of the country.⁷¹ With the economic opening of the country in 1978, these policies changed drastically.⁷² As China became a major importer and exporter of capital, it realized that its investment practices would need to significantly change to support cooperation with Africa without damaging their reputation on the continent.⁷³

⁶⁷ *Id.*

⁶⁸ For a broad discussion of how treaty interpretation is involved in the ISDS system, see Margie-Lys Jaime, *Relying Upon Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling The Gaps In International Investment Agreements*, 46 Geo. J. Int'l L. 261, 261–313 (2013); Stuart Bruce & Juliette Huard-Bourgois, *Maximising Investment Protection in Africa: The Role of Investment Treaties and Investment Arbitration in Africa*, King & Wood Mallesons (Mar. 21, 2015), <http://www.kwm.com/en/us/knowledge/insights/role-of-investment-treaties-and-investment-arbitration-in-africa-20150316> (discussing the relationship between the ISDS system and treaty interpretation).

⁶⁹ Strauss, *supra* note 32, at 780; see James M. Zimmerman, *China Law Deskbook: A Legal Guide for Foreign Invested Enterprises* 41–54 (2010) (noting the "unequal treaties" signed between China and major Northern powers, including the United States, Great Britain, and France, giving the Northern countries extraterritorial jurisdiction in China in matters involving their own citizens such as Hong Kong, Macau and other areas).

⁷⁰ Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 Mich. J. Int'l L. 131, 155 (2013); Axel Berger, *China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making, The Politics of International Economic Law: The Next Four Years*, at 7 (2008), available at <http://www.asil.org/files/ielconferencepapers/berger.pdf>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Sun, *supra* note 31 ("Africa is seen to be part of the 'foundation' on which China's broader strategic ambitions are built. Compared with the 'struggle' with big powers or China's strenuous relationship with its neighbors, Sino-African relations have been relatively smooth and free of major disturbances, thanks to a shared sense of historical victimization by Western colonial powers and a common identity/affinity as developing countries. The nature of Sino-African ties is largely transactional and reciprocal.").

Since 1978, China's economic interests in Africa, and in FDI generally, have changed. Scholars have separated Chinese foreign investment into three periods, each with its own distinct set of characteristics.⁷⁴ The first period is China's first set of BITs, from 1978–1991, which, except for its BIT with Ghana, were primarily signed with European countries.⁷⁵ The China-Europe BITs focused on the liberalization of investment, while the China-Ghana BIT focused on investment promotion and is considered more of a boilerplate, conservative BIT compared to the individualized BITs with Europe.⁷⁶

In 1989, China started signing BITs with the African continent. Many of these initial BITs have since changed significantly since they were initially signed. What has remained the same, however, is China's policy of non-interference in the internal affairs of its partner countries.⁷⁷ China's relationship with the continent has been one of mutual understanding and solidarity primarily supported through monetary freedom.

The second wave of BITs spanned from 1992–2000, when China began to modify both the substantive and procedural clauses of its once boilerplate BITs to include aspects of national treatment and China's accession to the ICSID Convention from the World Bank Group.⁷⁸ During this time, China signed fourteen BITs with African countries, including South Africa, which includes a clause on ICSID settlement procedures.⁷⁹

Finally, China's third wave of BIT signatures began in 2001 and continues into today. The major changes during this period are primarily due to China joining the World Trade Organization ("WTO") in 2001,⁸⁰ and the fact that China is now both the largest recipient of foreign investment and one of the largest investors of capital in foreign countries.⁸¹ Due to these changes in

⁷⁴ *Id.*; NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE 31 (2009).

⁷⁵ *International Investment Agreements: China Bilateral Investment Treaties*, INV. POL'Y HUB, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42/> (last visited July 15, 2018).

⁷⁶ Ofodile, *supra* note 30, at 177–78.

⁷⁷ Kidane & Zhu, *supra* note 30, at 1038.

⁷⁸ *Id.* at 1053.

⁷⁹ *International Investment Agreements: China Bilateral Investment Treaties*, *supra* note 30; Agreement Between the Government of the People's republic of China and the Government of the Republic of South Africa concerning Reciprocal Promotion and Protection of Investments, China–S. Afr., art. 9, sec. 4, Dec. 30, 1997, <http://tfs.mofcom.gov.cn/aarticle/h/aw/201002/20100206778967.html>. [hereinafter China-SA BIT] (“[T]he tribunal may, in the course of determination of procedure, take as guidance the Arbitration Rules of International Center for Settlement of Investment Disputes.”).

⁸⁰ *China and the WTO*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/countries_e/china_e.htm (last visited July 15, 2018).

⁸¹ *China Foreign Direct Investment*, TRADING ECON., <http://www.tradingeconomics.com/china/foreign-direct-investment> (last visited July 15, 2018); Stefano Pozzebon, *China Has Crossed a Major Investment Threshold That is Going to Change the*

China's economic outlook, current Chinese BITs include a more liberal use of the ICSID procedures for arbitration.

Despite these changes over time, some things have remained the same in all Chinese BITs. In all three generations of Chinese BITs, there is no single reference to CSR, environmental protection measures, labor rights, or human rights. Yet, China has adopted mandatory CSR in its national legislation.⁸² The failure of Chinese BITs to discuss human rights is not a problem that is limited to China. Only a handful of BITs (primarily those involving Canada and Brazil) mention human rights at all.⁸³ While some scholars note an increase in BITs with environmental protection issues being brought before investment tribunals,⁸⁴ other scholars discuss the significant lack of capacity to monitor labor rights in general let alone requiring that BITs contain provisions for monitoring labor rights.⁸⁵ However, what is interesting to note within Chinese-African BITs regarding human rights broadly is the continued commitment to anti-colonialism.

D. South Africa's Evolving Approach to BITs

South Africa signed its first BIT in 1994 at a time when the country was on the precipice of emerging into a more democratic society. This first BIT was signed with the United Kingdom, and began a slew of signatures between

Entire World, BUS. INSIDER (Feb. 4, 2015), <http://www.businessinsider.com/statistics-on-chinas-investment-abroad-2015-2?r=UK&IR=T>; Junyi Zhang, *How Does Chinese Foreign Assistance Compare to That of Developed Countries?*, BROOKINGS INST. (Aug. 25, 2016), <https://www.brookings.edu/opinions/how-does-chinese-foreign-assistance-compare-to-that-of-developed-countries/>.

⁸² Simon Zadek, *China: The Path to Responsible Business and Sustainable Growth*, THE GUARDIAN (Mar. 23, 2012 8:45 AM), <https://www.theguardian.com/sustainable-business/blog/china-sustainability-corporate-social-responsibility>; see, e.g., (中华人民共和国劳动合同法) [Labor Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471106.htm.

⁸³ See, e.g., Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Benin, art. 16, Jan. 9, 2013, <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/benin/fipa-apie/index.aspx?lang=eng>; Investment Cooperation and Facilitation Agreement, Braz.-Malawi art. 2(b), 2016, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4715>.

⁸⁴ See Mary E. Footer, *Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment*, 18 MICH. ST. J. INT'L L. REV. 1, 39 (2009); see also Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements*, (OECD Working Papers on Int'l Inv., Paper No. 2011/01, 2011), https://www.oecd.org/daf/inv/investment-policy/WP-2011_1.pdf.

⁸⁵ Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 MICH. J. INT'L L. 131, 194 (2013); Sharon Hang, *Investing in Human Rights: Using Bilateral Investment Treaties to Hold Multinational Corporations Liable for Labor Rights Violations*, 37 FORDHAM INT'L L. J. 1215, 1259–62 (2014).

South Africa and other European nations over the next four years.⁸⁶ During this time, the African National Congress (“ANC”) was deeply conflicted about supporting its new development policies through BITs. The ANC had goals of equality and economic independence in the future, but was in need of funding to support these goals. It had to find a way to attract Western FDI to gain the necessary funding to support its plans. The Freedom Charter of the ANC from 1955 highlights this conflict, stating that, “[t]he mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole.”⁸⁷ The Charter itself supports a movement of all property back to its rightful owners and away from big business monopolies that supported apartheid institutions. However, the problem of funding persisted. Thus, the country bent to the will of the western world once again, signing BITs to regain footing in the hopes that it would one day become independent enough to stand without the need for aid from the same nations that had created the apartheid system.⁸⁸

While a number of European BITs were signed after South Africa’s democratization in 1996, much of the language in the EU-South African BITs gave South Africans reason to question whether their Northern counterparts intended to actually aid South Africa or rather to exploit its natural resources.⁸⁹ As the South African Department of Trade and Industry explained in a 2009 policy framework review report:

BITs extend far into developing countries’ policy space, imposing damaging binding investment rules with far-reaching consequences for sustainable development. New investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally. Under such conditions, investment fails to encourage or enhance sustainable development.⁹⁰

⁸⁶ UNCTAD Investment Hub, *supra* note 13 (South Africa signed its first BIT with the U.K in 1994, which entered into force in 1998. Subsequently, South Africa entered into BITs with France, the Netherlands, Switzerland, and Germany in 1995, Austria and Denmark in 1996, Italy in 1997, and Spain and Greece in 1998.).

⁸⁷ AFR. NAT’L CONGRESS, THE FREEDOM CHARTER (1955).

⁸⁸ See generally FOLA ADELEKE, INTERNATIONAL INVESTMENT LAW AND POLICY IN AFRICA: EXPLORING A HUMAN RIGHTS BASED APPROACH TO INVESTMENT REGULATION AND DISPUTE SETTLEMENT, (2017) (discussing the origins and development of international investment law in Africa).

⁸⁹ See S. AFR. DEP’T OF TRADE AND INDUSTRY, BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW: GOVERNMENT POSITION PAPER 1, 11 (2009).

⁹⁰ *Id.*

It was, in fact, the signing of unequal BITs that eventually led South Africa to take an unprecedented step away from exploitative investment agreements and towards a human rights approach for investment decisions.

In 2010, South Africa began a previously unheard of mass termination of its long-standing European BITs that were signed during South Africa's pre-Constitutional era.⁹¹ Citing to a skewing of the treaties towards the protection of investors over the protections afforded to individuals under the South African Constitution,⁹² the Department of Trade and Industry concluded that the public interest, social, and economic priorities were being undermined by BITs.⁹³ By November of 2013, South Africa's Government had published a draft "Promotion and Protection of Investment Bill" (the Bill) which sought to allow further Governmental setting of policy within BITs alongside the more traditional investor protection mechanisms.⁹⁴ The Bill was approved in December of 2015, giving the Government the ability to set policies within BITs that put international investors on the same playing field with domestic ones, as well as allowing dispute resolutions to go to arbitration domestically.⁹⁵ While investors heavily criticized South Africa's Bill and warned that it would deter foreign investment in the country,⁹⁶ South Africa's government remained vigilant, stating that the Bill would be used to "redress . . . social and economic inequalities and injustices" of the past, referencing apartheid.⁹⁷ However, the bill and remaining BITs between South Africa and other global South nations,

⁹¹ Adam Green, South Africa: BITs in Pieces, *FIN. TIMES* (Oct. 19, 2012), <https://www.ft.com/content/b0eec497-5123-3939-92f7-a5fbc73dd33>; Hannah Ambrose & Nicholas Peacock, South Africa Terminates Its Bilateral Investment Treaty with Spain: Second BIT Terminated, as Part of South Africa's Planned Review of Its Investment Treaties, *LEXOLOGY* (Aug. 21, 2013), <http://www.lexology.com/library/detail.aspx?g=daf93855-71f9-425e-92d3-5368d104f8ff> (stating that South Africa has since terminated, or allowed to lapse, its agreements with Denmark, France, Austria, Belgium, Luxembourg, Germany, the Netherlands, Spain and the United Kingdom, all of which were signed between 1994 and 1996.).

⁹² UNCTAD Investment Hub, *supra* note 13.

⁹³ THE FREEDOM CHARTER, *supra* note 87; Damon Vis-Dunbar, South African Trade Department Critical of Approach Taken to BIT-Making, *INT'L INST. FOR SUSTAINABLE DEV.* (July 15, 2009), <https://www.iisd.org/itn/2009/07/15/south-african-trade-department-critical-of-approach-taken-to-bit-making/>.

⁹⁴ See Promotion and Protection of Investment Bill 2013, GN 1087 of GG 36995 (1 Nov. 2013).

⁹⁵ Vecchiatto, *supra* note 15; Protection of Investment Act § 4, 13 (S. Afr.), *supra* note 15 ("The purpose of this Act is to—(a) protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors; (b) affirm the Republic's sovereign right to regulate investments in the public interest; and (c) confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.", further confirming that such disputes may be submitted to the South African Courts for resolution by either party under Section 13(4)-(5) of the act).

⁹⁶ Webb, *supra* note 16; Joubert, *supra* note 16; Kron & Clark, *supra* note 16.

⁹⁷ Protection of Investment Act §12(1)(a) (S. Afr.), *supra* note 15.

such as China, have somehow skirted this re-negotiation and termination process.

While investors criticized South Africa's move towards the termination of its BITs with global North nations, South Africa's actions have led other nations to follow suit.⁹⁸ According to the South African government, South Africa plans to adopt a more human rights based approach to new BITs following from the Southern African Development Community's ("SADC") 2012 Model BIT. Additionally, future South African BITs will support the objectives of the Promotion and Protection of Investment Bill.⁹⁹ Thus, it appears that South Africa is not only introducing national laws aimed at creating investment obligations in relation to human rights, but also that the country may soon develop an entirely new generation of BITs that take the environment, labor, policy and human rights into consideration in all spheres of investment law.

E. The South African Development Community Model BIT: A Human Rights Approach to Investment

In 1980, Southern African states convened, and created, the Southern African Development Coordinating Conference ("SADCC") to promote economic development and to reduce economic dependence on apartheid South Africa. The SADCC aimed to create new links within Southern Africa to promote regional policies, and promote economic liberation from the global North.¹⁰⁰ The SADCC transformed into the SADC at a meeting of member nations in 1992. Member countries then adopted the SADC treaty to promote the "integration of economic development" among Member States.¹⁰¹ Although, the SADC Treaty did not become operational until 2005, the community quickly began to show just how versatile the Treaty would be. Under article 4 of the SADC treaty, member states committed to a general set of organizational

⁹⁸ Tevendale & Naish, *supra* note 18; *After South Africa, Indonesia Takes a Brave Decision to Terminate its Bilateral Investment Treaty with the Netherlands*, CTR. FOR RES. ON MULTINATIONAL CORP. (Mar. 24, 2014).

⁹⁹ Sean Woolfrey, *The Emergence of a New Approach to Investment Protection in South Africa*, in SHIFTING PARADIGMS IN INT'L INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED 223, 223 (Steffen Gindelang & Markus Krajewski eds., 2016) ("As of mid-2015 the model BIT has yet to be published, but the South African Government did indicate in early 2014 that the model BIT would be consistent with the Southern African Development Community (SADC) Model BIT Template adopted by the SADC Member States in 2012.").

¹⁰⁰ See *History and Treaty*, S. AFR. DEV. COMMUNITY (last visited July 15, 2018), <http://www.sadc.int/about-sadc/overview/history-and-treaty/>.

¹⁰¹ *Id.*

principles that include “human rights, democracy and the rule of law.”¹⁰² These principles necessitated the creation of a tribunal under article 16 to interpret and implement the SADC Treaty.¹⁰³

Most notably, the SADC Tribunal decided the *Campbell v. Zimbabwe* case, which held the government of Zimbabwe liable for gross human rights abuses in violation of the SADC norms in relation to economic concerns for its land reform program.¹⁰⁴ In early October, 2007, Mike and William Campbell filed an application with the SADC Tribunal challenging an acquisition of land for agricultural purposes in the Chegutu District of Zimbabwe and the eviction of the residents of the land.¹⁰⁵ The Applicants argued that the government unlawfully acquired the lands for resettlement purposes in violation of the land reform program.¹⁰⁶ Subsequently, the government removed the applicants from their lands, and applicants argued that the government denied compensation for the lands based on the color of their skin, being white during a time when Zimbabwe’s government supported the reclamation of agricultural lands from colonizers.¹⁰⁷ Although the compensation and discrimination claims were not based on the Applicants’ status as investors against the State, the claims made are parallel to that of any investor who brings a claim against a state in the investor-state dispute settlement system – for expropriation of their investment rights, and a denial of compensation for the violation of those rights. Ultimately, the Tribunal determined that the Zimbabwean government had racially discriminated against them and that compensation was due to the Applicants.¹⁰⁸ This decision, and the political climate of Zimbabwe at the time, led to the suspension of the Tribunal at the 2010 SADC summit.¹⁰⁹ The Tribunal has not been allowed to rule on any further human rights cases since.¹¹⁰

¹⁰² SADC Model Bilateral Investment Treaty Template with Commentary, Southern African Development Community (SADC) art. 4, (2012) [hereinafter SADC Model BIT]; *SADC Tribunal*, S. AFR. DEV. COMMUNITY, <http://www.sadc.int/about-sadc/sadc-institutions/tribunal/> (last visited July 15, 2018) [hereinafter referred to as SADC Tribunal] (noting that the SADC Tribunal was established by the Protocol on the Tribunal in 2005).

¹⁰³ *Id.*

¹⁰⁴ See *Mike Campbell (Pvt) Ltd v. Republic of Zimbabwe*, Case No. 2/2007, judgment, §VI (SADC Tribunal Nov. 28, 2008) [hereinafter *Campbell v. Zimbabwe Judgment*] (detailing that the SADC handed down judgment directing Zimbabwe to cease its racially discriminatory land reform program and to compensate farmers whose land had been compulsorily acquired as a result.).

¹⁰⁵ *Id.* at I.

¹⁰⁶ *Id.* at II.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at V.

¹⁰⁹ SADC Model Bilateral Investment Treaty Template with Commentary, Southern African Development Community, *supra* note 102.

¹¹⁰ See Natasha Venter, *Hearing of SADC Tribunal Case Set Down for 5 to 7 Feb. 2018*, AFRIFORUM (Feb. 2, 2018), <https://www.afriforum.co.za/hearing-sadc-tribunal-case-set-5-7-feb-2018/> (“The

Despite the suspension of the Tribunal, the SADC has still created more than twenty-one policies that have progressively incorporated human rights considerations into defining documents that some Member States are in the process of individually adopting as national legislation.¹¹¹ One such example is the SADC's "Model BIT Template," which was released in 2012 with the aim of implementing human rights, labor, and environmental protection into BITs of member states.¹¹² The SADC model BIT shows an emerging approach to investments in Southern Africa, emphasizing human rights and investor obligations, in addition to the protection of investors' rights.

By creating a "Rights and Obligations of Investors and States Parties" to include "Minimum Standards for Human Rights, Environment and Labour,"¹¹³ the SADC Model BIT not only requires both environmental and social impact assessments,¹¹⁴ it also lays out the specific duty for investors "not [to] assist in, or be complicit in, the violation of . . . human rights by others in the Host State."¹¹⁵ For example, the SADC Model BIT provides, that investors "shall not [establish,] manage, or operate investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State...."¹¹⁶

Furthermore, the SADC Model BIT focuses on addressing both investor rights and obligations, including: compliance with domestic law, environmental and social impact assessments, minimum standards for human rights, the environment, and labor, corporate governance standards, investor liability, and clauses for the transparency of contracts.¹¹⁷ By placing emphasis on alternative dispute resolution techniques in Part 4,¹¹⁸ further transparency

Protocol, as it now stands, limits the jurisdiction of the SADC Tribunal to disputes only between member states, thus denying the 277 million people living in the SADC region access to justice when the courts in their own countries fail to dispense justice."); *Southern African Development Community Tribunal*, INT'L JUST. RES. CTR., <http://www.ijrcenter.org/regional-communities/southern-african-development-community-tribunal/> (last visited Mar. 20, 2018) ("The SADC Summit of Heads of State and Government agreed in August 2012 to create a new court with a mandate limited strictly to the adjudication of inter-State disputes arising from the SADC Treaty and its protocols, rather than international human rights norms.").

¹¹¹ See Oliver Ruppel, *Regional Economic Communities and Human Rights in East and Southern Africa*, in HUMAN RIGHTS IN AFRICA: LEGAL PERSPECTIVES ON THEIR PROTECTION AND PROMOTION 275, 291-293 (Anton Bösl & Joseph Diescho eds., 2009).

¹¹² SADC Model BIT, art. 1 (2012) with commentary available here: <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>.

¹¹³ SADC Model BIT, *supra* note 112 art. 15.

¹¹⁴ *Id.* at art. 13.

¹¹⁵ *Id.* at art. 15.1.

¹¹⁶ *Id.* at art.15.3.

¹¹⁷ *Id.* at art. 11, 13, 15, 17 and 18.

¹¹⁸ SADC Model BIT, *supra* note 112 Part V.

in contracts in Article 24,¹¹⁹ and public participation in the dispute settlement process in Article 28,¹²⁰ the SADC Model BIT diverges from traditional BITs. The SADC Model BIT not only limits access for states to the ISDS, it also requires the exhaustion of domestic remedies.¹²¹ There is a strict three-year time limit for bringing investment claims,¹²² and rights for other claims must be waived in other dispute settlement forums beyond the first choice of forum.¹²³

As far as transparency is concerned, the SADC Model BIT requires the prompt publication of all laws, regulations, and international agreements that may affect investments and investors in other states.¹²⁴ These requirements reflect attempts to provide further public involvement in the dispute resolution process by allowing the submission of *amicus curiae* briefs by non-disputing parties.¹²⁵

Furthermore, the SADC Model BIT encourages the appointment of experts on tribunals when questions about the environment, health or safety arise.¹²⁶ Although this section does not mention human rights, it would not be out of character for the SADC to include human rights experts on a tribunal if such issues were present. In fact, the SADC Model BIT is in compliance with the UNGPs.

While this model BIT is a significant step forward for including human rights, environmental concerns, and labor provisions in BITs, only South Africa has adopted the model and it continues to struggle with implementing new BITs without a tribunal equipped to handle such issues. Although an additional two SADC member states have signed several BITs that are based on the SADC Model BIT,¹²⁷ they also struggle with the implementation of the provisions since there is no longer an SADC Tribunal to hear cases regarding the Model BIT.

¹¹⁹ *Id.* at art. 24.

¹²⁰ *Id.* at art. 28. ("All documents relating to a notice of arbitration, the settlement or resolution of any dispute pursuant to this Article, and the pleadings, evidence and decisions in them, shall be available to the public, subject to the redaction of confidential information Procedural and substantive oral hearings shall be open to the public. This may be achieved th[r]ough live broadcasting of the hearings by Internet broadcast.")

¹²¹ *Id.* at art. 28.4(a).

¹²² *Id.* at art. 28.14.

¹²³ SADC Model BIT, *supra* note 112 at art. 29.4(c).

¹²⁴ *Id.* at art. 24.

¹²⁵ *Id.* at art. 29.17.

¹²⁶ *Id.* at art. 29.16.

¹²⁷ See Dunia P. Zongwe, *An Introduction to the Law of the Southern African Development Community*, HAUSER GLOBAL L. SCH. PROGRAM (Feb. 2011), http://www.nyulawglobal.org/globalex/Southern_African_Development_Community.html.

This article will now turn to the relationship between international investment human rights more generally so that one can understand why this Model BIT is an important step forward.

III. THE RELATIONSHIP BETWEEN INTERNATIONAL INVESTMENT AND HUMAN RIGHTS

Although trade with Africa constitutes just 5 percent of China's total global trade, China spent about \$93.2 billion on imports from Africa in 2011.¹²⁸ China has been Africa's largest trading partner since 2009, a position it still holds today.¹²⁹ Greater than 80 percent of African imports to China were crude oil, raw materials, and natural resources.¹³⁰ Conversely, in 2009 Africa had received 45.7 percent of China's cumulative foreign aid.¹³¹ In the years to come, China's investments in Africa are only expected to grow.

With increased Chinese investment in Africa comes heightened anxiety among human rights activists and economists who worry that economic incentives can place the rights of individuals and communities at risk,¹³² while Western business tycoons worry that further commercial investments will bring major competition.¹³³ These anxieties are the appropriate response. Chinese aid in Africa is often spent on militarization, which fuels conflicts that lead directly to human rights abuses.¹³⁴ Current and former recipients of Chinese military aid include: Algeria, Angola, Cape Verde, Nigeria, Chad, Djibouti, Equatorial Guinea, Gabon, Uganda and Ghana, with China offering \$100 million dollars in military aid to the African Union in the next five years.¹³⁵

¹²⁸ Fred Dews, *8 Facts about China's Investments in Africa*, BROOKINGS (May 20, 2014), <https://www.brookings.edu/blog/brookings-now/2014/05/20/8-facts-about-chinas-investments-in-africa/>.

¹²⁹ *See id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Peter Guest, *Why the West Fears China in Africa*, GUARDIAN (Nov. 5, 2009, 9:30 PM), <https://www.theguardian.com/commentisfree/2009/nov/05/china-africa-aid-investment-fear>; *see also Zambia: Workers Detail Abuse in Chinese-Owned Mines*, HUM. RTS. WATCH (Nov. 3, 2011, 2:45 AM), <https://www.hrw.org/news/2011/11/03/zambia-workers-detail-abuse-chinese-owned-mines>.

¹³³ Princeton Lyman, *China and the US in Africa: A Strategic Competition or an Opportunity for Cooperation?*, COUNCIL ON FOREIGN REL. 1,4 (2014), https://www.cfr.org/content/thinktank/ChinaandUS_Africa.pdf.

¹³⁴ Adaora Osondu-Oti, *China and Africa: Human Rights Perspective*, 41 AFR. DEV. 65, 66 (2016) ("[T]here are ways China must have committed or aided human rights abuses in Africa...China's arm sales to countries like Sudan and Zimbabwe are said to have encouraged genocide in Darfur and Zimbabwe government crackdown on its citizen respectively.").

¹³⁵ Ashley Cowburn, *Two-thirds of African Countries Now Using Chinese Military Equipment, Report Reveals*, INDEPENDENT (Mar. 1, 2016, 3:45 PM),

One of the most recent egregious examples of human rights abuses fueled by China's military supplies occurred in Zimbabwe. In 2008, a primarily state-owned mine in the diamond-rich Marange fields of Zimbabwe was involved in the killing of over 200 local miners.¹³⁶ Zimbabwean police and military began shooting local miners from helicopters, gunning people down with military grade assault rifles to clear the area and provide the government with tighter control over the diamond trade. The government's goal was to remove "diamond flow from the Reserve Bank of Zimbabwe to the Zimbabwean military."¹³⁷

Due to these events and further reports of widespread human rights abuses in Zimbabwean diamond mines,¹³⁸ the Kimberley Process banned exports from the area from 2009–2011.¹³⁹ However, this was not the end of the mines. The Zimbabwean government, determined to implement its policy of indigenization over all businesses in the country, formed the Zimbabwe Consolidated Diamond Company ("ZCDC") in 2015, which allegedly created worse mining conditions than previous mining giants in the area.¹⁴⁰

It is important to remember where the financing for these acts came from. Despite the Marange fields being primarily state owned, most of the investments to begin mining actually came from China.¹⁴¹ In 2003, China invested into agricultural lands in Zimbabwe, buying more than 250,000 acres of land to produce corn for the entire country of Zimbabwe.¹⁴² During that same year, China invested "\$300 million... in... iron, steel, chrome, [diamond,] and

<http://www.independent.co.uk/news/world/africa/two-thirds-of-african-countries-now-using-chinese-military-equipment-a6905286.html>; *China to Offer \$100m in Military Aid to African Union in Next 5 years*, GLOBAL TIMES (Sept. 28, 2017, 10:53 PM), <http://www.globaltimes.cn/content/1068735.shtml>.

¹³⁶ Simon Goodley, *Death, Sanctions and Big Business in the Struggle for Zimbabwe's Diamonds*, GUARDIAN (Feb. 16, 2013, 7:05 PM), <https://www.theguardian.com/business/2013/feb/17/zimbabwe-death-sanctions-business-diamonds>.

¹³⁷ *Military Expansion Fuels Diamond Chaos in Chiadzwa*, WIKILEAKS (Jan. 9, 2009), https://wikileaks.org/plusd/cables/09HARARE24_a.html.

¹³⁸ *Diamonds in the Rough: Human Rights Abuses in the Marange Diamond Fields of Zimbabwe*, HUM. RTS. WATCH (June 26, 2009), <https://www.hrw.org/report/2009/06/26/diamonds-rough/human-rights-abuses-marange-diamond-fields-zimbabwe>.

¹³⁹ Greg Nicholson, *Blood Diamond trail leads to loopholes in Kimberley Process*, GUARDIAN (June 5, 2013), <https://www.theguardian.com/world/2013/jun/05/blood-diamonds-kimberley-process>.

¹⁴⁰ Clayton Masekesa, *Marange Communities Implore Government to Disband ZCDC*, NEWSDAY (Aug. 13, 2016), <https://www.newsday.co.zw/2016/08/13/marange-communities-implore-government-disband-zcdc/>.

¹⁴¹ Samuel Ramani, *Zimbabwe: China's 'All-Weather' Friend in Africa*, DIPLOMAT (Jan. 11, 2016), <http://thediplomat.com/2016/01/zimbabwe-chinas-all-weather-friend-in-africa/>; Andrew Meldrum, *Mugabe Hires China to Farm Seized Land*, GUARDIAN (Feb. 13, 2003), <https://www.theguardian.com/world/2003/feb/13/zimbabwe.andrewmeldrum>.

¹⁴² Meldrum, *supra* note 141; Ramani, *supra* note 141.

platinum resources" in Zimbabwe, which essentially handed the mining sector over to Chinese control.¹⁴³ The financial relationship between the two countries goes even deeper. In 2005, China gifted Zimbabwe's air force with six K-8 fighter jets and Zimbabwe purchased additional military equipment from China worth an estimated \$240 million USD.¹⁴⁴ According to one local newspaper, "[i]n 2014 [Zimbabwe] approved \$929 million of Foreign Direct Investment (FDI) projects, among which 72% was from China."¹⁴⁵

Without the funding from China for both the military and the mining equipment, the circumstances leading to the massacre in April of 2008 could not have occurred. While China's investments in Zimbabwe have certainly allowed the country to prosper in terms of infrastructure, the negative effects of these investments are of great weight. The positive and negative effects of China's FDI must be considered throughout Africa more broadly as well.

A. *An Overview of Current International Investment Structures*

Several legal scholars agree that international investment law has a significant overlap with international human rights law, though there is disagreement on whether it is from a historical or procedural perspective. Former Judge at the International Court of Justice and international human rights scholar, Bruno Simma, argues that, "international investment protection and human rights are not 'separate worlds'" because "the basis of both areas of international law is one and the same: the protection of the individual against the power of the State."¹⁴⁶ Simma further argues that current international investment agreements often rely upon historical interpretations of the term "discrimination" either from a human rights perspective or from an international investment law perspective; namely protecting investors' rights to be free from discrimination and expropriation.¹⁴⁷ This means that within states that receive foreign investment, individual human rights are a secondary consideration, if they are even considered at all.

¹⁴³See Ramani, *supra* note 141.

¹⁴⁴ Joshua Eisenman, *Zimbabwe: China's African Ally*, JAMESTOWN FOUND. (July 5, 2005), http://web.archive.org/web/20070805023113/http://www.jamestown.org/publications_details.php?volume_id=408&issue_id=3390&article_id=2369974.

¹⁴⁵ Tarisai Mandizha, *Zim to Benefit from China's \$40 Billion Investment*, STANDARD (Aug. 16, 2015), <https://www.thestandard.co.zw/2015/08/16/zim-to-benefit-from-chinas-40-billion-investment/>.

¹⁴⁶ Bruno Simma, *Foreign Investment Arbitration: A Place or Human Rights*, 60 INT'L & COMP. L.Q. 573, 576 (2011).

¹⁴⁷ *Id.* at 585–86, 589.

Generally speaking, international investments include six major stakeholders: (1) the host state where the investor or the multinational corporation (“MNC”) desires to invest; (2) the home state where the investor or MNC hails from; (3) the investors (either MNCs or individuals); (4) the people or groups affected by the investment; (5) the arbitration tribunals that resolve claims arising from violations of BITs; and (6) the arbitration institutions that promulgate rules and processes regulating investment dispute settlement procedures. Traditional investment regimes are aimed at protecting the international investors in the host states where they desire to invest in order to attract further FDI, which then boosts the economy of the host country.¹⁴⁸ The United Nations Conference on Trade and Development (“UNCTAD”) defines FDI as “an investment made by a resident of one economy in another economy, and it is of a long-term nature or of ‘lasting interest,’ in which, ‘the investor has a ‘significant degree of influence’ on the management of the enterprise.”¹⁴⁹ Having a significant degree of influence requires that the investor have at least ten percent of voting shares, which can be used to amend policies, investment strategies, or veto decisions on where to invest.¹⁵⁰

Host states in traditional BITs and investment schemes frequently trade their national safeguards and ability to regulate investments in exchange for further FDI and economic support on the international playing field. This has been the case in multiple BITs between South Africa and European nations, which recently led South Africa to allow those BITs to lapse.¹⁵¹ In traditional, older BITs, clauses often guarantee that an investor’s rights are protected against arbitrary or discriminatory treatment at the hands of a state giving investors “full protection and security” (“FPS”).¹⁵²

Such clauses also favor arbitration with the ISDS system. Beyond FPS provisions, stabilization clauses make it easier for investors to prevent states

¹⁴⁸ See e.g., UNITED NAT’L CONFERENCE ON TRADE AND DEV. (UNCTAD), TRENDS IN INTERNATIONAL INVESTMENT AGREEMENTS: AN OVERVIEW, at 1–2, U.N. Sales No. E.99.II.D.23 (1999).

¹⁴⁹ UNITED NAT’L CONFERENCE ON TRADE AND DEV. (UNCTAD), DIVISION ON INVESTMENT AND ENTERPRISE, UNCTAD TRAINING MANUAL ON FDI STATISTICS AND THE OPERATIONS OF TNCs, Vol. I: FDI FLOWS AND STOCKS, at 35, U.N. Sales No. E.09.II.D.2 (2009).

¹⁵⁰ *Id.*

¹⁵¹ For example, South Africa let its BITs with Belgium-Luxembourg, Spain, Germany, Switzerland, the Netherlands and Denmark lapse in 2012. See *Bilateral investment treaties in South Africa*, NORTON ROSE FULBRIGHT (July, 2014), <http://www.nortonrosefulbright.com/knowledge/publications/118456/bilateral-investment-treaties-in-south-africa>.

¹⁵² See e.g., Jeffrey Commission, *The Full Protection and Security Standard in Practice*, WOLTERS KLUWER: KLUWER ARBITRATION BLOG (Apr. 16, 2009), <http://arbitrationblog.kluwerarbitration.com/2009/04/16/the-full-protection-and-security-standard-in-practice/>.

from passing any new regulations that would require regulations for human rights, the environment, or labor.¹⁵³

Investment treaties provide investors with jurisdiction under international law to bring disputes against host governments to the World Bank's ICSID. The ICSID handles the majority of BIT disputes in the world.¹⁵⁴ Other investment arbitration institutions or investment standards, even *ad hoc* arbitration under UNCITRAL rules, are also available to investors. In most areas of international law, the subjects of international law are given both international rights and obligations. International investment law primarily supports investor rights with little emphasis on responsibilities.¹⁵⁵ Investors can and do exercise their rights by bringing international claims, often before the ICSID. Usually these claims are for breaches of the state's obligations to protect the BIT guaranteed rights of investors.¹⁵⁶ Where economic power asymmetry is vast, the fear of having these claims brought against states that subsequently result in extensive arbitral awards often prevents host states from even creating nationally protective regulations that support human rights concerns.¹⁵⁷

Beyond the asymmetric power issue, access to information about BIT decisions remains a problem. There is a significant lack of transparency for the arbitral decisions made under the ISDS, as such decisions are not required to be published either nationally or internationally according to the BIT of the two parties. While some international human rights legal scholars have heavily criticized FDI as directly and indirectly causing human rights violations,¹⁵⁸ there are also scholars that recognize both positive and negative

¹⁵³ See generally Andrea Shemberg, *Stabilization Clauses and Human Rights*, WORLD BANK GROUP (May 27, 2009), <http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES> (discussing specifically the human rights concerns attributed to stabilization clauses in international investment agreements).

¹⁵⁴ See *The ICSID Caseload—Statistics*, INT'L CTR. FOR SETTLEMENT INV. DISP., <https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx> (last visited July 15, 2018) (noting that "ICSID has hosted the majority of all known international investment cases.").

¹⁵⁵ See generally Sol Picciotto, *Rights, Responsibilities and Regulation of International Business*, 42 COLUM. J. TRANSNAT'L L. 131 (2003) (suggesting that international investment rights are favored over investor obligations under traditional international investment law).

¹⁵⁶ See HOWARD MANN, INT'L INST. FOR SUSTAINABLE DEV., INTERNATIONAL INVESTMENT AGREEMENTS, BUSINESS AND HUMAN RIGHTS: KEY ISSUES AND OPPORTUNITIES 4–5 (2008) (discussing state obligations under international investment law); see also JAMES R. CRAWFORD, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 116 (8th ed. 2012).

¹⁵⁷ See *id.* at 15–17.

¹⁵⁸ See, e.g., Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 297 (2002); cf. Shannon Lindsey Blanton & Robert G. Blanton, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, 69 J. POL. 143, 152–53 (2007) (rebutting the direct connection between FDI and human rights abuses but recognizing

aspects of FDI in the human rights context.¹⁵⁹ However, opinions are consistent between both sides that human rights can and should be more effectively promoted through FDI.¹⁶⁰ BITs and arbitral tribunals created by BITs could provide an avenue for states to give greater protections to reduce the risk of adverse human rights impacts accompanying investments.

The focus on FDI from a human rights perspective highlights the need for CSR, regulation, and accountability for MNCs when problems arise in host nations due to MNC activity. Generally, MNC investments are more likely to involve larger projects in sectors such as extractives, pharmaceuticals, or food and beverage.¹⁶¹ MNC activities related to those sectors have a higher possibility of human rights violations in comparison to other MNC activities, especially in developing countries.¹⁶² The larger the MNC, the more people affected, the more money invested, and the greater the potential for harm to human rights.

However, as money flows from these investments into host governments, so do the economic benefits that follow, such as jobs, new technology, and infrastructure that can be used to support human rights. Moreover, along with the improvement of developing economies from money generated in IIAs comes the possibility for improvement in economic, “improvements in economic, social, and cultural rights can lead to improvements in civil and political rights.”¹⁶³ Even scholars point to statistics showing “that the promise of FDI is

the potential for indirect connections); Dong-Hun Kim & Peter F. Trumbore, *Transnational Mergers and Acquisitions: The Impact of FDI on Human Rights, 1981–2006*, 47 J. PEACE RES. 723, 732 (2010).

¹⁵⁹ David Shea Bettwy, *The Human Rights and Wrongs of Foreign Direct Investment: Addressing the Need for an Analytical Framework*, 11 RICH. J. GLOBAL L. & BUS. 239, 240 (2012) (arguing that “human rights can be promoted more effectively by developing a framework to identify and to make operational the positive human rights impacts of FDI, in conjunction with, rather than in opposition to, a rights-based approach.”); James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law’s Unity*, 18 DUKE J. COMP. & INT’L L. 77, 106 (2007) (stating that developing countries often receive advantages from FDI and noting that “international investment law and human rights effectively can complement each other.”).

¹⁶⁰ See Drews, *supra* note 128.

¹⁶¹ MAGNUS BLOMSTROM, *THE ECONOMICS OF INTERNATIONAL INVESTMENT INCENTIVES* 168 (2002) (noting that “MNCs are mainly attracted by strong economic fundamentals in the host economies. The most important ones are market size... the availability of infrastructure and other resource[s] that facilitate[] efficient specialisation of production”). This leads to the conclusion that the larger the market, the greater the resources of the host country, and the greater the need, the greater the incentive to invest. See id.

¹⁶² See generally Michael Wright, *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse* (Harv. Univ. John F. Kennedy Sch. of Gov’t Corp. Soc. Responsibility Initiative, Working Paper No. 44, 2008) (highlighting the disproportionate number of human rights violations by the extractive, food and beverage, information technology, and pharmaceutical industry sectors in developing nations).

¹⁶³ Bettwy, *supra* note 159, at 243.

an incentive for a country to improve its human rights conditions.”¹⁶⁴ While there is much research yet to be done that directly indicates the positive and negative effects of FDI on the enjoyment of human rights based on statistics, there are a number of examples that should be discussed when examining this relationship, especially in the African context.

B. The Adverse Impacts of Investment on Human Rights

In 1958, Royal Dutch Shell began oil production in the Niger delta region of Nigeria with the support of the Nigerian government.¹⁶⁵ In 1990, the Movement for the Survival of the Ogoni People (“MOSOP”) developed in response to the repression of the Ogoni people regarding their opposition to the production of oil near their homelands.¹⁶⁶ In early 1993, MOSOP gained traction and began protesting the widespread human rights abuses and the environmental destruction of the Ogoni people’s homelands near Shell’s oil refinery in the Niger Delta.¹⁶⁷ In order to protect its investments in the area, Shell developed a partnership with the government, which, in return, provided Nigerian soldiers, infamous for their violent tendencies.¹⁶⁸ This led to the use of deadly force against members of MOSOP on multiple occasions.¹⁶⁹ At one particular event, the Nigerian military killed four Ogoni chiefs in order to suppress MOSOP.¹⁷⁰ Following this event, the military took the leader of MOSOP, Ken Saro-Wiwa, into custody for allegedly causing the deaths of the four tribal leaders, even though the military prevented Saro-Wiwa from attending the event.¹⁷¹ Even after this incident, Shell requested military support to build a pipeline through Ogoni, leading to further human rights abuses, violence, and the deaths of multiple human rights defenders at the hands of Shell’s Nigerian troops.¹⁷²

¹⁶⁴ *Id.* at 244 (citing David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1316 (2008)).

¹⁶⁵ *Factsheet: The Case Against Shell*, CTR. FOR CONST. RTS. (Mar. 24, 2009), <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-case-against-shell#> [hereinafter *Factsheet*].

¹⁶⁶ *Id.*

¹⁶⁷ For a full history of the Ogoni people, Shell, and MOSOP, see Richard Boele et al., *Shell, Nigeria and the Ogoni. A Study in Unsustainable Development: I. The Story of Shell, Nigeria and the Ogoni People—Environment, Economy, Relationships: Conflict and Prospects for Resolution*, 9 SUSTAINABLE DEV. 74 *passim* (2001).

¹⁶⁸ *See id.* at 78, 80.

¹⁶⁹ *Factsheet*, *supra* note 165; *see* Richard Boele et al., *supra* note 158, at 80.

¹⁷⁰ *Factsheet*, *supra* note 165.

¹⁷¹ *Id.*

¹⁷² *See id.*

During all these bouts of violence, Shell continued to provide monetary and logistical support for the Nigerian forces, causing raids of local villages and deaths of many. As for Ken Saro-Wiwa, Shell “closely followed the tribunal and his detention.”¹⁷³ Shell was even accused of bribing witnesses to give false testimony against Saro-Wiwa.¹⁷⁴ Shell joined the Nigerian government in creating a public relations campaign to discredit MOSOP.

In March of 2009, Shell settled with the plaintiffs, Saro-Wiwa and all other activists killed, for \$15.5 million U.S. dollars in direct compensation and legal costs to the plaintiffs alongside the creation of a trust for the benefit of the Ogoni people.¹⁷⁵ In 2011, Shell’s Nigerian subsidiary also paid another £55 million for environmental damages for oil spills in the Ogoni lands.¹⁷⁶ However, this monetary compensation did nothing to prevent further instances of investments leading to human rights abuses, even in such direct cases as this.¹⁷⁷

In another case, large-scale agricultural investments in Ethiopia’s Gambella region raised concerns about the implications of displacing thousands of indigenous persons without free, prior informed consent. It also raised the issues of police brutality, rape, and a host of other human rights violations in relation to that displacement.¹⁷⁸ The Gambella region of Ethiopia “is one of the most fertile and resource-rich areas of the country,” a rare oasis in a country primarily consisting of desert.¹⁷⁹ The “villagisation” program in Ethiopia, funded by the U.K.’s international development department, is designed to promote larger, foreign-based agricultural projects in the Gambella region.¹⁸⁰ However, this led to the forced relocation of Ethiopian indigenous

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Shell to Pay out \$15.5 Million to Settle Landmark Lawsuit over Death of Nigerian Activist Ken Saro-Wiwa*, DemocracyNow! (June 9, 2009), https://www.democracynow.org/2009/6/9/shell_to_pay_out_155_million; Ed Pilkington, *Shell pays out \$15.5m over Saro Wiwa killing*, Guardian (June 8, 2009), <https://www.theguardian.com/world/2009/jun/08/nigeria-usa>.

¹⁷⁶ John Vidal, *Shell Announces £55m Payout for Nigeria Oil Spills*, GUARDIAN (Jan. 6, 2015, 7:01 PM), <https://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills>.

¹⁷⁷ *Id.*

¹⁷⁸ “Waiting Here for Death” Forced Displacement and “Villagization” in Ethiopia’s Gambella Region, HUM. RTS. WATCH (Jan. 16, 2012), <https://www.hrw.org/report/2012/01/16/waiting-here-death/forced-displacement-and-villagization-ethiopias-gambella-region> [hereinafter *Waiting Here for Death*]; *Gunmen Kill One, Injure Four Pakistanis in Ethiopia*, EXPRESS TRIB. (Apr. 30, 2012), <http://tribune.com.pk/story/372009/gunmen-kill-one-pakistani-four-ethiopians-official/>.

¹⁷⁹ *Id.*

¹⁸⁰ Clar Ni Chonghaile, *Ethiopia’s Resettlement Scheme Leaves Lives Shattered and UK Facing Questions*, GUARDIAN (Jan. 22, 2013, 7:14 AM), <https://www.theguardian.com/global-development/2013/jan/22/ethiopia-resettlement-scheme-lives-shattered>.

groups to Kenya, beatings by soldiers, and a lack of access to basic food and water resources.¹⁸¹ In order to gain access to some of the most fertile lands in Africa, investors from the United Kingdom and state-owned enterprises in Ethiopia have reportedly been involved in violence, killings, arbitrary detention, rape, and other sexual violence committed by government forces funded by the United Kingdom.¹⁸² Human Rights Watch asserts that Mohammed al-Amoudi, a millionaire Ethiopian investor who owns Saudi Star and leases 10,000 hectares of land in the area to grow rice, caused thousands of forced relocations to make way for state-owned firms to farm the area, as well as ordered the shooting of many workers in the area.¹⁸³ He is only one of many. When locals began to protest their removal to make way for farms funded by foreign aid, protestors were shot and killed on multiple occasions, and women have since reported additional sexual violence by soldiers attempting to relocate them.¹⁸⁴ Were it not for the U.K.'s aid brought to the region to improve large-scale agricultural practices, it is much more likely that this degree of human rights abuses would have occurred.

As these examples show, FDI, while positively contributing to the economies of developing nations, also poses major risks to the protection of human rights. While international investment arbitral tribunals remain potential options in which to invest human rights protection mechanisms, there is still a long ways to go before the relationship between FDI, BITs, and human rights results in a primarily positive influence.

C. *The Constructive Contributions of Foreign Capital*

While Western and African nations continue to critique China's engagement with Africa from a human rights perspective, China's monetary aid to Africa has greatly contributed to the development of infrastructure throughout the continent. Since the early 1960s, China provided aid to more remote regions of Africa that the West either overlooked or failed to assist following a determination that that security and human rights issues

¹⁸¹ *Id.*

¹⁸² BUS. & HUMAN RIGHTS RES. CTR., STEEP RISE IN ALLEGATIONS OF HUMAN RIGHTS ABUSE AS BOOM IN INVESTMENT BRINGS HOPE OF PROSPERITY 5 (2014), <https://business-humanrights.org/sites/default/files/media/documents/eastern-afr-briefing-bus-human-rights-apr-2014.pdf>.

¹⁸³ See *Waiting Here for Death*, *supra* note 178; See also *Al Amoudi Among Firms Behind Thousands of Forced Relocations in Ethiopia*, ETH. TIMES (Jan. 24, 2012), <https://www.oaklandinstitute.org/al-amoudi-among-firms-behind-thousands-forced-relocations-ethiopia>.

¹⁸⁴ *Id.*

outweighed the need for aid.¹⁸⁵ China funded smaller, more local projects throughout Africa in areas such as agriculture, light industry, infrastructure, medical support, and technical assistance.¹⁸⁶ China has explicitly made a point of sending experts, aid, and equipment to many of Africa's least developed nations.¹⁸⁷ This has included projects for hydroelectric dams, deep-water ports, resurfacing roads, and building hospitals, schools, and even textile mills.¹⁸⁸

Many scholars have debated China's motives for such investments.¹⁸⁹ Some argue that China's main goal is to gain access to raw materials prevalent in Africa, while others argue that China is looking to "forg[e] strategic partnerships"¹⁹⁰ on the African continent.¹⁹¹ However, some scholars who see China's economic growth as a positive development model for the Global South.¹⁹² Some have even argued that China's support has allowed African states that receive aid to better focus more broadly on the notion of sustainable development, including the right to water and food.¹⁹³ Some scholars appreciate interdependence and argue that without access to the most basic human needs, states cannot adequately focus on the protection of human rights.¹⁹⁴

What is clear from these debates is that foreign capital does provide direct monetary aid towards building the most fundamental areas of infrastructure

¹⁸⁵ See Timothy Webster, *China's Human Rights Footprint in Africa*, 51 COLUM. J. TRANSNAT'L L. 626, 646–48 (2013) (listing areas such as Angola, Mauritania, Madagascar, Rwanda and the Congo as areas that China targeted for development projects).

¹⁸⁶ *Id.* at 645; see also CIA NAT'L FOREIGN ASSESSMENT CTR., COMMUNIST AID ACTIVITIES IN NON-COMMUNIST LESS DEVELOPED COUNTRIES 1978 19–27 (1979), http://www.foia.cia.gov/sites/default/files/document_conversions/89801/DOC_0000499889.pdf [hereinafter CIA REPORT].

¹⁸⁷ See BRUCE D. LARKIN, CHINA AND AFRICA 1949-1970: THE FOREIGN POLICY OF THE PEOPLE'S REPUBLIC OF CHINA 175 (1971).

¹⁸⁸ See CIA NAT'L FOREIGN ASSESSMENT CTR., COMMUNIST AID ACTIVITIES IN NON-COMMUNIST LESS DEVELOPED COUNTRIES 1978, *supra* note 186, at 20–26.

¹⁸⁹ See generally Mark Yaolin Wang, *The Motivations Behind China's Government-Initiated Industrial Investments Overseas*, 75 PAC. AFF. 187, 199–205 (2002).

¹⁹⁰ Kinfu Adisu et al., *The Impact of Chinese Investment in Africa*, 5 INT'L J. BUS. & MGMT. 3, 4 (2010).

¹⁹¹ See generally Chris Alden, *China in Africa*, 47 SURVIVAL 147 (2005); Li Anshan, *China and Africa: Policy and Challenges*, 3 CHINA SECURITY 69 (2007).

¹⁹² See Piet Konings, *China and Africa: Building a Strategic Partnership*, 23 J. DEVELOPING SOC'Y 341, 360 (2007).

¹⁹³ Webster, *supra* note 185, at 659.

¹⁹⁴ See generally AMARTYA SEN, DEVELOPMENT AS FREEDOM (2000); James W. Nickel, *Poverty and Rights*, 55 PHIL. Q. 385 (2005).

within some of the poorest, least developed nations in Africa.¹⁹⁵ Despite concerns over the motives driving China's delivery of aid to African nations, FDI can have both a negative and positive impact on human rights. However, as explored in previous sections, the negative effects generally outweigh the positive effects.

D. Human Rights and Investment Issues: The China-South Africa Relationship

South Africa, in particular, has taken the reigns regarding placing human rights, labor, and environmental protections first in investment decisions as demonstrated in the country's approach to BITs and the powers it maintains to take measures to redress inequality in investment law.¹⁹⁶ What is interesting in South Africa's case is that South Africa's decision to include human rights in its BITs has not deterred China from further investments in the country,¹⁹⁷ despite the fact that China is not historically known for its positive treatment of human rights.¹⁹⁸ Thus, this Article will address the specific investment relationship between China and South Africa to provide an example of how human rights standards could be included in investment processes without a loss in FDI.

While China's economic push forward in the last two decades has led it to become a global powerhouse, it still relies heavily on natural resources from Africa, and South Africa more specifically, to satisfy the demands to advance its economy.¹⁹⁹ China and South Africa rely on one another from an economic perspective. Despite this interplay, there is no mention of CSR, human rights, or protective labor practices in the BIT between these two nations.²⁰⁰ As defined by the United Nations Industrial Development Organization ("UNIDO"),

¹⁹⁵ See generally Andrea Goldstein et al., *China's Book: What's in it for Africa? A Trade Perspective*, in CHINA RETURNS TO AFRICA: A RISING POWER AND A CONTINENT EMBRACE (Chris Alden et al. eds., 2008).

¹⁹⁶ See, e.g., *Bilateral Investment Treaties in South Africa*, NORTON ROSE FULBRIGHT (July 2014) (summarizing features of the 2013 Promotion and Protection of Investment Bill).

¹⁹⁷ See, e.g., *A Chinese Perspective: Africa-China Bilateral Investment Treaties*, KING & WOOD MALLESONS (Mar. 16, 2015), <http://www.kwm.com/en/uk/knowledge/insights/bilateral-investment-treaties-20150316> (discussing major destinations for Chinese investments continue to include South Africa).

¹⁹⁸ See, e.g., *China: Events of 2017*, HUM. RTS. WATCH (2018), <https://www.hrw.org/world-report/2018/country-chapters/china-and-tibet>.

¹⁹⁹ See generally David Dollar, *China's Engagement with Africa: From Natural Resources to Human Resources*, JOHN L. THORNTON CHINA CTR. BROOKINGS (2016) <https://www.brookings.edu/wp-content/uploads/2016/07/Chinas-Engagement-with-Africa-David-Dollar-July-2016.pdf>.

²⁰⁰ See China-SA BIT, *supra* note 79.

Corporate Social Responsibility is a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders. CSR is generally understood as being the way through which a company achieves a balance of economic, environmental and social imperatives . . . while at the same time addressing the expectations of shareholders and stakeholders.²⁰¹

Because definitions of CSR are varied, this Article will focus on the aspect of CSR that emphasizes respect for human rights in relation to the UNGPs. In doing so, this Article will outline a framework for the protection, respect, and remediation of human rights within a CSR context in both China and South Africa. This Article will then proceed to assert that CSR in China and South Africa remains a silent partner in the economic relationship between the two countries, and that it should become a more dominant force within future BITs between China and South Africa.

1. Corporate Social Responsibility and Human Rights in China

Despite China's hesitation to support human rights above sovereignty and development goals,²⁰² on multiple occasions the nation has been involved with international legislation that concerns human rights. For example, China signed and ratified the International Covenant on Economic, Social and Cultural Rights ("ICESCR");²⁰³ signed but did not ratify the International Covenant on Civil and Political Rights ("ICCPR");²⁰⁴ was involved in the drafting of the Universal Declaration of Human Rights ("UDHR"); and voted

²⁰¹ *What is CSR?*, UNITED NATIONS INDUS. DEV. ORG., <https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr> (last visited July 15, 2018).

²⁰² See Sonya Sceats & Shaun Breslin, *China and the International Human Rights System*, CHATHAM HOUSE ROYAL INST. INT'L AFF. 7 (Oct. 2012), https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/r1012_sceatsbreslin.pdf (citing a quote from Tang Jiaxuan, Minister for Foreign Affairs of China: "[a] country's sovereignty is the prerequisite and the basis of the human rights that the people of that country can enjoy. When the sovereignty of a country is put in jeopardy, its human rights can hardly be protected effectively.").

²⁰³ See *Status of Ratification Interactive Dashboard*, UNITED NATIONS OFF. HIGH COMM'R FOR HUM. RTS., <http://indicators.ohchr.org/> (last visited July 15, 2018) (after selecting China, the dashboard indicates that China signed the ICESCR in 1997, and ratified in 2001).

²⁰⁴ *Id.* (showing that China signed the ICCPR in 1998, but has not ratified it).

in favor of its adoption in the General Assembly in 1948.²⁰⁵ The United Nations has noted that China's 2004 Constitution, which references human rights, reflects a change in Chinese policy to allow at least some "Chinese academics to explore and debate issues of human rights law and policy within certain parameters."²⁰⁶

Generally, China emphasizes the "duties of a person, rather than his rights," in order to support the forward movement of society as a whole.²⁰⁷ Chapter two of the Chinese Constitution states that all citizens are given certain rights, such as equality and electoral rights, and a host of freedoms such as speech, personal freedom, personal dignity, and the freedom of religion.²⁰⁸ However, the Chinese believe that these rights follow closely with each citizens' duties to act in accordance with Chinese laws regarding the restrictions of these freedoms to uphold social order.²⁰⁹ This perspective severely restricts China's encouragement of human rights, but it does provide significant support for CSR policies in China's foreign and national investments.²¹⁰

While CSR is a private sector initiative supported by socially-conscious consumers in the Western world²¹¹, China has adopted CSR policies in recent years by creating a government-guidance program for state-owned enterprises throughout not only China but the world as well.²¹² Corporations in both China and Western countries create and incorporate CSR guidelines into their business strategies to appease consumers and to remain competitive in the

²⁰⁵ *Universal Declaration of Human Rights Voting Record Search*, UNITED NATIONS BIBLIOGRAPHIC INFO. SYS.,

<http://unbisnet.un.org:8080/ipac20/ipac.jsp?&profile=voting&uri=full=3100023~!909326~!0&ri=1&aspect=power&menu=search&source=~!horizon>, (last visited July 15, 2018) (noting that China voted in favor of the adoption of the UDHR).

²⁰⁶ Sceats & Breslin, *supra* note 202, at 9.

²⁰⁷ Kidane & Zhu, *supra* note 30, at 1041.

²⁰⁸ See XIANFA art. 33–36 (1982) (China).

²⁰⁹ JAMES M. ZIMMERMAN, *CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN INVESTED ENTERPRISES* 37 (3d. ed. 2010).

²¹⁰ See Li-Wen Lin, *Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China*, 15 *Cardozo J. Int'l. & Comp. L.* 321, Part V (A) (1) (2007) (discussing China's recent "Company Law" as a Chinese formulation of CSR as supporting investments overseas rather than supporting further social responsibilities including human rights).

²¹¹ Dima Jamali & Ramez Mirshak, *Corporate Social Responsibility (CSR): Theory and Practice in a Developing Country Context*, 72 *J. BUS. ETHICS* 243, 244 (2007).

²¹² Biyan Tang, *Contemporary Corporate Social Responsibility (CSR) in China: A Case Study of a Chinese Compliant* 1 *MORAL CENTS: J. ETHICS FIN.* 13, 15 (2012), <https://sevenpillarsinstitute.org/wp-content/uploads/2017/11/Corporate-Social-Responsibility-in-China-EDITED.pdf>.

ever-increasingly globalized marketplace.²¹³ However, what differs in China's case is that their CSR policies require greater governmental involvement, which in some cases leads to more comprehensive laws, guidelines, and regulations.²¹⁴ Not only have CSR reports increased since the introduction of the government-sponsored CSR initiative in 2004, but there has also been a significant improvement in economic performance by Chinese state-owned enterprises ("SOEs") that engage in CSR.²¹⁵ Furthering this trend, the Chinese government even introduced the Labor Contract Law and the Central Government Guidelines on Social Responsibility Implementation for State-Owned Enterprises.²¹⁶

The positive impacts of this legislation, as well as CSR, however, come at a cost. As more and more SOEs are required to adopt new CSR policies, there has been a decline in SOE implementation of these policies, leading scholars to question the true societal benefits of the Chinese CSR strategy.²¹⁷ While China's CSR strategy is markedly different than that of most nations, it begs comparison to that of South Africa, one of its most consistent investment destinations.

2. Corporate Social Responsibility and Human Rights in South Africa

CSR in South Africa comes from a significantly different perspective than that of China, and yet there remain many similarities between the philosophy of both countries. In South Africa, the use of CSR reporting is mandated for

²¹³ Ying Chen, *Corporate Social Responsibility from the Chinese Perspective*, 21 IND. INT'L. & COMP. L. REV. 419, 433 (2011).

²¹⁴ See Tang, *supra* note 212, at 15; e.g. Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change?* 28 BERKELEY J. INT'L L. 64, 67–81 (2010) (detailing a wide range of governmental CSR initiatives in China).

²¹⁵ Christina Larson, "Corporate Social Responsibility" Reports in China: Progress or Greenwashing?, BLOOMBERG (Dec. 12, 2013), <https://www.bloomberg.com/news/articles/2013-12-12/corporate-social-responsibility-reports-in-china-progress-or-greenwashing>.

²¹⁶ See PEOPLES' REPUBLIC CHINA, GUIDELINES TO THE STATE-OWNED ENTERPRISES DIRECTLY UNDER THE CENTRAL GOVERNMENT ON FULFILLING CORPORATE SOCIAL RESPONSIBILITIES, ST.-OWNED ASSETS SUPERVISION & ADMIN. COMMISSION ST. COUNCIL; Zhonghua Renmin Gongheguo Laodong Fa [Labor Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Congress, July 5, 1994, effective Jan. 1, 1995).

²¹⁷ See Dongyong Zhang et al., *Evolving Corporate Social Responsibility in China*, 6 SUSTAINABILITY 7646, 7648 (2014); Jeremy Moon & Xi Shen, *CSR in China Research: Salience, Focus and Nature*, 94 J. BUS. ETHICS 613, 615 (2010) (highlighting the negative impacts that Chinese CSR has in China); Lei Wang & Heikki Juslin, *The Impact of Chinese Culture On Corporate Social Responsibility: The Harmony Approach*, 88 J. BUS. ETHICS 433, 436–7 (2009) (discussing the Chinese cultural aspects and their effects on CSR).

companies wishing to be listed on the South African Stock Exchange.²¹⁸ However, just as China does, South Africa emphasizes corporate social investment over that of general corporate responsibility.²¹⁹ Although business in South Africa has not always been necessarily CSR minded, primarily due to apartheid, South Africa has adopted the notion of corporate social investment practices with comprehensive policies and practices that allow for businesses to operate in an ethical, legal, environmental, and societally acceptable manner.²²⁰ The main difference between the South African CSR philosophy and China's is that South Africa's focus stems from an understanding of human rights that is deeply embedded in the country's newly democratic society.

Although South Africa's perspective on human rights has created new paths for the implementation of human rights in its investment policies and society more generally, its past actions towards black South Africans, the environment, and forced labor tell a darker story that has yet to be remediated.²²¹ Despite South Africa's decision to look forward with intentions to implement CSR, rather than backward to remediate past harms, the number of South African companies reporting today on CSR is significantly higher than that of the Fortune Global 100.²²² This, however, does not necessarily mean that the CSR reports enforce South African companies' commitments to CSR and support for human rights within businesses. Rather, these numbers simply indicate that, as in the case of China, companies that report on CSR do so more frequently because reporting is required by law.²²³ South African companies do seem to perform well as far as implementing the standards contained within their CSR reports.²²⁴ Specifically, the South

²¹⁸ In order to be listed on the Johannesburg Stock Exchange, all listed companies must annually report the extent to which they comply with the King Code, which includes both sustainability and integrated Environmental, Social and Governance (ESG) reporting, see *Johannesburg Stock Exchange*, SUSTAINABLE STOCK EXCHANGES INITIATIVE, <http://www.sseinitiative.org/fact-sheet/jse/> (last visited July 15, 2018).

²¹⁹ David Fig, *Manufacturing Amnesia: Corporate Social Responsibility in South Africa*, 81 INT'L AFF. 599, 601 (2005).

²²⁰ *Id.*

²²¹ See *id.* at 601–02.

²²² See Cedric Dawkins & Faith Wambura Ngunjiri, *Corporate Social Responsibility Reporting in South Africa: A Descriptive and Comparative Analysis*, 45 J. BUS. COMM. 286, 286 (2008).

²²³ See generally, Institute of Directors Southern Africa, *Understanding King IV and what it is intended to achieve*, INST. DIRECTORS S.AFR. (Mar. 6, 2018), <http://www.iodsa.co.za/news/389613/Understanding-King-IV-and-what-it-is-intended-to-achieve.htm> (explaining integrated reporting and providing the King's Code of South Africa which requires CSR reporting); see also, *King III vs King IV: What you Really Need to Know*, GRANT THORNTON (Feb. 2017) https://www.grantthornton.co.za/globalassets/1.-member-firms/south-africa/pdfs/kingiv_feb17.pdf.

²²⁴ Micaela Flores-Araoz, *Corporate Social Responsibility in South Africa: More Than a Nice Intention*, POLITY (Sept. 12, 2011), <http://www.polity.org.za/article/corporate-social-responsibility-in-south-africa-more-than-a-nice-intention-2011-09-12>.

African government has in the past accused companies of failing to adequately include information in their CSR reports, which could lead to removal from the stock exchange listing.²²⁵

While China continues on a slow path towards a greater acceptance of human rights, South Africa has been a leader in the codification of human rights since the country's transition to democracy in the early 1990s.²²⁶ Stemming from the gross human rights abuses that the majority of the South African population bore during apartheid rule, the 1996 South African Constitution mirrors language from all of the core United Nations human rights documents, seeking a more democratic coalition of support for human rights.²²⁷

In post-apartheid South Africa, the African National Congress ("ANC") stood as an alliance of black nationalists and socialist unions that created development policies intended to improve black South Africans' living conditions throughout the country.²²⁸ This stance later turned sharply left towards socialist reconstruction policies.²²⁹ The ANC developed employment policies stressing the need for the creation of welfare for the black majority, creating more socialist and democratic economic policies to redistribute wealth.²³⁰ To support this endeavor, the ANC created the Truth and Reconciliation Commission to uphold a new set of cultural values that would contribute to the development of a new era where human rights were respected

²²⁵ David Beresford, *South African Firms Deny Discrimination*, GUARDIAN (Sept. 13, 2006, 06:48 AM), <https://www.theguardian.com/business/2006/sep/13/southafrica.internationalnews>; *Global CSR Disclosure*, INITIATIVE FOR RESP. INV., (last visited July 15, 2018) <https://iri.hks.harvard.edu/csr>.

²²⁶ See generally, HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION (Chris Arup et al., eds., 2000); STEVEN L. ROBINS, FROM REVOLUTION TO RIGHTS IN SOUTH AFRICA: SOCIAL MOVEMENTS NGOS & POPULAR POLITICS AFTER APARTHEID (2008).

²²⁷ See S. AFR. CONST., 1996, art. 2, §10 (providing rights to human dignity stemming from human dignity under UDHR art. 23); S. AFR. CONST., 1996, arts. §24, §26–27, and §29 (providing rights to the environment, housing, health care, food, water, social security, and education, each of which are rights given by the ICESCR under art. 11, 12 and 13); S. AFR. CONST., 1996, arts. §14, §16, and §18–19 (providing rights to privacy, freedom of expression, freedom of association, and political rights, which stem from the ICCPR art. 19(2), art. 22(1) and the preamble.).

²²⁸ Richard Peet, *Ideology, Discourse, and the Geography of Hegemony: From Socialist to Neoliberal Development in Postapartheid South Africa*, 34 ANTIPODE 54, 55 (2002) [hereinafter Peet, *Socialism in South Africa*].

²²⁹ *Id.*

²³⁰ *Id.* at 56.

and nurtured, rather than repeatedly violated.²³¹ It was due to apartheid-era experiences that South Africa decided to base its constitution in the doctrine of human rights, and to move towards a more democratic realization of those rights.²³² However, South Africa has yet to fully implement a human rights based approach to its economic investment dealings.

3. Walking the Talk – CSR in a New China-South Africa BIT

The question remains: do the CSR policies and differing commitments to human rights of China and South Africa impact investment decisions made by the two countries? As of July 2016, China has invested more than \$2.8 billion USD into an energy and metals industrial park in South Africa.²³³ The park was approved by the same Department of Trade and Industry that spoke about economic, environmental, and human rights concerns it had in relation to South Africa's BIT with the United Kingdom—the BIT that eventually led South Africa to suspend its BITs with much of Europe in 2009.²³⁴ According to Taung Gold, China's investment relationship with South Africa has "been steadily building [through] direct and indirect investments in South Africa during the last decade. And it is not just in mining and minerals."²³⁵ While South Africa is China's second largest investment hub in Africa overall, the investments between the two nations have included electronics, "manufacturing, banking, textiles, property, and agriculture."²³⁶ These investment decisions were the result of years of cooperation, primarily arising out of the Forum for China-Africa Co-operation (FOCAC), which has encouraged the continued creation and implementation of China-South Africa BITs.²³⁷

²³¹ James L. Gibson, *Truth, Reconciliation, and the Creation of a Human Rights Culture in South Africa*, 38 L & SOC'Y. REV. 5, 24–25 (2004).

²³² See generally HEINZ KLUG *supra* note 226; STEVEN L. ROBINS *supra* note 226.

²³³ Liezel Hill, *Chinese to Invest \$2.8 Billion in South Africa Economic Zone*, BLOOMBERG (July 14, 2016, 9:42 AM), <http://www.bloomberg.com/news/articles/2016-07-14/chinese-to-invest-2-8-billion-in-south-africa-economic-zone>.

²³⁴ *Id.*

²³⁵ *Chinese Investment in South Africa*, TAUNG GOLD INT'L LIMITED., http://www.taunggold.com/zh_cn/gold-sa/chinese-investment-in-south-africa (last visited July 15, 2018).

²³⁶ *Id.*

²³⁷ See *Focac Abc*, FOCAC (Apr. 9, 2013), <http://www.focac.org/eng/ltida/ttj/t933522.htm> (outlining the founding, objectives and major events of the FOCAC); *South Africa, China Sign Trade and Industry Deals*, BRAND S. AFR. (Dec. 4, 2015), <https://www.brandsouthafrica.com/investments-immigration/business/chinese-south-africa-trade-041215>.

At the 2015 FOCAC forum, China pledged to invest \$60 billion in Africa, \$6.5 of which will go to deals with South Africa alone.²³⁸ As stated in Section II of this paper, unlike Africa's relationship with the United States, China and Africa's investment relationship is built upon much more than aid packages. While China's economic push forward in the last two decades has led it to become a global powerhouse, it still relies heavily upon natural resources from Africa, and South Africa more specifically, to satisfy demands to continue the advancement of its economy.²³⁹

In Ofodile's 2014 paper on ISDS in Africa, she specifically requests further research into the relationship between China and South Saharan Africa ("SSA"). The request was due to the relationship's unique nature for investment dispute settlements in recent years. She states that

"[c]ompared to investors from Europe and North America, Chinese investors have generally refrained from initiating claims against SSA countries. To date, no single investment dispute has been brought by a Chinese investor against a country in SSA. Why? Does this suggest a tendency for both sides to consider and utilize ADR mechanisms in resolving disputes?"²⁴⁰

Ofodile raises an important point about the China-South African relationship in particular. If China and South Africa remain in one another's good graces of, as far as investments are concerned, why have the two nations not butted heads about the previously discussed issues? Both nations' citizens can demand change within national investment laws to better support human rights, especially between two nations whose relationship is built on a fight against colonialism. What better way to remove the yolk of colonial powers than including human rights protections within BITs that western investment systems still have yet to recognize?

China and South Africa have submitted few disputes to any international investor-state dispute settlement system,²⁴¹ and this creates an interesting

²³⁸ *China and South Africa in \$6.5bn Worth of Deals*, BBC (Dec. 3, 2015), <http://www.bbc.com/news/business-34991846>; see also, Lynsey Chutel, *China Pledges \$60 Billion to African Development*, BUS. INSIDER (Dec. 4, 2015, 1:17 PM), <http://www.businessinsider.com/ap-china-pledges-60-billion-to-african-development-2015-12>.

²³⁹ See generally, David Dollar, *China's Engagement with Africa: From Natural Resources to Human Resources*, BROOKINGS INST., 41–48 (July 13, 2016), <https://www.brookings.edu/wp-content/uploads/2016/07/Chinas-Engagement-with-Africa-David-Dollar-July-2016.pdf>.

²⁴⁰ Uché Ewelukwa Ofodile, *Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject?*, AILA (Oct. 12, 2014), <http://blogaila.com/2014/10/12/africa-and-the-system-of-investor-state-dispute-settlement-to-reject-or-not-to-reject-uche-ewelukwa-ofodile/>.

²⁴¹ Joe Zhang, *First ICSID Case Brought by Chinese Mainland Investors Dismissed on Jurisdictional Grounds*, INV. TREATY NEWS (Nov. 26, 2015), <http://www.iisd.org/itn/fr/2015/11/26/awards-and-decisions-21/> (outlining the dismissal on jurisdictional grounds of "what is believed to be the first claim at ICSID initiated by investors from mainland China.").

dynamic that requires further analysis. There are cases pending in different non-ICSID forums filed by Chinese businesses. The next section of this article will therefore address the ISDS systems in place throughout the world. This article will then turn specifically to South Africa and China's use (or lack thereof) of the international arbitral systems. This will be done to question whether there is a space for human rights within the ISDS systems throughout the world.

IV. PROTECTION, RESPECT, AND REMEDY FOR HUMAN RIGHTS IN THE INVESTMENT SPHERE

A. Preconditions for Including Human Rights Issues in Investment Dispute Resolution

We argue that that states must do at least three things to overcome the obstacles posed to the realization of human rights in BITs: (1) engage in a human rights approach when negotiating BITs; (2) design BIT clauses with an eye to human rights concerns; and (3) create grievance mechanisms within national and international systems when such precautions fail. This will require states to look to the UNGPs to properly apply a human rights approach to BITs and subsequently address all three areas of concern. Next, this paper will review relevant provisions of the UNGPs and other international instruments that states and investors could find helpful in promoting respect for human rights and offer recommendations for including human rights issues in investment dispute resolution processes.

B. Proposed Amendments to BITs: A Human Rights Approach to International Investment Law

Originally, investors seeking to invest abroad agreed to obey national laws in exchange for the protection of investments through the host state. Today, interactions among states and investors require more than an exchange of protections, they require an exchange of obligations. The obligations for both states and investors can be understood through the lens of the UNGPs.²⁴² The UNGPs implement a three-pillar approach, known as the "protect, respect and remedy" framework, created by John Ruggie, the Special Representative of the Secretary-General of the UN on Business and Human Rights.²⁴³ The

²⁴² See generally Human Rights Council Res. 17/4, U.N. Doc. A/17/31 (March 21, 2011) [hereinafter Implementing the UNGPs].

²⁴³ *Id.* at 3.

framework first describes the state's duty to protect human rights; second, the corporate responsibility to respect human rights, and; third, access to remedy.²⁴⁴ In order to ensure the protection of human rights in a business or investment context, we argue that all three pillars can and must be met in the crafting of international investment agreements.

When speaking about international investment in relation to human rights, both BIT and the ISDS systems need major changes in order to adequately support the state's duty to protect human rights and the corporate (often investor's) responsibility to respect those same rights. The first step in fulfilling these obligations is to negotiate BITs in such a way that human rights concerns are properly addressed. This requires that states look to the Principles for Responsible Contract Drafting.

C. A Human Rights Approach to BIT Negotiations

In addition to the UNGPs, the UN principles for contract drafting include human rights considerations in state-investor negotiations, specifically highlighting the need for BIT negotiations to adequately support human rights.²⁴⁵ The principles show a greater need for: (1) stabilization clauses to be drafted in ways so as to not interfere with the state's right to regulate in order to meet its human rights obligations²⁴⁶; (2) the need for greater community engagement and transparency²⁴⁷, and; (3) the creation of grievance mechanisms for non-contractual harms to third parties.²⁴⁸ The critique of the ISDS systems in Section IV further highlights the need for a pre-emptive approach to protecting human rights. Scholars additionally call for both states and investors to engage in human rights due diligence ("HRDD") within the ISDS system and when negotiating BITs.²⁴⁹

HRDD is a "process to identify, prevent, mitigate and account for how they [businesses and states] address their impacts on human rights."²⁵⁰ Procedurally speaking, applying the HRDD process must begin at the most

²⁴⁴ *Id.*

²⁴⁵ See UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, PRINCIPLES FOR RESPONSIBLE CONTRACTS: INTEGRATING THE MANAGEMENT OF HUMAN RIGHTS RISKS INTO STATE-INVESTOR CONTRACT NEGOTIATIONS (2015) [hereinafter Principles for Responsible Contracts].

²⁴⁶ *Id.* at 1, 16.

²⁴⁷ *Id.* at 25.

²⁴⁸ *Id.* at 28.

²⁴⁹ See e.g., Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L.Q. 573, 594 (2011).

²⁵⁰ Implementing the UNGPs, *supra* note 242, at 15(b).

fundamental level where human rights are most at risk. In the case of investment law, applying an HRDD approach means that the process should begin during BIT negotiations to ensure risks to human rights are identified early and avoided. During this HRDD process, states and investors could discuss, among other things: the use of social and environmental impact assessments, the publication of all major disputes and contracts on an accessible public forum, the exhaustion of domestic remedies before entering the ISDS system, the inclusion of exception clauses that allow states to regulate in the public interest without the interference of investors, and the creation of operational level grievance mechanisms for harmed third parties. We believe these practices would be consistent with the UNGP's call for a process to identify and address risks to human rights.

As was reported to the Human Rights Council in 2011, "considering human rights early will help ensure that States maintain adequate policy space in the investment contract, including for the protection of human rights, while avoiding claims relative to the contract in binding international arbitration."²⁵¹ BITs are the earliest point at which human rights considerations could and should be dealt with in the international investment context. BITs are currently designed to aid states and investors in avoiding disputes and costly litigation associated with the ISDS system. However, most BITs still provide investors with access to ISDS as the first line of response to a dispute, thereby avoiding national courts. If BIT negotiations properly focus on applying the three pillars of the UNGPs, we believe they would likely: (1) allow states to properly regulate in the public interest in order to support the state's duty to protect human rights; (2) require investors to publish the BITs they sign with states and allow the community within the state to provide feedback on the BITs so that corporations and investors uphold their obligation to respect human rights, and; (3) include clauses that detail domestic and international forums for victims of human rights abuses to access remedy, or, if there are not any forums, to create them. By including clauses in BITs that support all three pillars of the UNGPs and encouraging states and investors to follow the guidelines of the principles for responsible contract drafting, BITs can over time support better human rights protections.

As for the third pillar, accessing remedy, even if BITs include clauses that are designed to support access to domestic and international remedies, this would still require the creation of some sort of grievance mechanism for victims of human rights abuse. One important point to remember is that BITs were the first documents to focus exclusively on the protection of investments, which no longer required the domestic exhaustion of remedies, and actively avoided domestic courts in less developed nations.²⁵² This allowed for the ISDS system

²⁵¹ Principles for Responsible Contracts, *supra* note 245, at 6.

²⁵² See generally, Daniel C. K. Chow & Thomas J. Schoenbaum, International Business Transactions 362–364 (3rd ed., 2011).

as an alternative to host state courts.²⁵³ Arbitral tribunals are designed to protect investors' interests, and perhaps not surprisingly their decisions frequently lead to large monetary awards against states for violations of BITs.²⁵⁴ Therefore, in order to envision a world where victims of human rights abuse are able to access remedy, there must be a forum where such disputes can be heard.

Although BITs can and should include a clause that requires access to human rights grievance mechanisms, those mechanisms must exist before access can be required. Given the critique of the ISDS system in Section IV, there is adequate space within the ISDS system for the tribunals to hear human rights cases. The issue is that those same tribunals are unlikely to hear cases involving human rights without the creation of a mechanism specifically designed for state-based counter-claims to investor's complaints or the creation of an exception for states to regulate for the purposes of public policy and human rights. This paper will therefore turn to a discussion regarding amendments to the ISDS system, supporting the implementation of a new set of human rights grievance mechanisms to allow victims of human rights abuse better access to remedy.

D. Applying a Human Rights Approach to China-South Africa BITs

When reviewing the historical relationship between China and South Africa, it is important to note the deeply rooted connection between these nations regarding anti-colonial sentiment. Both nations pride themselves on their independence from Western powers, and as such, rely heavily upon their own independent national investment systems and global South-South cooperation. South Africa specifically has introduced alternatives to the ISDS system by requiring that investors first submit disputes before South African courts, thereby exhausting domestic remedies before pursuing claims within the ISDS system.²⁵⁵ The additional termination of all first-generation BITs with many of Africa's once colonial keepers in Europe allowed South Africa to assume a leadership role on the Continent in challenging unequal

²⁵³ *Id.*; Won-Mog Choi, *The Present and Future of the Investor-State Dispute Settlement Paradigm*, 10 J. Int'l Econ. L. 725, 732 (2007).

²⁵⁴ *Investor-State Dispute Settlement: Public Consultation: 16 May – 9 July, 2012*, Org. for econ. co-operation & dev. Division (2012), <http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf>, at 8 [hereinafter OECD, ISDS].

²⁵⁵ The Promotion and Protection of Investment Bill, GN 733 of GG 39009, § 12(5) (22 July 2015) [hereinafter the PPI Bill].

international investment power dynamics.²⁵⁶ Having already recognized the 2012 SADC Model BIT, South Africa indeed has access to a model that supports all of the country's goals with respect to human rights²⁵⁷, independence from Western authority²⁵⁸, and supporting national courts to handle investment disputes.²⁵⁹ The Model BIT meets all criteria supporting the UNGPs and further encourages investors to respect human rights as an obligation.²⁶⁰ However, South Africa has not implemented this BIT system because it has yet to sign the Model BIT into action with any other nation. Thus, the question then remains whether South Africa will use this model to re-negotiate its BITs in the near future if it is not yet prepared to sign it into action. This paper therefore recommends that South Africa begin this process with the re-negotiation of its BIT with China.

As noted in Section II(D)(i), Chinese and South African perspectives on CSR are actually quite similar, and if South Africa can blend its discussion of human rights into a re-negotiation process that focuses on CSR with an emphasis on corporate social investment, perhaps the two countries could come to an agreement regarding future BITs that supports both parties' goals. This would include a movement away from Western investments and dispute settlement systems, social and environmental impact assessments, and a mixture of both South Africa and China's CSR regimes. In this discussion, South Africa should note the need for implementing an HRDD framework to ensure that Chinese investors are aware of the issues involved with investing in certain industry sectors and particular politically active areas. Looking to the Principles for Responsible Contract Drafting can aid South Africa and China in incorporating CSR concerns that support human rights through new age BITs. Even if such BITs are successfully negotiated between the two nations, this requires additional changes to the ISDS system more broadly, however, it appears that both China and South Africa would most likely agree to such amendments.

²⁵⁶ See, e.g., King III (In order to be listed on the Johannesburg Stock Exchange, all listed companies must annual report the extent to which they comply with The King Code, which includes both sustainability and integrated Environmental, Social and Governance (ESG) reporting, see *Johannesburg Stock Exchange*, SUSTAINABLE STOCK EXCHANGES INITIATIVE, <http://www.sseinitiative.org/fact-sheet/jse/> (Last visited July 15, 2018); see also *Kings III Reporting in Terms of the JSE Listing Requirements*, (Jan. 2013), <https://www.jse.co.za/content/JSEGuidanceLettersItems/King%20III%20Reporting%20in%20terms%20of%20the%20JSE%20Listings%20Requirements.pdf>; The Protection and Promotion of Investment Bill (Protection of Investment Act 22 of 2015 (S. Afr.); the SADC Model BIT, *supra* note 102.

²⁵⁷ See SADC Model BIT, *supra* note 102, at art. 15.2.

²⁵⁸ See *id.* at art. 20.

²⁵⁹ See *id.* at art. 28.4.

²⁶⁰ *Id.* at art. 15.1 (Supporting the UNGPs and the corporate obligation to respect human rights, leading to the assumption that such protection would require the use of HRDD to adequately support such requirements).

While the suggestion of having South Africa choose China as the guinea pig for its first re-negotiated BIT may lead to skepticism considering China's human rights record on the African continent, one must note that no such human rights abuses have occurred in South Africa, and China has never brought a single dispute against an African country within the ISDS system. This suggests that neither China nor South Africa is content with the current ISDS system. South Africa clearly supports the exhaustion of domestic remedies before turning to ISDS, given its standpoints in both The Bill and the SADC Model BIT. Yet China remains hesitant to submit investment disputes to domestic courts in South Africa, despite having only brought one dispute before ICSID so far.²⁶¹ Although China has not submitted many disputes before any ISDS systems, it has always included such provisions in its BITs for the last 15 years.²⁶² This inclusion shows that China enjoys the protection afforded by ISDS, where it can opt to engage in dispute resolution through the system if need be, even if it's not often needed. Therefore, if BITs were amended to allow states to engage in counter-claims, as well as the creation of an exception for legislation in the interests of public policy and human rights protection with reasonable compensation to investors if expropriation occurs, perhaps this would placate both South Africa and China's anxieties.

Taking these steps could ease South Africa's concerns with protection for its national right to legislate in the public interest, alongside providing an additional level of protection to support state-based counter-claims, while easing China's concerns about having to engage in dispute resolution through South African domestic courts under South Africa's new Protection and Promotion of Investment Bill.

V. CONCLUSION

Although there has been much skepticism by Western and African scholars regarding China's investment push into Africa, particularly in the realm of human rights issues,²⁶³ it appears that China and South Africa have reached a point where these concerns can be placated by the inclusion of certain protective measures in both a newly negotiated BIT and amendments to the ISDS system. As South Africa and China prepare to negotiate their BIT in the coming year, this paper suggests that the two countries should take a moment to recognize their long-standing relationship, and that they agree on CSR strategies and the need for further protection of human rights in all investment

²⁶¹ Joe Zhang, *supra* note 241.

²⁶² China: *Bilateral Investment Treaties*, INV. POL'Y HUB,

<http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu> (last visited July 15, 2018).

²⁶³ See *supra* Section III (particularly for a more in-depth discussion of scholars' responses to human rights issues between China and Africa).

interactions in the future. Furthermore, if the two nations can agree on these changes to their BIT, they could also lead the charge for other developing nations and the global south more broadly to call for amendments to the existing ISDS system. This would go a long way to better support host nations' rights to legislate in the public interest and to support states' and investors' obligations to protect, respect and remedy human rights through the creation of a state-based counter-claim measure that would allow human rights-based claims.

By emphasizing the breadth of investment cooperation between South Africa and China, as well as the power of BRICs nations more broadly, this paper suggests that the two countries are now in a place where they can change the face of investment treaties throughout the world by including human rights as a major concern for investors. If South Africa and China work together to implement a human rights-based strategy for investment, they could become leaders in this field going forward. While these efforts to protect human rights in investment treaties and dispute resolution processes may take years to adequately realize, without the push from nations like South Africa and China, no such changes will take place, leaving human rights open for continual violation. Now is the time for South Africa and China to take charge.

As the eve of the termination date for South Africa and China's BIT draws near, South Africa needs to negotiate the integration of new standards which include human rights protections for responsible FDI through BITs in order to preserve the steps taken away from colonialism and into a new dawn of democracy in Africa. If we look to the deeply connected history between South Africa and China, the relationship demonstrates that there is much space for human rights-based policy development within the investments between these two countries. Such actions require further development in the international sphere, and implementation by two of the most powerful developing emerging market economies to gain traction such that other nations may follow suit.