

China-Africa investment treaties: do they work?

Lorenzo Cotula, Xiaoxue Weng, Qianru Ma and Peng Ren



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Contents

List of boxes, figures and tables	4
Acronyms	5
Executive summary	7
1 Introduction	11
1.1 Topic and rationale	11
1.2 Focus and methods	14
1.3 Report outline and main findings	15
2 The China-Africa investment landscape	17
2.1 General outlook	17
2.2 The natural resource and infrastructure sectors	19
2.3 The place of investment treaties	20
3 China-Africa BITs: what is in the treaties?	23
3.1 Policy context	23
3.2 Trends in treaty content	25
3.3 South-South cooperation and China-Africa BITs	30
4 Do BITs matter to Chinese businesses investing in Africa?	34
4.1 Linking investment treaties and practice	34
4.2 BITs and investment decisions	38
4.3 Chinese companies and political risk	43
5 Conclusion and recommendations	48
5.1 What is in the China-Africa BITs?	48
5.2 Do the treaties influence investment decisions?	49
5.3 Possible ways forward	50
References	53

List of boxes, figures and tables

Box 1. Investment treaties: what they are and why they matter	13
Box 2. Investment treaty clauses: key concepts	26
Box 3. The blurred lines between BIT policy phases	28
Box 4. A recalibrated treaty? The China-Tanzania BIT	30
Box 5. Brazil's investment facilitation and co-operation agreements	32
Box 6. Contract-based versus treaty-based arbitration	46
Figure 1. Trends in China-Africa investment treaty making (1989-2013)	24
Figure 2. African countries' bilateral investment treaties with China (2016)	25
Figure 3. How effectively do BITs protect investments from expropriation?	39
Figure 4. How effectively do BITs protect investments from adverse regulatory change?	39
Figure 5. How important are BITs in your company's investment decision making?	40
Figure 6. How do you recover loss caused by host government conduct?	44
Table 1. Breakdown of 55 interviewees	37

Acronyms

ADR	alternative dispute resolution
BIT	bilateral investment treaty
CAITEC	Chinese Academy of International Trade and Economic Cooperation, Ministry of Commerce, China
FDI	foreign direct investment
FOCAC	Forum on China-Africa Cooperation
GEI	Global Environmental Institute
ICSID	International Centre for Settlement of Investment Disputes
IIED	International Institute for Environment and Development
MOFCOM	Ministry of Commerce, People's Republic of China
RCEP	Regional Comprehensive Economic Partnership
SADC	Southern African Development Community
SAIS	School of Advanced International Studies, Johns Hopkins University
SMEs	small and medium-scale enterprises
SOEs	state-owned enterprises
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
US	United States
WTO	World Trade Organization

Executive summary

Over the past 15 years, China's investments in Africa have increased rapidly and China has become Africa's largest trading partner. International economic diplomacy inspired by principles of South-South cooperation has accompanied this increased interdependence. There is an extensive literature on China-Africa economic relations. But there are continuing misperceptions about those relations, and little empirical evidence on the policy tools that underpin China's economic diplomacy in Africa and how they affect the conduct of Chinese companies.

International treaties to promote foreign investment are one prominent tool that China and sub-Saharan African states use in contemporary economic diplomacy. Globally, these international agreements increasingly are comprehensive regional or bilateral economic treaties with a chapter on investment. But the China-Africa agreements involve more narrowly focused bilateral investment treaties (BITs) between China and one African counterpart.

This report explores the content of the China-Africa BITs, and whether they achieve their stated goal of promoting foreign investment. It draws on a literature review; a legal analysis of the treaties; and 55 interviews with Chinese businesses operating in sub-Saharan Africa's natural resource and infrastructure sectors, and with industry experts. Because of significant data limitations, this report is an exploratory study that aims to pave the way to further research.

Why the topic matters

International agendas emphasise the role of private investment in realising the Sustainable Development Goals, so it is particularly relevant to investigate treaties designed to promote investment. Under many investment treaties worldwide, states agree to provide each other's investors with specified standards of treatment in the expectation that this will promote mutually beneficial investments. In practice, there is mixed evidence of whether investment treaties promote investment. This would question the rationale of states signing these treaties, and calls for more fine-grained data and analysis.

At the same time, legal proceedings that investors have brought around the world to challenge public action – including in sensitive policy areas such as public health, land governance and environmental protection – highlight the previously ignored costs of investment treaties. Shifting perceptions about the costs and benefits of investment treaties have fostered increased public scrutiny of treaty negotiations, particularly in high-income countries.

Despite the growing academic literature on the subject and in contrast to the lively discussions on investment treaty policy in Europe and North America, public debate on BITs in China and sub-Saharan Africa is limited. A better understanding of the legal, political and economic significance of these BITs, and of the extent to which they influence investment, is therefore important as it can inform policymaking in Africa, China and beyond.

What is in the treaties?

The China-Africa BITs are framed as policy tools to promote foreign investment as part of South-South economic cooperation. Compared to many North-South investment treaties, the China-Africa BITs present some notable specificities that make them more deferential to national regulation.

But ultimately, the China-Africa BITs adapt repertoires of treaty provisions that European governments, the United States (US) and Canada developed to negotiate with low and middle-income countries. Like traditional North-South treaties, the China-Africa BITs aim to promote foreign investment by protecting such investment from adverse state conduct, thereby mitigating political risk. Since the late 1990s, China-Africa BITs have shifted towards more robust protection. The investment treaty policies of other emerging economies such as Brazil and India show that there is greater scope for departing from conventional North-South BIT models. For example, treaties recently concluded by Brazil emphasise investment facilitation.

Despite important commonalities, the China-Africa BITs are quite diverse. Although this partly reflects changes in China's investment treaty policy, it also suggests that China seems willing to accommodate proposals from partner countries where possible. This flexible approach to negotiations seems a distinctive feature of the China-Africa BITs and of China's investment treaty stock more generally. It sets China apart from other big capital exporters such as the US and might give African states an opportunity to set agendas and negotiate effectively.

Do the treaties influence investment decisions?

In interviews with representatives from Chinese companies, respondents pointed to low awareness of investment treaties among all staff, including those in their legal departments. They also indicated that Chinese business take little account of BITs when making investment decisions, at least in the sectors reviewed. While our findings are preliminary and subject to revision, they suggest the China-Africa BITs may not be fulfilling their stated goal of promoting foreign investment.

A nuanced understanding of Chinese investors and the factors that drive their operations helps explain these findings. Although most public debates focus on large state-owned enterprises (SOEs), it is increasingly private-sector companies, including small and medium-scale enterprises (SMEs), that drive China's economic engagement in Africa. And awareness of investment treaties – never mind the ability to activate them – may be beyond the reach of many Chinese SMEs. In the case of large SOEs, although they would have the resources and expertise to consider and activate investment treaties, other considerations may trump their concerns about political risk.

Company managers' incentive structures also tend to favour short-term gains – in other words, getting the deals done – over long-term political risk concerns. The company interviews also suggest that at least some Chinese businesses operating in Africa see political risk as a fact of life and attach relatively low priority to mitigating it. These findings raise questions about the relevance of BITs that are primarily centred on political risk mitigation.

This does not mean that Chinese businesses in Africa would not value effective investment policies. Company interviewees raised concerns about access to business opportunities and unfair competition. They have developed strategies to deal with investment disputes, with a strong emphasis on alternative dispute resolution (ADR). But existing China-Africa BITs have little to say about these issues and strategies, so law and practice seem misaligned. Changing this could involve reconfiguring investment treaty policies, placing greater emphasis on collaborative investment facilitation and ADR. This would make the China-Africa BITs more distinctive compared to established BIT models and possibly give fuller effect to the concept of South-South cooperation.

Recommendations

The findings and limitations of this study show that there is a need for further research on the issue, but they also point to important implications for policy and practice – and to a clear need for public debate to help forge new policies that can more effectively pursue sustainable development aspirations in both China and Africa.

- **Implications for policy and practice in China:** This research makes a strong case for a more grounded understanding of the operational reality and policy needs of Chinese investors in Africa. For example, the Chinese government may consider conducting a broad-based survey of Chinese businesses that operate in Africa, encompassing diverse sectors and scales of operation. The authorities could use the survey results to identify the problems that businesses actually face and possible responses to them. This could also provide the foundations for a new approach to investment treaty policy and China's global leadership in this policy arena.

- **Implications for policy and practice in sub-Saharan Africa:** African governments have entered into far-reaching legal commitments, expecting these to promote foreign investment. But this research found no evidence that the treaties have delivered their promised benefits. And while the China-Africa BITs have not created any known liabilities, the possibility that Chinese investors might bring arbitration claims in the future cannot be ruled out: investment treaties typically involve long-term commitments; Chinese investment in Africa is growing; and companies could become more aware of the treaties and initiate arbitrations.

There is a strong case for African governments to review the performance of their BITs and inform their decisions on whether to conclude new treaties, terminate or renegotiate existing ones and reconfigure their approaches to treaty drafting. China's pragmatic approach to treaty negotiations could provide opportunities for African governments to set their own investment treaty policies and templates, and engage in negotiations on that basis. Cooperation among African states could help address imbalances in negotiating power.

- **Increased public debate and influence:** Lively debates on investment treaty policy in Europe and North America offer a stark contrast with the limited public interest in the investment treaties low and middle-income countries have signed, including with China. Parliaments, civil society and citizens at large need to get involved in their national debates so they can scrutinise and influence the way in which their governments reshape public policy.

1

Introduction

1.1 Topic and rationale

China-Africa economic relations have received extensive attention in recent years. Today, China is Africa's largest trading partner (Sun 2014) and its investments in the continent increased 60-fold between 2003 and 2014.¹ Although conventional wisdom suggests a close connection between China's policy of South-South cooperation and China-Africa trade and investment, there are continuing misperceptions about China-Africa economic relations. There is also little empirical evidence on the policy tools that underpin China's economic diplomacy in Africa and how they affect the conduct of Chinese companies.

International treaties to promote foreign investment are a prominent policy tool in contemporary economic diplomacy, including in both China and Africa. The international sustainable development agenda emphasises the role of private investment in realising the Sustainable Development Goals (UNGA 2015), so it is particularly relevant to investigate agreements aimed at promoting investment (see also UNCTAD 2015). Around the world, these treaties increasingly involve comprehensive regional or bilateral economic deals with a chapter on investment – for example, the proposed Trans-Pacific Partnership among 12 countries around the Pacific and the proposed Regional Comprehensive Economic Partnership (RCEP) in the Asia-Pacific region. But all China-Africa agreements are more narrowly focused bilateral investment treaties (BITs) between the Chinese government and one African counterpart.

Globally, investment treaties have been described as a 'grand bargain' (Salacuse and Sullivan 2005) through which states agree to provide each other's investors with specific standards of treatment, in the expectation that this will promote mutually beneficial

¹ Calculated using data from SAIS China-Africa Research Initiative (2016).

cross-border investments (see Box 1). But in practice, there is mixed evidence of whether investment treaties work, which raises questions around why states sign such treaties. Although several studies have found that the treaties promote investment (such as Salacuse and Sullivan 2005, and Neumayer and Spess 2005), some concluded differently (such as Hallward-Driemeier 2003, and Yackee 2011) or documented positive effects in certain sectors (Colen *et al.* 2014; Danzman 2016) or circumstances (Berger *et al.* 2010) but not others.

On the other hand, investors around the world have activated the treaties by bringing many legal proceedings to challenge public action, highlighting the previously neglected costs of investment treaties (Poulsen and Aisbett 2013). These investors have sought large amounts of compensation in a wide range of policy areas, including industrial strategy, taxation, public health, land governance and environmental protection. In recent years, shifting perceptions about the costs and benefits of investment treaties have increased public scrutiny of treaty negotiations – particularly in Europe and North America, but also in some middle-income countries (Abdul Aziz 2015; Cotula 2016).

China has become a leading player in the international investment treaty landscape, having concluded at least 129 BITs with a wide range of countries and ranking second only to Germany in the number of BITs signed.² China's changing place in the global economy could make its approach to investment treaties more influential. For their part, African states have signed many investment treaties with leading capital exporters outside Africa and among themselves. Investment treaties are now in place between China and at least 29 sub-Saharan African countries, and BITs have become one of the policy tools that underpin China-Africa economic diplomacy.

There is growing academic literature on this trend (Schill 2007; Gallagher and Shan 2009; Berger 2011; Ofodile 2013; Kidane 2014; Sauvart and Nolan 2015; Chi 2015; de Brugiére and Morgan 2016). But in contrast to the lively discussions on investment treaty policy in Europe and North America, there is little public debate on China-Africa BITs, including in the African countries concerned. Work remains to be done to understand the legal, political and economic significance of these investment treaties, the factors that influence their negotiation and – importantly – the role those BITs play in shaping Chinese firms' investment decisions. Understanding these issues more thoroughly can inform policymaking in Africa, China and beyond.

² Based on treaties available on the UNCTAD International Investment Agreements Navigator (Investment Policy Hub 2016).

Box 1. Investment treaties: what they are and why they matter

International investment law is the body of international law that governs the admission and treatment of foreign investments. Investment treaties account for the bulk of the norms of international investment law. There is no comprehensive global treaty that sets standards of treatment for foreign investment, and there is no global institution comparable to the World Trade Organization (WTO). Instead, international investment law is centred on a network of more than 3,000 bilateral and regional investment treaties.

The stated objective of these treaties is to promote cross-border investment flows. They aim to do this largely by seeking to mitigate political risk, establishing obligations about how states must protect investments by nationals of other state(s) within their territory. A growing minority of treaties also include investment liberalisation provisions.

Investment treaties must be distinguished from investment contracts. The latter may be concluded between an investor and a state (or state-controlled entity) for a specific investment project. Examples include establishment conventions, natural resource concessions and land leases. Investment treaties are concluded between states and apply to all covered investors and investments. Some treaties require states to honour the contracts they have entered into.

Most investment treaties allow investors to bring disputes to international investor-state arbitration (rather than national courts) if they consider the state has breached its treaty obligations. Over the years, investors have brought some 700 such arbitrations to challenge state conduct, including in policy areas relevant to sustainable development. Arbitral tribunals issue awards, which are similar to judgments, and can order states to compensate investors if they find violations.

Widely ratified multilateral treaties make it easier to enforce pecuniary arbitral awards.³ If a state fails to comply, an investor may seek enforcement in any signatory country where the state holds commercial interests – for example, by seizing goods or freezing bank accounts. So investment treaties have legal bite – even in countries where domestic rule of law is weak. Governments often honour arbitral awards so they can keep attracting investment, but a few states have delayed payment or refused to pay altogether.

³ Depending on applicable arbitration rules, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

1.2 Focus and methods

This report sheds light on the investment treaties concluded between China and African states. It investigates the political and economic context in which they operate, their content and whether they achieve their stated goal: promoting foreign investment as part of South-South cooperation. In line with the wider China-Africa literature (such as Brautigam 2015a), this report focuses on sub-Saharan Africa. It uses 'Africa' as a shorthand for sub-Saharan Africa and 'China-Africa investment treaties' as a shorthand for the treaties concluded between China and one sub-Saharan African state.

In assessing whether BITs promote foreign direct investment (FDI), the report focuses on two sectors: natural resources and infrastructure. The former includes petroleum, mining, forestry and agriculture; the latter, construction of transport and power facilities. Both sectors account for a significant part of China's economic engagement with Africa.⁴ Investment protection is deemed to be relevant to these sectors, due to high sunk costs and the vulnerability of investments to adverse public action over project duration (Wälde 2008; Danzman 2016). The natural resource and infrastructure sectors account for 30 and 33 per cent, respectively, of the caseload of the International Centre for Settlement of Investment Disputes (ICSID), a prominent global forum for investment treaty arbitration (ICSID 2016).⁵

This report draws on three sources of data:

- **A literature review:** This focused on China-Africa investment relations and earlier analyses of China-Africa BITs, and included publications in English and Chinese.
- **A legal analysis of China-Africa investment treaties:** This covered BITs available on the United Nations Conference on Trade and Development (UNCTAD) International Investment Agreement Navigator (Investment Policy Hub 2016), and on the website of China's Ministry of Commerce (MOFCOM 2016). Of the 31 known China-Africa BITs, at least 15 have entered into force,⁶ but half were not available on the UNCTAD or MOFCOM websites. So the treaty analysis covered the 15 available treaties, of which ten have entered into force. The treaties were drafted in English, French and Chinese.
- **Interviews with Chinese stakeholders:** Inspired by Yackee (2011), this research uses stakeholder interviews to generate evidence on the role China-Africa BITs play in the investment decisions of Chinese firms. But while Yackee conducted a survey of 200 legal counsels in large United States (US) companies, this research takes a

4 IIED (2016), covering both sectors and drawing on multiple primary and secondary data sources.

5 The figure for infrastructure aggregates ICSID caseload data for construction, electric power and energy, and transportation; the figure for the natural resource sector aggregates ICSID data for the extractive industries and agriculture, forestry and fisheries.

6 China has concluded two separate treaties each at different points in time with the Democratic Republic of Congo and Nigeria, so there are 31 BITs with 29 countries. See Investment Policy Hub (2016).

qualitative approach, not least because of the remote likelihood of obtaining responses from comparable numbers of Chinese companies, given the general lack of access to large, representative samples of Chinese company staff – a recurring problem in China-Africa literature. The research draws on 22 interviews with representatives from Chinese companies that are active in Africa's natural resource and infrastructure sectors and 11 interviews with Chinese experts. It also draws on 22 Chinese company interviews conducted during earlier studies on Chinese outward investment decision making. Additional information on interview methods is provided in Chapter 4, which also presents relevant findings.

While this qualitative approach is inevitably only a first step towards better understanding the issues, it generated in-depth insights into the complex factors that influence company decisions and calculations. To our knowledge, no other study has documented insider perspectives on investment treaties within the Chinese corporate sector, so this research offers new perspectives on a complex issue that deserves further exploration.

1.3 Report outline and main findings

Drawing primarily on the literature review, Chapter 2 discusses the context of China-Africa economic diplomacy, the role the BITs play and Chinese investment trends in Africa. It examines the policy objectives that investment treaties aim to pursue and finds that China-Africa economic diplomacy configures BITs as a tool to promote foreign investment in a wider relationship that is inspired by a logic of South-South cooperation.⁷

Chapter 2 also sheds light on the potential 'users' of the treaties, particularly in the natural resource and infrastructure sectors. The public debates around China-Africa investment relations tend to focus on large, state-owned enterprises (SOEs). But this analysis finds that private sector small and medium-scale enterprises (SMEs) are an important driving force of China's economic engagement in Africa. This finding underscores why it is important for investment policies to address the needs of Chinese investors from this group.

Chapter 3 presents findings from the legal analysis of the China-Africa BITs. It documents alignments and misalignments between China's South-South cooperation policy and the content of the China-Africa BITs. Compared to many North-South investment treaties, the China-Africa BITs present specificities that make them more deferential to national regulation. But they largely adapt repertoires of treaty provisions that European and North American states historically developed for their negotiations with low and middle-income countries.

⁷ The notions of North and South would require unpacking in light of complexities in the contemporary global economy. This report uses these terms because of their explicit use in China-Africa economic diplomacy.

Like traditional North-South treaties, the China-Africa BITs aim to promote foreign investment primarily by protecting it. The BITs concluded since the late 1990s present tighter investment protection standards. Chapter 3 compares these findings with the evolving investment treaty policies adopted by other emerging economies, such as Brazil and India, finding, for example, that recent treaties concluded by Brazil place greater emphasis on facilitating – rather than protecting – investments. This analysis also finds significant diversity in the China-Africa BITs. This partly reflects changes in China's investment treaty policy; but it also suggests that China is willing to accommodate proposals from partner countries when policy red lines are not at stake.

Chapter 4 draws on interviews with experts and company staff to explore the extent to which the China-Africa BITs promote investment in Africa's natural resource and infrastructure sectors. Respondents pointed to very low awareness of investment treaties among company staff, including legal personnel. They also suggested that Chinese businesses pay little attention to BITs in their investment decisions. While these findings are preliminary and subject to revision as more data becomes available, they provide a cautionary tale about whether the BITs promote foreign investment.

The factors discussed in Chapters 2 and 3 partly explain these results. For many Chinese SMEs, awareness of investment treaties may be beyond their reach, never mind activation. And while large SOEs would have the resources and expertise to consider and activate investment treaties, other considerations that drive their operations may trump any concerns about political risk. It seems that political risk is a low priority for Chinese businesses in Africa, and this raises questions about the relevance of BITs that are primarily centred on protecting investment. The interviews also suggest that the BITs do not address the concerns of these businesses, including access to business opportunities and unfair competition.

The conclusion (Chapter 5) provides pointers for policy and practice in China and Africa and for further research. In China, next steps may involve conducting a broad-based survey of Chinese SOEs and private businesses operating in Africa, and reconfiguring investment treaty policy based on the findings. Should the survey confirm the findings of this research, the process could involve significant shifts in treaty formulation, increasing the distinctiveness of China-Africa BITs and possibly giving fuller effect to the concept of South-South cooperation.

Next steps in Africa may include rigorous reviews of the costs and benefits of national BIT stocks; clear national BIT policies; and, where relevant, treaty templates as a basis for negotiations. This would ensure states are making the most of China's pragmatic approach to treaty making. Arrangements for collective action in treaty negotiation could strengthen the negotiating position of African states. There needs to be inclusive public debate on investment treaty policy and follow-on research could shed more light on investment treaties and their performance.

2

The China-Africa investment landscape

Drawing primarily on the literature review, this chapter finds that China-Africa economic diplomacy configures the BIT as a tool to promote foreign investment in the context of South-South cooperation. The analysis also identifies the potential users of the treaties in the infrastructure and natural resources sectors.

2.1 General outlook

Investment flows between China and Africa have soared in recent years, with Chinese FDI stock in Africa jumping from US\$500 million to 32 billion over 2003-2014 (SAIS China-Africa Research Initiative 2016).⁸ These evolutions are part of a wider global geo-economic restructuring that is changing the place of China in the world economy, and has sharply increased the relevance of China to Africa's development pathways. The academic literature has also grown exponentially. Over time, it has started to challenge conventional narratives about the nature of China-Africa FDI flows.

Early accounts emphasised the role of China's centrally planned interventions and large SOEs in acquiring natural resource contracts in Africa (Kaplinsky *et al.* 2007; Alden and Alves 2009). More recent research has shown that configurations can in fact be very diverse: Chinese SOEs coexist with private firms operating at different scales; SOEs are themselves under pressure to operate on a commercial basis and often act semi-independently of government planning; and multiple state-business projects supported

⁸ The underlying data is based on UNCTAD bilateral FDI statistics, China statistical yearbook and The statistical bulletin of China's outward foreign direct investment. Data covers North Africa too.

by central and provincial Chinese government agencies – each with their distinctive regulations, institutions, business cultures and approaches – can result in a proliferation of uncoordinated activities (Weng *et al.* 2014; Gu *et al.* 2016; Weng and Buckley 2016).

It is also clear that, while official discourses frame China-Africa economic relations in terms of South-South state-driven development cooperation, China's economic diplomacy in Africa configures business activity as the real engine of economic development (Schiere 2011; Scoones *et al.* 2016). This strategy involves combinations of public policy levers at both regional and bilateral levels, including aid, trade, investment and public finance. It is also premised on the rapid expansion of Chinese business activity on the African continent, in line with China's longstanding (since 1999) Going Out policy to encourage Chinese businesses to expand overseas.

This evolving context is creating new hybrid relations between state (tasked with financing and guiding) and business (which drives implementation) (Scoones *et al.* 2016; see also Munson and Zheng 2012). Public policy tools include institutional infrastructure centred on the three-yearly meetings of the Forum on China-Africa Cooperation (FOCAC), and a range of operational instruments including China EximBank, various tax incentive and soft loan schemes and the China-Africa Development Fund set up in 2007 to support Chinese investment in Africa.

In practice, incentives are often skewed towards politically connected SOEs, and their importance in shaping business relations has sometimes been overstated (Gu *et al.* 2016; Weng and Buckley 2016). On the other hand, China's private sector operators have played an increasingly important role in driving economic integration. In 2014, private investment accounted for nearly half (46 per cent) of China's outward FDI flows to Africa, up from only one-fifth in 2006 (CAITEC *et al.* 2015). An unquantified, but likely significant, share of Chinese private investment operates through unrecorded channels, particularly in the case of Chinese SMEs (Gu 2009; Weng 2014). So the role of private investment will probably be more prominent than official statistics suggest.

China-Africa investment relations entail significant but asymmetric economic stakes for the parties involved. For China, Africa provides appealing strategic and business opportunities, including – but not only – as a source of commodities and raw materials to underpin China's economic growth and increasingly, an expanding regional market for its products. That said, Africa remains the smallest regional destination for Chinese outward FDI – for example, Africa accounts for 3.7 per cent of Chinese outward FDI stock and 2.6 per cent of outward FDI flows (CAITEC *et al.* 2015; SAIS China-Africa Research Initiative 2016 presents broadly comparable data). These statistics include North Africa, so sub-Saharan Africa's share of Chinese investments is even smaller. The figures will probably miss large amounts of private investment by SMEs, but the unaccounted flows are not necessarily Africa-specific. This data puts into perspective oft-quoted narratives about the scale of China's economic embrace of the African continent.

For Africa, China's economic diplomacy provides new opportunities for financing, trade and investment, and more generally for greater leverage in external negotiations through diversifying options away from traditional donors and economic partners (Scoones *et al.* 2016). But there are also new challenges for African states to ensure that business activity does contribute to national development priorities – including in light of controversies surrounding the social and environmental performance of Chinese businesses operating in Africa, which beg for more rigorous empirical and comparative studies.

To sum up, this brief discussion challenges some prevailing narratives about China-Africa investment relations. It qualifies accounts that identify centrally planned action by large SOEs as the main vehicle for China's outward investment; it reconfigures the stakes and the articulation between public and private elements in China's economic strategy in Africa; and it emphasises diversity in Chinese enterprises operating in Africa, pointing to the need to include Chinese private investors in the analysis of China-Africa economic relations.

2.2 The natural resource and infrastructure sectors

The need to question prevailing narratives is compounded by a more fine-grained analysis of the sectors reviewed in this report – namely, infrastructure and natural resources. In agriculture, much debate focuses on the alleged role of Chinese companies in acquiring large areas of land in Africa for food-related plantation agriculture (Malone 2008; Rubinstein 2009; French 2010). But more careful analyses have questioned this narrative, pointing to: the very small share of agriculture in China's outward investment in Africa (Information Office of the State Council 2010); the dearth of documented Chinese land acquisitions on the continent (Brautigam and Zhang 2013; Cotula 2013); and the diverse forms of Chinese agricultural ventures in Africa – including smallholder-oriented technology transfer models and agro-industrial crops such as rubber and cotton (Buckley 2012; Assembe-Mvondo *et al.* 2015).

Chinese agribusinesses active in Africa include private companies and SOEs (Brautigam 2015a). Private SMEs are increasingly prevalent in some countries (see, for example, Barungi 2016). In oil and gas, Chinese companies have worked to penetrate a sector long dominated by European and North American multinationals. They first acquired positions in countries such as Sudan, that for diverse reasons European and North American companies had shunned (Brautigam 2010), and then moved to expand to a more diverse portfolio across the continent (Alessi and Xu 2012). Large SOEs dominate China's involvement in the oil and gas sector.

The mining sector highlights the important role of commodities in China's economic presence in Africa. In 2011, Chinese mining investment in Africa accounted for nearly three-quarters of China's total outward mining FDI (Commodity Discovery Fund 2011, citing data from the Chinese Mining Association). It includes both vertically integrated large-scale operations – both state and privately owned – and supply chains relations involving local small-scale miners (Jansson *et al.* 2009; Hilson 2013; Frankel 2016). Chinese migrants have also been involved in small-scale mining and supply chains servicing the small-scale sector – for example, in Ghana (Yang 2014). Diverse business configurations involve different time horizons: large-scale mining operations are inherently long term but businesses sourcing from local miners can have shorter-term investment outlooks.

In forestry, the Chinese market is crucial to Africa: close to 80 per cent of Africa's timber exports went to China in 2009 (Huang *et al.* 2013). In Gabon, Chinese companies own more than a third of the concessions and are interested in long-term operations (WWF 2016). But in most other African countries, Chinese businesses mainly operate through SMEs engaged in trading of unprocessed timber. Over 80 per cent of the Chinese companies that invested since 2007 have less than US\$10 million in registered capital (Li and Yan 2016). These companies tend to present a short to medium-term outlook of their investment in the country of operation.

In infrastructure, Chinese companies are estimated to have built 15 per cent of Africa's infrastructure projects in 2015, including railways, dams and power stations (Deloitte 2015).⁹ These construction companies are a mix of SOEs and relatively large private companies. The infrastructure projects are financed by a variety of sources including Chinese commercial banks, Chinese government-linked banks such as the China Development Bank and China EximBank, and other multilateral institutions such as the World Bank and the African Development Bank. There are links between the different sectors, not least because some investment deals bundle together interventions in both extractives and infrastructure.¹⁰

2.3 The place of investment treaties

The nature of China-Africa investment relations has important implications for investment treaty policy. First, investment treaties can only be properly understood in light of the institutional infrastructure of economic diplomacy they are anchored to. All FOCAC action plans commit both sides to negotiating BITs to increase China-Africa investment flows,¹¹

9 Only projects worth over US\$50 million are included.

10 On resources-for-infrastructure swap contracts, see, for example, Konijn (2014).

11 FOCAC (2000) paragraph 3.2.2; FOCAC (2003) paragraph 4.4.3; FOCAC (2006) paragraph 3.2.2; FOCAC (2009) paragraph 4.2.2; FOCAC (2012) paragraph 4.2.2; and FOCAC (2015) paragraph 3.7.2.

by “creat[ing] an enabling environment for investment cooperation and protect[ing] the lawful rights and interests of investors.”¹²

The action plans also identify complementary measures to promote foreign investment, including tax treaties, special economic zones and investment facilitation. In turn, promoting foreign investment is but one issue in a bundle of economic relations that also includes trade, aid and loan facilities. So in any bilateral relations, the economic deal may go well beyond what appears in the letter of an investment treaty.¹³ A comprehensive assessment of agreed arrangements would need to consider the full set of deals.

Like the investment treaties, the relevant provisions of the FOCAC action plans are formulated in reciprocal terms: they refer to investment flows between the two sides, in a relationship framed in terms of South-South cooperation. However, the economic reality primarily involves relations between a capital exporter (China) and a capital importer (African states), setting the scene for opposed bargaining interests in investment treaty negotiations – protecting foreign investment overseas versus preserving national policy space – and possibly for imbalances in negotiating power between the parties.

Second, the diversity of Chinese businesses in Africa (from large SOEs to private SMEs) will probably affect the relevance of investment treaties to the operation of Chinese companies; and thus ultimately the extent to which the treaties can achieve the policy objective of promoting investments. Indeed, Chinese operators will probably have different financial, human and political resources and incentives to activate or even obtain information about investment treaties. Investment protection would be expected to be a prominent issue for relatively large Chinese private sector companies operating in the infrastructure sector.

On the other hand, investor-state arbitration involves significant costs (Hodgson 2014). This may place treaty protections beyond the reach of many private SMEs – for example, in agriculture, forest and mining. In addition, the short- to medium-term time horizons prevailing among some Chinese enterprises in the forest and mining sectors would be expected to decrease the relevance of investment protection. Large-scale investments in mining and petroleum can involve substantial sunk costs, and have been commonly associated with concerns about political risk and investment protection (Wälde 2008). But SOEs play a significant role in these sectors, and considerations other than political risk could make the outlook rather different from situations where private sector operators prevail – as explained in Chapter 4.

12 FOCAC (2006) paragraph 3.2.2.

13 For example, China and Mali signed a BIT in February 2009, during the Chinese president's visit to Mali. The treaty is part of a wider package of deals that diplomatic cables available via WikiLeaks report to include financing and construction contracts – for example, for major transport infrastructure and a sugar processing facility.

This discussion raises two sets of questions about China-Africa BITs. First, the clear FOCAC policy objectives and the framing of the treaties as a tool for South-South cooperation call for reviewing the content of the China-Africa BITs, examining the investment promotion mechanisms they deploy and assessing the extent to which South-South cooperation principles permeate their formulation. Chapter 3 explores these issues. Second, the discussion about the expected relevance of BITs to different groups of potential users sets the backdrop for analysing the 55 company and expert interviews. In turn, the interviews shed light on the empirical grounding of some of these points, and on whether BITs advance their policy objective of promoting foreign investment. These issues are discussed in Chapter 4.

3

China-Africa BITs: what is in the treaties?

Having set the context for understanding China-Africa investment relations, this chapter examines the content of the BITs. Despite considerable diversity, the China-Africa BITs pursue the FOCAC policy goal of promoting investment through political risk mitigation via investment protection. This contrasts with the approach recently adopted by some other emerging economies.

3.1 Policy context

After an initial phase of resistance in the 1960s, African states signed many investment treaties with main capital exporters outside Africa and among themselves. Evidence suggests governments signed the treaties in the expectation that doing so would promote FDI, while often underestimating the potential liabilities the BITs could entail (Poulsen 2015). It is impossible to do justice to the great diversity of situations in the limited space allowed here, but as a broad generalisation, African states have tended to be 'rule takers' in investment treaty negotiations. In other words, they have often subscribed to templates developed by high-income countries (Alschner and Skougarevskiy 2016).

Mauritius and South Africa provide examples of departure from this trend. Mauritius has developed a distinctive network of BITs – including with other African states – as part of a broader policy to position the country as an investment hub for the region. South Africa has evolved from rule taker when negotiating primarily with high-income countries to rule maker, particularly in subsequent negotiations with low and middle-income countries (Alschner and Skougarevskiy 2016).

In the 1960s and 1970s, China maintained a largely hostile policy to investment treaties, due to on their Marxist ideology and historical experience of unequal treaties during colonialism (Berger 2011). After economic reforms in the late 1970s, China signed its first BIT with Sweden in 1982 (Berger 2011). From the 1980s to the mid-1990s, China negotiated BITs with several capital-exporting states, renegotiating some of these treaties in the early 2000s (Sauvant and Nolan 2015; Berger 2015).

China has since concluded some 130 BITs, which makes it a major player on the investment treaty scene. China has also negotiated bilateral and regional economic treaties that include investment chapters (Berger 2013): a notable example is the ongoing negotiation of the RCEP in the Asia-Pacific region. There is considerable diversity in China's BIT stock, partly reflecting different phases in China's investment treaty policy (Gallagher and Shan 2009; Han 2015), but also the range of considerations that drive China's negotiations with economies that have different characteristics (Berger 2015).

China's first investment treaty with an African country was with Ghana in 1989. China now has bilateral treaties with at least 29 sub-Saharan African countries. Many such treaties were concluded in 1996-2005. The possibility cannot be ruled out that further treaties exist, but are not listed on the relevant websites. About half the China-Africa BITs do not seem to be in force, including several treaties concluded five years ago or more. But information about whether treaties are in force may itself not be up to date. Figure 1 visualises the trend over time, while Figure 2 provides a snapshot of existing China-Africa investment treaties.

Figure 1. Trends in China-Africa investment treaty making (1989-2013)

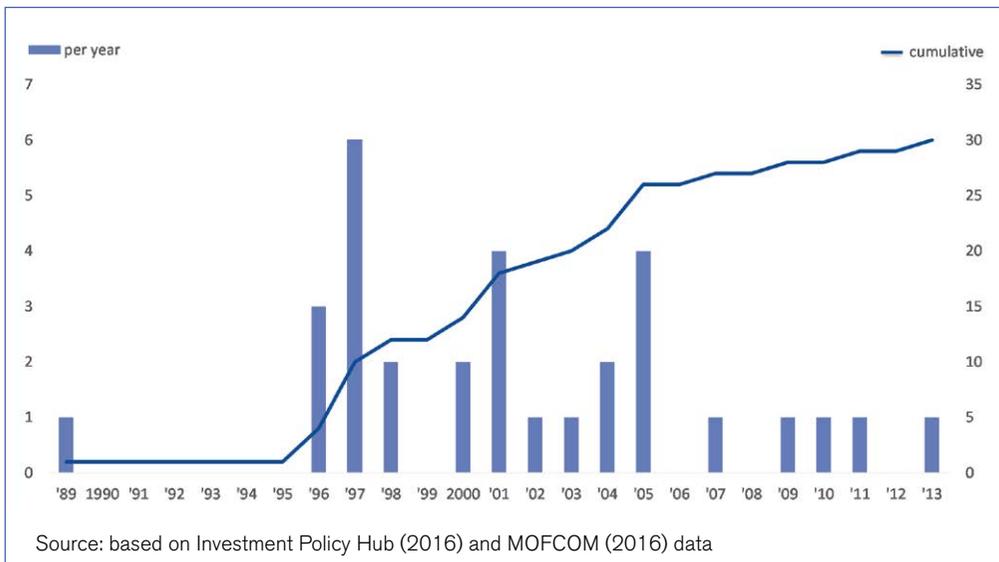
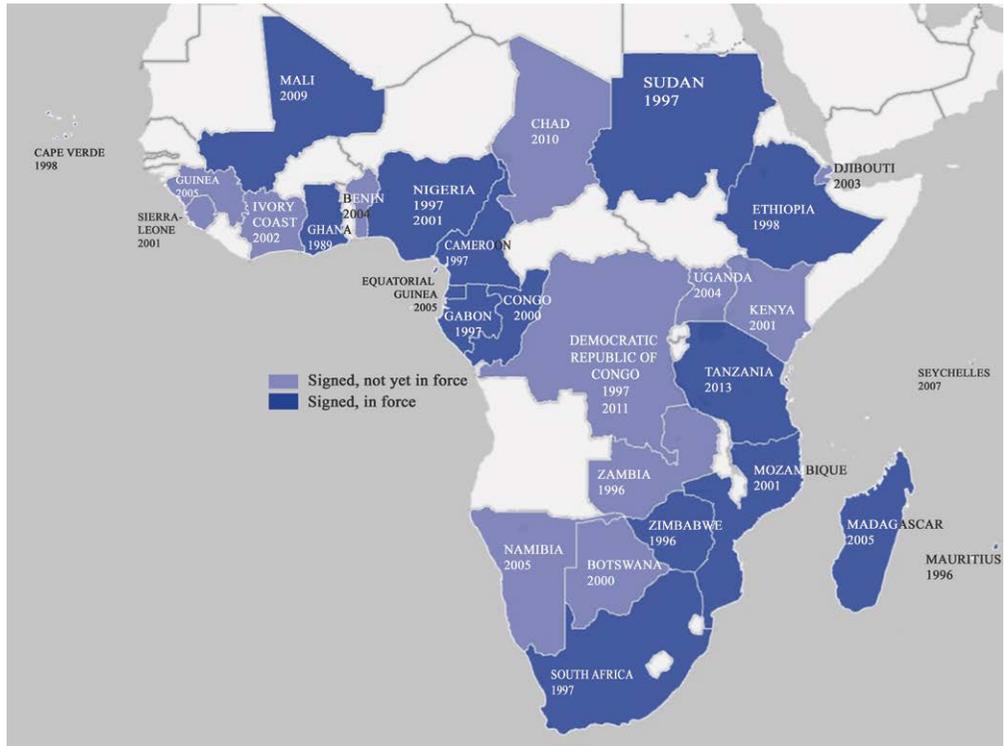


Figure 2. African countries' bilateral investment treaties with China (2016)



Source: based on Investment Policy Hub (2016) and MOFCOM (2016) data

There is limited evidence on the criteria used to initiate investment treaty negotiations. One Chinese expert interviewed as part of this research suggested that, from China's perspective, the existence of Chinese investment is usually a precondition for initiating negotiations, but at times BITs are signed as a political gesture. According to this expert, for example, the China-South Africa BIT was signed when the two countries formally established diplomatic relations. That several China-Africa BITs have been signed but do not appear to have been brought into force would seem to compound this political dimension of investment treaty making. This dimension is also confirmed in recent literature (Hadley 2013; Poulsen 2015; and Jandhyala *et al.* 2015).

3.2 Trends in treaty content

Several China-Africa BITs are not publicly available, making it difficult to draw general conclusions about patterns in treaty content. Overall, available treaties present both commonalities and differences. One important commonality is that, with one partial exception,¹⁴ all the BITs reviewed are formulated in post-establishment terms – meaning

¹⁴ The China-Tanzania BIT of 2013 extends the most-favoured-nation clause to the establishment phase.

they provide protection to investments admitted into the country, but do not create obligations for states to admit foreign investment. Investment protection is the primary, if not exclusive, focus of the treaties: all the China-Africa BITs reviewed aim to promote investment flows by mitigating political risk.

There are commonalities in specific treaty clauses too. Broadly speaking, the China-Africa BITs are based on the repertoire of clauses commonly used in investment treaties worldwide (Box 2). In more specific terms, all the treaties reviewed feature broad definitions of protected investments, based on a non-exhaustive list of assets. They also feature clauses that require states to provide 'fair and equitable treatment' or set conditions for the legality of expropriations. That said, significant drafting differences

Box 2. Investment treaty clauses: key concepts

While specifics can vary significantly, many investment treaties worldwide feature recurring provisions. Widely used clauses include:

- 'National treatment' and 'most-favoured-nation' clauses that typically require states to treat foreign investors or investments no less favourably than investments in similar circumstances by their own nationals (national treatment) or by nationals of other states (most-favoured-nation treatment)
- 'Fair and equitable treatment' clauses that require states to treat foreign investment according to a minimum (but undefined) standard of fairness, irrespective of the rules they apply to domestic investment under national law
- 'Full protection and security' clauses that typically require states to take steps to protect the physical integrity of foreign investment, but in some cases were interpreted more broadly to cover legal protection too
- Expropriation clauses that set conditions for the legality of both direct and indirect expropriations, with the latter referring to regulatory measures that do not transfer ownership but substantially affect investments; these clauses often state that any expropriation must be for a public purpose, non-discriminatory and that governments must follow due process and pay compensation according to specified standards typically linked to market value
- 'Transfers' clauses that allow investors to make financial transfers in connection with their investments (for example, to repatriate returns)
- 'Umbrella' clauses that require states to honour commitments they may have entered into with investors from the other states, and
- Dispute settlement clauses that allow investors to bring disputes against the state to international arbitration rather than national courts.

affect several treaty clauses and seem partly linked to the time of negotiation. Broadly speaking, the treaties reviewed can be grouped in three phases, which are discussed below.

3.2.1 Deference to national regulation: 1989-1999

In contrast to prevailing international trends in investment treaty making, the older China-Africa treaties restrict investment protection both substantially and procedurally (Ofodile 2013; Kidane 2014; Sauvart and Nolan 2015). Examples of the substantive dimensions include:

- The absence of a 'national treatment' clause in several China-Africa treaties, allowing states to treat foreign investors less favourably than nationals so long as they comply with other treaty provisions – includes China's BITs with Ghana (1989), Mauritius (1996), Zimbabwe (1996) and Cape Verde (1998)
- Vague references to ensuring investment protection, instead of a more explicit 'full protection and security' clause – includes treaties with Ghana (1989), Zimbabwe (1996), South Africa (1997) and Ethiopia (1998). The Cape Verde-China BIT (1998) contains two separate clauses, referring both to protection and to constant protection and security, and
- Qualified most-favoured-nation clauses, for example restricted to the application of the 'fair and equitable treatment' and 'full protection and security' standards – includes treaties with Zimbabwe (1996), South Africa (1997), Cape Verde (1998) and Ethiopia (1998).

In procedural terms, these older, more restrictive treaties purport to limit the ability of investors to access investor-state arbitration. For example, several treaties – with Ghana (1989), Mauritius (1996), Zimbabwe (1996), Cape Verde (1998) and Ethiopia (1998) – restrict investor-state arbitration to disputes over the amount of compensation for expropriation. But in the arbitration *Tza Yap Shum v. Republic of Peru*, the arbitral tribunal interpreted a comparable formulation in expansive terms, finding it had jurisdiction to hear disputes beyond the narrow issue of compensation amounts.¹⁵

3.2.2 Stronger investment protection: 1999 onwards

The treaties concluded from the late 1990s tend to provide more generous standards of treatment for foreign investment. For example, 'national treatment' clauses are now routinely included, even though several treaties still feature qualifiers, such as "without

¹⁵ *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6. Decision on jurisdiction and competence, 19 June 2009, paragraphs 150-161.

prejudice to parties' laws and regulations".¹⁶ Similarly, 'full protection and security' clauses are more explicit,¹⁷ although formulations continue to vary significantly.¹⁸ Procedurally, the more recent treaties contain broader arbitration clauses that allow investors to access arbitration for any investment disputes.¹⁹

Box 3. The blurred lines between BIT policy phases

Detailed analysis of China-Africa BITs points to a need for caution in overly neat periodisation of investment treaty policy. Take expropriation clauses. More recent treaties contain clearer statements that compensation must be equivalent to the genuine or real value, and that payment should be made without delay.²⁰ This is a shift from earlier treaty practice. Older treaties referred to compensation "without unreasonable delay";²¹ which leaves states with greater latitude. However, there are several deviations to this trend: the tighter "without delay" standard features in some treaties dating back to the mid-1990s,²² while some recent treaties use the more generous "without unreasonable delay".²³

Similarly, umbrella clauses are absent in some older treaties,²⁴ and are a common feature in more recent ones, in line with the prevailing narrative about an increased concern over investment protection.²⁵ But some more recent ones have no umbrella clause,²⁶ while the China-Mauritius BIT of 1996 restricts its umbrella clause to commitments made "in accordance with [national] laws". Finally, while recent treaties have formally broadened scope for investor-state arbitration, several of the more open arbitration clauses still contain significant caveats, allowing states to require investors "to go through the domestic administrative review procedures" before accessing international arbitration".²⁷

16 China's investment treaties with South Africa (1997), Botswana (2000), Congo (2000), Nigeria (2001), Cote d'Ivoire (2002), Djibouti (2003), Benin (2004), Uganda (2004) and Madagascar (2005).

17 China's investment treaties with Botswana (2000), Cote d'Ivoire (2002), Djibouti (2003), Benin (2004), Uganda (2004) and Madagascar (2005). See also Sauvart and Nolan (2015).

18 For example, "full and complete protection and safety" in the China-Uganda BIT (2004); "continuous protection" in the China-Nigeria BIT (2001); and "constant protection and security" in treaties with Cote d'Ivoire (2002) and Djibouti (2003).

19 For example, China's investment treaties with South Africa (1997), Botswana (2000), Congo (2000), Cote d'Ivoire (2002), Djibouti (2003), Benin (2004), Madagascar (2005), Nigeria (2001) and Uganda (2004).

20 On the "without delay" formulation, see China's investment treaties with Botswana (2000), Congo (2000), Cote d'Ivoire (2002), Djibouti (2003), Benin (2004) and Uganda (2004).

21 China's investment treaties Ghana (1989) and Ethiopia (1998).

22 China's investment treaties with Mauritius (1996), Zimbabwe (1996) and South Africa (1997).

23 For example, China's investment treaties with Nigeria (2001) and Madagascar (2005).

24 China's investment treaties with Ghana (1989), Zimbabwe (1996), Cape Verde (1998) and Ethiopia (1998).

25 China's investment treaties with Congo (2000), Nigeria (2001), Cote d'Ivoire (2002), Djibouti (2003), Benin (2004) and Uganda (2004).

26 Botswana-China BIT (2000), China-Madagascar BIT (2005).

27 Citation from the Benin-China BIT (2004). The China-Nigeria BIT (2001) is an exception to this trend.

Several authors have linked the preference for stronger investment protection standards to the adoption in 1999 of the Going Out policy, and China's growing role as a capital exporter (Ofodile 2013; Sauvart and Nolan 2015). Others have explained the changes in terms of international policy diffusion, with treaty formulations becoming more aligned with those of treaties concluded by major capital exporters (Berger 2015). In any case, the lines between the different phases of China-Africa treaty making are blurred. Based on treaty formulation, the China-Mauritius BIT of 1996 and the China-South Africa BIT of 1997 appear to have been important turning points – yet both preceded China's Going Out policy. A closer look at specific treaty provisions confirms this conclusion (see Box 3).

3.2.3 Towards balancing investment protection and policy space?

The growing number of arbitrations investors brought against states under investment treaties worldwide has fuelled concerns that the treaties could unduly restrict the ability of states to take public interest action. There have also been debates about ways to integrate social and environmental considerations into BITs (UNCTAD 2015). Partly in response to such concerns, several states have sought to 'recalibrate' their investment treaties (Alvarez 2010). This shift fostered new departures in treaty formulations – including more narrowly drafted fair and equitable treatment provisions, new clauses on social and environmental issues and general exceptions clauses to preserve the right of states to regulate in the public interest.²⁸

Most of the China-Africa investment treaties reviewed present no or little sign of recalibration. But the China-Tanzania BIT of 2013 – the most recent treaty available – does depart from earlier treaty practice in significant ways (Box 4). This treaty maintains the more robust investment protection standards established since the late 1990s, but it also introduces formulations to avoid undue restrictions on policy space and to include some consideration of social and environmental issues.

²⁸ For a fuller discussion, see Cotula (2014).

Box 4. A recalibrated treaty? The China-Tanzania BIT

The China-Tanzania BIT of 2013 differs significantly from the other treaties reviewed. This treaty:

- Restricts the ‘fair and equitable treatment’ provision to denial of justice or to “obvious discriminatory or arbitrary measures”
- Integrates into the expropriation clause criteria to determine whether an indirect expropriation has occurred
- Features balance-of-payment and other exceptions in the transfers clause, and a local entrepreneurship exception to ‘national treatment’
- Clarifies that investment protection standards cannot be interpreted to prevent public interest regulation in the areas of environment, health and safety, and
- Includes a ‘denial of benefits’ clause to prevent use of treaty protections by shell companies.

However, it is too early to point to a wider trend in this direction based on one treaty, particularly given the idiosyncratic patterns observed above. The China-Mauritius BIT of 1996 also contains early elements of recalibration, including a ‘prohibitions and restrictions’ clause that carves out exceptions for regulation to protect the environment and public health. Similarly, the China-South Africa BIT of 1997 exempts from the national treatment clause both tax laws and affirmative action programmes to deal with the legacy of apartheid. However, comparable approaches do not feature in subsequent China-Africa BITs. Nor does the China-Tanzania BIT feature the full suite of recalibration techniques used in many recent investment treaties worldwide – for example, the China-Tanzania BIT recognises “that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures”, but unlike the US model treaty it does not explicitly address labour issues beyond health and safety.

3.3 South-South cooperation and China-Africa BITs

3.3.1 General outlook

FOCAC action plans frame BITs in terms of South-South cooperation. A South-South approach does not come with a ready-made set of BIT provisions. One way to assess its operationalisation is to examine whether the China-Africa BITs reviewed reflect a distinctive enough approach that sets them apart from conventional North-South investment treaties. Part of the challenge is that North-South BITs are themselves

quite diverse – for example, European states, the US and Canada have used markedly different templates.

The China-Africa BITs present some distinctive features. Compared to many North-South treaties, their formulation appears to allow greater deference to national regulation. As discussed earlier, this applies particularly to the older China-Africa BITs, but some more recent treaties subject investment protection to national laws and contain elements of recalibration. Even within China's own stock of BITs, the treaties with African countries seem more deferential to national regulation than the treaties China has concluded with high-income countries in recent years (Berger 2016). This circumstance suggests that the Chinese government takes a differentiated approach depending on whether it negotiates with a high or low-income country (Chi 2015).

But ultimately, the fundamental parameters of China-Africa BITs are broadly comparable to those of prevailing BIT patterns worldwide. Like North-South BITs, the China-Africa treaties are primarily centred on investment protection as a means to mitigate political risk. The repertoire of treaty provisions – and more recently of recalibration techniques – seems largely inspired from treaty models historically developed by European and North American states. The narrow focus on investment protection, in the context of asymmetric capital exporter/importer relations between China and Africa, can arguably create tensions with the peer-to-peer logic of South-South cooperation.

3.3.2 Beyond the North-South canon

To provide a comparison, since 2015 Brazil has developed a distinctive approach to investment treaty making (Monebhurrin 2016), significantly nuancing investment protection and tackling other issues outside the purview of conventional treaties (Box 5). Brazil's approach emphasises cooperation between the parties – for example, through joint institutions and exchange of information. It does not represent the only or best model for effecting a logic of South-South cooperation, but it does suggest that there is more room for departure from the conventional BIT canon than is reflected in the China-Africa treaties.

Box 5. Brazil's investment facilitation and co-operation agreements

Brazil signed 14 BITs in the 1990s but did not ratify any of them. Opposition by Congress was a key reason for non-ratification. There were concerns in Congress that these treaties would provide preferential treatment to foreign investors in breach of constitutional provisions (WTO 2013).

In 2015, Brazil concluded new 'investment facilitation and co-operation' treaties – including with Angola and Mozambique – that differ significantly from most existing investment treaties. These treaties place much emphasis on investment facilitation through exchange of information, joint committees and national ombudsmen. These provisions are typically absent in conventional BITs.

With regard to investment protection, the new Brazilian treaties contain a direct expropriation clause but do not include the fair and equitable treatment standard or address indirect expropriation. They allow state-to-state arbitration but not investor-state arbitration. Rather, the treaties envisage a role for the national ombudsmen to manage ADR, working with government and the private sector.

India is another emerging economy that has developed a distinctive approach to investment treaty making. After experiencing several investor-state arbitrations, the Indian government released a new model BIT in late 2015. The more radical innovations included in an initial draft for consultation were eventually dropped (Kelsey 2016). But the final version departs in important ways from the conventional canon (Singh and Ilge 2016). For example, the Indian model treaty does not include a most-favoured-nation clause; replaces 'fair and equitable treatment' with a more specific set of obligations tied to customary international law; explicitly requires investors to comply with national law; and requires exhaustion of domestic remedies before accessing investor-state arbitration.

In the African context, the Southern African Development Community (SADC) developed in 2012 a model investment treaty that qualifies conventional investment protection standards and introduces new investor and state obligations, including on: anti-corruption; social and environmental standards; compliance with national law; corporate governance; investor liability; and transparency of contracts and payments. The model also contains provisions on investment facilitation – for example, through investment promotion events and exchange of information.

The examples from Brazil, India and SADC illustrate a wider trend towards greater diversity in the content of investment treaties worldwide, which arguably increases space for innovation and distinctiveness in BIT policymaking. They show that BITs need not be restricted to investment protection and that they can harness diverse mechanisms – including collaborative arrangements, investor obligations and safeguards for policy space – to promote investments and ensure these promote sustainable

development. Compared to these examples, the China-Africa BITs involve lesser departures from the fundamentals of many North-South investment treaties.

3.3.3 China's flexibility, Africa's agency

One distinctive feature of China's investment treaty stock, with African countries and beyond, is its diversity. As discussed earlier, this partly reflects changes in China's BIT policy. But differences in treaty formulations would also suggest that, with the exception of areas where firm policy applies (for example, traditional adversity to pre-establishment national treatment clauses), the Chinese government adopts pragmatic, flexible negotiation strategies that are open to taking on board proposals from the other side (see also Berger 2016). This trend has been documented for negotiations with middle and high-income countries (Berger 2016). But although commonalities among the China-Africa BITs would suggest African states were largely 'rule takers' in treaty negotiations, a closer look at the treaties provides evidence of agency by African states too.

For example, the China-Madagascar BIT of 2005 ties the 'fair and equitable treatment' standard to the "principles of international law". This formulation is common in French BITs. The China-Madagascar BIT closely follows the BIT that Madagascar concluded with France in 2003, suggesting the wording might have come from Madagascar rather than China. This language also appears in some subsequent Chinese BITs in Africa (with the Seychelles in 2007) and beyond (with Mexico in 2008). Similarly, the China-South Africa BIT of 1997 contains an exception for any "special advantages" granted to development finance institutions. This exception features in other South African BITs (such as with Denmark in 1996 and Mozambique in 1997), suggesting the clause may have come from South Africa.

This flexible approach to investment treaty negotiations sets China apart from some other capital exporters – particularly the US, which rarely departs from its own treaty model (Berger 2016). Compared to negotiations with other capital exporters, African states negotiating with China may have more room to shape treaty formulations. This would strengthen the case for African states to invest in preparedness ahead of negotiations, including through developing clear policies and templates.

4

Do BITs matter to Chinese businesses investing in Africa?

This chapter explores whether the China-Africa BITs fulfil their stated policy objective of promoting investment. It draws on interviews with representatives from Chinese businesses investing in Africa. The chapter sets out some methodological issues, presents interview findings and outlines preliminary conclusions based on those findings.

4.1 Linking investment treaties and practice

4.1.1 Many treaties, few arbitrations

In terms of number of BITs signed, China has been one of the most active BIT negotiators worldwide. But Chinese investors have only brought five known treaty-based arbitrations worldwide, none of which involves an African state.²⁹ As an extreme comparison, US investors are believed to have brought 145 known arbitrations around the world.³⁰ The few treaty-based arbitrations against states also contrast with the hundreds of commercial arbitrations involving Chinese companies, which are registered at major commercial arbitration centres. The China International Economic and Trade Arbitration Commission, commonly used by Chinese companies, has ranked second worldwide for its

²⁹ Four are listed on UNCTAD's investment hub (see <http://tinyurl.com/h7dcov>), and a fifth is publicly known to have happened. Additional arbitrations may not be in the public domain.

³⁰ Also on UNCTAD's investment hub. See <http://tinyurl.com/j7xagul>

number of arbitration since 2009 (Liu *et al.* 2015), indicating that Chinese companies do make use of other types of arbitration to handle commercial disputes.

Various explanations have been advanced to explain this contrast between China's many BITs and the few known attempts to activate them, including the restrictions that the China-Africa treaties place on access to arbitration (de Brugiere and Morgan 2016). In addition, China only became a net capital exporter in 2014 (Wang *et al.* 2015), so it may be too early to properly assess BIT activation by Chinese investors. Africa's particularly low profile in China-related investor-state arbitration is also not entirely surprising, given the small share of Chinese investments flowing to this continent compared to other regions (see Chapter 2) and given that several China-Africa BITs do not appear to be in force.

Bringing an arbitration claim against a sovereign state can also have different repercussions from a purely commercial arbitration; these repercussions are discussed further in Section 4.2.5. Also, it is possible to use investment treaties without resorting to arbitration – for example, investors could refer to an applicable treaty or threaten arbitration to strengthen their position in negotiations with the state, as discussed in Section 4.2.6. Nonetheless, the lack of any known arbitration raises questions about the extent to which investment treaties matter to Chinese companies investing in Africa.

4.1.2 Exploring the BIT-FDI interface: the macro approach

Globally, researchers have taken different approaches to assess whether investment treaties influence FDI. Several macro-level studies have explored statistical correlations between BIT coverage and FDI flows (examples include Hallward-Driemeier 2003, and Salacuse and Sullivan 2005). These studies have reached different conclusions, partly reflecting diverse coverage and methods. One such study specifically considering China found that the existence of a BIT was correlated with increased FDI flows from partner countries into China, but made no difference to FDI flows from China to its developing country partners (Hadley 2013).

Methodological challenges affect this type of research. For example, FDI statistics in low and middle-income countries can be highly unreliable and data on Chinese outward investment is known for its patchiness (Brautigam 2015b). Many factors – such as natural resource endowments, market size, and production factor costs – could affect investment location decisions and properly controlling for them can be a challenge. Investment treaties have diverse content, potentially affecting their ability to promote FDI (for a study that disaggregated by treaty content, see Berger *et al.* 2010). Commonly used definitions of FDI and the BIT definitions of investment typically do not correspond and many treaties protect investments that are only indirectly controlled by nationals of the states parties – which in FDI statistics might appear as investments from a third country (Bonnitcha *et al.* forthcoming).

4.1.3 The micro route: this report's approach

This report takes a different route to assess whether BITs work, inspired by the approach used by Yackee (2011). Instead of examining macro-level patterns, the report relies on stakeholder interviews to determine how Chinese companies factor BITs into their investment decisions. This micro-level analysis involved a total of 55 interviews with Chinese stakeholders, divided in three main groups.

Group 1 interviewees: These were representatives from 22 Chinese companies investing in Africa's natural resource and/or infrastructure sectors. The interviews were based on a semi-structured interview guide adapted from Yackee (2011) and focused on respondent's awareness, perceptions and use of investment treaties. The interviews took place through different channels, depending on the circumstances – a written flexible questionnaire,³¹ live questions and answers via private chats using online platform WeChat or face-to-face interviews.

Interviewees included representatives from ten Chinese state-owned enterprises, the rest were representatives from private Chinese companies of various sizes. The company representatives were legal department personnel or senior decision makers in investment deal making, depending on company size and structure. Several interviewees were top decision makers in the African country office, while others (legal officers, some senior decision makers) were based at headquarters level. Regardless of the job title, specific efforts were made to ensure that the interviewee was the person with most knowledge about political risk mitigation within the company.

The BIT coverage of the African countries where the interviewees worked varied: 12 interviewees operated in a country where a BIT with China was in force; 7 in countries where a BIT was signed but appeared not to have been in force; and 3 at the regional level, covering both categories of African countries.

Group 2 interviewees: These were Chinese company representatives responsible for outward investment in natural resource and/or infrastructure sectors, primarily in Africa but also other developing countries. These interviews were conducted before this study, as part of separate research projects, using different semi-structured guides. Those earlier research projects investigated how Chinese businesses investing overseas mitigate social, environmental and political risks. So, although the findings shed no light on questions about BITs, they provide useful contextualisation to interpret data from the first group of interviews. The research team reviewed notes from a pool of more than 150 interviews conducted since 2006. Twenty-two contained information relevant to this report, as they explicitly discussed how Chinese company representatives perceived and managed political risk when operating in low and middle-income countries.

³¹ To replicate the qualitative feel of these interviews, the questionnaire included open boxes that prompted respondents to elaborate on their responses and/or provide examples.

Group 3 interviewees: These were stakeholders other than company representatives. The team interviewed 11 Chinese experts, including scholars based in universities and government-linked think tanks, who advise government departments on issues related to outward investment policy; and legal professionals who provide legal services to Chinese companies investing overseas. Unlike Group 1 interviews, these expert interviews primarily provided material for contextualisation and explanation. The interviews were conducted face to face or via WeChat. Due to lack of access, it was not possible to interview the Chinese government officials who set relevant policy or handle treaty negotiations.

Table 1. Breakdown of 55 interviewees

Interview group	Number of interviews	Interview methods
Group 1: Chinese companies in Africa's infrastructure and natural resource sectors	22	Semi-structured: flexible questionnaire, face-to-face and WeChat
Group 2: Chinese companies working in the Global South, interviewed as part of earlier research relevant to political risk mitigation	22	Semi-structured: face-to-face only
Group 3: Chinese experts in law firms, government think tanks and academia	11	Semi-structured: face-to-face and WeChat

4.1.4 Study limitations

Important limitations need to be acknowledged. The sensitive topic made it difficult to access interviewees and connections played an important role in persuading interviewees to talk. So the resulting pool of interviews is not only small; it cannot be considered a representative sample. But, given the lack of empirical research, insights from 44 companies make a viable exploratory study. Also, despite investment treaties issues being potentially relevant to the interviewees' professional roles, many interviewees had limited understanding of the issues and/or saw limited relevance to their operations. This is an interesting finding in its own right, but it also proved a constraint on the depth of some interviews.

Cultural factors also affected response patterns. A notable example is that, for social desirability reasons, several company interviewees stated they were aware of BITs, yet all their responses to subsequent questions pointed to a lack of understanding of the treaties. It proved easier to identify and address this issue in face-to-face interactions than in online interviews. The team reviewed the response trees in light of

these considerations, in a few cases greying responses that were clearly contradicted by answers to other questions. Together, these limitations highlight that micro-level approaches also present drawbacks. Given these limitations, the empirical component of this research is best understood as an exploratory study aimed at paving the way to further research.

4.2 BITs and investment decisions

4.2.1 Lack of awareness among interviewees

The most striking research finding is the very low level of awareness about investment treaties among the representatives from the 22 companies interviewed (Group 1 interviewees). Response patterns varied. Broadly, however, the interviewees could be grouped into three categories. First, most interviewees (16 out of 22) seemed completely unfamiliar with investment treaties. As expected based on the analysis in Chapter 2, these companies included SMEs in agriculture, mining and forestry but also medium-scale players in infrastructure.

Second, some interviewees (3 out of 22) displayed awareness of the existence of BITs as part of the wider institutional infrastructure of China-Africa economic diplomacy, but had hardly any knowledge of their content and how they work. For example, one interviewee who worked for a SOE in the energy sector said: "I do not have any concept of how BITs can protect investments". All three interviewees were from infrastructure companies with a degree of internationalisation and some in-house legal expertise. This finding runs counter to the expectation set out in Chapter 2, whereby infrastructure companies would be expected to have greater awareness and capability in BIT matters.

Third, three interviewees appeared to know of the investment protection value of investment treaties, but were not familiar with the arrangements assisting enforcement of arbitral awards. As a result of this incomplete information, the interviewees attached little practical value to investment treaties, believing that shortcomings of national court systems in Africa make legal strategies generally ineffective. The interviewees were knowledgeable legal personnel from among the largest and most internationalised SOEs in China.

No interviewee appeared to grasp the full potential of investment treaties, including the transnational enforceability of arbitral awards. Interviewees working in countries where a China BIT was in force, or where a BIT had been signed but did not appear to be in force, provided similar answers, so BIT status did not seem to affect awareness. Based on their role in corporate structures and investment decision making, the interviewees would have been expected to have greater knowledge of BITs than they displayed during the interviews for the treaties to have any meaningful influence on investment processes. Strikingly, even in-house legal experts displayed limited knowledge about BITs.

Responses to a few specific questions help illustrate these findings. Figures 3 to 5 show the large share of interviewees who responded 'Don't know' or did not provide an answer when asked about the effectiveness of BITs in protecting investments from expropriation (Figure 3) or from adverse regulatory change (Figure 4), and about the importance of BITs in their company's investment decision making (Figure 5). It is worth noting that, even among the interviewees with some awareness of BITs, assessments of the effectiveness of BITs were mild at best (Figures 3 and 4). No interviewee deemed BITs particularly important in their company's investment decision making (Figure 5). The 'No answer' responses in Figures 3 to 5 can be safely deemed to reflect low awareness, as other responses by the same interviewees revealed no or very limited understanding of BITs.

Figure 3. How effectively do BITs protect investments from expropriation?

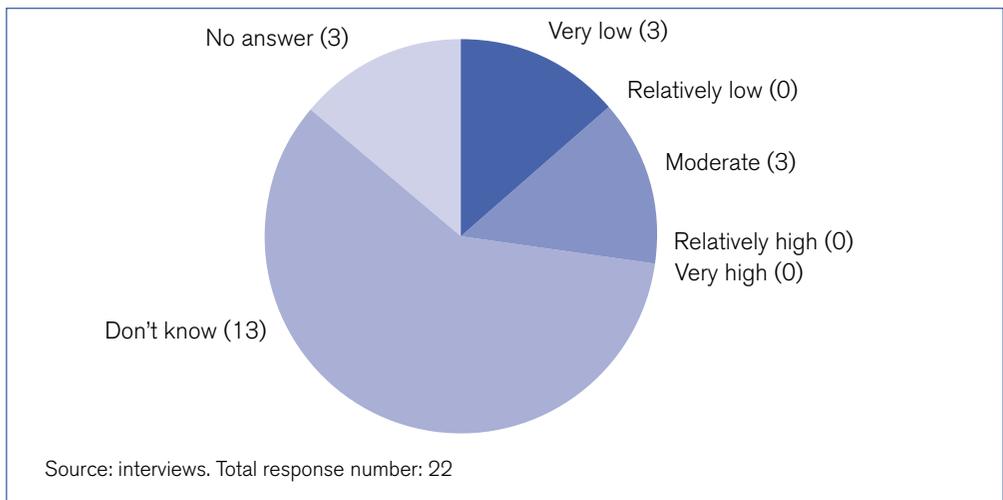


Figure 4. How effectively do BITs protect investments from adverse regulatory change?

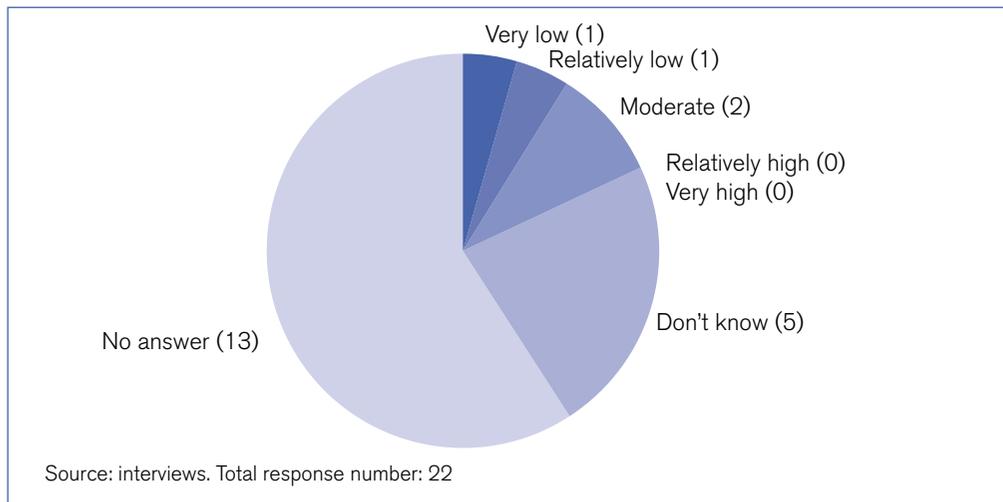
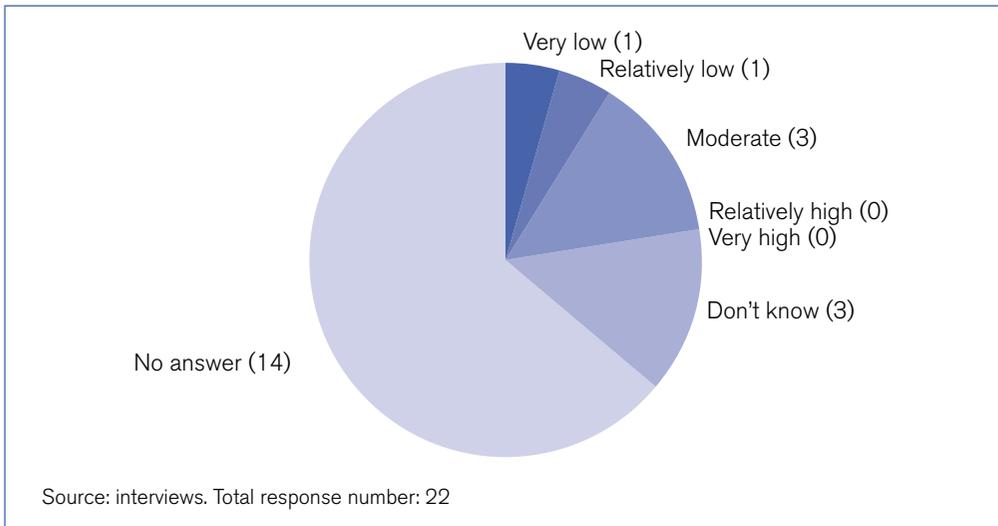


Figure 5. How important are BITs in your company's investment decision making?



The small number of interviews and the non-representative sample make it impossible to generalise these findings. But even if preliminary and subject to revision, the findings cast doubt about whether Chinese companies operating in Africa take account of investment treaties and whether these treaties advance their stated goal of promoting cross-border investment. The picture may look different in sectors other than infrastructure and natural resources. In the telecommunications sector, for example, the degree of internationalisation and private ownership of Chinese high-tech companies might make them particularly susceptible of using international legal arrangements to protect their investments.

That said, investment protection through BITs is commonly considered highly relevant to the natural resource and infrastructure sectors (see Chapter 1); and based on structural characteristics alone, medium to large private infrastructure companies would have been expected to have greater knowledge about BITs than the interviews suggest (see Chapter 2). The company interviews and the interviews with Chinese experts (Group 1 and Group 3 interviews) provided five key insights on the probable reasons for the low awareness of – and lack of interest in – BITs. These insights are presented in the next few sections. The insights partly corroborate some of the expectations that Chapter 2 set out based on analysis of the natural resource and infrastructure sectors.

4.2.2 The role of the law and lawyers

Awareness of international law in general appears to be low, and the role of lawyers seems limited among interviewee companies. A lawyer who advised for many years Chinese companies operating overseas commented: “Chinese companies are generally not familiar with international laws and arbitration mechanisms [including but not limited to BITs and investor-state arbitration].” Lawyers appear to play little or no role in investment decision-making processes, and several legal professionals working for law firms expressed frustration that companies would only seek legal expertise after problems arise – and even then, they tend to prefer extra-legal routes.

It is perhaps not surprising that small-scale enterprises make business decisions with little or no input from lawyers. But the situation seems not too dissimilar in larger companies with in-house legal expertise. According to one interviewee, for example, the headquarters of a medium-sized mining company with a market value of US\$600 million and operations in three African countries only employs one legal expert for contract management, with no role in political risk mitigation according to an interviewee.

The only case where legal professionals seemed to play a greater role came up in the interview with one staff member of a large infrastructure SOE. The legal department this interviewee belongs to participates in all meetings related to investment decision making and reports directly to the company's chairperson. But the interviewee also noted that extra-legal considerations may prevail over the legal department's advice.

4.2.3 Politically driven investments

Investment projects driven by political and diplomatic interests are one occasion when companies might discount legal considerations. This issue is particularly relevant to some of the large SOEs that directly respond to government directives linked to high-profile infrastructure projects. In these cases, political decisions may trump any proper legal assessment of risks. In the words of a legal advisor at a leading Chinese SOE: “Legal staff have little control over mitigating political risks, which BITs may help with; even if we have the procedure to submit legal opinion reports, the top management has already made a decision regardless of the investment environment.”

It is worth noting that, based on publicly available information, the past award of some large infrastructure or agribusiness contracts coincided with the signature of investment treaties – as in the China-Mali BIT of 2009, mentioned in Chapter 2. But there is little information on the relations between the multiple deals in such instances and it is impossible to establish whether and how multiple deal making was coordinated.

4.2.4 Access versus protection

Another factor that might help to explain the little interest in investment protection via BITs is that Chinese companies are at an early stage of market penetration in Africa. Possibly reflecting this reality, legal experts observed that many Chinese companies are more interested in access to investment opportunities than in post-establishment political risk management. According to these expert interviewees, the companies value benefits granted in connection with new investments (such as tax breaks) more than investment protection. This applies to investment treaties and even to contractual protections.

In the words of one expert interviewee: “Chinese companies are focused on getting the deals sealed, and they do not pay as much attention to putting a conflict resolution clause in place.” A private company interviewee summarised what they consider to be important as follows: “We do not consider BITs [in our investment decision making]; we are more concerned with pricing, financing and tax breaks.”

In large SOEs, prioritising access over protection seems partly linked to the incentive structures of company staff. Several interviewees explained that medium to senior-level SOE management staff are assessed based on the number and value of contracts they secure, rather than the long-term returns on investments. These appraisal systems create incentives for managers to focus on the short term, and can make post-establishment political risk a lower priority.

Some SOEs have recently reformed their staff appraisal systems, but incentive structures still seem to favour short-term and access considerations. One interviewee observed that their company introduced performance-based appraisals for medium to senior-level management in 2014. Although the guidelines are detailed, they do not cover the medium to long-term performance of investment projects.

4.2.5 Fear of losing future contracts

The interface between market access and investment protection involves another dimension too. Company interviewees expressed concern that pursuing legal avenues might damage their relations with the host government and ultimately lead to loss of future contracts particularly in the highly competitive infrastructure sector (Weng and Buckley 2016). For this reason, all interviewees from large SOEs expressed scepticism about using legal channels to protect investments.

One SOE interviewee said their company would not pursue arbitration because “you may never win another project if you upset the government.” Another company interviewee concurred: “Negotiations should resolve any potential disputes. If resolved through a legal process, there is potential for a market loss; therefore, it’s necessary that we resolve through extra-legal channels”.

4.2.6 The cost of activating investment treaties

Finally, treaty-based arbitration can involve significant costs (Hodgson 2014). This creates barriers for SMEs, given their more limited financial and human resources. Most SME interviewees³² did not have any legal experts in-house – and where expertise existed, it seemed stretched and mainly devoted to contractual issues. Large SOEs would have the resources to pursue arbitration. According to one interviewee, one such company has over 100 staff in the legal department. But other considerations reduce the appeal of arbitration for large SOEs, particularly in the infrastructure sector. As discussed, these concerns include possible market access repercussions and possible political embarrassment.

It is important to recognise that, even if companies are reluctant to file arbitrations, they could still rely on BITs, for example in negotiations with the host government. In a negotiation, an applicable BIT might affect negotiating power and outcomes, because the parties would know that the investor could take the case to arbitration should negotiations fail. However, this research could not generate empirically based insights on this issue.

4.3 Chinese companies and political risk

If Chinese companies in Africa make little of investment treaties, how do they perceive and manage political risk and what issues matter to them? These questions have significant policy relevance. If the goal of investment treaty policy is to promote cross-border investments, as repeatedly stated in the FOCAC action plans, understanding and addressing the issues that matter to businesses would seem an important basis for informed investment treaty policy. This section briefly explores these issues, drawing on both Group 1 and Group 2 interviews.

4.3.1 A low priority

Almost all company interviewees appear to attach low priority to political risk mitigation in general. As one private company interviewee bluntly put it, “I have never thought about political risk mitigation.” Another interviewee, the director of the legal department of a leading SOE, stated: “We don’t yet have specific mechanisms to address potential loss caused by host government conduct.”

Several interviewees from both SOEs and private sector backgrounds elaborated that companies unable to enter the competitive markets in high-income countries accept higher political risks in low and middle-income countries as a fact of life. Political risk appears to be a more prominent consideration among large SOEs, though as discussed political factors and short-term incentives may offset this consideration.

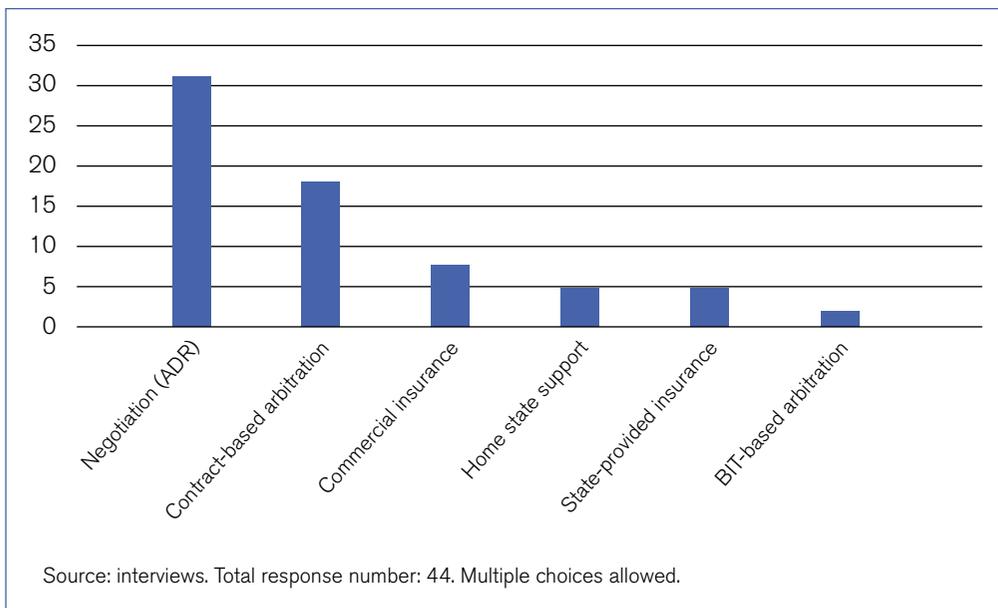
³² Based on self-identification.

These findings are in line with available quantitative studies confirming the low priority Chinese companies tend to attach to political risk. Statistical studies found that Chinese outward FDI is not deterred by high political risk (Quer *et al.* 2012; Chen *et al.* 2016). In fact, some studies concluded that Chinese outward FDI correlates to contexts combining valuable natural resources endowment and high political risk (Buckley *et al.* 2007; Kolstad and Wiig 2009; Ramasamy *et al.* 2012).

4.3.2 Political risk mitigation strategies

Despite the low importance attached to political risk mitigation, several company interviewees and legal experts did mention political risk mitigation strategies. Figure 6 presents findings based on Group 1 and Group 2 interviews. The next few sections briefly discuss insights on three main strategies: ADR, contract-based arbitration and political risk insurance.

Figure 6. How do you recover loss caused by host government conduct?



4.3.3 Alternative dispute resolution

The interviews indicate that Chinese companies rely heavily on ADR. In this context, ADR primarily involves negotiation. As Figure 6 shows, negotiation emerged as the primary approach to political risk management, having been identified by 31 interviewees

out of 44. A SOE manager with 30 years of experience in Africa put it as follows: “If problems arise, I will likely not rely on the treaty. I am more likely to look for specific solutions through consultation with [...] the local government and other stakeholders.” Another interviewee argued that the best investment protection method is “to maintain a good relationship with local government.”

Beyond this pragmatic attitude, the pro-ADR orientation of Chinese companies has wider roots. One is the limited trust Chinese companies seem to have in the quality of the rule of law in Africa. One interviewee explained that their company pays significant attention to legal arrangements when operating in high-income countries, but not when working in Africa. “It’s useless to look too closely at laws and regulations [here]” because of perceived shortcomings of the rule of law. As a result, they do not deem law-based strategies in general to be promising – even though investment treaties and arbitration are designed to provide recourse outside domestic legal systems. Another interviewee from a private company elaborated: “Even if there are treaties, [the host government] cannot follow it through; the local rule of law is so weak.”

The emphasis on ADR may also reflect dispute settlement patterns in China itself, particularly the role of ADR methods in Chinese legal and business culture. This aspect would represent another example of Chinese companies ‘exporting’ their domestic practices to Africa, in line with trends across wide-ranging aspects of business operations (Child and Rodrigues 2005; Brautigam 2015a; Sun 2016; Weng and Buckley 2016). This emphasis on ADR in business practices seems at odds with the framing of China-Africa BITs, which set up investor-state arbitration as the main international vehicle for settling investment disputes – even though several treaties restrict access to arbitration. The Brazilian approach to investment treaties, which does not feature investor-state arbitration but envisages an ADR role for national ombudsmen, would seem to resonate more closely with the Chinese company practices described above.

4.3.4 Contract-based arbitration

Several interviewees mentioned contract-based arbitration (see Box 6) as a viable risk mitigation tool, as shown on Figure 6. However, interviewees typically considered this route as a last resort, to be pursued if the other options fail. A SOE interviewee explained: “Yes, we have an arbitration clause in our contract [...] I will rely on it if all else fails.” The reasons for this reluctance to initiate contract-based arbitration against public authorities are similar to those presented above – from concerns over market loss and political sensitivity to a lack of trust in domestic rule of law.

Box 6. Contract-based versus treaty-based arbitration

In contract-based arbitration, an investor-state dispute is taken to arbitration on the basis of a dispute settlement clause included in the investment contract, rather than the investment treaty. Both arbitration routes involve legal proceedings, but they differ in important ways. For example, in contract-based arbitration the arbitral tribunal applies the contract and applicable law, whereas in treaty-based arbitration the tribunal determines whether the state breached treaty standards.

Although contracts limit access to arbitration to identified contracting parties, investment treaties could expose governments to claims from an unknown and potentially large number of investors. There may be complex interlinkages between contract and treaty-based proceedings – for example, where investors invoke an umbrella clause to claim that contractual breaches violate a BIT.

4.3.5 Political risk insurance

Several company interviewees and legal experts mentioned political risk insurance issued by Sinosure as one possible political risk mitigation measure. Some company interviewees viewed political risk insurance as too expensive and not providing comprehensive enough coverage. One noted: “Companies generally do not like to seek out Sinosure insurance; their premium is too high.” Several legal experts shared this assessment.

That said, Sinosure is experiencing a rapid increase in its coverage of Chinese companies in Africa: in 2014, its insurance coverage for Africa-based³³ operations totalled US\$18.9 billion, jumping by 82 per cent compared to the previous year (Xinhua 2014). Several interviewees suggested that Sinosure insurance is a precondition for loan disbursement by Chinese government-linked banks such as China EximBank and the China Development Bank.

One question is whether investment treaty protection would reduce the insurance premium companies need to pay (Poulsen 2010; Yackee 2011). Two expert interviewees with direct knowledge of the issue suggested this indirect impact may not yet exist in the case of China. One said: “BITs are not very important to Sinosure because [the portfolio managers] know that Chinese companies operating in Africa mostly rely on connections and relationships with local stakeholders when problems arise.”

The other interviewee described how Sinosure staff are evaluated based on the amount of insurance sold, which would create incentives for largesse, and added that “whether there is a BIT between the two countries or not is not in the scope of the consideration.” But this situation could change in the future: the first interviewee explained that, as Sinosure tightens up its due diligence processes, BITs and other political risk mitigation measures may well enter into consideration.

33 Includes both North and sub-Saharan Africa.

4.3.6 Beyond political risk management

The previous sections highlight the low priority of political risk management for company interviewees, and the relevance of tools other than BITs for mitigating political risk and settling investment disputes. Beyond political risk, the interviews brought up a wide range of issues that matter to Chinese companies operating in Africa. The concerns about accessing business opportunities have already been discussed; there is also concern about vicious competition between Chinese companies, particularly in the infrastructure sector (see also Weng and Buckley 2016).

Some company interviewees expressed the view that Chinese government agencies can do more to curb corrupt practices in some Chinese companies, which they deemed to undermine fair competition, and to promote streamlining of public procurement and contracting processes in partner countries (Weng and Buckley 2016). Existing China-Africa BITs offer no answers to these concerns, which might compound the limited interest in the treaties among company interviewees.

5

Conclusion and recommendations

The previous chapters developed detailed analysis of the China-Africa BITs, their economic and political context and how effectively they promote Chinese investment in Africa's natural resource and infrastructure sectors as part of wider South-South economic cooperation. This brief conclusion brings together key findings and offers pointers for follow-on research, policy and practice.

5.1 What is in the China-Africa BITs?

This research documented both alignments and misalignments between the South-South cooperation policy that informs China-Africa economic diplomacy and the content of the China-Africa BITs. Compared to many North-South investment treaties, the China-Africa BITs present some notable specificities that make them more deferential to national regulation.

But ultimately, the China-Africa BITs adapt repertoires of treaty provisions found in many North-South investment treaties. Like traditional North-South treaties, the China-Africa BITs primarily aim to promote foreign investment by protecting it from adverse state conduct, thereby mitigating political risk. Since the late 1990s, China-Africa BITs have shifted towards more robust protection. This creates tensions with the notion of South-South cooperation, particularly as the shift is taking place in the context of asymmetric capital exporter/importer relations between China and Africa.

Despite important commonalities, the China-Africa BITs are considerably diverse in their formulation. This partly reflects changes in China's investment treaty policy, but it also suggests that China is willing to accommodate proposals from partner countries when

policy red lines are not at stake. This flexible approach to negotiations seems a distinctive feature of the China-Africa BITs, and of China's investment treaty stock more generally. It sets China apart from other leading capital exporters such as the US and might create room for African states to set agendas and negotiate effectively.

5.2 Do the treaties influence investment decisions?

This research also documents misalignments between the content of investment treaties and the needs and practice of Chinese businesses working in Africa. The company interviews point to very low awareness of investment treaties among company staff, including legal personnel, suggesting that Chinese businesses pay little attention to BITs in their investment decisions. Although these findings are preliminary and subject to revision as more data becomes available, they provide a cautionary tale about the extent to which the BITs fulfil their stated goal of promoting foreign investment.

This confirms findings from other research, particularly an econometric study that found no correlation between China's BIT coverage and outward Chinese FDI to low and middle-income countries (Hadley 2013). The findings also resonate with comparable research on other capital-exporting countries, particularly a survey of legal counsels from big US corporations that documented low awareness and expectations about the political risk mitigation value of investment treaties (Yackee 2011). A nuanced understanding of Chinese investors and the factors that drive their operations help explain these findings.

Many Chinese SMEs seem unaware of the investment treaties. Public debates in investment issues tend to focus on large SOEs, but private-sector companies, including SMEs, are increasingly driving China's economic engagement in Africa. And even though large SOEs would have the resources and expertise to consider and activate investment treaties, other considerations that drive their operations – such as market access and politics – may trump their concerns about political risk. In many companies, management incentive structures seem to favour short-term gains (getting the deals done) over concerns about long-term political risk.

More generally, the interviews suggest that at least some Chinese businesses operating in Africa see political risk as a fact of life and attach relatively low priority to mitigating it. Chinese firms also appear to manage political risk through ADR, contract-based arbitration and insurance. These findings question whether BITs that are primarily centred on political risk mitigation are the most effective policy tool for China-Africa investment relations.

This does not mean that Chinese businesses in Africa would not value effective investment policies. Company interviewees raised concerns about access to business opportunities, corruption and unfair competition. They have developed strategies to deal with investment disputes, with a strong emphasis on ADR. Existing China-Africa BITs have little to say about these issues and strategies, which seems to create a misalignment between law and practice. It is possible to address these issues by reconfiguring the investment treaty policies.

5.3 Possible ways forward

5.3.1 Recommendations for follow-on research

This study had its limitations, including partial sectoral coverage, a small number of interviews and the non-representative nature of interviewees. As a result, it is inevitably only a step towards improving public understanding of a complex phenomenon. This leaves a rich agenda for follow-on research.

Additional studies can shed light on sectors other than infrastructure and natural resources. High-tech industries may be particularly relevant, as some large Chinese private sector companies may have the incentives and resources to engage with BITs. New research should try to involve larger, statistically representative samples, although accessing large numbers of interviewees may prove difficult. More in-depth case studies – on how businesses make investment decisions and manage political risk; the role of individual departments in those processes; and the place of investment treaties – would also be useful.

5.3.2 Recommendations for policy and practice in China

The findings of this report offer China food for rethinking its investment treaty policy to ensure it meets the challenges that Chinese businesses face when operating in Africa. The businesses have developed their own solutions to these challenges, so any rethinking of policy should also build on these. If BITs are to promote outward foreign investment, they would need to meet businesses where they are, rather than where abstract theories about investment protection and promotion would expect them to be.

There is a strong case for the Chinese government – possibly via in-country consulates – to conduct a broad-based survey of Chinese businesses operating in Africa, including diverse sectors and scales of operation. This survey would help the authorities identify the problems businesses face, develop possible responses and establish the foundations for a new approach to investment treaty policy.

Should the survey confirm the findings of this report, this new approach may involve a significant reconfiguration of China's investment treaty policy. For example, it may place greater emphasis on investment facilitation and ADR. There is also scope for deepening and systematising the recalibrated provisions that feature in more recent China-Africa BIT practice, including clauses that tackle social and environmental issues.

The role of investment facilitation and ADR would make the recent Brazilian treaties (see Box 5) a more relevant comparator than conventional approaches to investment treaty making. Basing the reconfiguration of the treaties on grounded perspectives may increase the distinctiveness of China's investment treaty policy, and possibly give fuller effect to the notion of South-South cooperation. Charting a novel path could also give China a leading role in wider international debates about options for reforming the global investment treaty regime.

5.3.3 Recommendations for policy and practice in Africa

African governments have signed BITs in the expectation that they would promote foreign investment. Yet, despite its limitations, this research found little to suggest the treaties play any meaningful role in the investment decisions of Chinese companies in the sectors reviewed. It found no evidence that the treaties have delivered on their promised benefits. And although the China-Africa BITs have not created known liabilities through investor-state arbitration to date, they could in the future. Investment treaties typically involve long-term commitments; Chinese investment stocks in Africa have been growing and continue to grow; and these businesses may become more aware of the treaties. As such, the possibility cannot be ruled out that Chinese investors might bring arbitration claims based on the treaties.

There is a strong case for African governments to conduct rigorous reviews of the performance of their investment treaties, including both costs and benefits. Although this research has focused on Chinese perspectives, follow-on research should explore African perspectives. These national reviews and policy research would contribute to more informed investment treaty policy in Africa, including choices on whether to conclude new treaties, terminate or renegotiate existing ones and reconfigure approaches to treaty drafting.

China's pragmatic approach to treaty negotiations would strengthen the African governments' case for developing investment treaty policies in line with their own development strategies and – where relevant – treaty templates as a basis for future negotiations. Such increased preparedness may allow governments to shape treaty texts in negotiations with China.

There is also scope for action at the regional level, particularly to address imbalances in negotiating power. Current China-Africa investment treaty diplomacy involves regional action plans (via FOCAC), and bilateral negotiations. A more collective approach to negotiations could strengthen African countries' bargaining position. As a region-wide institutional framework, FOCAC could provide the vehicle needed for a more collective approach to investment treaty negotiations.

5.3.4 The need for public debate

Lively debates around investment treaty policy in Europe and North America are in stark contrast to the limited public interest in low and middle-income countries. China-Africa BITs are no exception. Parliaments, civil society and citizens have a role to play in reshaping public policy. They can scrutinise and influence proceedings to help forge new policies that can more effectively pursue sustainable development aspirations in both China and Africa.

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Over the past 15 years, China's investments in Africa have increased rapidly and China has become Africa's largest trading partner. There are continuing misperceptions about China-Africa economic relations, and little empirical evidence on the policy tools that underpin China's economic diplomacy in Africa and how they affect the conduct of Chinese companies.

China and several sub-Saharan African states have signed bilateral investment treaties. This report explores the content of the treaties, and whether they achieve their stated goal of promoting foreign investment as part of South-South cooperation. It draws on a literature review, a legal analysis of the treaties and interviews with Chinese stakeholders. The findings provide a cautionary tale about whether the treaties fulfill their objective, as well as pointers for follow-on research and for policy and practice in China and Africa.

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