CHINA IN AFRICA: NEOCOLONIALISM OR MUTUAL RELATIONSHIP?

A SOUTH AFRICAN CASE STUDY

by

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DECLARATION

Except for references specifically indicated in the text, and such help as I have acknowledged, this thesis is wholly my own work and has not been submitted for a degree at any University.

CERTIFICATION

I declare that this Mini-Thesis which is hereby submitted for the award of Legum Magister (LLM) in International Trade, Business, and Investment Law at the Mercantile Law Department, University of the Western Cape, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

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LIST OF ACRONYMS

ADEP	Aquaculture Development Enhancement Program
APSS	Agro-Processing Support Scheme
BEE	Black Economic Empowerment
BIT	Bilateral Investment Treaty
BPS	Business Process Service
BRI	Belt Road Initiative
BRICS	Brazil, Russia, India, China South Africa
CADF	China African Development Fund
CGETI	Contact Group on Economic and Trade Issues
CPFP	Capital Project Feasibility Progress
CSP	Customised Sector Program
CTCP	Clothing and Textile Competitiveness Programme
DTI	Department of Trade and Investment
DTT	Double Taxation Treaty
FDI	Foreign Direct Investment
FIG	Foreign Investment Grant
G20	Group 20
GDP	Gross Domestic Product
HIPC	Heavily Indebted Poor Country
ICBC	Industrial and Commercial Bank of China
ICSID	International Centre for Settlement of Investment Dispute
IMF	International Monetary Fund
IPAP	Industrial Policy Action Plan
LDC	Less Developed Countries

M+CV-AIS Scheme	Medium and Heavy Commercial Vehicle Automotive Investment
MCEP	Manufacturing Competitiveness Enhancement Programme
MIP	Manufacturing Investment Program
MNF	Most Favoured Nation
MOFCOM	Ministry of Commerce (China)
PPP	Private Public Partnership
PRC	People Republic of China
RSA	Republic of South Africa
SAP	Structural Adjustment Programmes
SME	Small and Medium Scale Enterprise
SOE	State Owned Enterprise
UK	United Kingdom
UNC	United Nations Charter
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United National Conference on Trade and Investment
WB	World Bank
WTO	World Trade Organisation

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ABSTRACT

As China's investment in Africa continues to show unprecedented growth, [1]questions are being raised about many aspects, including the infrastructure for ordering economic relations. The principal legal instruments that govern China-Africa investment relations are Bilateral Investment Treaties. In December 1997 the People's Republic of China (PRC) and the Republic of South Africa (RSA) entered into an agreement that came into force in January 1998.

South Africa–China relations are developing at a steady pace, from the onset of formal diplomatic ties in 1998 to the multi-faceted partnership we see today. Its various elements include historical links, diplomatic relations, multilateral cooperation, trade and investment, and public media engagement. At the same time, there are differences between the two countries that continue to shape ties and distinguish them from China's relations with other African countries. South Africa is a diversified economy with relatively strong institutional structures and is home to a vibrant civil society; China is seen as a key competitor in sectors South Africa views as strategic, as well as being an investor in resources that enjoy a favourable trade balance. Sharing a similar global vision, the two emerging countries are working towards closer strategic cooperation that takes account of the structure of bilateral economic ties, domestic diversity and overlapping interests.

It is in the backdrop of this agreement that the trade relations between PRC and RSA were strengthened. However, in recent years there have been serious allegations levelled against PRC that it is practicing neo-colonialism towards Africa in this instance RSA. Accordingly, this study seeks to consider the role of Bilateral treaties and Loans provided by the Chinese and other investments to South Africa in the allegations of neo-colonial practices by China.

KEYWORDS
China, South Africa, Sino-Africa, neo-colonialism, bilateral treaties, debt trap diplomacy, loans.

[1] Detailed information on the growth of China-Africa economic relations is available on the official website of the China-Africa Cooperation ("FOCAC") at http://www.focac.org/eng/.

CHAPTER 1

INTRODUCTION

1.1. Foundation Of Study

Neo-colonialism is a convoluted term endowed with significant rhetorical power. It refers to the influence exercised by foreign powers over the policy and economic trajectory of less developed states through means other than direct political control.[2] The term can also imply a mercantilist model for economic relations: decolonized states remain dependent upon the exportation of raw materials for fuel growth in the developed world.[3] The term was first used in the 1960s to explain the influence maintained by colonial powers in decolonized states. Limits to the independence of African states were recognized in 1961 by the “All African People’s Conference”.[4]

The literature on neo-colonialism suggests several mechanisms by which influence is exercised. These mechanisms may be useful in understanding China’s relationship with the African States The institutions remaining after the departure of these metropolitan powers continues to function in ways that facilitated exploitation The domestic elite of the many decolonized states lacked the means to maintain power, infusion of capital and weapons were thus one mechanism of neo-colonial control.[5]

Post-colonial states entered the world economy from a disadvantaged position, and reliance on foreign capital facilitated neo-colonial practices. The competitive edge enjoyed by Foreign Direct Investment (“FDI”) produced a vicious cycle, profits were repatriated abroad, rather than contributing to the domestic accumulation of capital.[6]

Africa is rich in mineral resources, and with commodities prices fuelled by accelerating growth in Asia,[7] there are strong incentives for investors to focus on the development of extractive industries. This renders future development dependent upon fluctuations

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[2] A.A. Jarrett, The Underdevelopment of Africa (Maryland: University Press of America, 1996) 81
[3] K. Nkrumah, Neo-Colonialism: the Last Stage of Imperialism (London: Heinemann, 1968) 47
[4] C. Leys, Underdevelopment in Kenya: The Political Economy of Neo-Colonialism (London: Heinemann Educational Books, 1977) 26
[5] C. Leys, Underdevelopment in Kenya: The Political Economy of Neo-Colonialism (London: Heinemann Educational Books 1977) 62
[6] K. Nkrumah, Neo-colonialism: the Last Stage of Imperialism (London: Heinemann, 1968) XV
[7] C. Alden, China in Africa (New York: Zed Books 2007) 12

in prices and promotes uneven development across sectors of the economy[8]. The opposing argument is that mineral exportation is Africa's Comparative advantage. But mineral extraction is technology-intensive with limited potential for the job market[9] so social development will be thwarted unless greater economic diversification is managed.

An account of China's contemporary role in Africa begins during the Cold War. China competed with capitalist states and Russia for spheres of influence in the less developed world by providing support and aid to regimes amenable to foreign policy. However, after the Cold War, diplomatic relations between China and most African States began to dwindle. It is only in the 1990s that diplomatic relations re-intensified and China now highlights its support of anti-colonial struggles.[10] China presents itself as a distinctive model of development, which provides an alternative to free market capitalism[11]

The level of Chinese investment in Africa today is unprecedented. China-Africa bilateral trade has been steadily increasing for the past two decades. However, weak commodity prices since 2014 have greatly impacted the value of African exports to China, even while Chinese exports to Africa remained steady.[12]

- Due to the supply chain disruption by Covid-19, the value of China-Africa trade in 2020 was US$176 billion, down from US$192 billion in previous years.
- In 2020, the largest exporter to China from Africa South Africa, followed by Angola and the Democratic Republic of Congo.
- In 2020 Nigeria the largest buyer of Chinese goods, followed by South Africa and Egypt. [13]

Levels of Chinese FDI in Africa have also grown steadily. The flow of FDI surged from US$ 75 Million in 2003 to US$4.2 billion in 2020 the peak was in 2008 with US$5.5 billion, This was largely due to the purchase of a 20% share of Standard Bank South

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[8] A.A. Jarrett, The Underdevelopment of Africa (Maryland: University Press of America, 1996) 111
[9] H.G. Broadman, Africa's Silk Road: China and India's new economic Frontier (World Bank 2007)
[10] K. Nkrumah, Neo-colonialism: The Last Stage of Imperialism (London: Heinemann, 1968) 109
[11] S Marks, African Perspectives on China in Africa (Cape Town: Fahamu 2007) 11
[12] Data: China-Africa Trade — China Africa Research Initiative (sais-cari.org) site accessed 13/09/2022
[13] Data: China-Africa Trade — China Africa Research Initiative (sais-cari.org) site accessed 13/09/2022

Africa by the Industrial Development Bank of China.[14] Whilst levels of investment from Africa to China have grown at a more modest rate, Chinese investment has concentrated primarily on mineral extraction, but it is beginning to diversify. The intensification of economic relations between Africa and China is indicative of China's bid for global economic power and greater need for a resource to fuel rapid industrialization.[15]

Diplomatic relations between China and Africa are characterized by rhetoric of development partnership and competition with the capitalist West.[16] This rhetoric manifests in China's "non-conditionality policy". China professes itself to be without political motivation and will engage with pariah states.[17] They will provide loans without the economic restructuring required by the International Monetary Fund ("IMF"). But are the ambitions of a fast-developing state in line with the development goals of less-developed states?

China currently provides an unprecedented amount of aid to African states and is presented as an unconditional stimulus for development. In 2018 China alleged that 45% of its global aid went to African states.[18] Top Chinese Aid recipients were Angola, the Democratic Republic of Congo, and Sudan. Where aid is provided in the form of infrastructure, it can facilitate productivity and trade. However, these infrastructural projects are often rendered less beneficial to the African Economy by the importation of Chinese labours, contracting to Chinese firms, and importation of materials.[19]

Menell, in her article,[20] interprets the China-Africa relationship as mutually dependent and she provides an argument against the characterization of a neo-colonial relationship. However, this mutual dependence is vastly unequal. China relies upon cheap resources, for which Africa presents a particularly non-competitive source, but

[14] Data: Chinese Investment in Africa — China Africa Research Initiative (sais-cari.org) Access site13/09/2022

[15] H.G. Broadman, Africa's Silk Road: China and India's New Market Economic Frontier (World Bank 2007) 10-12

[16] C. Alden, China in Africa (New York: Zed Books, 2007) 35

[17] G. le Pere, Crouching Tiger, Hidden Dragon? (Pietermaritzburg: University of KwaZulu Natal Press, 2008) 29

[18] Data: Chinese Investment in Africa — China Africa Research Initiative (sais-cari.org) Access site14/09/2022

[19] Data: Chinese Investment in Africa — China Africa Research Initiative (sais-cari.org) Access site 02/03/2023

[20] Natasha Manell, "China in Africa: The New Neo-colonialism?"

it is by no means the only source. While China's thirst for resources provides leverage to African states, Africa's dependence on China outweighs China's dependence upon Africa.[21]

South Africa being one of the most stable economies and political climates in Africa, represented a special case of Sino-African relations. Trade and Investment between South Africa and China are coordinated by a network of institutions from a State level to a Regional Level. Bilateral relations between China and South Africa are especially strong and these are institutionalized in the China-South Africa Bi-National Commission, which provides a forum for cooperation at many levels of government.[22]

South Africa is the only African state with significant investment in China, estimated at US$80 Billion in 2016.[23] It must be borne in mind that South African relations on the continent are well established politically and economically, which provides China with an access point to the rest of the continent. Furthermore, South Africa's reputation for human rights and government accountability may assist in legitimising Chinese involvement in Africa.[24]

The partnership created between Standard Bank and the Industrial and Commercial Bank of China in 2007 could provide the infrastructure for improved application of Chinese aid and investment. China's rapid growth provides markets for South Africa's resources. But Chinese export presents a challenge in the international markets, as well as domestic industries especially textile imports. However, labour unions have succeeded in creating pressure on the government to mitigate competition. South Africa reached an agreement with China to voluntarily limit textile imports in line with the World Trade Organisation protocols. [25]

[21] N Manell, "China in Africa: The New Neo-Colonialism" Page 58
[22] G. le Pere, Crouching Tiger, Hidden Dragon? (Pietermaritzburg: University of KwaZulu Natal Press 2008) 24
[23] Government has trumpeted China's pledge of R193 billion – but South Africa has invested much more than that in China | Businessinsider Site accessed 14/09/2022
[24] S. Naidu, "Chinese and African Perspectives on China in Africa" (Cape Town: Fahamu) page 176
[25] S. Naidu, "Chinese and African Perspectives on China in Africa" (Cape Town: Fahamu) page 170-183

In 2009 China become South Africa's number one trading partner superseding Germany.[26] This was due largely to the trade relations that had been established in 1998 with the signing of the China-South Africa bilateral treaty. Although China's engagement has mostly been met with pessimism many African states have perceived this renewed engagement favourably.

This has awakened allegations of neo-colonialism practices and garnered the attention of the European States that have accused China of practicing neo-colonialism. In the article,[27] China Drive towards Africa, the author advances four arguments as evidence of China's neo-colonial practices,

(a) The Chinese are using the same tactics as the colonial powers, which is extracting raw materials from African soil in exchange for cheap prices.

(b) The debt that China uses as a tool for domination of this relatively new market. The Sino-African relations were endorsed by the "going-out" strategy The loans without political conditions were interpreted as encouraging corruption and rouge states.

(c) The growing number of Chinese workers in Africa also evidences neo-colonial practices.

(d) The Chinese policy of ignoring imposing conditions before providing any assistance to African Countries facing accusations of oppression and neglecting human rights.

Unlike the ascending of hemogenic powers throughout history, China as a rising power shall be considered the only power that did not build its own states through direct military invasion or colonialization, rather it executes and promotes the peaceful rise

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[26] South African Embassy Beijing, China (dirco.gov.za) Explains how trade relations between South Africa and China have been on an upward trajectory since the signing of their Bilateral Investment Treaty.

[27] "China drive towards Africa between arguments of neo-colonialism and mutual-beneficial relationship: Egypt as a Case Study" Alyaa Wagdy el-Shafei (Review of Economics and Political Science vol 7 No.2 2022) page 137-152

model that is driven by capital, resource acquisition, and technology.[28] It is against this backdrop that the Chinese have refuted the allegations of neo-colonial practices in Africa. In 2006 during a press conference in Cairo, Chinese Prime Minister Wen Jiabao,[29] stated that *“The hat of ‘neo-colonialism’ simply does not fit China”*. China has adopted a rhetoric to defend China’s intention toward Africa embracing decolonisation movements that blossomed in Africa as well as emphasizing its stand in supporting reciprocal benefits between China and African countries.

There are two main pieces of evidence to support this argument, the first one refers to the fact that the Chinese expansion is part of China’s outward role in pursuing capitalism policies i.e., China is adhering to the market economies through concluding contracts with governments in Africa that rely on demand and supply, generating revenues and searching for energy sources to support the growing internal economic expansion as well.

The second piece of evidence refers to the fact that the Chinese multi-dimensional interaction with African countries is part of the modern interdependence relationships among world countries.

1.2. Conceptual Framework

The conceptual framework guiding this study is the “interdependency theory” developed by Robert O. Keohane and Joseph S Nye in their classic book on international relations theory entitled ***“Power and Interdependence”*** in 1989. It provided an adequate understanding of the international changes, the roles of emerging powers, and a profound analysis of the relative decline of military power and increasing international economic interdependence.

The theory explains interdependence in politics and economics as “situations characterized by reciprocal effects among countries or among actors in different

[28] Msimango, N. (2016), “Chinas changing foreign policy and resource diplomacy towards Africa: the role of China in the socio-economic development of Nigeria”, (Unpublished Doctoral Dissertation), University of South Africa
[29] Chinese Premier Wen Jiabao (2006), Transcript of Premier Wen’s Press Conference in Cairo, China Daily, Beijing.

countries. These effects often result from international transactions – the flow of money, goods, people, and messages across international boundaries".[30]

Interdependence occurs when reciprocity is achieved, where the relationship among involved actors has the shape of asymmetry in dependence and does not necessarily represent an evenly balanced mutual dependence.

The theory extends the role of power of international actors including states, by encompassing two main dimensions, which are sensitivity and vulnerability. The sensitivity concept is relevant to the impact on each actor/country involved in an interdependent relationship as a reflection of imposed changes from outside, for instance, the international financial crisis. On the other hand, vulnerability explains whether a country can execute alternative policies that limit transaction costs imposed by external effects of economic policies resulting from outside, such as boycotts or other trade disruptions.[31]

Interdependence as a concept was elaborated by Keohane and Nye to respond to real-life situations, which resembles in most cases the notion of complex interdependence. Complex interdependence is defined through abstracting reality into the most ideal three conditions which are: the absence of force, lack of hierarchy among issues, and the presence of proliferation of channels of contact between society. It is conceived that the actual situation would approximate these ideal conditions to a certain degree.

The first condition of force absence entails that control is more accurately measured through the ability of the government to control outcomes and the ability to adapt to change within minimum costs rather than its military power. The second condition on the difficulty to arrange goals and hierarchy of issues is manifested in that government is now responsible for the economic prosperity besides military security due to the long evolvement of development of the welfare state. The third condition of the various

[30] R.O. Keohan and J.S. Nye: Power and Interdependence 4th Ed (Longman: Boston MA.) 2012
[31] Del Rosio Barajas-Escamilla, Kia A, and Sotomayor, M (2016) "Concepts and Measurements of economic interdependence: the case of the United States and Mexico" Germany: Global Economy Journal Vol 16 No. 1 pp 63-90.

channels of communication is achieved due to the incredible technological advances and transportation that minimises distance barriers.[32]

In reference to the three mentioned conditions, Keohane and Nye elaborated that the notion of state's welfare evolved over time and got more complicated by eliminating the military power as a state priority and equal gains as an indication of reciprocity hence the refuting of neo-colonialism practices.[33] Such complications resulted in a pattern of coexistence between international actors and a fluctuation of priorities.

The interdependence theory fits in the analysis of the relationship between South Africa and China. As military power plays a negligible role in this relationship and the diminished military power between China and South Africa is maintained due to the mutual respect and non-interference agreed upon between both countries.[34]

Moreover, China has plenty of issues on the agenda with South Africa that exceeds trade relations, whereas South Africa's relations with China are strong on multiple levels of contact. Trade volumes with China have been on a constant prominent increase over the past decade. In addition, the comprehensive strategic agreements that South Africa maintains with China, such as strong official relations as the notable increase in official conversion with China expressed in the official visits between the two countries and mutual consent on global matters.

The trade relations between South Africa and China were further strengthened when South Africa joined BRICS. Therefore, is imperative that this study analyse such a novel peaceful rise of China-South Africa relations utilising the interdependence theory.

[32] Keohane R.O. and Nye J.S. (2012) Power and Interdependence, 4th ed, Longman Boston MA, p. 194
[33] Keohane R.O. and Nye J.S. (2012) Power and Interdependence, 4th ed, Longman Boston MA, p. 194
[34] China drive towards Africa between arguments of neo-colonialism and mutual-beneficial relationship: Egypt as a Case Study" Alyaa Wagdy el-Shafei (Review of Economics and Political Science vol 7 No.2 2022) page 137-152

1.3. Statement Of The Problem

Bilateral Investment Treaties ("BIT") have been recognized as chief instruments by which countries outline the rules that govern the investments in their national individual states. A BIT is a formally concluded and ratified agreement entered into between two states, the essence of which is to guarantee investors from one state, are given level of treatment when they invest in the other state. `

China and Chinese investment have made an extensive foray into Africa, forming strategic partnerships with the countries on the continent and steadily setting itself up to become the leading player in FDI on the continent.[35] Investment from the West may not necessarily have slowed, but China is increasingly making inroads into the continent, not only providing capital for infrastructural development[36] but also bringing corporations, which carry out the infrastructural development or operate in diverse sectors of in states as small and medium scale enterprises.[37]

Many African states held a favourable view of China and Chinese investments according to a 2015 survey of Global Attitudes by Pew Research.[38] This positive view was largely considered as being motivated by China's burgeoning investment in Africa. It was believed that Chinese investment in Africa was without guile and was undergirded by the mutuality of benefits that resulted from such engagements.[39]

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[35] Vadi V, (2012) Converging Divergence: The Rise of the Chinese Outward investment and its implications for International (Investment) Law, Yearbook of International Investment Law and Policy 705-24. (Suggests that the growing FDI of China confirms its economic rise as an active and influential player in international relations)

[36] According to the Chinese Ministry of Commerce (MOFCOM), the value of the contracts for infrastructural projects signed by the Chinese firms in Africa hit US$62.2 billion in 2016. Data available at MOFCOM Business Review XXVI (2017) http://english.mofcom.gov.cn/article/newsrelease/significantnews/217/201702515699.shtml Accessed 15/09/2022

[37] According to MOFCOM, the non-financial direct investment flow from Chinese enterprises to Africa increased 25% (by more than US$3billion) MOFCOM Business Review XXVI2017 http://english.mofcom.gov.cn/article/newsrelease/significantnews/217/201702515699.shtml accessed 15/09/2022

[38] Pew Research Centre, "Views of China and Its Increasing influence 2015 (showing that a number of Sub-Saharan African Countries held a highly favourable opinion of the Chinese Involvement in Africa) http://www.pewresearch.org/fact-tank/2015/09/16/key-findings-about-africans-views-on-economy-challanges/ accessed 15/09/2022

[39] Moyo D, 'Beijing, A Boon for Africa' New York Times, June 27, 2012. (Arguing that investment by China in Africa is given in exchange for much-needed resources in Africa. In the authors words:

The above argument is primarily hinged on the economic benefits that inure to the state parties. It is of vital importance that these blossoming economic relations be examined first in the context of how it measures against prior FDI on the continent and also in the context of Africa's sustainable development and human rights concerns.

Framing the Sino-African economic relations in the context of sustainable development and human rights demands a benchmark and the Bilateral Investment Treaty ("BIT") offers this benchmark. The choice of a BIT as a benchmark is instructive and will be shown in this study that BITs have become the chief instrument by which FDI emanating from capital-exporting nations are protected.

Presently there are 35 BITs signed between Africa's 54 countries with China.[40] To this end, there has been a great deal of engagement from the Chinese SOEs as well as an influx of private investments which have found African states as attractive investment destinations.[41] The present engagement of China in the African continent is primarily based on the rhetoric of mutual benefits. China-Africa trade scholars do not agree on whether there is a discernible pattern in the Chinese-African BIT which suggests that China is exploiting the use of BITs to pursue economic ends on the African continent.[42] Ofodile[43] generally treats BITs in the South-South context with scepticism especially as most of the investment activities implicate the natural resources sector.

BITs are generally by their nature between a developed state and a developing state although this is not exclusively the case. They presuppose a contractual relationship between a strong and weak party. This power relation has been said to have consequences, especially for developing nations.

"[t]o satisfies China's population and to prevent a crisis of legitimacy for their rule, leaders in Beijing need to keep economic growth rates high and continue to bring hundreds of millions of people out of poverty. And to do so, China needs arable land, oil and minerals.")

[40] http://www.pewresearch.org/fact-tank/2015/09/16/key-findings-about-africans-views-on-economy-challanges/ accessed 02/03/2023

[41] Ofidile, Uche E, Africa-China Bilateral Investment Treaties: A Critique' (2014) 35 Michigan Journal of International Law 133-55

[42] Kidane Won (2016) 175 'China's Bilateral Investment Treaties with African States in a Comparative Context' 49 Cornell Journal of International LAW 141-175 (Although some of the BITs have the hallmarks of the traditional North-South BITS there is no evidence that China is systematically using BITs to push purposefully a particular economic agenda)

[43] Ofidile, Uche E, Africa-China Bilateral Investment Treaties: A Critique' (2014) 35 Michigan Journal of International Law 133-55

Developing nations have negotiated and entered into BITs without the requisite experience to fully understand the dangers these agreements posed to their national interest and how very much skewed to the benefit of foreign investors these are.[44] This realization has led some countries of the developing world to commence a review of their BITs.

South Africa's Department of Trade and Industry in the early 2000s in their position paper pointed out issues arising from the inexperience that accompanied the signing of most BITs and how these have resulted in a divergence between the protection afforded under South African law and under the BITs. To this extent, the Department proposed closer scrutiny and review of the BITs.[45] Pursuant to this scrutiny and review, the government of South Africa as of 2013, followed through with the termination of several expiring BITs in order to protect and strengthen its investment regime, and also preserve its sovereign right to pursue policy objectives.[46] Although the language of the BITs presupposes that parties enjoy reciprocal rights, this is hardly ever the case for the host state, given the unidirectional flow of investment. In Africa this is different as most of the investment by Chinese investors is directly linked to the extraction of mineral resources or the building of infrastructure which in most cases is deemed as the property of Chinese investors.

BITs involve a wide range of commitments on the part of the host state. These commitments are usually couched as the rights of investors and investments of the host countries[47]. A cursory look at these commitments may reveal no harm, however, their effect becomes more glaring in the context of Less Developed Countries("LDCs") or developing states as they seek to forge policies aimed at sustainable development and development strategies. The standard of treatment clause helps to appreciate the policy constraints which LDCs and their developing counterparts face.

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[44] Sheffer, Megan Wells, 'Bilateral Investment Treaties: A Friend or Foe to Human Rights' (2011) 39 Denver Journal of International Law and Policy, 483-522

[45] South Africa Department of Trade and Industry https://pmg.org.za/policy-document/161/ Accessed 17/09/2022

[46] Kolver, Liandi (2013) http://www.engineeringnews.co.za/article/sa-proceeds-with-termination-of-bilateral-investment-treaties-2013-10-21/rep_id:4136 some other developing countries outside of Africa have also either taken steps to terminate BITs entered into with several countries or have already done so.

[47] Kaushal Asha, 'Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime' (2009) 50 Harvard International Law Journal 491-534

Typically, standard BITs require that the host state afford investors and investments of the counterparty national treatment. Many African countries are still grappling with developing their local industries and their small and medium-scale enterprises ("SMEs"), some level of discrimination is not only desirable but imperative, in order to give locals a chance to compete or to help particularly disadvantaged sections of society[48]. Commenting on the invasive nature of traditional BITs, the South African Department of Trade and Industry pointed out that:

"BITs extend far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for sustainable development. New investment rules in BITs preventing developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally. Under such conditions investment fails to encourage or enhance sustainable development."[49]

Colonialism and the attendant exploitation of the natural resources of the countries in Africa, amongst other factors, have been blamed for the weak institutions in many African states as well as the persistent underdevelopment of the continent[50]. Chinese investment in Africa is often in the nature of natural resource extraction and has informed the cautionary tale of some form of neo-colonialism and its capacity to continue to further underdevelopment on the continent[51] Furthermore, like the case with most of the developed nations of the global North, investment in most cases, is unidirectional, so that the benefits that the protections afforded by BITs still favour capital exporting country.

[48] Salgado, Victor R, 'The Case Against Adopting BIT Law in the FTAA Framework' (2006) Wisconsin Law Review 1025-66
[49] See South African Trade and Industry (2017) https://pmg.org.za/policy-document/16 Accessed 17/09/2022
[50] Nunn, (2007) 157-75 where he developed a model that explained why colonial rule contributed to the underdevelopment in Africa, and even though it has ended, it continues to matter in Africa's underdevelopment.
[51]Sanusi Lamindo (2013) https://www.ft.com/content/562692b0-898c-11e2-ad3f-00144feabdc0#axzz2kergjtnD Accessed 17/09/2022 (The author, a former Governor of Nigeria's Central Bank opined as follows: '[s]o China takes our primary goods and sells us manufactured ones. This was also the essence of colonialism. The British went to Africa and India to secure raw materials and markets Africa is now willingly opening itself up to a new form of imperialism')

Against this backdrop, the China-South Africa BIT will be examined to see if where it deviated from the standard BIT and how such a deviation has contributed to allow Chinese investors to practice neo-colonialism.

1.4. Research Questions And Objectives Of Study

Against this background, the study seeks to critically analyse to what extent the use of China-South Africa BIT, influences the neo-colonial practices of the Chinese investors and what interventions can be implemented to, ensure that the Chinese-South Africa investment relations are strengthened.

In addressing the above question, the following sub-questions will also be considered:

a) What is the concept of neo-colonialism and how it is currently defined by scholars?
b) What is the current definition of Investment as defined in the Protection of Investment Act No 22 of 2015 as opposed to the definition of Investment in the China-South Africa BIT?
c) What is the perception of South Africa as it pertains to the loans and investments from China and to what extent are these loans and investments viewed as a Debt Trap?
d) What is Debt Trap Diplomacy and what role does it play in the perception of neo-colonialism by Chinese investors?
e) What is BRICS and has it strengthened investment relations between partner states? Determine to what extent China has utilised BRICS to further its neo-colonial practices in South Africa
f) Critical analysis of the Zambia and Tanzania China BITs in contrast to the South Africa-China BIT and the existence of lacunas in these BITS and how this has aided China in solidifying its presence in Africa?

The following research objectives would facilitate the resolution of the above questions:

a) To review related literature to shed light as to which practices are considered neo-colonial practices and explain theoretical aspects of neo-colonialism, its history, and how States like China are perceived as using neo-colonial practices through loans. Furthermore, a review of the literature on Debt Trap Diplomacy and to gain insight if it has been utilized as a tool for the furtherment of the neo-colonial hold China has in South Africa.

b) To undertake an examination of the global trends of China BITS a critical analysis of the China-Zambia and China-Tanzania BITS. North-South BIT in relation to the South-South BITs and how some scholars are typically not in favour of the South-South BITs.

c) To examine South Africa's new Investment Act and Identify its strength and weaknesses as it pertains to the China-South Africa investments.

d) The role of some of the Chinese investment in the collapse of some of the industries in South Africa and Africa at large.

1.5. Motivation And Significance Of The Study

This study has been motivated by the following reasons:

a) The renewed engagement of China with African states and China's growing assertiveness on the global stage have spurred the polarizing debate on the conceptualization of China's involvement in Africa within the wider academic literature.[52]

b) The African policy, as part of the Chinese Government's foreign policy of the "Going out Strategy" poses some serious questions about the role of China as a rising power and its impact on the current international system order.[53]

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[52] Chen HP 2016, 'China's 'One Belt, One Road' Initiative and its implications for Sino-African Investment Relations', Transactional Corporate Review vol.8, no.3 178-182
[53] Chen 178

c) Traditionally, China's presence in Africa has been viewed through three different strands of thought: as a development partner, economic competitor, or colonizer.[54]

d) Lastly, there are a few scholarly articles that suggest that clearly, China's foreign policies demonstrate some form of neo-colonial tendencies with an imperial undertone, there are other scholars that suggest that China investment in Africa is crucial and needed and that such partnerships will boost African state attractiveness as an investment partner.

In consideration of the foregoing the study will be useful in the following aspects:

a) An account of the ideological, political, and economic underpinnings of China's African policy will be vastly interrogated in this paper. This is essential to establish China's motive towards its assertive engagement with Africa.

b) This study will delve into the heart of the debate of whether China's African Engagement is a threat or an opportunity for Africa. This will be discussed considering both arguments for China's African engagement and those who are completely against such engagement as they view it as some form of colonialism.

c) This study will serve as a tool for the cautious approach in negotiating investment deals, trading contracts as well as loan negotiations between China and the African state, as well as understanding Chinese foreign policy in Africa.

d) Lastly this study will make significant contributions to the existing literature, and it carries with it the benefits of bridging the information awareness and research gap.

54 Alden C, 2007 'China in Africa' Zed Books, London, New York 5-6

1.6. Scope Of Study And Its Limitation

The thesis mainly focuses on the China-South Africa investment relations as underpinned by the BIT. China's African Policy is founded on a mix of historical narratives, win-win relationships, and South-South economic relations. Sino-South African relations are not new and have featured prominently in the Chinese foreign policy discourse as a continuous pattern of South-South development cooperation and shared identity with African People.

This study does not seek for South Africa and other African states to completely cease their trade relations with China but seeks to raise awareness to not fall into the same predicament as it previously did with their Western Colonisers. It seeks for Sino-South African relations with China to be beneficial to both parties and not for one party to be completely dependent on the other.

1.7. Methodology Of Research

Desk research methodology involving a qualitative review of the relevant primary and secondary literature obtained from the library and internet databases will be used for this study. A significant part of this study will be based on peer-reviewed articles, working papers, reports, and dissertations pertaining to the Sino-South Africa-China relations and how others perceive it as the neo-colonial relationship.

Further, descriptive, analytical, comparative, and prescriptive approaches will be utilized to achieve the study's central objective in the following way:

a. An overview of the China-South Africa BIT and South Africa new Investment Act using the analytical approach.

b. The descriptive approach will be used to describe the trade relations between China and South Africa throughout the years and the shortcoming of the legal instrument in protecting the interest of the general South African population.

c. A comparative study of the BITs that China has with other African states and how some states have come to the realization that Chinese engagement in Africa is mostly beneficial to China. The Zambia and Tanzania BITs with China will be used in this comparative study as Zambia at some stage managed to call out the neo-colonial practices of China and Tanzania has recently signed probably the largest Bilateral Investment Treaty with China.

d. Finally, based on the findings from the descriptive, analytical, and comparative approaches, recommendations will be made using the prescriptive method.

1.8. Organisation Of Study/ Chapter Outline

This study will comprise of five chapters which shall tentatively serve the following purposes:

Chapter 1 – This chapter introduces the topic and covers other preliminary matters which include: the problem statement; research aims and objectives; the significance of the study and the methodology used for the research. It also covers the scope of the study and the literature review.

Chapter 2 – This chapter will examine the conceptual issue of defining neo-colonialism, the definition of investment, and an overview of the Chinese investment and loans to South Africa and how they contribute to the "Debt Trap". The interdependence theory will be unpacked and how scholars perceive this considering the allegations of neo-colonial practices.

Chapter 3 – This chapter will delve into the BRICS engagement as a tool for the furtherment of neo-colonial practices. This chapter will unpack why it was important for South Africa to join BRICS and how this has led to China being a strategic lender to South African SOEs.

Chapter 4 – This chapter will analyse as a comparative study the BITs China has with Zambia and Tanzania. It will then compare it with the China-South BIT and investigate if there are indeed loopholes in the wording of the BITs that would substantiate the claims of neo-colonial practices by China.

Chapter – 5 This chapter will provide a summary of the findings from the study, draw conclusion and make recommendations.

CHAPTER 2

DEFINING NEO-COLONIALISM, INVESTMENT, AND DEBT TRAP

2.1. INTRODUCTION

Foreign Direct Investment (FDI), when properly regulated can accelerate the economic growth and sustainable development of a country. International investment is increasingly seen as a significant contributor to both economic growth and prosperity throughout the world.[55] As a result, most countries pursue FDI to advance their national economic development.[56] This specific pursuit of FDI is particularly pronounced among developing countries that have an enormous amount to gain from such investments. [57] Such investments may provide a number of key benefits to the countries from employment and skills development to the transfer of technology and development in general.[58] These potential benefits attached to FDI generate competition between states to attract the limited number of investments available internationally to their own countries.[59]

It is, however, not only countries that may benefit from international investment, Companies from both developed, and developing countries invest massive amounts of capital and other resources abroad each year.[60]

Countries offer foreign investors certain protections and guarantee that they may safely and securely invest in that specific country. By establishing these protections these countries hope that foreign investors will choose that country to invest in. The main instrument that has been used in recent years to offer this protection are treaties. These treaties are commonly known as bilateral investment treaties ('BIT').

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[55] JW Salacuse The Three Laws of International Investment (2013) vii
[56] JW Salacuse The Three Laws of International Investment (2013) vii
[57] NR Nourbakhshian et al 'The Contribution of Foreign Direct Investment into Home Country's Development'2012 International Journal of Business and Social Science page 279.
[58] Noubakhshian (above) page 277
[59] G Anastassopoulos 'Countries' International Competitiveness and FDI: An Empirical Analysis of Selected EU Member-Countries and Regions' 2007 (10) Journal of Economics and Business page 36
[60] JW Salacuse The Three Laws of International Investment 2013 vii

This chapter examines conceptual issues such as the definition of investment and how loans and investments from China greatly contribute to the neo-colonial practices of China. Furthermore, an analysis will be conducted of the Chinese debt and how it contributes to the “Dept Trap”.

This will greatly contribute to the current discourse that the Chinese is making inroads in Africa and is using BITs and Debt Trap to further their neo-colonial practices. It therefore pertinent that these terms are defined to gauge and engage in the nuances of the discord.

2.2. DEFINITION OF INVESTMENT

2.2.1. The UNCTAD and BIT Definition

The first provision that merits analysis when considering any international investment instrument is the definition of investment. This provision is essential as it delineates the scope of application of the BIT. It is fundamentally necessary to initiate the protection and provisions found in the BIT.

The United Nations Conference on Trade and Development (UNCTAD) alluded to the importance of the definition clause in any investment policies and agreements. UNCTAD stated that the definition of investment is aligned with the scope of the application of rights and obligations of investment agreements and with the establishment of the jurisdiction of investment treaty-based arbitral Tribunals. [61]

The most applied type of definition in this regard is the broad asset-based approach as found in the South Africa-China BIT.[62] Definitions of this nature have however been criticized by some. This is because they have often been widely interpreted by arbitral bodies in the past.[63] This broad stance on interpretation has recently resulted in a trend toward narrowing the definition in newer investment instruments.[64]

The South Africa-China BIT defines **“Investment”** in Article 1 as follows:

For the purposes of this Agreement,

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[61] The UNCTAD, ‘Definition of investor and investment in international investment agreements (UNCTAD) http://unctad.org/SearchCentrer/Pages/results.aspx?k=definition%20of%investment accessed 4 May 2023

[62] Ranjan P ‘Definition of Investment in Bilateral Investment Treaties of South Asian countries and Regulatory Discretion’ (2009) 219 Journal of International Arbitration page 220

[63] UNCTAD ‘Scope of Definitions’ 2011 Page 5

[64] UNCTAD ‘Scope of Definitions’ 2011 Page 5

(1) The term investment means every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, and in particular, though not exclusively, include:

(a) Movable and immovable property as well as any property rights, such as mortgages, liens, and pledges;

(b) Shares, debentures, stocks and any other kind of participation in companies;

(c) Claims to money or to any other performance having economic value;

(d) Intellectual property rights, in particular copyrights, patents, utility-model patents, registered designs, trade-marks, trade-name, trade and business secrets, technical processes, know-how and good-will;

(e) Concessions conferred by law, including concessions to search for, or to exploit resources.

The first consideration to consider when evaluating the definition of investment is to determine whether an asset or enterprise-based approach is utilised. In this case, the BIT follows the asset-based approach in defining investment, unlike the current Protection of Investment Act which follows the enterprise-based approach to define investment. [65]

The next important aspect of the definition of investment is the limiting factors that apply to it. The main limiting factor is namely: the legality aspect of investment.

The addition of this legality provision to the definition has the effect of excluding any unlawfully obtained assets, as well as any unlawful investment into an asset from a definition.[66] This will result in any such illegally attained asset or investment not enjoying the protection in terms of the BIT.

The condition that investment must be made in terms of the laws of both the host country and investor state has two primary purposes. The first purpose is to affirm that both local and foreign investors have to comply with the host country's laws, thereby

[65] The definition in the Act closely resembles the enterprise based definition in the South African Development Community (SADC) 'Model Bilateral Investment Treaty Template(2012)

[66] UNCTAD 'International Investment Agreements: Key Issues Volume 1 (2004) page 122

levelling the playing field between the investors.[67] The second and more significant motivation is to ensure that the investment will only be covered if it is consistent with the host state development policy which is expressed through its domestic legislation.[68] This consequently allows South Africa and China to only give protection to those investments that satisfy their domestic needs as set out in municipal legislation.[69]

The concern however is that legislation affecting the legality of an investment may be changed at any time. An amendment of legislation will therefore affect the legality of the investment made after such a change. The country, therefore, has a broad regulatory discretion in this regard. The fact that both South Africa and China may alter their laws and regulations at any time may lead to uncertainty regarding which investments qualify for protection under the BIT and which do not. [70] This aspect of the definition, therefore, tends to protect the state's right to regulate above the rights of investors.[71]

Although the BIT has a slightly restrictive definition of investment as discussed above it is, however, a much broader definition as compared to the current definition in the Protection of Investment Act. The Act defines Investment not as one would expect under the definition section[72] but rather includes a distinct section dealing with the specific term of Investment. This highlights the importance of the term "investment". The definition in the Act is contained in section 2. This will be discussed below.

The definition of investment in the Act is relatively limited in its scope. The consequences are that fewer investments are covered by the Act,[73] and as a result, fewer foreign investors will be able to rely on its protections. The definition further leads to uncertainty regarding which investment will be covered and which investment will

[67] UNCTAD 'Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking' 2007 page 9
[68] UNCTAD 'Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking' 2007 page 9
[69] Ranjan p 'Definition of Investment in Bilateral Investment Treaties of South Asian countries and Regulatory Discretion' (2009) 219 Journal of International Arbitration page 220
[70] M Sornarajah 'The International Law on Foreign Investment 3rd Edition (2010) Page 227
[71] M Sornarajah 'The International Law on Foreign Investment 3rd Edition (2010) Page 227
[72] Section 1 of the Protection of Investment Act
[73] Swart D, Legal Protection of Foreign Investment in South Africa, Unpublished Masters Dissertation, University of Pretoria (2016)

not. This is of concern as an investor would want to be assured that it can rely on the provisions of the Act should they invest in South Africa.[74]

The BIT definition also allows other ways in which investment may be made. The investors may make an investment by way of the "holding or acquisition of shares, debentures or any kind of participation in the companies" This is merely an extension of the previously discussed subsection, and any such investment would similarly have to comply with the requirements as discussed above. In addition to the above methods of investments, the definition includes a list of assets that may be deemed as investments when acquired by the investor.

This illustrates that the definition of investment in the BIT although has certain restrictions or limitations in its scope, still can be used for the furtherment of neo-colonial practices. The South African government in recent years has terminated several BITs citing that the withdrawals from these BITs were because they are unequal and exploitative and excessively constrain governmental policies needed to fight poverty.[75] However, they have not reviewed the China-South Africa BIT and it is still in effect while many of the North BITs that South Africa had signed have been terminated.

a. ICSID Background on The Term Investment

The International Centre for the Settlement of Investment Dispute (ICSID) is an organisation created by the Washington Convention to facilitate international investment by creating a body to settle disputes between investors and states that may arise from such investments. [76] The signatories believed that a structured method of dispute resolution would foster international investment and that such investment would spur economic development. When determining the jurisdiction of such arbitral panels, the signatories extended to international investment.[77] However, the drafters of the convention declined to define the word ***"investment"***.

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[74] Section 2 of the Protection of Investment Act

[75] Jeffrey A 'The Investment Bill and FDI: Promotion and Protection of Investment Bill' (2014) Page 18 *Without Prejudice*. Other reasons are that the BITs do not conform to the Constitution and that they limit the policy space available to the Government.

[76] International Centre for the Settlement of Investment Dispute Convention, October 14, 1966 U.S.T. 1270, 575 U.N.T.S. 159 (hereinafter ICSID Convention)

[77] ICSID Convention, Article 25(1)

The signatories opted to leave investment undefined in the final convention as they were of the view that states were expected to manage the ICSID's jurisdiction.[78] Unfortunately, the signatory's decision to leave investment undefined has still caused problems. States do define what qualifies as an investment in their BITs through procedures set out by the ICSID Convention. Arbitrators quickly realised that consent alone could not make something an investment. There had to also be an objective definition of investment to set the outer bounds of ICSID authority.[79]

This has given rise to a long-standing issue of arbitral panels attempting to develop a workable test for whether something falls under the ambit of ***"investment***". The first few tribunals to raise this question did so *sua sponte* and concluded that the objective definition of investment was met.[80] However, their analysis did not probe the matter in any depth because neither of the parties in the cases had suggested that the issue was of much importance.

The first rigorous analysis of the objective definition of investment occurred in *Fedax N.V. v The Republic of Venezuela*[81] That case laid down elements that would eventually become a four-part test. The test was finally formulated in 2001 by the case of *Salini et al v Morocco*[82] which is currently the leading case on the subject. The Salini test defines an investment as having four elements, namely:

- A contribution of money or assets.
- A certain duration.
- An element of risk.
- A contribution to the economic development of the host sate.[83]

[78] ICSID Convention, Article 25(3)
[79] Grabowski A (2014) "The Definition of Investment under the ICSID Convention: A Defence of Salini" Chicago Journal of International LAW. Vol. 15: No 1, Article 13 available at; https://chicagounbound.uchicago.edu/cjil/vol15/iss1/12
[80] *Kaiser Bauxite Co V Jam*, ICSID Case No ARB/74/3, 296,297 Decision on Jurisdiction (Jul 6, 1975); *Alcoa Minerals of Jamacia v Jamacia*, ICSID Case No. ARB/74/2, Decision on Jurisdiction 2/4 (Jul 6 1975)
[81] *Fedax N.V. v Republic of Venezuela*. ICSID Case No. ARB/96/3 Decision of the Tribunal on the Objection to Jurisdiction, 1381 16 (Jul 11, 1997) 37 I.L.M. 1380 (1998)
[82] *Salini et al v Morocco*, ICSID Case No. ARB/00/4 Decision on Jurisdiction, 52 (Jul 23, 2001), 42 I.L.M. 609 (2003)
[83] Ibid 52

Since then, numerous cases have dealt with the same issue. Many accept the *Salini* test,[84] while other panels move in a variety of directions.[85]

Quiborax v Bolivia attempted to advance one of the newer, divergent theories of investment definition.[86] The fundamental debate between *Quiborax* and *Salini* hinges on whether something must "contribute to the economic development of the host state" in order to qualify as an investment.[87] Quiborax argues that while the ICSID Convention attempts to foster economic development via international investment, such development is not a necessary element of investment. Grabowski [88]argues that Quiborax divergence from Salini is ill-advised for two reasons, both of which are grounded in the Vienna Convention on the Interpretation of Treaties (the Vienna Convention)[89] First, the Quiborax interpretation runs counter to the text of the ICSID Convention and unnecessarily expands ICSID jurisdiction. The second is that overturning Salini would create uncertainty around investment over which the ICSID has control.

The textual argument references the Preamble to the ICSID Convention, which clarifies that ICSID exists in order to facilitate international investment and thereby contribute to the economic development of the host state.[90] Quiborax misreads this as an ephemeral hope that investments contribute to economic development,[91] whereas Salini properly views its limitation on the ICSID's arbitrational jurisdiction since it would be unusual to expand that jurisdiction beyond the organisations stated purpose.[92]

The practical issue surrounding Quiborax is the uncertainty that it creates. Both governments and investors are sophisticated parties with a good understanding of settled rules and the ability to plan around them. Quiborax disrupts the settled rule of

[84] See for example *Joy Mining Machinery Ltd v Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 53 (Jul. 23,2001) 19 ICSID Rev 486 (Aug 6, 2004)
[85] See, for example*, Quiborax v Bolivia*, ICSID Case No. ARB/06/, Decision on Jurisdiction, 220 (Sept 27, 2012); *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/06/20 Award 110 Jul 14, 2010
[86] Quiborax, 220
[87] Compare, Quiborax 363 with Salini,
[88] Grabowski A (2014) "The Definition of Investment under the ICSID Convention: A Defence of Salini" Chicago Journal of International LAW. Vol. 15: No 1, Article 13 available at; https://chicagounbound.uchicago.edu/cjil/vol15/iss1/12
[89] Vienna Convention on the Law of Treaties art. 31 May 23, 1969, 1155 U.N.T.S. 331 (herein after Vienna Convention
[90] ICSID Convention, at the Preamble.
[91] Quiborax; at 222
[92] Salini,52

Salini and introduces uncertainty, which chills investment and thus harms the economic development of the states. This runs counter to the reason ICSID exists in the first place.[93] This issue also speaks more broadly to the value of precedent in international law. Different international organisations take different views of precedent based on their goals.

b. The Definition Of Investment Through Salini

Fedax centred on a set of debt instruments that Venezuela issued to Fedax NV, a company located on the island of Curacao.[94] Fedax held six promissory notes issued to Venezuela, which Venezuela refused to honour.[95] Venezuela contended that the notes did not constitute an investment under the definition of ICSID. They argue that:

[T]his transaction does not amount to a direct foreign investment involving "a long-term transfer of financial resources – capital flow – from one country to another (the recipient of the investment) in order to acquire interest in a corporation, a transaction which normally entails certain risks to potential investors."[96]

In rejecting this argument, the panel in Fedax did not produce a clear test for the definition of investment; but did lay out several important principles, like the certain duration and the contribution to the development of the host state, that would go on to form the foundations of the current investment definition.[97]

That final investment definition was finally conceived in its current form in *Salini et al v Morocco.*[98] The Salini case revolved around two Italian companies Salini Costruttori and Italstrade, and their dispute with the Moroccan government. The government of Morocco, through a private company, went through a bidding process for the construction of a fifty-kilometre highway. The two Italian companies jointly submitted a bid and won the contract for the construction of the highway. The two companies completed the highway thirty-six months later going four months over the timetable laid out in their bid, which made the Moroccan government unwilling to pay for the

[93] ICSID Convention, at the Preamble
[94] Fedax, at 1
[95] Fedax
[96] Fedax, at 19
[97] Fedax at 43
[98] Salini

highway. After exhausting domestic channels, the Italian companies submitted the dispute to ICSID arbitration.

Salini introduced a clear four-pronged test that arbitrators were to use to determine whether the two companies had in fact made an investment for the purpose of ICSID arbitration. The test required:

(a) A contribution of money or assets;
(b) A certain duration over which the project was to be implemented;
(c) An element of risk; and
(d) A contribution to the host state's economy.[99]

In order to develop this test, the arbitrators examined a variety of evidence. They looked at older decisions relating to international investment and found that the first three prongs of their test stemmed from international law concepts implicit in the decisions of those older decisions.[100] However, the arbitrators in Salini felt that the largely tacit nature of the test up to this point – that is the first three prongs – left it incomplete. They believed that Fedax's requirements of transfer of goods or services for a certain duration with an element of risk did not fully capture the notion of investment. [101] Consequently, they added the fourth prong after the examination of the ICSID Convention's preamble, which makes special mention of the role of private investment in the economic development of host states.[102]

Over the year this test has proven fairly controversial, especially the fourth prong pertaining to the host states' economy.[103] However, no matter how regularly uses it as the starting point from which to base their analysis, which demonstrates that the test has gained no small degree of legitimacy.

Numerous panels have grappled with the Salini test over the years, and they came to a variety of results. Many have simply adopted the test as it stands. Some have

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[99] Salini 4
[100] The Salini board surveyed past decisions and found that the majority of them did not explicitly raise the concept of investment. Instead, the Salini tribunal attempted to back out a consistent rationale from those cases that arbitral boards took.
[101] Salini
[102] Salini
[103] Salini

removed prongs or recharacterized them, while others added more elements on top of the ones that Salini originally had.

c. Quiborax V Bolivia: Attempting To Synthesise A Dissent

Quiborax v Bolivia is a case that attempts to grapple with the Salini test, eventually opting to discard the fourth prong. [104] Quiborax is a Chilean company that mines non-metallic minerals, most specifically ulexite from which boron can be extracted.[105] It is the largest supplier of borate (mineral boron) in South America.[106] Quiborax initially mined minerals in Chile, but it operated on land near the Bolivian border.[107] In an effort to increase production of ulexite, which has seen a recent growth in demand, Quiborax wanted to expand operations into Bolivia, which has large deposits of high-quality ulexite.[108] They were particularly interested in the deposit at Salar de Uyini , then owned by Campania Menera Rio Grande Sur S.A. Quiborax made some deal to secure a supply of ulexite from Salar de Uyini, but the nature of the arrangement was unclear. The dispute over the nature of that agreement formed the basis of the case.

Quiborax acted as a good representative for the cases opposed to Salini because it simply rejected the fourth prong, and it did so on textual grounds, which appears to be the most common reason for doing so, to the extent that commonality exist at all.[109] Furthermore, the Quiborax panel was heavily influenced by the reasoning of other panels that chose to modify the Salini test, so some sense it can be viewed as a culmination of that line of decisions.

The Quiborax panel rejected the fourth prong because it found that the preamble of the ICSID Convention merely states that economic development is a goal for investment, not an inherent characteristic of it. To that end they relied on *Victor Pey Casado*, saying:

"It is true that the Preamble to the ICSID Convention mentions contribution to the economic development of the host state. However, this reference is presented consequently and not as a condition of the investment: by protecting investment, the Convention facilitates the development of the host State. This does not mean that

[104] Quiborax v Bolivia at 220
[105] Quiborax at 1-2, 7
[106] Quiborax 7
[107] Qiborax 8
[108] Quiborax9-10
[109] Quiborax

development of the host State becomes a constitutive element of the concept of investment."[110]

The panel also gave a small nod to the *LESI S.p.A.*[111] decision's regard to the practical difficulties of ascertaining whether an investment leads to the economic development of the host state, saying:

"It further stated that it did not appear necessary to also meet the element of contribution to the economic development of the country, 'a requirement that is in any event [sic] difficult to establish and implicitly covered by the elements reviewed.'"[112]

This reasoning for rejecting Salini is understandable, but contains two flaws, argues Grabowski. Firstly, it failed to grapple with the full implications of the full ICSID Convention's Preamble, which is required under the Vienna Convention.[113] While it is not unreasonable in a vacuum to say that a contribution to the economy of the host state is merely a goal of investment , this does not match well with the stated purpose of the ICSID, to foster economic development, and it broadens ICSID jurisdiction beyond the range necessary to serve those purposes. Second, determining whether something makes an economic contribution to the host state may be practically difficult, but ignores the practical issues stemming from the continued and unpredictable variations on the Salini test that make it difficult for companies to plan their international operations. The parties to the arbitration had no way of knowing prior to this decision whether arbitrators would diverge from Salini, and even if they knew that, they could not know in which direction that divergence would run. This unpredictability runs counter to the stated goals of ICSID signatories because they were attempting to streamline international, investment.

[110] *Victor Pey Casado and President Allende Found v Republic* of Chile ICSID Case No ARB/98/2, Award, 232 (May 8 2008)
[111] *LESI S.p.A et Astaldi S.p.A v People's Democratic Republic of Algeria* ICSID Case No. ARB/05/3 Decision on Jurisdiction, 72 (July 12,2006)
[112] Quiborax
[113] Vienna Convention at Preamble

d. Arguments For Retaining The Salini Test

The Salini test for determining what transactions arbitrators should consider an investment still constitutes controlling law, or at the very least persuasive precedent from which to start reasoning, as far as ICSID arbitrators are concerned.[114] The case is widely cited across a variety of different arbitrations spanning the decades since it was originally decided. Often arbitral boards simply adopt the Salini test in its entirety, leaving it untouched.[115] Additionally, even though some cases do not choose to stray from Salini they still feel a need to account for it as the beginning of their analysis.[116] Furthermore, those who depart from the test seldom scrap it entirely. Instead, they simply revise it, and even those revisions tend to disagree, varying in many different directions with Salini as a common centre point. [117]

This staying power and the deference that other arbitrators afford to Salini give rise to a pair of arguments for retaining it on a more permanent basis, both of which have ample support from the Vienna Convention. The first part of Salini's longevity is attributable to its strong foundation in the text of the ICSID Convention.[118] The ICSID Convention specifically calls out the facilitation of private investment to bring about greater economic development of the host state as the purpose of ICSID.[119] While some boards have found this to simply espouse a general hope rather than a limitation on the jurisdiction of the ICSID, that view has only come about more recently and has not gained general acceptance. The second reason to retain Salini is more practical; the unpredictability of the panels that seek to replace or alter it both harms individual parties and impedes the purpose that ICSID was created for, facilitating international investment.[120]

The fundamental difference between the test advanced in Salini and the one advanced in Quiborax and cases like it, regarding the text of the ICSID Convention, is how they

[114] Quiborax 220
[115] Joy Machinery 53
[116] Quiborax 220
[117] Quiborax
[118] ICSID Convention Preamble
[119] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Document ICSID/2, ICSID Reports, 1993, 23
[120] Becker DM Debunking the Sanctity of Precedent, 76 Washington U. L.Q 853, page 856-57 n8 (1998) espousing the value of certainty and detailing the costs that uncertainty exposes on actor; ICSID Convention supra at Preamble explaining that the goal of ICSID is to facilitate international investment.

perceive the Preamble's view on an investment's economic contribution to the host state. The pertinent portion of the ICSID Convention's Preamble reads:

"[t]he Contracting states considering the need for international cooperation for economic development and the role of private investment therein; … have agreed as follows…" [121]

It then proceeds to lay out the actual articles of the Convention. Salini takes this language to mean that ICSID investments must contribute to the economic development of the host state. Otherwise, the arbitral tribunals would exceed their jurisdiction under the Convention. The Preamble also supports Salini's interpretation by making it clear that ICSID falls under "the auspices of the International Bank for Reconstruction and Development." This choice of organisation to oversee ICSID clearly demonstrates the importance of economic development to the signatories. Unlike Salini, the arbitrators in Quiborax took the language more as words of purpose. They felt that the economic development of the host state was certainly a desired goal of investment, but something would need to bring about such development to fall under ICSID's jurisdiction.

There are numerous sources that counsel for the resolution of the dispute in favour of the Salini test. The first is the text of the Preamble itself which lays out the purpose of the ICSID is to promote economic development.[122] It would be odd to expand the organisation's jurisdiction beyond the bounds necessary to do that, which means that the economic development prong ought to remain. Beyond the text, the Vienna Convention allows for the examination of the treaty's circumstances, context and preparatory work to resolve cases where the text of the treaty is possibly ambiguous.[123] To that end, the preparatory work and other documentation surrounding the preparation of the treaty similarly supports the idea that the economic development of the host state is central to the goals of the ICSID Convention.[124] The report of the Executive Directors also repeatedly emphasises the goal of ensuring a flow of capital into a country saying "adherence to the Convention by a country would provide

[121] ICSID at Preamble
[122] ICSID at Preamble
[123] Vienna Convention at Preamble
[124] Malaysian Historical Salvors, SND, BHD v Malaysia, ICSID Case No. ARB/05/10 (April 16, 2009) Dissenting Opinion of Judge Mohamed Shahabuddeen, Annulment Decision,22

additional inducement and stimulate a larger flow of private international investment into territories, which is the primary purpose of the Convention" [125] Moreover there is a strong contextual link between ICSID and the economic development of signatory countries in that ICSID is a member of the World Bank Group and has strong ties to the World Bank. [126] The World Bank's mission is to facilitate economic development, and it holds ICSID out as a partner in this mission.[127]

In addition to the Vienna Convention, another important international instrument pushes for the retention of Salini's fourth prong, the United Nations Charter. The UN Charter contains within it the concept of sovereign equality, a broad principle that underlies a large portion of international law.[128] The Charter states that the UN "is based on the principle of sovereign equality of all its Members.[129] Although the UN does not govern ICSID, the fact that such an important document features the concept of sovereign equality, the belief that all countries should have unimpeded control of domestic affairs, so prominently shows that this principle can provide clarity during the textual interpretation of international laws.

Broadly speaking, the principle of sovereign equality states that all countries have equal rights to control the going on within their borders.[130] That sovereignty, in most cases, cannot be removed without their permission.[131] This principle pushes for a narrow interpretation of the textual basis of ICSID jurisdiction. The existence of sovereign equality evinces a strong preference for allowing a nation to manage their own affairs. International organisations like ICSID chip away at this sovereignty since they have the authority to bind countries to their decisions. Consequently, when disputes arise over the breadth of such organisations' power panels should resolve

[125] Report of the Executive Directors, page 12
[126] For instance, the annual meeting of the ICSID's Administrative Council take place as part of the yearly World Bank and International Monetary Fund Meeting. Furthermore, the World BANK President is also the chairman of the ICSID Administrative Council
[127] For instance, the annual meeting of the ICSID's Administrative Council take place as part of the yearly World Bank and International Monetary Fund Meeting. Furthermore, the World BANK President is also the chairman of the ICSID Administrative Council
[128] United Nations Charter article 2
[129] United Nations Chatter article
[130] Kelsen H, The Principle of Sovereign Equality of States as a Basis for International Organisation, Yale Law Journal 207, 209 (1944)
[131] Kelsen

them in favour of the narrow interpretation, lest they force the country to cede more of its sovereignty that it consented to.[132]

There is a rhetoric that China has given loans to African state and disguised these loans as investment whilst the PRC is actively pursuing their neocolonial practices and using loans as debt trap. It is therefore imperative that this study highlights what is investment and if loan amount to investment. Furthermore, it is critical that we analyse what constitute debt trap and if this is an indication of the neocolonial practices.

2.3. DEFINITION OF NEOCOLONIALISM AND DEBT TRAP DIPLOMACY

2.3.1. Definition Of Neocolonialism

The term neo-colonialism was first coined by Dr Kwame Nkrumah in his book *"Neocolonialism the final stages of Imperialism"*. He described neo-colonialism as the worst form of imperialism: for those who practice it, it means power without responsibility, and for those who suffer it, it is exploitation without redress.[133] Predominantly neo-colonialism has no definite definition. It has various versions of definitions such as the Western, Asian, and African versions of definitions. Encyclopaedia Britannica, Sandra Halperin defined neo-colonialism, as "Neo-colonialism, the control of less-developed countries through indirect means."[134] She states that the 'indirect means' as the developed countries are dominating developing and under-developed countries by using colonial exploitation rules.

She further alluded that neo-colonialism was originally applied to European policies that were seen as schemes to maintain control of African countries.[135] Basically, neo-colonialism is a process by which a colonial mother country exposed exploiting rules and regulations to her newly independent underdeveloped country or less developing country for indirect dominating; the dominating can be economic, political, and cultural. It has been noticed predominantly through economic policies however this usually cloaks political and cultural exploitation.

[132] Grabowski A (2014) "The Definition of Investment under the ICSID Convention: A Defence of Salini" Chicago Journal of International LAW. Vol. 15: No 1, Article 13 available at; https://chicagounbound.uchicago.edu/cjil/vol15/iss1/12

[133] Northrop D 'A Companion to World History' West Sussex (UK): Willi Blackwell 2012 https://www.marxist.org/subject/africa/nkrumah/neocolonialism/introduction.htm Site accessed 11 May 2023

[134] https://global.britannica.com/topic/neocolonialism. Site accessed 11 May 2023

[135] https://global.britannica.com/topic/neocolonialism. Site accessed 11 May 2023

Economy is the driving force for the development of any country. Without economic development, no country can achieve development. In the African context, imperialist countries had applied economic tools as an arm to dominate the newly independent country. During the decolonisation, Dr Kwame Nkrumah, the president of Ghana stated that 'neo-colonialism is the worst form of imperialism and the highest stage of capitalism.' He alluded that it such a system by which colonial powers like Britain, Germany, and France, gave liberation to the colony on the one hand but on the other hand robbed this liberation. Without economic independence political independence is futile and absolute independence does not exist.[136]

Scholars argue that the goal of neo-colonialism by imperialist countries was to transform newly independent countries into underdeveloped countries and they would do so at any cost. Consequently, the sovereign country lost its sovereignty and colonial exploitation became a continuous process. Neo-colonial tools do not necessarily mean that the imperial countries ceased investing in the newly liberated countries, but they would invest in that country and the imperial state would get most of the profit that they invested in the less developed state.[137]

The meaningless independence further perpetuated the economic exploitation of Africa, and the process began from colonial rule. African States have an estimated 53% of the world's industrial mineral and metal reserves. However, those resources have been and are still being used for the greater development of the overseas interest.[138] Such exploitations were not the only way of colonial economic exploitation but, colonial power exploited Africa in several ways.

Africa has not been able to grow capital, technologies, experts, and standards of management to run new independent states. Scholars argue that agents of the former imperial Countries. The World Bank, International Monetary Fund, and IFIC had taken this opportunity to appropriately bound Africa in the neo-colonial iron curtain.[139] The WB and IMF are lending loans to African States without hard terms and conditions.

[136] K. Nkrumah, Neo-Colonialism: the Last Stage of Imperialism (London: Heinemann, 1968)
[137] Okoth A 'A History of Africa: African Nationalism and the De-colonisation Process' Nairobi: East African Educational Publishers, 2006 Page 3
[138] K. Nkrumah, Neo-Colonialism: the Last Stage of Imperialism (London: Heinemann, 1968)
[139] Okoth A 'A History of Africa: African Nationalism and the De-colonisation Process' Nairobi: East African Educational Publishers, 2006 Page 3

Debt Recipients countries must pay back with interest that was more than what they had accepted.

It is evident that postcolonial states entered the world economy from a disadvantaged position, and reliance on foreign capital facilitated neo-colonialism. This has produced a competitive edge and driven African states to have FDI. Diplomatic relations between China and Africa are characterised by rhetoric of development partnership and competition with the Capital West.[140] This rhetoric is manifest in China's 'non-conditionality' policy. China professes itself to be without political motivation and will engage with pariah states.[141]

China has built many projects in Africa including but not limited to, roads, railways, bridges, dams, and economic zone as a way through which it could penetrate Africa's growing markets. Such cooperation is a pro mutually beneficial argument. China and Africa have long history of close cooperation, mutual respect, and a common interest. In 2011, trade with Africa reached a record with RSA being their largest trading partner in Africa. PRC and RSA greatly benefit from their comprehensive strategic partnership, which aids to maintain mutual respect and common development.

Neo-colonialism is characterised by unequal economic relations which damage the development potential of the less powerful state. Manel argues that this is not uniformly the case of relations between China and African states.[142] Strong domestic institutions and transparency are fundamental to the utilisation of Chinese credit and investment for development goals. Chinese firms have proven themselves willing to conduct business within the confines of the norms and standard of practice within a state, but these must be effectively enforced. And to ensure the resolution of any grievance which may arise in society relating to foreign capital, ownership and competition, there must be legitimate, institutional channels though which these can be made salient in the policies of the state.

As Manel[143] argues although China has a stronger economic influence than African States, it does not necessarily amount to neocolonialism. The history of the

[140] C Alden*, China in Africa* New York: Zed Books, (2007) page 35
[141] G le Pere, *Crouching Tiger, Hidden Dragon? (Pietermaritzburg: University of KwaZulu Natal Press)* 2008 page 29
[142] Manell N, *China in Africa: The New Neocolonialism*, 2020
[143] Manell N, China in Africa: The New Neocolonialism, 2020

relationship between the PRC and RSA seems to negate the idea that the PRC is actively seeking to trap RSA into debt thus resulting in neocolonialism. Therefore, it is important that this study also delves into the definition of Debt Trap and if PRC is utilising debt to trap RSA thus furthering its neocolonial practices.

2.3.2. Defining Debt Trap

Africa's growing public debt has sparked a renewed global debate about debt sustainability on the continent. This is largely owing to the emergence of China as a major financier of African infrastructure resulting in a narrative that China is using debt to gain geopolitical leverage by trapping poor countries in unsustainable loans.[144] To fully understand the Debt Trap narrative and the impact debt has on the African continent this paper will also look at the history of debt in Africa.

During the 1980s African economies had substantial sovereign debts that they were unable to repay and by the mid-1990s much of the continent was frozen out of the global financial system.[145] This was followed by attempts to address the debt problem through structural adjustment programmes (SAPs), which were largely disruptive failures. The solution, reached in 2005, was for lenders to write off loans to heavily indebted poor countries (HIPCs), 30 of which were in Africa. With fresh credit and better economic policies, many of these countries turned their fortunes around. By 2012 the median debt level in Sub-Saharan Africa had fallen to 30% of the gross domestic product (GDP).[146]

Chinese lending to Africa is driven by the financing of more than 3000 infrastructure projects through which China has extended in excess of $86 Billion in commercial loans to African governments and state-owned entities.[147] While commercial relations between China and Africa have been in existence for quite some time, it is the scale

[144] Jones L and Hameiri S, "*Debunking the Myth of 'Debt-Trap Diplomacy' How Recipient Countries Shape China's Belt and Road Initiative*" August 2020 Asia-Pacific Programme

[145] The Economist, 'Debt is creeping back up in sub-Saharan Africa', 13 march 2018, https://www.economist.com/graphic-detail/2018/03/13/debt-is-creeping-back-up-in-sub-saharan-africa, site accessed 15 May 2023

[146] International Monetary Fund 'Assessing Sustainability' 28 May 2002, https://www.imf.org/external/np/pdr/sus/2002/eng/052802.pdf Site accessed 15 May 2023

[147] Schneidman W & Wiegert, *'Competing in Africa: China, the European Union, and the United States',* Brookings Institution blog, 16 April 2018, http://www.brookings.edu/blog/africa-in-focus/2018/04/16/competing-in-africa-china-the-european-union-and-the-united-states/ site accessed 15 May 2023 Xi

and pace of China's trade and investment flow[148] that are particular about the current Chinese commercial investment activities in Africa.

The term "Debt Trap" was born in a think tank in northern India and was further explored by two Harvard University Graduates students who called it Chinese Debt Book Diplomacy.[149]This paper was enthusiastically cited by the Guardian and New York Times and another major outlet as academic proof of China's nefarious Intentions. The paper postulated that China's Debt Trap Diplomacy is the process by which China seeks to entrap countries in a web of debt to secure some kind of strategic advantage or an asset of some kind.[150]

According to Wening Setyanti and Nanang Pamuji[151] China's "Debt Trap Diplomacy" is a new vocabulary in international relations that was raised by Indian Academics in early 2017, just when China was still the centre of the world's attention. This term refers to debt diplomacy under the framework of economic diplomacy – through the provision of loans from the lending country to the borrower country, which, whether international or not, will plunge the borrower country into a condition trapped in its debt.[152] They argue that the term debt trap or Chinese debt trap originated from the introduction of the Belt and Road Initiative (BRI) by Chinese President Xi Jinping in 2013. Which aimed to connect the Eurasian economy with infrastructure, trade and investment.[153] This policy is global and is not aimed at specific geographic situations even though it is only alluded to linking the Eurasian economy. With the BRI being popular in developing countries it has also received criticism from countries with advanced industrial economic systems. One fundamental criticism is that the program lacks transparency making it difficult to know in detail how much China is lending for

[148] Broadman HG, *'Chinese-African Trade and Investment: The Vanguard of South-South Commerce in the Twenty-first Century*, page 87 in China into Africa (2008) (Robert I Rotberg ed)
[149] Broadman HG, *'Chinese African Trade and Investment: The Vanguard of South-South Commerce in the Twenty-first Century*, page 87 in China into Africa (2008) (Robert I Rotberg ed
[150] Broadman 88
[151] Wening Setyanti & Nanang Pamuji Mugasejati (2018) *'China's Debt-Trap Diplomacy'* Di Era Xi Jinping Case Study Sri Lanka, Hambantonta,
[152]Wening Setyanti & Nanang Pamuji Mugasejati (2018) *'China's Debt-Trap Diplomacy'* Di Era Xi Jinping Case Study Sri Lanka, Hambantonta,
[153] Wening Setyanti & Nanang Pamuji Mugasejati (2018) *'China's Debt-Trap Diplomacy'* Di Era Xi Jinping Case Study Sri Lanka, Hambantonta,

each project, the terms of the loans, how the contractor is selected, and what environmental and social risks are involved.[154]

As stated above the pace and amount of investment by the Chinese government has been highly scrutinized, mainly by Western countries. They viewed this as a deliberate entrapment of the African states by the Chinese as most of these African states will not be able to pay back the loans that they have accumulated from China. Western countries have made claims that China uses bribes, opaque agreements, and strategic use of debt to hold states in Africa captive. The US and Western pundits have warned that China is a rogue donor with regard to its finances and is using these loans and donations as means to colonise. African States.[155]

While the power imbalance between China and Africa is substantial, China has two advantages over the West in terms of Africa's receptivity to its presence on the continent. Firstly, China does not have the West's fraught legacy in Africa. Secondly, when the Chinese government interacts with African governments it does not present itself as a solution to African problems. China frames its interaction in the context of South-South cooperation.[156]

China's approach conveys respect despite African governments having limited power, particularly given the Chinese preference for bilateral agreements. It tends to emphasise that only Africa can solve its governance problems and does not make this resolution a prerequisite for development assistance.

It is against this backdrop that this study will further seek to discuss the impact of the Chinese debt to South Africa and if this is indeed a Dept Trap and how China is utilizing the debt to further their neo-colonial practices.

[154] Anonim (2017) *'The New Great Game: China's Debt-Trap Diplomacy.'* Amsterdam: European Foundation for South Asian Studies
[155] Anonim (2017) *'The New Great Game: China's Debt-Trap Diplomacy.*' Amsterdam: European Foundation for South Asian Studies
[156] United Nation Development Programme in China: 'China – UNDP Global Cooperation: 2017 Highlights'2018 http://www.cn.undp.org/content/china/en/home/library/south-south-cooperation/china--undp-global-cooperation-2017-highlights-.html site accessed 17 May 2023

2.4. THEORETICAL PERSPECTIVE OF INTERDEPENDENCE THEORY AND DEBT TRAP

Robert O Keohane and Joseph S Nye in their classic book on international relations theory entitled 'Power and Interdependence'[157], developed the interdependence theory. It provided an adequate understanding to international changes, roles of emerging powers, a profound analysis of the relative decline of military power and the increasing international economic independence. The theory explains interdependence in politics as 'situations characterized by reciprocal effects among countries or among actors in different countries.[158]

The interdependence theory as discussed in Chapter 1 above, fits in the analysis of the relationship between China and South Africa. These relations are strong on multiple levels of contact. Trade volume with China is on a constant prominent increase over the years. In addition to the comprehensive strategic agreements that South Africa maintains with China, the relationship is strong on official levels as notable increasing official conversions with China are expressed in the official visits between the two countries.

In 2010, China and South Africa announced a 'comprehensive strategic partnership' which elevated bilateral ties from the previous strategic partnership. The Beijing Declaration, as it became known, was signed by both President Zuma and President Xi Jinping during the upgrade in relations.[159] With regard to political and regional affairs, the two countries committed themselves to enhancing joint efforts in the global arena, such as the UN and FOCAC, and to maintain frequent contact in order to enhance mutual understanding for and support of each country's position and interest. In economic ties the governments agreed to improve the current structure of trade between the two countries, particularly by working towards a more balanced trade profile encouraging trade in manufactured value-added products.[160]

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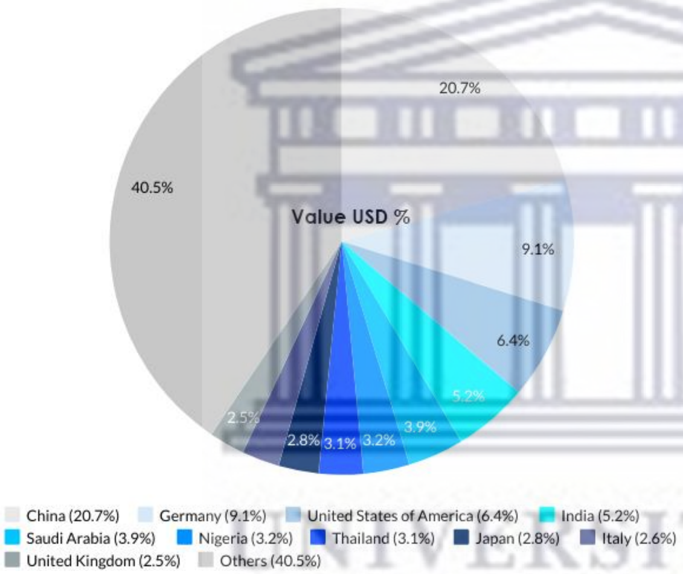
[157] R.O. Keohan and J.S. Nye: *Power and Interdependence* 4th Ed (Longman: Boston MA.) 2012
[158] R.O. Keohan and J.S. Nye: *Power and Interdependence* 4th Ed (Longman: Boston MA.) 2012
[159] Alden C *'Solving South Africa's Chinese puzzle: Democratic Foreign Policy Making and the two "Chinas Questions"*, Broderick J et al (Eds) South Africa's Foreign Policy: Dilemmas of a new Democracy, Basingstoke: Palgrave, 2001, page 121.
[160] Stratsis Incite 'China and South Africa deepen bilateral agreement', 28 August 2010 http://stratsisincite.wordpress.com/2010/08/28/china-and-south-africa-deepen-bilateral-relationship/ Site accessed 17 May 2023

The rapid pace of China-South Africa economic relations is a testament to how far the relationship has progressed over a relatively short space of time. In 2008, only a decade after formal diplomatic links had been established, China was South Africa's primary import and export trade partner.[161]

Since 1998, bilateral relations have been on a steady upward trajectory between South Africa and China. This rapid growth has been the result of a combination of the burgeoning bilateral friendship and global factors. These include China joining the WTO in 2001 and South Africa's formal recognition of China's market economy status and upgrading a strategic partnership.[162] The illustration below is an indication of the current South Africa trading partners and the percentage of trade between those countries.



While bilateral trade has grown enormously, the investment picture differs considerably and highlights some of the unique characteristics of South Africa-China relations. Hopes of Chinese investment was initially quite high: on the eve of formal recognition in 1997. China had planned to invest $300 million in South Africa far above

[161] According to Rob Davies, the South African Minister of Trade and Industry: 'Bilateral relations between South Africa and China have improved remarkably over the last several years 'See SA Government Online ,23 October 2012. http://ww.info.gov.za/speech/DynamicAction?pageid=461&sid=31781&tid88526, site accessed 17 May 2023, "South Africa /China: Relations have never been better', African -Asia Confidential, 13, 11 September 2010 page 2.

[162] Shelton G & Kakemba C *'Win-Win Partnership? China, Southern Africa, and Extractive Industries.* Johannesburg: Southern Africa Research watch, 2012, page 196

the current FDI stock. [163]Most significantly, until 2007, and unlike China's experience with the rest of Africa, South African companies had invested more in China than their Chinese counterparts had done in South Africa. At the same time, the overall figures on FDI show that actual investment forms a very modest portion of their economic relations.[164]

Although specific figures for China-South Africa investment ties remain inconsistent (mostly due to differing data-reporting practices)[165] the numbers do provide a glimpse into the nature of the relationship. For instance, South African Reserve Bank data reveals that China was a modest source of FDI for South Africa from 1997-2010 when compared to the countries such as the UK, US and Germany – with the exception of 2008 when it was the most important FDI source.[166]

While the trend of increasing Chinese FDI is apparent, with a strong jump in FDI in 2008, China's investment has a long way to go. Certain distinctive features of the South African environment are behind this anomaly from the experiences of much of the rest of Africa. Although South Africa is a resource-rich country, it is viewed in

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[163] Shelton G *'South Africa and China- a strategic partnership?* In Alden C et al (ed) *China Returns to Africa: Arising Power and a Continent Embrace.'* London: Hurst, 2008 page 260. For the full text of the Pretoria Declaration see http://www.peopledaily.comen/english/200004/25/3ng20000425_39697.html site accessed 23 May 2023

[164] Shelton G '*South Africa and China- a strategic partnership?* In Alden C et al (ed) *China Returns to Africa: Arising Power and a Continent Embrace.'* London: Hurst, 2008 page 260. For the full text of the Pretoria Declaration see http://www.peopledaily.comen/english/200004/25/3ng20000425_39697.html site accessed 23 May 2023

[165] Gelb S, *Foreign Direct Investment Links Between South Africa and China'*, the Edge Institute page 6, 2010, http://www.tips.org.za/files/foreign_direct_investment_links_between_south_africa.pdf accessed 23 May 2023

[166] Sandrey R, *' Foreign Direct Investment in South Africa: The BRIC Perspective'* Tralac Working Paper, 22 February 2013 page 3, http://www.namc.co.za/upload/other_trade_publications/FDI%20in%20SA%2020130222.pdf accessed 23 May 2023. Notably, analysts from China provide alternative figures based on Chinese estimates that are much higher, suggesting that China's FDI stock in South Africa has moved from $44 Million in 2003 to over $4 Billion in 2011. Statistics anomalies like these are a continuing source of contention at the ministerial level. Also see Huang M& Ren P 'A Study of the Employment Effect of the Chinese Investment in South Africa ' Discussion Paper, Centre for Chinese Studies, University of Stellenbosch, October 2013 page 10 http://ccs.org.za/wp-content/uploads/2013/10/DP_4_2013_Chinese_Employment_South_Africa_Huang_Ren_ONLINE.pdf Accessed 23 MAY 2023

industry terms as maturing, so opportunities from outside investors are limited.[167] Moreover, its regulatory environment is considerably more complex than that of other African countries and is reasonably well enforced. Coupled with this are the rigid labour markets and strong positions of trade unions which make life difficult for Chinese investors. The promotion of "Black Economic Empowerment" (BEE), which requires businesses to provide company assets to black South Africa, also served to inhibit investors. For novice Chinese entrepreneurs, these factors have presented obstacles that have taken some, time to overcome.[168]

These factors are evident in the cautious approach adopted by Chines companies in investing in the South African Mining sectors. According to industry insiders, Chinese investment in the South African economy has consistent of joint ventures and "brownfield" development in the mining sectors as a response to the obstacles and concerns.[169] These investments include the Zinjing Mining Group's $16 Million purchase of a 29.9% share in the platinum producer Ridge Mining in 2006. The decision by Sinosteel one of China's most forward-looking SOEs to embark on a joint venture with South Africa's Samcor in chromium mining built their experience in an earlier, more modest investment in Limpopo 1996.[170] This relationship, which involved Chinese financing and market access coupled with South African management of production, has been characterised as a good model for Chinese business partnerships with South African Companies.[171]

From this tentative start and following the stabilisation of the severe market turbulence of 2009, Chinese investment has begun to pick up. Arguably the Industrial and Commercial Bank of China (ICBC) and Standard Bank investment, coupled with the opening of the China African Development Fund (CADF) office in Johannesburg, played a role in raising Chinese awareness of investment opportunities in South Africa.

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[167] Interview with Coenraad Bezuidenhout, Executive Director of the Manufacturing Circle, Johannesburg, 24 January 2014.
[168] Gelb S, *Foreign Direct Investment Links Between South Africa and China'*, the Edge Institute page 6, 2010, http://www.tips.org.za/files/foreign_direct_investment_links_between_south_africa.pdf accessed 23 May 2023

[169] Interview with Representative from Chamber of Mines 14 April 2023
[170] Sinosteel Fonds joint venture in South Africa 'People's Daily, 22 December 2006, http://www.pmg.org.za/fields/docs/100618limdev.doc Accessed 2 May 2023
[171] Shelton G and Kabemba, page 79

One study of 16 representative Chinese Companies and the decision to invest found that the majority of investors are state-owned and depending on their sector, were resource and/or market-seeking in their approach.[172] At the same time the bulk of FDI continues to be focused on the mining sector (ICBC-Standard Bank deal notwithstanding) while the modalities of Chinese investors remain much the same, namely seeking to enter into joint ventures and arrangements with suppliers in South Africa with the aim of obtaining long-term, stable sources.[173] Furthermore, in overall terms, the primary form of economic engagement in the mining sectors remains focused not on investment but on trade, with China as a customer for South African minerals and South Africa as a customer for Chinese machinery.[174]

Jidong Development Group China's second-largest cement maker acquired a majority stake in a new cement plant with the support of the CADF in 2010. Jidong and CADF invested ZAR 382.5 million and Chinese banks were expected to provide about ZAR450 Million with the rest of the money in the form of equity stakes from two South African partners – Continental Cement and Wiphold, a black women's empowerment group – and loans from Nedbank. The investment was the first by Jidong in a production plant outside China and the biggest investment at that point for CADF in South Africa. It also marked the China Development Bank's move to a more politically minded approach to financing, with BEE components of the deal being a central feature, an issue that subsequently raised public concerns.[175]

In addition to these investments, CADF also invested considerable funds through Chinese company Suntech in South African solar and wind power projects. Certainly, by 2010, encouraged by the then-South African President's foreign policy strategy aimed more consciously at leveraging Chinese financial resources in pursuit of South African development and its African Agenda for the continent, Chinese investors' interest grew. The South African Government's announcement of the multi-billion-dollar investment in infrastructure in 2012 focused on boosting transportation networks, power outputs, and rail capacity. There has been significant media

[172] Huang M and P Ren pages 12-14
[173] Shelton G and Kabemba C page 79
[174] Huang M and P Ren 12-14
[175] Standard Bank was approached initially to finance the deal but was concerned about the aspect of the BEE dimensions. Financial Times "*China seals cement deal with South Africa* "13 May 2010, http://www.ft.com/cms/s/0/0dbb3886-5ea7-11df-af86-00144feab49a.html site accessed 22 May 2023

speculation over the use of Chinese financing to support a high-speed rail linking Johannesburg and Durban, including the purchase of the rolling stock and negotiations over Chinese investment in the construction of a power station.[176]

Another sector that is experiencing small but potentially significant Chinese investment is agriculture. With food security as an abiding concern in China, there has been much speculation over the possibilities inherent in the South African agriculture sector, some of it reflected in official positions encouraging greater collaboration. [177]

Finally, Chinese involvement in South Africa's financial sector bears closer examination, especially as it has generated much publicity. The announcement in October 2007 that ICBC, the leading Chinese bank by market capitalisation, would take a 20 percent equity stake in South Africa's Standard Bank for $5.5 Billion took the financial capacity by surprise. This was a significant outlay, even for ICBC, as the finance allocated to the deal equate to 8 percent of its capital. The reasoning seemed sound from a strategic point of view: ostensibly Standard Bank would help ICBC serve its corporate customers in Africa while Standard Bank would gain a foothold in China. Moreover, given its global expansion plans, Standard Bank hoped to use the capital for expansion into the rest of Africa and the rest of the developing world.[178] Standard Bank was an appealing partner for ICBC in large measure because it had operations in 18 African countries, a market capitalisation of $14.6 billion in South Africa, highly advanced operating systems, management information, and credit risk policies in place. ICBC is the foremost bank among Chinese SOEs and retains a strong national presence.[179]

As discussed above, it is evident that the velocity and complexity of the South Africa-China relations rooted in deep historical ties while being increasingly subject to the exigencies of commerce, are defining the shape of the future ties. In many ways, South

[176] Chinese Academy of International Trade and Economic Co-operation '*China-Africa Trade and Economic Relationship*- Annual Report, 2014 page 4, http://www.caitec.org.cn accessed 22 May 2023

[177] On food security and land grabs, see Cotula L & Vermeulen S '*Deal or no deal: The outlook for agricultural land investment in Africa'* International Affairs, 85, 6 2009; on official interest in developing this sector, see China Africa White Paper on Economic and Trade Co-operation, Information Office of the State Council of the People's Republic of China, 2013, with specific reference to agriculture.

[178] Standard Bank Group: Chinese Cheque MacQuarie First South Securities, December 2007.

[179] Standard Bank ICBC reveal details behind strategic agreement Trade Finance 10 December 2007

Africa’s unique position in Africa and global affairs, coupled with its resourced-based economy makes it a natural partner for the emerging giant.

In as much as the trade relations between South Africa and China have been on an upward trajectory, the investment trajectory has been slow, and it could be that China has taken a cautious approach to investing in South Africa as the South African regulatory systems are rigid and in most instances are enforceable. The China-South Africa BIT defines investment and requires investment to be made in terms of the law and therefore could not be used in an exploitive manner. The argument that China thus is utilizing the BIT and loans to trap South Africa in debt seems to fall away as most of the loans and investment deals indicate an interdependent relationship between the two countries. However, Chinese investment will be discussed in detail in the next chapters of this study. A closer look at the investments as they pertain to the current BRICS engagement could reveal signs of neo-colonialism.

2.4. CONCLUSION

China has made several investments in South Africa, and its presence is a sign of Chinese expansion in Africa. Since 2014, China has increased its investment in Africa by over 60%. China's investment in Africa is only economically, but also politically and strategically significant.

The Belt Road Initiative (BRI) a major Chinese innovation to promote South-South cooperation and global development governance, reflects the world order of “mutual benefit, common development, shared prosperity”. In its implementation, financing plays a fundamental role, and development finance is the most widely used form of cooperation in financing. The mechanisms established for domestic development provide know-how to apply development finance to projects. Through financing by national development financial institutions, creating multilateral financial institutions, cooperating with development financial institutions of relevant countries and multilateral development institutions, as well as PPP, China applies development finance with Chinese characteristics to projects.

Notwithstanding all the criticism, China’s engagement in Africa certainly contributes to Africa’s economic development and can help open the continent and make business competitive. The cooperation of BRICS members with African nations provides an enormous potential for the development of the continents, especially as China attaches an ever-increasing importance to BRICS and its relation to Africa. The chapter below delves further into the BRICS engagement in respect of Investment. The chapter will look into how BRICS engagement and its impact on RSA investment programmes.

CHAPTER 3

THE BRICS ENGAGEMENT AS A TOOL FOR THE FURTHERMENT OF NEOCOLONIAL PRACTICES

3.1. INTRODUCTION

Subsequent to significant diplomatic efforts, South Africa's inclusion into the 'BRICS' grouping in 2011 can be regarded as one of South Africa's principal foreign policy achievements over the past years. It also fundamentally altered the nature of the BRICS group giving it a more global structure. Yet little is known about why South Africa sought BRICS membership, and why it was chosen over larger economies such as Indonesia, or faster-growing economies such as Nigeria.

The African relationship with BRICS is far more complex, internally divergent and perhaps precarious than it may seem.[180] The impact of the BRICS countries on Africa can only be understood if it is seen as a part of a wider shift in the international balance of power, both politically and economically. BRICS is emerging as an intergovernmental network somewhat comparable to Group 20 (G20). The BRICS functions on agenda setting, policy coordination, and as a platform for knowledge production and information exchange.

BRICS has no founding document (formal charter or treaty), which means there is no formal structure, voting procedure, or central secretariat. Moreover, BRICS so far fails to provide for any mechanism to come up with legally binding decisions, nor does it have a dispute settlement procedure in place. In a strict sense, BRICS does not constitute an international organisation for public international law, and it is yet to be seen whether it will develop as such in the future. BRICS is neither an international organisation nor a trade bloc in terms of regional economic community. It refers to itself as a partnership that comprises a non-hierarchical governance structure in which relations among actors are repeated and enduring, but where no one has the power to arbitrate and resolve disputes among members.[181]

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[180] Oliver C, Ruppel &Katharina Ruppel-Schliting, (2013) *The BRICS Partnership: Development and Climate Change Policy from an African Perspective, in Climate Change: International Law and Global Governance:* Policy, Diplomacy and Governance in a Changing Environment page 543-569

[181] Oliver C, Ruppel &Katharina Ruppel-Schliting, (2013) The BRICS *Partnership: Development and Climate Change Policy from an African Perspective, in Climate Change: International Law and Global Governance*: Policy, Diplomacy and Governance in a Changing Environment page 543-569

In respect of investment policy, the Contact Group on Economic and Trade Issues ("CGETI") is intended to become a platform for BRICS. It shall pursue to foster trade cooperation and encourage investment links between BRICS countries, with an emphasis on sharing policy practices on trade and investment.

This chapter of the study will delve into how joining BRICS has altered South Africa's economy and investment drive. On April 14, 2011, the 3rd BRICS Summit began in China. After two successful summits, this third summit marked a definitive establishment of the BRICS groupings as an important part of South-South Cooperation. Most importantly, for the first time, South Africa participated as a fifth member of the group, whose name thus officially changed from BRIC to BRICS. By inviting a country that the creator of the term Jim O'Neill, had not included and whose inclusion was criticized by some scholars.[182] Policymakers in the emerging powers assumed ownership of the grouping.[183]

The BRICS were now primarily a political construct, no longer a mere investment category devised by an economist at Goldman Sachs. Far from being a mere additional member of an already mature structure, South Africa's inclusion has fundamentally altered the nature of the BRICS grouping- turning it into a more global alliance with a stronger capacity to speak on behalf of the emerging world.[184] South Africa's inclusion also underlined the BRIC countries' long-term commitment in strengthening their presence in Africa and as an effort to depict themselves as Africa's partners in the larger context of South-South cooperation.[185]

The inclusion of South Africa into BRICS has brought with it certain scrutiny from scholars who feel that the larger Economies of the BRICS grouping were utilising South Africa as a gateway to African economies in order to further their neo-

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[182] S Harvieu (2011) *'South Africa gains entry into the BRIC club"* The Guardian April 19 2011. http://www.guardian.co.uk/world/2011/apr/19/south-africa-joins-bric-club

[183] O Stunkel (2012) *"Keep BRICS and IBSA Separate."* The Diplomat August 13 2012 http://thediplomat.com/the-editor/2012/08/13/keep-the-brics-and-ibsa-separatw/

[184] C Moore (2012) *'BRICS Partnership: A case of South-South Cooperation? Exploring the of South Africa and Africa'* Focus July 9 http://www.igd.org.za/home/206/brics-partnership-a-case-of-south-sout-cooperation-exploring-the-roles-of-sout-africa-and-africa

[185] C Moore (2012) *'BRICS Partnership: A case of South-South Cooperation? Exploring the of South Africa and Africa'* Focus July 9 http://www.igd.org.za/home/206/brics-partnership-a-case-of-south-sout-cooperation-exploring-the-roles-of-sout-africa-and-africa

colonialism practices.[186] The study will engage the assertion that the accession of South Africa into BRICS had a major impact on South Africa's role in the global arena, significantly increasing its visibility as part of a global 'emerging power elite' Furthermore, this chapter will discuss the discourse of the FDI benefits of joining BRICS and the disadvantages it brought in regards of the intra-Africa commitments.

3.2. SOUTH AFRICA'S ENTRY INTO BRIC

Central to South Africa's intention of joining BRICS the following were enumerated as advantages of South Africa joining of BRICS:[187]

- Access to Emerging Markets: South Africa's membership in BRICS provides a gateway for investors to access the fast-growing emerging markets of Brazil, Russia, India, and China. These countries provide a significant economic potential and offer various investment opportunities across sectors such as manufacturing services, technology, infrastructure and more.
- Enhanced Trade Opportunities: Being part of BRICS strengthened South Africa's trade ties with other member countries. It opens up avenues for increased bilateral trade, reduces trade barriers, and improved market access. This can boost South Africa's export potential, especially in sectors where it has a competitive advantage such as mining, agriculture, and services.
- Foreign Direct Investment Inflows: BRICS membership can attract FDI to South Africa. As part of the group South Africa gains credibility and visibility as an investment destination, which can attract capital from both within and outside the BRICS countries. The collective strength and economic potential of the BRICS nations can instil confidence in investors looking for opportunities in emerging markets.
- Infrastructure Development: BRICS nations place significant emphasis on infrastructure development. As a member, South Africa can benefit from cooperation in areas such as transportation, energy, telecommunications, and other vital infrastructure projects. Investment in infrastructure can boost

[186] S Harvieu (2011) '*South Africa gains entry into the BRIC club"* The Guardian April 19, 2011. http://www.guardian.co.uk/world/2011/apr/19/south-africa-joins-bric-club
[187] S Harvieu (2011) *'South Africa gains entry into the BRIC club"* The Guardian April 19, 2011. http://www.guardian.co.uk/world/2011/apr/19/south-africa-joins-bric-club

economic growth, improve connectivity, and enhance South Africa's competitiveness on a global scale.

- Knowledge Sharing and Collaboration: BRICS promotes knowledge sharing and collaboration among member countries. South Africa ca benefit from sharing best practices, expertise, and experiences in various fields including technology, and innovation, and drive investment in sectors that have the potential to thrive.
- Political and Economic Influence: Joining BRICS allows South Africa to exert its influence on the global stage. As part of the group, South Africa gains a platform to address global economic and political issues, advocate for its interest, and contribute to shaping the global agenda. This increased visibility and influence can enhance South Africa's attractiveness to investors and open up opportunities for strategic partnerships.

It is important to note that while joining BRICS offers these potential benefits, individual investment decisions should consider various factors such as the specific investment climate, market conditions, regulatory frameworks, and geopolitical risks. Assessing these factors will help investors make informed decisions regarding investment opportunities in South Africa as part of the BRICS grouping.

Immediately following South Africa's entry into BRICS, questions increasingly arose questioning the basis for the country's inclusion in the grouping. The major concerns critics of the accession focused largely on the fact that South Africa does not possess in any way the economic profile putatively required for the privilege of membership of BRICS.[188]

Foreign Investment has played a pivotal role in the growth of BRICS economies since 2001, with the annual FDI inflows to the bloc more than quadrupling from 2001 to 2021 and contributing significantly to the gross fixed capital information. According to the World Bank, the shares of BRICS in global GDP grew from 18 percent in 2010 to 26 percent in 2021, with increases in all years during the period.[189] A significant reason for this upward trend is the growth of China which accounted for over 70 percent of the BRICS GDP, in 2021. In per capita terms, the BRICS as a group had a nominal;

[188] Naidoo V & Ojkeke-Uzodike U (2012) *Synchronising with SADC or Boosting BRICS? South Africa's Latest Foreign Policy Dilemma*. Loyola Journal of Social Sciences. 26 (1): pages 79-91
[189] GDP (nominal data) can be found here https://data.worldbank.org/

per capita GDP of $7,666 in 2021, against global per capita GDP of $12,263 in the same year. However, in purchasing power parity terms, the average per capita GDP for BRICS economies is $17, 990, much closer to the global average per capita GDP of $18,721.[190]

The Fifth BRICS Summits on 27 March 2013 in Durban took place under the working title "BRICS and Africa: Partnership for Development, Integration and Industrialisation".[191] In that final summit declaration, the BRIC leaders provided for a retreat under the theme "Unlocking Africa's Potential: BRICS and Africa Cooperation on Infrastructure". During this retreat, the leaders confirmed and reiterated their commitment to the African Industrialisation process through their stimulation of FDI, knowledge exchange, capacity building, and diversification of imports from Africa within the framework of the New Partnership for Africa's Development ("NEPAD"). It was acknowledged that infrastructure development was of special importance for the African continent, so BRICS will now actively seek to stimulate infrastructure investment based on mutual benefit to support industrial development, job creation, skills development, poverty eradication and sustainable development.[192]

This BRICS engagement and its partnership with Africa has resulted in proponents of neocolonialism advancing their claim that China is actively seeking trade and investment in Africa, and it is currently using South Africa and BRICS as a gateway to Africa.[193]

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[190] It is important to note that the population growth of BRICS economies has slowed relative to the global average in the last decade. At the same time, the BRICS share of the global GDP has been growing. The result of these two trends has been for the BRICS' per capita GDP to grow faster than the global per capita GDP.

[191] Fith BRICS Summit

[192] Elkamann C & Ruppel OC, *Chinese Foreign Direct Investment into Africa in the Context of BRICS and Sino-Bilateral Investment Treaties*, 13 Richmond Journal of Global Law and Business 593 (2015) available at http://scholarship.richmond.edu/global/vol13/iss4/3

[193] Elkamann C & Ruppel OC, *Chinese Foreign Direct Investment into Africa in the Context of BRICS and Sino-Bilateral Investment Treaties*, 13 Richmond Journal of Global Law and Business 593 (2015) available at http://scholarship.richmond.edu/global/vol13/iss4/3

3.3. SOUTH AFRICA’S FOREIGN INVESTMENT POLICY

Investment and investment facilitation are important areas of cooperation in BRICS.[194] Investment can and does promote sustainable development and inclusive growth while investment facilitation promotes investment, stimulates the industrialisation process, and structurally transforms the host economy. BRICS countries have signed various agreements/treaties to promote intra-trade and investment. Key of these agreements are The Trade and Investment Cooperation Framework, 2013; BRICS Trade and Investment Facilitation Action Plan, 2014 and the BRICS Economic Partnership, 2015 amongst others.

There are however no collaborative outcomes to realise this potential in South Africa.[195] The reason for these failures points to some challenges in the South African Investment policy. This section will delve into the South African Foreign Investment policy as a key strategy for investment promotion and explain South Africa’s FDI position with the BRIC.

The FDI attractiveness of South Africa is high, as compared to its BRIC counterparts yet its performance is relatively weak. Despite leading the FDI influx in Africa, the country’s FDI contracted by 41 percent between 2016 and 2017.[196] Domestic demand, which is lower than investor expectations, is one of the key factors to blame for this decline.[197]

A. Consideration For Investment

South Africa has a large market potential, a well-developed infrastructure, and a competitive domestic economy. The country’s democracy is also well-established, and the rule of law is observed. The country has put in place economic reforms, which have led to macroeconomic stability, as well as tax and customs reductions.

South Africa has many attractive advantages for investors, such as readily available labour, diversified, competitive, and upper-middle-income countries, plentiful natural

194 BRICS (2017) Outlines for BRICS Investment Facilitation https://www.brics2017.org/wdfj/201708/t20170831_1829.html
195 BRICS (2017) Outlines for BRICS Investment Facilitation https://www.brics2017.org/wdfj/201708/t20170831_1829.html
196 UNCTAD (2018) World Investment Report 2018 Investment Policy Hub http://www.unctad.org/investmentpolicyhub
197 Santander 2018 South Africa, Foreign Investment https://en.portal.santandertrade.com/establish-overseas/south-africa/foreign-investment

resources, a stable legal system, and political stability. However, the country suffers from a high crime rate and growing social discontent, high levels of corruption, and systemic challenges in service delivery.[198]

Investors are worried about the lack of clarity concerning policy and structural reforms. Investment potential is hampered by certain legal uncertainties that discourages foreign investors, despite the promulgation of the Protection of Investment Act, which reinforces legal guarantees for foreign investors.[199]

The South African Department of Trade and Investment (DTI) has put in place various measures to attract investment. In 2016 the DTI[200] put in place certain investment measures, which relaxed restrictions on how much foreign entities can invest. These also included tax incentives and regulatory policies.

B. Policies And Measures To Attract Foreign Direct Investment

Almost all business sectors are open to foreign investors. Government approval is not required and there are few restrictions on how or how much foreign companies can invest. Additionally, the government has put in place various measures to encourage FDI. The following is a list of investment measures as reported by the DTI:

(a) The Foreign Investment Grant (FIG) is a cash grant, which provides up to 15 percent of the value of new machinery and equipment. The grant compensates qualifying Foreign Investors (foreign investors that have been approved for the Manufacturing Investment Program (MIP)), for the cost incurred in moving qualifying new machinery and equipment from abroad to South Africa.

(b) The Skills Support Program provides up to 50 percent of training cost and 30 percent of workers' salaries.

(c) The Industry Policy Project offers tax allowances. This project comprises of

i. The Agro-Processing Support Scheme (APSS) aims to stimulate investment in the South African agro-processing/beneficiation (agribusiness) enterprise.

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198 Santander 2018 South Africa, Foreign Investment https://en.portal.santandertrade.com/establish-overseas/south-africa/foreign-investment

199 Santander above

200 Department of Trade and Investment 2018 Financial Assistance Incentives. http://www.thedti.gov.za/financial_assistance/financial_incentive.jsp?id=45&subthemeid=26

ii. The Aquaculture Development Enhancement Program (ADEP), available to South African Registered entities engaged in primary, secondary, and ancillary aquaculture activities in both marine and freshwater categorised under SIC 132 (aquaculture fish production, hatchery, and fish farms) and SIC301 AND 3012 (aquaculture fish production, processing, and preservation). The grant is provided directly to approved applications for new and upgrading or expansion projects.

iii. Business Process Service (BPS) incentive program to lure investment and generate job opportunities in South African offshore activities. Since its inception, in 2012, the incentive has led to the creation of approximately 9,077 new jobs with an annual growth of 26 percent over the period 2012-2020.

iv. Capital Project Feasibility Program (CPFP), a cost sharing grant that contributes to the expense of feasibility studies aimed at project that will improve local exports and promote the South African capital goods and service market.

v. Clothing and Textile Competitiveness Program (CTCP) forms a core part of the implementation of the Customised Sector Program (CPS) for clothes, textiles, footwear, and leather goods industries. The main objective of the CTCP is to help the industry upgrade processes, products, and people and to mobilise South Africa to compete effectively against other low-cost producing countries as well as to upgrade equipment.

vi. Medium and Heavy Commercial Vehicles Automotive Investment Scheme (MHCV-AIS) designed to grow and develop the automotive sector through investment in new and/or replacement models and components that will increase plant production volumes, sustain employment, and/or strengthen the automotive value chain.

vii. The Manufacturing Competitiveness Enhancement Program (MCEP) is a key action program of the Industrial Policy Action Plan (IPAP) which provides enhanced manufacturing support aimed at encouraging manufacturers to upgrade their production facilities in a manner that sustains employment and maxims value-addition in short to medium term.

The above measures have resulted in economic stimulus which has seen a growth in reforms enhancing investment. The growth-enhancing reforms and programs, drive to mobilize ZAR1.2 trillion in investment over a five-year period; building confidence through enhanced policy coherence and predictability, and re-prioritization of public spending towards investment measures.[201] The above measures identify sectors and technologies that require enhancers to improve the competitiveness and dynamism of the industry.

3.4. FOREIGN INVESTMENT INCENTIVES

The DTI provides financial support to qualifying companies in various sectors of the economy. Financial support is offered for various economic activities including manufacturing, business competitiveness, export development, and market access, as well as FDI. This section will identify a few financial assistance schemes or incentives with a direct link to the FDI initiative (DTI 2022)

1.1.1. 121 Tax Allowance Incentive (121TAI)[202] is designed to assist Greenfield Investment (i.e., new industrial initiatives that use only new or unused manufacturing resources) as well as Brownfield investment (i.e. overhaul or update existing industrial projects. The incentive provides support for both capital investment and training.

1.1.2. The APSS, aims to stimulate investment by the South African agro-processing/beneficiation (agri-business) enterprises. The investment should demonstrate that it will achieve increased capacity, employment creation, modernised machinery and equipment, competitiveness and productivity improvement, and broadening participation.[203]

1.1.3. The ADEP, targeted at entities engaged in primary, secondary, and ancillary aquaculture activities in both marine and freshwater classified under SIC 13. The grant is directly provided to approved applications for new, upgrading, or expansion projects, with the aim of sustaining and creating jobs, increasing

[201] BRICS 2018 10TH BRICS Summit. *A Review of South Africa's Trade and Investment Relationship with BRIC.* https://www2.deloitte.com/content/africa/za_brics_15_year_review_july2018.pdf
[202] 12I Tax Allowance Incentive – The Department of Trade Industry and Competition (thedtic.gov.za) Site visited 11 July 2023
[203] Agro Processing Support Scheme – The Department of Trade Industry and Competition (thedtic.gov.za) Site accessed 11 July 2023

production, and encouraging geographical spread. The program provides a reimbursable cost-sharing grant of up to a maximum of R30 Million eligible cost for machinery and equipment; bulk infrastructure; land and/or building; rental improvement and competitiveness improvement activities as outlined in Section 8 of the ADEP Guidelines.[204]

1.1.4. The Automotive Investment Scheme (AIS), designed to grow and develop the automotive sector through investment in new and/or replacement models and components that will increase plant production volumes and sustain employment and/or strengthen the automotive value chain.[205]

1.1.5. The Strategic Partnership Program (SPP) aim to encourage large private-sector enterprises in partnership with government to support, nurture and develop small and medium enterprises (SMEs) within the partner's supply chain or sector to manufacturers of goods and suppliers of services in a sustainable manner. The other intention is to support the Broad-Based Black Economic Empowerment (B-BBEE) policy by encouraging businesses to strengthen the element of Enter and Supplier Development (ESD) of the Codes of Good Practice. SPP is available on a cost-sharing basis between the government and the strategic partner.[206]

1.1.6. The Sector-Specific Assistance Scheme (SSAS) is a reimbursable cost-sharing incentive scheme whereby financial support is granted to organisations supporting the development of the industry sector and those contributing to the growth of South African export. Organisations supported under the SSAS include export councils, joint action groups industry associations, and those involved in the development of emerging exporters.[207]

1.1.7. The Critical Infrastructure Program (CIP)[208] is a cost-sharing incentive meant to leverage investment by supporting infrastructure that is deemed to be critical, thus lowering the cost of doing business. The incentive is provided in line with

[204] Aquaculture Development and Enhancement Programme – The Department of Trade Industry and Competition (thedtic.gov.za) Site accessed on 11 July 2023

[205] Automotive Investment Scheme – The Department of Trade Industry and Competition (thedtic.gov.za) Site accessed on 11 July 2023

[206] Strategic Partnership Programme – The Department of Trade Industry and Competition (thedtic.gov.za) Site accessed on 11 July 2023

[207] Sector Specific Assistance Scheme – The Department of Trade Industry and Competition (thedtic.gov.za) Site accessed 11 July 2023

[208] Critical Infrastructure Programme – The Department of Trade Industry and Competition (thedtic.gov.za) Site accessed 11 July 2023

the National Industrial Policy Framework (NIPF) and Industry Policy Action Plan (IPAP). The CIP is a cost-sharing incentive that is available to the approved applicant/s or infrastructure project/s upon the completion of verifiable milestones or as may be approved by the Adjudication Committee. Infrastructure is deemed “critical” to the investment if such investment would not take place without the said infrastructure, or the said investment would not operate optimally.

The above measures provide a focused and purposeful industrial strategy and master plan developed by the RSA government in conjunction with business and labour sectors with high potential for growth. It further provides active support for investors by providing a wide range of incentives including a comprehensive suite of tax incentives for investment especially in Special Economic Zones (SEZs). Investment in labour-absorbing industries is encouraged through various mechanisms.

PRC and RSA have an extensive history of close cooperation, mutual respect, and common interest. They have benefited greatly from the comprehensive strategic partnership. China is having a profound impact on the South African economy. The increasing economic expansion is particularly evident in South Africa has been a result of the above incentives.

3.5. BRICS IMPACT ON SOUTH AFRICA'S FOREIGN DIRECT INVESTMENT

The literature reviewed of macroeconomics theories of FDI emphasised productivity and growth as key FDI motives.[209] Scholars argue that to unlock productivity and growth FDI needs an enabling environment.[210] They postulate that this can occur with institutional new mechanisms which have three components, namely Direct TAX Treaties (DTT) BITs, Trade-Related Investment Measures (TRIMS) as well as government policies towards FDI.[211]

As of BRICS formation, South Africa's outward FDIs with BRIC has substantially increased. This sudden increase is attributable to a plethora of factors inter alia increased international operations by South African firms; major exchange rate relaxation in 2011, coupled with the weakening of the Rand against the US Dollar, and the rising stock prices of foreign-listed subsidiaries.[212] The overall foreign investment status with BRIC shifted from a net negative balance of US$261 billion to a net positive balance of US$71 billion between 2001 and 2016. This indicates a higher FDI increase from South Africa in BRIC and vice versa. Since 2005, South Africa has been a net investor into BRIC with a record US$82 billion in outward FDIS in 2016 [213] India was the largest recipient of South African investment among the BRICS countries. Thereafter, China surpassed India, holding over 70 percent of South Africa's outward FDIs to date.

Alongside South Africa dominating investment in the BRIC, FDI inflows from BRIC have risen steadily since South Africa joined the grouping in 2010. In the seven years since South Africa joined the grouping, its fellow BRICS members have spent three times as much money in the country than in the seven years before 2011. However, a

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[209] Saleena Nirmalagiri J 2013 *'Impact of FDI on Services Export: Evidence from India'* Journal of Business Management and Social Science Research (JBM&SSR) 2 (11): Pages 32-38

[210] Su, Yaquin and Zhiqiang Liu (2016) '*The Impact of Foreign Direct Investment and Human Capital on Economic Growth: Evidence from Chinese Cities'* China Economic Review page 37 (C) pages 97-109

[211] Mathur, Sanjal and Marthur Dasgupta, (2013). *BRICS: Trade Policies, Institutions, and Areas of Deepening Cooperation (Working Paper*). New Delhi: Centre for WTO Studies https://wtocentre.iift.ac.in/FA/Brics.pdf

[212] BRICS 2018 10TH BRICS Summit. *A Review of South Africa's Trade and Investment Relationship with BRIC*. https://www2.deloitte.com/content/africa/za_brics_15_year_review_july2018.pdf

[213] BRICS 2018 10TH BRICS Summit. *A Review of South Africa's Trade and Investment Relationship with BRIC*. https://www2.deloitte.com/content/africa/za_brics_15_year_review_july2018.pdf

once-off investment of US$6.4 billion in 2014 obscures the inward reading of FDI in preference of China.[214]

Between 2003 and 2017, South Africa received an average of US$1.2 billion annual FDI inflows from BRIC. The annual average remained below US$1 billion however rising beyond US$2 billion in 2008, 2014, and 2016 per year from its fellow BRIC partners. [215]

Existing literature suggests and reveals that Brazil and Russia are less prominent investors in South Africa, as compared to China. However, Russia has invested US$466 million in 17 capital investment projects which is more than double the number of projects and more than six times the value of Brazil.[216] Brazil and Russian investments are centred around a limited number of business activities.[217]

Consequently, as opposed to India, Russia and Brazil, China invested in a lower number of projects but on average it has invested twice the amount of the capital per project. More than half of China's capital investment was directed at the real estate and infrastructure sector. [218]

In general BRIC countries invested in South Africa, and the investments are more aligned with sectors and activities in the country's industrialisation program. However, this has not translated into greater manufacturing export from South Africa to fellow BRIC members. This, therefore, confirms that the investments are market-seeking and not targeted at improving South Africa's export competitiveness[219]

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214 BRICS 2018 10TH BRICS Summit. *A Review of South Africa's Trade and Investment Relationship with BRIC*. https://www2.deloitte.com/content/africa/za_brics_15_year_review_july2018.pdf

215 BRICS 2018 10TH BRICS Summit. *A Review of South Africa's Trade and Investment Relationship with BRIC*. https://www2.deloitte.com/content/africa/za_brics_15_year_review_july2018.pdf

216 BRICS 2018 10TH BRICS Summit. *A Review of South Africa's Trade and Investment Relationship with BRIC*. https://www2.deloitte.com/content/africa/za_brics_15_year_review_july2018.pdf

217 Mathur, Sanjal and Marthur Dasgupta, (2013). *BRICS: Trade Policies, Institutions, and Areas of Deepening Cooperation (Working Paper)*. New Delhi: Centre for WTO Studies https://wtocentre.iift.ac.in/FA/Brics.pdf

218 United Nation *1Conference on Trade and Development BRICS Investment Report* 2023 April 2023 http://www.unctad.org/investmentpolicyhub

219 BRICS 2018 *10TH BRICS Summit. A Review of South Africa's Trade and Investment Relationship with BRIC*. https://www2.deloitte.com/content/africa/za_brics_15_year_review_july2018.pdf

The above data does not assist in contradicting the opinion of many who view South Africa's involvement with BRICS as a tool for the Chinese Government to further its neo-colonial footprint in Africa. The argument is that China's vulturistic attitude and economic natural resource exploitation is the main reason why the BRIC group invited South Africa to join grouping.[220]

While there is little doubt about China's presence in South Africa there is little consensus among experts on Sino-South African relations with regard to how to interpret this phenomenon. The view on China in South Africa range from China as a South African 'development partner' pursuing win-win benefits and providing South Africa with the non-Western model of development, to China as a foreign economic competitor in South Africa, competing with other foreign powers over rich South African resources to China as a 'new coloniser' trying to not only exploit South African resources but also control the country's markets as much as possible for the Chinese product.[221]

A. *FDI Inflows And Stock In The BRICS*

UNCTAD FDI data show that the BRICS as a grouping, have seen a more than fourfold increase in their annual FDI inflows, from $84 billion in 2021 their share in global FDI inflows has also doubled from 11 percent in 2001 to 22 percent in 2021. The first decade of the 21st century was characterised by a strong growth rate in FDI inflows to the BRICS, which increased annually by 13.5 percent. Whilst this was typical during a period of expansion in foreign investment,[222] the rate was almost double the global average of 7.6 percent.

At the individual economy level, performance was varied. China's FDI inflows grew annually by over 10 percent from 2001-2011, before falling back to 4 percent from 2011-2021. The Russian Federation and India saw exceptionally strong annual growth rates for FDI inflows of about 30 percent and over 20 percent respectively, from 2001-

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[220] Edoho F (2011) '*Globalization and Marginalization of Africa: Contextualization of China-Africa Relations'* Africa Today vol 58, No 1 pages 103-124

[221] Edoho F (2011) *'Globalization and Marginalization of Africa: Contextualization of China-Africa Relations'* Africa Today vol 58, No 1 pages 103-124

[222] UNCTAD World Investment Report 2020: International Production Beyond the Pandemic. United Nations: New York and Geneva. https://unctad.org/system/files/official-document/wir2020_en.pdf

2011, but have since deteriorated to just over zero percent and 2 percent respectively in the last ten years.[223] Subsequent to a strong performance in the first decade of the 21st century Brazil's annual growth in FDI inflows turned negative in the second decade, although with a recovery since 2015.[224]

The BRICS Investment Report shows that the trend in South Africa had a negative annual growth rate in FDI inflows from 2001-2011. This ran counter to the general trend observed in BRICS and posted an annual growth rate of over 25 percent from 2011 to 2021. Despite slowing and fluctuating growth from 2011 to 2021, the grouping performed better than the world average and its share in the global FDI inflows posted an increase over the decade.[225]

A decade of fluctuating but nevertheless resilient FDI inflows contributed to a steady rising inward FDI stock for the grouping, which rose by more than 80 percent from $2.1 trillion in 2011 to $3.9 trillion in 2021. However, in contrast to FDI flows, FDI stocks in the BRICS declined as a share of global stock, falling from over 10 percent in 2011 to 8.5 percent in 2021.[226]

B. FDI Outflows And Stocks From BRICS

At the turn of the century, emerging markets such as BRICS (excluding South Africa) started to show a potential to become an important source of FDI, including flows to developing countries and among each other- supporting the so-called South-South cooperation.

From 2001 to 2010, FDI outflows from the BRICS grew one percent of global flows to over 10 percent. During this period, the annual growth rate of[227] outflows, at 33 percent was more than three times larger than the global average. By 2020, the share of

[223] UNCTAD World Investment Report 2022: International Tax Reforms and Sustainable Investment New York and Geneva. https://unctad.org/system/files/official-document/wir2022_en.pdf

[224] UNCTAD BRICS Investment Report April 2003: United Nations New York BRICS Investment Report | UNCTAD page 7

[225] UNCTAD BRICS Investment Report April 2003: United Nations New York BRICS Investment Report | UNCTAD page 7

[226] UNCTAD BRICS Investment Report April 2003: United Nations New York BRICS Investment Report | UNCTAD page 7

[227] UNCTAD BRICS Investment Report April 2003: United Nations New York BRICS Investment Report | UNCTAD page 9

BRICS outflow had reached 20 percent of global flows.[228] The Investment report further indicates that; despite having since fallen back, as a share of global outflows the absolute value of BRIC outflows reaches a historic high, in 2021 at almost $250 billion. And even though the annual growth rate of outflows slowed markedly in the decade 2011-2021, reflecting the global environment for FDI, the annual growth rate of BRICS outflow remained more than 10 times larger than the global average.[229]

BRICS outward FDI stock mushroomed from $1.1 trillion in 2011 to $3.7 trillion in 2021, an increase of 235 percent, in contrast to the inward FDI stock held by investors in the BRICS, the level of outward FDI stock held by BRICS investors abroad increased consistently in every year of the decade. However, the BRICS group accounted for less than one percent of the world's outward FDI stock in 2021, which suggests their potential as foreign investors can further be explored.[230]

3.6. ANALYSIS OF CHINESE INVESTMENT IN SOUTH AFRICA

The advent of BRICS raised concerns as the world continues to witness serious shifts in the international order, but for South Africa, it was hoped that this was a positive dawn for the country.[231] The World Bank suggests that South Africa remains a dual economy with one of the highest inequality rates in the world, perpetuating inequality, and exclusion.[232]

South Africa's membership of BRICS increases the chances of the country establishing free trade / easy trade with the BRICS member countries and other developing countries.[233] Chiyemura argues that South Africa's membership into BRICS has the prospects of creating and increasing intra-BRICS trade. Multilateral

[228] BRICS Investment report on page 9
[229] Deng Ping, *Investing for Strategic Resources and its Rationale: The case of Outward FDI from Chinese* Companies, 50 Business Horizon (2007) page 72
[230] Berger A, *Investment Rules in Chinese Preferential Trade, and Investment Agreement: Is China Following the Global Trends Towards Comprehensive Agreement?* (German Development Institute, Discussion Paper No. 7 2013) available at http://www.die-gdi.de/discussion-paper/article/investment-rules-in-chinese-preferential-trade-and-investment-agreements-is-china-following-the-global-trend-towards-comprehensive-agreement
[231] Jethro, A and Asueline L.E. (2013) *Building with BRICS: A burgeoning dynamic for South Africa?* Journal Research in Peace, Gender and Development (RJPGD) Vol 3(3) pages 29-37
[232] Chiyemura F (2014) *South Africa in BRICS: Prospect and Constraints*. A dissertation submitted to the University of Johannesburg, South Africa
[233] Chiyemura F (2014) *South Africa in BRICS: Prospect and Constraints*. A dissertation submitted to the University of Johannesburg, South Africa

schemes or arrangements generate fair gains for participating countries. It is evident that South Africa has already witnessed a high trade volume increase with China and little progress with other BRICS nations.[234]

He further postulates that this will give the country the opportunity to alleviate some of its challenges and achieve its goals and objectives as set out in the National Development Plan (NDP). The increased trade with other BRICS countries also has the potential to alleviate the country's position regionally, continentally, and internationally. The blueprint of South Africa, National Development Plan Vision 2030, acknowledges that many developing countries in the world have had to revisit and evaluate their programs aimed at stimulating and sustaining economic development and growth.[235]

According to Sautman and Hairong, there are many factors that made China's relationship with South Africa distinctive, other than aid and migration policies, the "Chinese model" of investment and infrastructure loans known as the "Beijing consensus" is a very important approach.[236] The Chinese model of investment in essence brings economic growth objectives and foreign policy together guiding trade and investment decisions in South Africa along with "no strings attached" financial and technical assistance argues Zafar. [237] The Chinese bid competitively for resources and construction projects using investment and infrastructure loans. The loans are often advanced at zero or near-zero percent interest or allow for repayment in natural resources. According to This Day (2005),[238] the Chinese are not imposing the neo-liberal package of reform usually required by the World Bank under its "conditionality provisions." Chinese aid by contrast comes without conditions (no strings attached) and is seen as supporting initiatives by South Africa to address development issues not solved by western investment.[239]

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[234] Jethro, A and Asueline L.E. (2013) *Building with BRICS: A burgeoning dynamic for South Africa?* Journal Research in Peace, Gender and Development (RJPGD) Vol 3(3) pages 29-37

[235] Zafar A (2007) *The Growing relationship between China and Sub-Saharan Africa: macroeconomics, trade investment and aid links*. The World Bank Observer, Advance Access.

[236] Sautman, B, & Hairong Y (2007) *Friend and Interest: China's distinctive links with Africa*. African Studies Review, 50 (3) pages 75-114

[237] Zafar A (2007) *The Growing relationship between China and Sub-Saharan Africa: macroeconomics, trade investment and aid links*. The World Bank Observer, Advance Access.

[238] This Day (12 August 12. 2005 Nigeria) *Can Nigeria be Africa's China*.

[239] Sautman

This section will further elaborate more on the Chinese investment in South Africa and how scholars and analyst view them as furthering their neo-colonial and imperialistic practices and if there is any evidence of China utilising the BRICS investment bloc as a tool for neo-colonialism.

The NDP is closely aligned with the Government's policy on industrialisation of the country's economy and the Industrial Policy Action Plan (IPAP), and it coincidentally aligns with the apex priority of the BRICS group, that of infrastructural development.[240] In this respect Asueline, argues that "South Africa's participation in BRICS provides important opportunities to build its domestic manufacturing base, enhance value-added exports, promote technology sharing, support small business development and expand trade and investment opportunities." He states that: "Innovative proposals relating to the establishment of a BRICS-led Development Bank contributes to enhanced financial support for domestic and sub-continental infrastructure and regional industrial integration"[241]

The latter articulation from the IPAP underlines the fact that infrastructural development and financing of the infrastructural projects and programs in developing nations is one of the cardinal pillars of the BRICS bloc. This is cogently captured in BRICS New Development Bank's aim "to utilise resources at its disposal to support infrastructure and sustainable development projects, public or private, in the BRICS and other emerging market economies and developing countries, through the provisions of loans, guarantees, equity participation and other financial instruments"[242]

Given the above fact that industrial development and infrastructural development form part of the apex priorities of BRICS and coincidently part of South Africa's NDP, one may argue that South Africa has a lot to benefit from the BRICS bloc. Simply put the industrial development and infrastructure-financing cooperation is one of the mostly anticipated economic outputs of the BRICS nations.[243]

Recently, one of the BRICS member-states, China within the China-South Africa industrialisation partnership has pledged $50billion towards industrialisation projects

[240] Asueline LE (2018) The Pros of South Africa's Membership of BRICS: *Journal of African Union Studies, Vol. 7 No. 1(April 2018)* pages 129-150
[241] Asueline page 140
[242] New Development Bank (2014) Agreement on the BRICS New Development Bank. NDBBRICS.ORG 1-12 available at http://ndbbrics.org/agreement.html Accessed 15 July 2023
[243] Chiyemura

in South Africa and the African continent.[244] The article further states the "the Chinese government would also provide technical experts who are experienced in building and upgrading of industrial parks, building of new power plants, 40 000 training opportunities indifferent sectors" The China-Africa industrialisation partnership will be at the forefront of any development in the continent followed by agricultural activities. China will also increase investment in Africa especially in the Special Economic Zones and provide training in those sectors.[245]

Furthermore, the BRICS New Development Bank has pledged to provide funds to South African parastatal Eskom, to aid it in connecting more renewable energy to the national grid.[246] This fund was meant to be a total of R2.25 billion. This part of the fund came from the New Development Bank as its executives announced that the bank was issuing a set of finances to its countries. This is indeed a confirmation that these countries are serious about the industrial revolution. For South Africa, this was a great benefit, as this has the potential to help reduce the country's global warming carbon emission by two million tons a year.

Steyn (2014)[247] wrote that South Africa is the nation that stands to benefit the most from BRICS' New Development, which will grant it access to cheaper money for infrastructure projects as well as a crisis fund, which will double its emergency credit line in the event of a balance of payment crisis. The fact that the BRICS New Development Bank would provide finance-to-finance infrastructural programs in developing and emerging economies means that the country would benefit immensely.

Developing Countries and emerging economies now have the option of choosing the BRICS' bank or Western traditional institution when they are in need. This will strategically position South Africa in Africa and help keep its status as the gateway to the continent. South Africa has the most developed, diversified, technologically advanced, and industrially integrated economy on the African continent. It remains

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244 Mail & Guardian (2015) *China Pledges $50bn to Industrialize South Africa and Africa* 1-8. Available at http://mg.co.za/article/2015?10?20?china?pledges?50bn?industry?projects?in?south?africa?and?africa Accessed 15 July 2023

245 Mail & Guardian (2015)

246 Fabricius P (2016) *National BRICS Bank to loan Eskom over R2 Billion*. Mail & Guardian 1-8 Available at http://mg.co.za/article/2016?04?21?brics?bank?to?loan?eskom?over?r2?billion Accessed 15 July 2023

247 Steyn L. (2014) *South Africa to access cheaper BRICS cash*. Mail & Guardian, 1-8 available at http://mg.co.za/article/20140724satoaccesscheaperbricscash1/8 Site Accessed 15 July 2023

one of the preferred investment destinations in Africa and it is also an important gateway for markets and other business opportunities throughout the continent.[248] The South African economy has become increasingly diversified over the years, thereby reducing its sectoral concentration risks, particularly in mining. This has unlocked a diverse range of high-yield investment opportunities, predominantly but not exclusively in sectors with high export propensities. The success of many domestic industries in export markets is indicative of inherent global competitiveness.[249]

In recent times one of the top South African state-owned enterprises, Transnet received a significant loan from the Development Bank of China. The loan will total R30 billion, this loan from China would aid Transnet as it embarked on its biggest recapitalisation including R50 billion programme to purchase 1 064 locomotives, argues Paton and Magubane (2015)[250]

China's investment in African mines is significant, even though the figures suggest it is still far from dominating the sector. Chinese interests controlled around 7 percent of African mine production by the end of 2018, according to one analysis (the authors measured control using weighted ownership stakes).[251]

Finally, in connection with all the above, the fact that BRICS New Development Bank and Contingent Reserve Arrangement were launched formally in 2014; that year later BRICS leaders witness a signing of the Agreement on the New Development Bank in Brazil, and then a year later the preparation and organisation work of the NDB has been completed, reflect "BRICS Speed" as well as vitality and efficiency of this mechanism.[252]

China and South Africa have a long history of friendship, dating back to the 1950's. China has consistently demonstrated its support for South Africa's development and

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[248] South African Investment Report 2022 available at www.investsa.gov.za site accessed 13 October 2023
[249] South African Investment Report 2022 available at www.investsa.gov.za site accessed 13 October 2023
[250] Paton C & Magubane K (2015). Transnet Gets R30bn loan from Chinese Bank. Business Day Live available at http://www.bdlive.co.za/business/transport/2015/06/04/transnet?gets?r30bn?loan?from?chinese?bank?service=print Accessed 15 July 2023
[251] Halle H (2021) *The Wire China* 20210627+-+The+Wire+...+Mines[3482].pdf Accessed 22 July 2023
[252] Xuejun T (2015) Written Interview by Ambassador Tian Xuejun on Ufa BRICS Summit. Available at http://www.chinese?embassy.org.za/eng/sgxw/t1283217.htm accessed 22 July 2023

has committed to expanding its bilateral cooperation in all areas. The Belt and Road Initiative is a high quality that China is working to advance by assisting African countries in fully implementing its programs.

3.8. CONCLUSION

The South African Economy boasts an extensive and modern infrastructure network, which is being expanded further as a massive investment program rolled out by the public sector. Together with various other forms of industrial support from the South African government and other public sector institutions, this provides an attractive pull factor for investors.

The RSA economy has the potential to achieve a higher growth trajectory through the unlocking of competitive advantages in key sectors of the economy as well as the implementation of institutional and governance reforms to support a sustained recovery in business and investor confidence. It is due to this confidence in the South African government's ability to address structural impediments, including the achievement of greater policy coherence, consistency, and certainty as well as its focus on entrenching a business-friendly investment-supportive environment. These developments alongside an anticipated recovery in global growth over the decade augur well for South Africa’s very open economy, with significant catalytic ramifications for long-term investment prospects across a wide variety of sectors.

Despite the rhetoric that China is currently utilising BRICS in the furtherment of it neocolonial clutches in Africa there is little to no proof to substantiate this rhetoric. Therefore, it is pertinent that this study scrutinizes the various BITs China has with various African states to see if there is a common thread on the wording of these BITs.

The underpinnings of these BITs should be analysed to identify the common ground of the intentions of the Chinese government in African states and whether these BITS support the interdependency theory that is fundamental to South-South cooperation.

CHAPTER 4

COMPARATIVE ANALYSIS OF THE CHINA-AFRICA BITS

4.1. INTRODUCTION

The remarkable transformation of the Chinese economy over the past few decades puts China in a unique position in modern history: it is a developing country that is both the largest recipient of foreign investment and the second-largest exporter of capital. Since China adopted its open-door policy in 1978, it made considerable efforts to order its trade and investment relations with the rest of the world by law.[253] The ideological and historical factors that contributed to the advent and sustenance from 1956 to 1978 of the Cultural Revolution had a significant impact on the Chinese approach to foreign investment. [254] Historically, China's treatment by Western powers, including the exterritorial application of their laws, appears to have delayed its acceptance of international legal principles that emerged in the West.[255] Once it opened to the external world in 1978, however, China began embracing international norms, despite suspicions and misgivings.[256]

The international legal regime for the protection of foreign investment, dominated by BITs,[257] is essentially designed to protect the investment of the developed world in the developing world. [258] Professor Salacuse states that the political answer as to why a trade-like multilateral investment regime failed to emerge is that "given the asymmetric nature of bilateral negotiations between a strong, developed country, and a usually much weaker developing country, the bilateral setting allows the developed country to use its power more effectively than does multilateral setting, where the power may be much diluted." [259] In essence, what sustains the bilateral arrangement is the imbalance that favours investors of the developed world in the developing world. The imbalance comes from the implicit understanding that although the promise and concessions are

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[253] Gallagher N & Shan W, Chinese Investment Treaties 35 (2009)

[254] A growing body of academic literature addresses various aspects of the relatively new robust economic relations between China and Africa. Kidane W*, China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration* (2001)

[255] Kidane

[256] Kidane

[257] Lowenfeld Andreas F*, International Economic Law* 554-55 (2nd Ed) (2008)

[258] Salacuse JW, *The Emerging Global Regime for Investment*, 51 Harvard International Law Journal 427,-464 (2010)

[259] Salacuse

theoretically reciprocal, in practice, virtually no investor of the developing country invest in the developed country.[260]

This understanding encourages developed countries to enter bilateral investment treaties. It also explains BITs such as the U.S-Rwanda BITs, which are in theory – but not in practice – reciprocal. No matter what their terms, BITs are also attractive to the developing country as they signal a willingness to open doors for foreign investment.[261] The parties to these BITs almost invariably have different motives. Hence, more than a mere element of self-deception almost always underpins the great majority of the North-South BITs.

China's position as both a major importer and exporter of capital puts it in a serious theoretical dilemma as to the aforementioned rationale. As a recipient of capital, it has all the incentives of a developing country to be protective; while as an exporter of capital, it has incentives to seek the most expansive rights for its nationals.

Two decades ago, bilateral investment treaties were concluded primarily between developed and developing countries.[262] With the changing geography of trade and investment and the resulting increase in South-South economic cooperations, developing countries are increasingly concluding BITs among themselves.[263] In the context of trade between the Chinese and countries in Africa, there has been an increase in the number of BITs and DTTs that have been concluded. The number of BITs between China and states in Africa has grown in the last 3 decades the fist of which was concluded in 1989 between Ghana and China.

Although BITs are arguably the most important legal instruments for the governance of global FDI flows, little attention has been given to the growing number of and deepening South-South economic cooperation. Thus, while African leaders celebrate

[260] Salacuse
[261] Sauvant Karl P & Sachs LE (2009) *The Effects of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows.*
[262] Mahnaz M, *Recent Developments in Regional and Bilateral Investment Treaties* 4-5, Second Annual Forum of Developing Country Investment Negotiators (Nov 3, 2008) http://www.iisd.org/pdf/2008/dci_recent_dev_bits_pdf (observing that, initially, BITs were signed between developing countries has grown over the last few years) Dolzer R & Stevens M, *Bilateral Investment Treaties 267-285 for chronological list of BITs*
[263] United Nations Conference on Trade & Development, South-South Cooperation in International Investment Arrangement, at 1 UNCTAD 2005

China's renewed interest in the continent[264] few appear to be paying attention to the legal instruments that form the bedrock of Chinese investment in the continent. This chapter will examine the trends, contours, and development implications of the China-Africa BITs. This chapter will seek to fill the gap in the literature by identifying and analysing the evolving normative framework for South-South investment relations and calling attention to some troubling aspects of the BITs that countries in Africa now conclude with other developing countries. Several questions are raised and addressed in this chapter:

(a) In engaging in Africa, how is China utilising BITs and why?

(b) In the BITs it is concluding with states in Africa, is China merely utilising rules, norms, and models used by the developed countries in the North, or is China pursuing its own distinctive policies?

(c) Does China-Africa BITs strike the right balance between protecting Chinese investors and safeguarding the public interest in Africa?

(d) What are the development implications of China-Africa BITs?

(e) To what extent does China's BIT agenda in Africa support or contradict China's Africa policy or the rhetoric of mutual benefit and win-win outcomes that underscore South-South cooperation discourse?

(f) Ultimately, are BITs that account for and are adapted to each country's individual and changing circumstances and development needs possible in the context of South-South economic relations?

These questions will be answered utilizing the comparative method of the China BITs with the following states, South Africa, Zambia, and Tanzania. Taking into account that a lot is known and has been written about North-South BITs, Sout-South BITs are still understudied. Given the sheer number of South-South BITs and in the absence of a

[264] African Welcome China's Growing Economic Power, Reuters (March 28 2011) http://www.reuters.com/article/2011/03/28/ozabs-china-perceptions-africa-idAFJOE72R01D20110328 Site Accessed 22 August 2023

comprehensive multilateral or regional treaty on investment, BITs presently "constitute a *de facto* international regime for the governance of FDI". BITs should be carefully studied for the norms they generate. [265]

With the rise of South-South FDI flows there has come a related increase in the number of South-South investment agreements. The implications of the growing number of South-South investment treaties need to be carefully studied and analysed.[266] South-South BITs are usually concluded without much discussion or debate, perhaps because of the false notion that South-South economic trade and investments are benign, mutually beneficial, and always create win-win outcomes.[267] For capital-importing states, this false sense of security could prove very costly. Given some asymmetries in South-South relations, it is important to study and understand the ways that BITs may advantage some developing countries at the expense of others.

4.2. CHINA-AFRICA BITS IN COMPARATIVE CONTEXT

BITs are an integral part of China's "Going Out" policy.[268] BITs have assumed increased importance to Beijing as China's status has changed from that of the capital importer to that of the capital exporter.[269]

Early Chinese BITs "provided investors with little protection in practice" [270] and accorded host governments considerable policy space. Regarding dispute resolution for instance, a marked feature of China's early treaties was the absence of effective

[265] Luke Reic Perterson, *Conference Report, Dialogue on Globalisation, Bilateral Investment Treaties- Implications for Sustainable Development and Options for Regulations* 2 (Feb 2007) http://www.fes-globilization.org/publications/ConferenceReport/FES%20CR%20Berlin_Peterson.pdf
[266] United Nations Conference on Trade and Development. Investor-State Dispute Arising from Investment Treaties: A Review, United Documents UNCTAS/ITE/ITT/2005/4, UN Sales No E.06.II.D.1 (2005) (Discussing the growing number of claims based on BITs through 2005)
[267] The Global South, The Challenge of Free Trade Agreements in Asia: A Roundtable Discussion Summary Report (March 3 2011), http://focus-web.org/content/challange-free-trade-agreements-asia-roundtable-discussion-summary-report-new-dehli-3-march
[268] Berger A, *China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Law Making, the Politics of International Economic Law: The Next Four Years* at 7 (2008) available at http://www.asil.org/files/ielconferencepaper/berger.pdf
[269] Berger A (noting that China is becoming an FDI-exporting economy)
[270] Berger A

investor-state dispute resolution provisions.[271] BITs that China signed in the 1980s and early 1990s either contained no investor-state dispute settlement provisions or had very restrictive provisions.[272] In these earlier BITs, Beijing pushed for several provisions that enhanced China's position as a host government.

During the last three decades, China gradually moved towards a more liberal approach to BITs.1998 marked a turning point in China's BITs practices following the adoption of the "Going Abroad" policy encouraging Chinese outbound investment.[273] The result is that second-generation BITs involving exhibit characteristics, which together suggest a more liberal, pro-investor approach to BITs, including more comprehensive substantive provisions, automatic and compulsory dispute settlement by international arbitration, broader national treatment clauses, and considerably fewer restrictions on the transfer of funds.[274]

4.2. COMPARISON OF THE SALIENT FEATURES OF CHINESE BITs

4.2.1. China Tanzania BIT

The China-Tanzania BIT is more recent, having been signed on the 24th of March 2013.[275] It resembles the third-generation Chinese BITs which are more liberal and are more investor protection stringent.

A. Substantive Obligations

The China-Tanzania BIT puts the policy objective in its preamble as follows:

"The Government of the People's Republic of China and the Government of the United Republic of Tanzania (hereinafter referred to as the Contracting Parties);

Intending to create favourable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party;

Recognising that the reciprocal encouragement, promotion and protection of such investment on the basis of equality and mutual benefit will be conducive to stimulating

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[271] Chen A, *Should the Four Great Safeguards in Sino-Foreign BITs Be Hastily Disbanded?* J World Investment & Trade 899, 900 (2006) (observing that in the past Beijing maintained a cautious attitude towards BITs and paid much attention to reserving various sovereign rights)

[272] Chen A, *Should the Four Great Safeguards in Sino-Foreign BITs Be Hastily Disbanded?* J World Investment & Trade 899, 900 (2006) (observing that in the past Beijing maintained a cautious attitude towards BITs and paid much attention to reserving various sovereign rights)

[273] Berger

[274] Congyan C, *Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practices*, World Investment & Trade 639 (2006)

[275] Congyan C, *Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practices*, World Investment & Trade 639 (2006

the business initiative of the investors and will increase economic prosperity in both States;

Respecting the economic sovereignty of both States;

Encouraging investors to respect corporate social responsibilities; and

Desiring to intensify the cooperation between both States, to promote healthy, stable, and sustainable economic development, and to improve the standard of living of nationals." [276]

There are certain additions to this BIT in Comparison to the China-Zambia BIT, most notably the part that says, "to promote healthy, stable, and sustainable economic development, and to improve the standard of living of nationals." Although the policy objective is stated this way, as it will be discussed, there are no considerable changes in the BIT that would allow for the conclusion that substantive changes were made to existing BIT models to achieve the newly stated objective. It is important to note, despite the statement that the main policy underpinning this is "reciprocal encouragement, promotion and protection" of investment the flow is still one way.

The definition of investment is essentially taken from the old Chinese BITs[277] with one notable elaboration on the claims to money:

"For the avoidance of doubt, claims to money in Paragraph 1(c) of this Article does not include:

a. *Claims of money that arise solely from commercial contracts for sale of goods or service by a national enterprise in the territory of other Contracting Party; or*
b. *claims to money that arise from marriage or inheritance and that have no characteristics of an investment."*[278]

The rule under subsection (a) that expressly excludes claims to money from purely commercial sales of goods is a common rule enshrined in the Chinese BITs and other

[276] China-Tanzania BIT, International Investment Agreements Navigator, Investment Policy Hub, http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu Last visited 23 August 2023 or also see Agreement between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the promotion and reciprocal Protection of Investments, China-Tanzania March 2013 http://images.mofcom.gov.cn/tfs/201409/20140928170911164.doc
[277] China-Tanzania BIT
[278] China-Tanzania BIT

BITs, as well as other investment treaties like NAFTA.[279] The rule under subsection (b) on marriage and inheritance are new, however, and are perhaps peculiar to China-Tanzania relations. It would be interesting to examine whether it is a growing phenomenon signalling significant people-to-people relations to the point where such issues are deserving of mention in treaties.

The China-Tanzania BIT defines the term investor in the same manner as older-generation BITs. Unlike other Chinese BITs, the China-Tanzania BIT, by limiting the definition to nationals only, does not include permanent residents of contracting parties.

In terms of the treatment, while the content appears to be the same as the third-generation model discussed above, the China-Tanzania BIT adds an exception with the potential to swallow the rule. It reads:

1. *Without prejudice to its applicable laws and regulations, with respect to the operation, management, maintenance, use, enjoyment, sale or disposition of the investments in its territory, each Contracting Party shall accord to its investors of the other Contracting Party and their associated investments treatment no less favourable than that accorded to its own investors and associated investments in like circumstances.*
2. *Each Contracting Party, in accordance with its laws and regulations may grant incentives or preferences to its nationals for purposes of developing and stimulating local entrepreneurship provided that such measures shall not significantly affect the investments and activities of the investors of the other Contracting Party.*[280]

Both subsections leave significant leeway for the host state to limit National Treatment laws and regulations. The first subsection subjects the rule to applicable laws and regulations while the second subsection allows preferential treatment to nationals if such incentives "shall not significantly affect" the investor's investment.[281] This is a remarkable retreat from the established National Treatment Clause of the third-generation Chinese BITs. There is almost no doubt that this provision was inserted to

[279] Compare China-Tanzania with NAFTA (North American Free Trade Agreement (Canada, Mexico, United State of America, Chapter 11 December 17, 1992, 32 ILM 289 (1993)
[280] China-Tanzania BIT, at article 3
[281] China-Tanzania BIT, at article 3

accommodate Tanzania's demands as it is the main recipient of the investment. The fact that China agreed to this regression is remarkable because Tanzania's concerns and desire to benefit some local industries could have been addressed at the time of admission of the investment and through other means that follow the very well-established principle of international investment law allowing broad areas of host state discretion.

The MFN clause is standard and does not contain any notable modification.[282] Consistent with the latest models, MFN provisions do not apply to dispute settlement provisions.[283] The fair equitable treatment provision, however, contains some odd and unclear additions. The meaning that the China-Tanzania BIT gives to "fair and equitable treatment" and "full protection and security" appears unusual and very specific to this BIT. It categorically links the definition of fair and equitable treatment to fair judicial proceedings. This is especially odd considering that the only time disputes go to judicial proceedings is if the investor elects to utilise the dispute settlement provisions.[284]

The definition of full protection and security also appears to be very literal because it limits the meaning to physical protection and security.[285] It is a provision clearly negotiated for specific concerns most likely concerning of physical security of Chinese operations in Tanzania. That the clause purports to equalise protection and security to nationals is doubly odd, though it is clearly a result of political compromise. The China-Tanzania BIT's fair and equitable treatment provision makes no reference to international standards and limits it to physical protection by linking it to police action.[286] It seems to be unique in that sense. The expropriation provision[287] is unremarkable, except for its addition of a modern definition of indirect expropriation, a definition like other Chinese BITs.

One notable addition to the third-generation BIT is a provision on health and environment. Its formulation has a striking resemblance with the latest US Model BIT. It reads as follows: "

[282] China-Tanzania BIT at article 4
[283] China-Tanzania BIT at article 5
[284] China-Tanzania BIT at article 13
[285] China-Tanzania BIT at article 5
[286] China-Tanzania BIT at article 5
[287] China-Tanzania BIT at article 6

1. *The Contracting Parties recognise that it is inappropriate to encourage investment by relaxing domestic health, safety or environment measures. Accordingly, a Contracting Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor.*
2. *Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining environmental measures necessary to protect human, animal or plant life or health.*[288]

It is a very weak formulation as far as protection of the environment is concerned because it uses terms such as "it is inappropriate" rather than mandatory language. Similarly, the second provision replaces mandatory language with the term "unjustifiable" Indeed, it appears that this formulation is partly informed by the 2004 US Model BIT.[289] Regardless, given the absence of any mention of the environment in the previous Chinese BIT models, this is a step forward.

B. *Dispute Settlement*

The dispute settlement provision is also unremarkable. It gives the investor four options: domestic court litigation in the host state, ICSID arbitration, ad hoc arbitration under UNCITRAL Rules, and ad hoc arbitration under any other agreed rules. The host state retains the right to require the exhaustion of local administrative remedies before the investor can exercise the right to resort to international arbitration. [290] The choice of substantive law provision is important to highlight. With one exception, the provisions of the BIT and rules of international law govern.[291] The exception relates to contractual commitments. It reads in part "*Each Contracting Party shall observe any written commitments in the form of agreement or contract it may have entered into*

[288] China-Tanzania BIT at article 10
[289] Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, Rwanda-U.S. article 12, February 19, 2008, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2241
[290] China-Tanzania BIT, ibid at Article 13
[291] China-Tanzania BIT at article 13(6)

with the investors of the other Contracting Party with regard to their investments."[292] Disputes relating to written commitments are subject to

(a) The rules of law as may be agreed by the disputing parties; or

(b) If the rules of law have not been agreed:

(i) *The law of the Contracting Party where the investment has been made, including its rules on the conflict of laws; and*

(ii) *Such rules of international law as may be applicable*.[293]

The only conceivable way that this exception will have meaning is if the investor chooses to bring a treaty action rather than a contract action for breach of contract or perhaps if it makes sense under the circumstances. In any case, the default choice is international law apart from contract claims.[294]

The remedies provision is notable for its imprecision. The remedies are damages and/or restitution.[295] The restitution provision is indeterminate. It gives the decision maker the discretion to award damages in lieu of restitution.[296] It may be construed as allowing specific or forced performance against the host state unless the decision maker chooses to award damages instead This is not a very common formulation.

C. Salient Features

The China-Tanzania BIT is a recent BIT that China has signed with an African state. Although it contains some contemporary provision on such issues as indirect expropriation and environmental regulations, it remains decidedly consistent with the Model China used in the early 2000s. The peculiar characteristics, which are not specifically significant include:

- A focus on sustainable development in the preamble but not in the text in any significant way.
- A relatively broad definition of investment excluding claims for money for the sale of goods and claims for money from marriages and inheritance, which is peculiar.

[292] China-Tanzania BIT at article 14(2)
[293] China-Tanzania BIT at article 13(6)
[294] China-Tanzania BIT
[295] China-Tanzania BIT at article 13(7)
[296] China-Tanzania BIT at article 13

- A watered-down version of the National Treatment allowing preferential treatment of nationals for the purpose of encouraging local entrepreneurs.
- A fair and equitable treatment provision that limits the application to fair judicial proceedings.
- A protection and security provision that limits the meaning of police protection of physical investment.
- An elaborate definition of indirect expropriation.
- A dispute settlement provision that offers investors four options and allows for damages as well as restitution as discretionary remedies.

The above analysis suggests that it is inherently difficult to classify the China-Tanzania BIT as a North-South or South-South BIT. It should be borne in mind that China is evidently the stronger party, it does not appear that it took advantage of its superior economic standing in the BIT with Tanzania. It does, however, appear that some of the added provisions were not carefully considered. In fact, there might even be some mechanical deficiencies in the definition of fair and equitable treatment as well as in the protection and security provision.

4.2.2. China-Zambia BIT

Since economic liberalisation in the early 1990's the government of China and the Republic of Zambia have strengthened their economic ties. The Zambian government has sought FDI to assist with the accelerated economic growth. On the 21st of June 1996, Zambia and China signed their Bilateral Investment Treaty.[297]

A. Substantive Clauses

In as much as the China-Zambia BIT put the policy objectives in its preamble, as a second-generation BIT it has certain defining characteristics. The Preamble of this BIT reads as follows:

The Government of the People's Republic of China and the Government of the Republic of Zambia (hereinafter referred to as the Contracting Parties),

Intending to create favourable conditions for investors of one Contracting Party in the territory of the other Contracting Party;

[297] China-Zambia BIT

Recognising that the reciprocal encouragement, promotion and protection of such investments will be conducive to stimulating business initiative of the investors will increase prosperity in both States;

Desiring to intensify the economic cooperation of both States on the basis of equality and mutual benefit.

Have agreed as follows…

Although it states the policy objective of both parties, it does not go further like the China-Tanzania BIT which added that both parties will respect and uphold the sovereignty of the individual states. The China-Tanzania BIT goes on to state:

"Encouraging investors to respect corporate social responsibilities; and

Desiring to intensify the cooperation between both State, to promote healthy, stable, and sustainable economic development, and to improve the standard of living of nationals."

It must be noted that even though this is stated in the third-generation BIT, nothing substantial has been done in Tanzania to encourage respect for corporate social responsibility. Essentially the underpinnings of this preamble it is to encourage and foster economic relation between the contracting parties.

The definition of investment offered by the China-Zambia BIT does not substantially differ from other generations of BITs. It does, however, contain a slight variation in the way the term "Claims to money" is defined. In fact, the China-Zambia BIT is silent about the term "Claims to money" definition. It merely states that:

(c) Claims to money or any other performance having economic value.

It is unclear if this was done purposefully to be silent about the term "Claims to money" to broaden the meaning of investment or to limit it. To date there has not been a dispute that relates specifically to these terms that has been adjudicated upon. It therefore widens the scope of application of the definition of investment.

As to the definition of investor, the China-Zambia bit protects investors who are both natural and juristic persons of the Contracting Parties. It further states that the juristic person must be incorporated or constituted in terms of the Domestic laws of the contracting parties. The BIT then further adds a requirement that the juristic person must have its main domicile in either of the contracting parties to receive the privileges of the BIT.[298]

A notable provision that the China-Zambia BIT adds is a brief provision on admission. [299] Given the importance of admission decisions, the provision that the contracting parties decided to insert is quite remarkable in its brevity. It is clear from this provision that the contracting parties could not agree on a common standard of admission, but its inclusion perhaps serves as a placeholder for future compromises on the perpetually contentious issue of admission.

The China-Zambia BIT merged fair and equitable treatment and MFN and National Treatment, although contained in separate paragraphs of article 3. These are fundamental principles of any BIT, and it has been a norm in China BIT to merge these clauses but seem to have deviated from this norm in their third-generation BITs. This is mainly due to the contentious nature of such clauses and having to link the clause to international law and state practice.

This provision states the obligations in a precise term including treatment in respect of establishment and conduct in general. It links MFN to the minimum standards of treatment. It is also remarkable that the MFN clause expressly excludes the dispute settlement provision.[300] This makes sense given the visible effort that it has made to customize the dispute settlement provision to their specific needs.

The National Treatment sub-clause is notable for its clarity in the China-Zambia BIT. It specifically expresses treatment regarding the permissibility of prescribing formalities and information requirements -measures that could be confused with regulatory restrictions that may infringe upon substantive rights granted to the investor under the BIT.

In addition to elaborating and clarifying the abovementioned standard substantive provisions, the China-Zambia BIT contains some substantive provisions. These provisions cover details such as nationality and requirements, to immigration

[298] China-Zambia BIT at Article 1(2)
[299] China-Zambia BIT at Article 2
[300] China-Zambia BIT at article 3 (2)

regulations.[301] Some of these are important details that other BIT models did not contain. In terms of performance requirements, the China-Zambia BIT does not incorporate the WTO Agreement on Trade-Related Investment Measures (TRIMs) and is silent even in referencing TRIMs.

The expropriation provision is almost identical to the expropriation provision found in third-generation BITs.[302] It incorporates the Hull Rule on compensation without going into details of how valuations should be conducted. It thus preserves the old rule and does not shed additional light. In effect, if controversy arises with respect to expropriated investment, this BIT provides no better guidance than the previous models, which is somewhat surprising.

B. Dispute Settlement

As with all BITs that China has concluded with African States, the China-Zambia BIT has a dispute settlement clause. The scope of the investor state dispute settlement provisions has evolved over time in the direction of less restriction on the right of the investor to invoke mandatory international arbitration.

Dispute settlement clauses in BITs address several issues including the types of disputes that can be submitted to an arbitral tribunal. Under the older BITs that China concluded with countries in Africa, only a narrow range of issues could be submitted for arbitration. An example would be the China-Ghana BIT, which states under Article 10(1) that *only dispute "concerning the amount of compensation for expropriation" may be submitted to an arbitration tribunal*.[303] By contrast, the China-Zambia BIT provides that "Any dispute between an investor of one Contracting Party and the other Contracting party in connection with an investment in the territory of the other Contracting Party" may be submitted for arbitration.[304]

Another issue that dispute settlement clauses in a BIT address is the tribunal (domestic, regional, or international) that will hear a case if and when a dispute arises. The China-Zambia BIT grants investors the choice of submitting a dispute to a

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[301] Junngam N, "*An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration by Reference"*, 15 UCLA Journal of International Law and Foreign Affairs 399, 408 (2010)
[302] China-Zambia BIT at Article 4
[303] China-Ghana BIT: "Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Ghana, October 12 1989, available at http://www.unctad.org/sectios/dite/iia/docs/bits/china_ghana.pdf
[304] China-Zambia BIT at Article 9(1)

competent tribunal, court of the Contracting Party, or international arbitration.[305] Regarding international arbitration, the ICSID is explicitly mentioned in Article 9(4) of the China-Zambia BIT. This is a notable deviation to most China-Africa BITs which do not explicitly state the ICSID but simply make mention that disputes may be submitted to an ad hoc tribunal without clarifying whether the tribunal must be local or international.

The applicable law clause in the event of an investment dispute is similar to earlier BITs, which stated that the applicable law in the event of an investment dispute such dispute should be resolved in accordance with the laws of a host country, the relevant BIT and in accordance with the recognised principles of international laws. China-Zambia BIT goes further to include the phrase "accordance with the laws of the Contracting State to the dispute accepting the investment including its rules on conflict of laws, the provisions of this agreement as well as generally recognised principles of international law accepted by both Contracting States."[306]

China-Zambia BIT stipulate that arbitration decision shall be final and binding upon both parties to the dispute.

C. *Salient Features*

Is the China-Zambia BIT markedly different or worded different from the traditional North South BITs in terms of their objectives, coverage of investment and development dimension? China -Zambia BIT departs from the model utilised by Western States in a few aspects. In terms of coverage, China -Zambia BIT focuses primarily on investment promotion and protection and much less on investment liberalisation, has a limited transparency clause, does not prohibit performance requirements in their entirety, and typically does not grant free access and establishment.

Although there are some differences between China-Zambia BIT and standard BITs used by developed countries, there are some major similarities that can be discerned. The following are salient features of the China-Zambia BIT:

- Contains the standard guarantees found in most China-Africa BITs as well as Africa-North BITs.

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305 China-Zambia BIT at Article 9(3)
306 China-Zambia BIT at Article 9(4)

- Does not have provisions providing for “special and differential treatment” or provisions that acknowledge the development exigencies or both treaty parties.
- Does not account for and is not adapted to each state’s individual and changing circumstances. (Appear to have followed boilerplate template favoured by China).
- Does does not affirm the state’s right to development, its right to regulate in the public interest, or its right to pursue other social policy goals; and
- Generally, pays little attention to the wider policy objectives of signatory governments.

Finally, in terms of their overall impact on development, it is not clear that China-Zambia BIT create or will create more development dividends than typical Africa-North BITs. However, more empirical studies are needed before any conclusion in this regard is made.

4.2.3. China-South Africa BIT

Bilateral Investment Treaties have been recognised as the chief instrument by which countries outline the rules that govern the investment of their nationals in individual states.[307] In 1998 the China and South Africa BITs came into effect and the China South Africa BIT is a second-generation BIT that has certain defining characteristics.

A. Substantive Clauses

The definition of investment offered by the China-South Africa BIT does not substantially differ from other BITs. It does, however, contain a slight variation in the way that the term "claims to money" is defined.

"(c) claims to money or any other performance having economic value;…"[308]

This slightly differs from the definition of investment in the Chinese BITs with the global north which usually defines it *as "returns reinvested or claims to money or any performance having financial value."* [309] It must be noted that the more contemporary North-South BITs from China exclude claims to money not associated with investment from protection. It is the same trend that the China-South BIT appears to follow that trend of excluding money not associated with investment.

As to the definition of investor the China-South BIT protects the investment of natural persons who are citizens of both the Contracting parties, as well as their juristic entities.[310] The only difference is that the China-South Africa BIT requires a juristic person of the contracting states to be domiciliaries or be constituted in accordance with the laws and regulations of the contracting state, to receive the privileges of the

[307] Salacuse JW & Sullivan NP *"Do BITs Really Work? An Evaluation of Bilateral Treaties and Their Grand Bargain"* 2006 (46) Harvard International Law Journal 67-130

[308] Agreement Between the Government of the People's Republic of China and the Government of the Republic of South Africa Concerning the Reciprocal Promotion and Protection of Investment 30 December 1997 http://investmentpolicyhub.unctad.org/Download/TreatyFile/730

[309] Agreement Concerning the Promotion and Reciprocal Protection of Investment, China Iceland article 1(3)(c), 31 March 1994, http://investmentpolicyhub.unctad.org/Download/TreatyFile/741

[310] China-South Africa BIT Article 1(2)

treaty.[311] This is different from a typical China BIT with a state in the global north,[312] as this condition is not imposed or included in those BITs.[313]

As far as the treatment of investment is concerned, the China-South Africa BIT accords fair and equitable and MFN treatment. In comparison China and a developed state those BITs in most instances have added what could be termed an optional or quasi-national treatment provision. An example would be China-Iceland BIT:

"In addition to the provisions of paragraphs 1 and 2 of this [fair and equitable treatment Article] either Contracting Party shall, to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations, to the investments of investors of the other Contracting Party the same as accorded to its own investor." [314]

Although the expropriation provision is stated quite differently the substantive prescription is more the less the same.[315] Expropriation must be for public purpose, accord due process and the investor must be offered reasonable compensation without unreasonable delay.[316] However, the China-Iceland BIT (concluded in the same decade) allows for a domestic review process not present in the China-South Africa BIT. Overall, though, the differences with the global north BIT are unremarkable.

Substantively, the only significant difference between the Chinese BITs on the global north to the global south appears .to be a move towards conditional or optional National Treatment in some instances as exemplified by the China-Iceland BIT. The greatest difference though relates to the dispute settlement provisions.

It is important to note that China had signed the ICSID Convention by February 1990 although it did not ratify it until 7 January 1993.[317] China however had used the ICSID

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311 China-South Africa BIT Article 1(2)

312 In the Development discourse and throughout this study "North" refers to developed countries and "South" refers to developing countries. All African States are considered developing countries of the South. See United Nations Conference on Trade & Development, Economic *Development in Africa Report 2010: South-South Cooperation-Africa and the New Forms of Development Partnership*, 24-25 U.N Doc. UNCTAD/ALDC/AFRICA/2010, 18 June 2010 http://unctad.org/en/Docs/aldcafrica2010_en.pdf

313 China-Iceland BIT Article 1(2)

314 China Iceland BIT at Article 3(3) Agreement Concerning the Promotion and Reciprocal Protection of Investments, China-Iceland 31 March 199, http://investmentpolicyhub.unctad.org/Download/TreatyFile/741

315 China-South Africa BIT Article 4

316 China-South Africa BIT Article 4

317 International Centre for Settlement of Investment Disputes, List of Contracting States and Other Signatories to the Convention (2023),

Convention, in earlier BITs, but only in relation to the use of its rules of procedure as guidance for good ad hoc tribunals authorised to adopt their own rules of procedure. The China-South Africa BIT contains a more prominent mention of the ICSID Convention. While the principal dispute settlement mechanism in the China-South Africa BIT is court litigation, [318] It also allows the investor to submit a claim on the quantum of compensation to an ad hoc tribunal.[319]

It also gives the Secretary General of the ICSID the default authority to appoint to appoint the chair of the tribunal.[320] Although prominence is also given to ICSID in the Chinese BITs with the global north it accords similar rights and obligations as with the South African BIT. However, China-South Africa BIT does not demonstrate any discernible China-North or China-South patterns.

B. Salient Features

The Substantive provisions of International Investment agreements are "particularly important in reflecting the development dimension, and the overall balance of right and obligations that arise out of a treaty."[321] An examination of issues that are excluded in the China-South Africa BIT does not suggest an overall sensitivity to the development dimension. Although there are some differences between China-South Africa BIT and standard BITs used by developed countries major similarities can be discerned:

- Contain the standard guarantees found in most Africa-North BITs;
- Does not have provisions providing for "special and differential treatment" or provisions which acknowledge the development exigencies of one or both treaty parties;
- Does not account for and is not adapted to the countries' individual and changing circumstances (it appears to have been adopted more or less from a boilerplate template favoured by China);
- Does affirm South Africa's right to development, its right to regulate in the public interest, or its right to pursue other social policy goals; and

https://icsid.world.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf Accessed 25 November 2023

[318] China-South Africa BIT Article 9

[319] China-South Africa BIT Article 9(2)

[320] China-South Africa BIT Article 9(3)

[321] UNCTAD 2005 at page 40

- Generally, pays little attention to the wider policy objectives of South Africa and China.

In terms of the overall impact on development, it is not clear that the China-South Africa BIT creates or has or will create more development dividends that South Africa-North BITS.

4.3. CRITICAL ANALYSIS OF THE CHINA -AFRICA BITs AND DEVELOPMENT POLICY MAKING

Focusing on the noticeable differences between the China-Africa BITs with a traditional North-South BIT this section will look at how this affects the development strategies of the African States. A deeper look into the structure of the China-African BITs and how sensitive they are to allowing government flexibility in addressing domestic problems.

According to UNCTAD, "flexibility is a central feature of the development dimension of IIAs because it allows signatories to preserve the necessary policy space for the pursuit of development-orientated policies".[322] Flexibility could be created in the preamble, in the substantive provisions of the agreement, or in provisions allowing differentiated obligations between parties in different levels of economic development.

The preamble of the BITs reviewed were not crafted with the view to providing the necessary flexibility and policy space for capital importing countries, however, the admission clause model of the BITs allows countries in the region to regulate entry and establishment of foreign investment.[323] The admission model allows host countries to reserve some economic sector to national investors or favours the

[322] Robison P, *Criteria to Test the Development Friendliness of International Investment Agreements*, 7 Transnational Corporations 83 (1998).
[323] South Centre, The European Union and the United States' Approach to International Investment Agreements with Developing Countries: Free Trade Agreements and Bilateral Investment Treaties, 52, SC/TPD/AN/EPA/24 (April 2010) The Implication of the admission clause is that, regardless of whether the .host country maintains any admission and screening mechanism for foreign investment- and unless the BIT states otherwise- there is no obligation on the part of the host country to eliminate discriminatory legislation affecting the establishment of foreign investment.

nationals of one country over the nationals of another country as regards to market access.[324]

The substantive provisions of international investment agreements are “particularly important in reflecting the development dimension, and the overall balance of rights and obligations that arise out of a treaty.”[325] An examination of issues that are included and issues that are excluded in the China-Africa BITs does not suggest an overall sensitivity to the development dimension. Given the vague language of many clauses in the BITs reviewed estimations about development implication are only best guesses. Terms such as “full protection and security,” “fair and equitable” treatment or “measures having effects equivalent to nationalisation or expropriation” cannot be easily defined and their scope depends on individual arbitrators and will likely vary from one case to another. Thus, the implications of the BITs reviewed will ultimately depend on the arbitrators chosen to interpret a given agreement in each case. Ofodile[326] argues that the uncertainty regarding the meaning and precise scope of the treaty term is heightened by the fact that stare decisis is not a recognised principle in international investment law. Peterson[327] notes that investment arbitration “can be plagued by a troubling lack of consistency” and tribunals can reach widely divergent conclusions in parallel cases.

The China-Africa BITs reviewed apply to pre-existing investments, even though under the Vienna Convention treaties generally have no retrospective effect. It would be desirable that in future when African states negotiate their BITs they make clear indication of whether the BIT has retrospective application.

Ofodile further argues that the broad definition of “Investment” in some China-Africa BITs is a concern. The term “investment” is typically defined to cover “every kind of asset.”[328] In some China-Africa BITs, the asset-based definition is qualified by a clause stipulating that the BIT applies only to investments made in accordance with the laws

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[324] Muchlinski P, *The Framework of Investment Protection: The Content of BITs, in The Effects of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* 37, 40
[325] UNCTAD 2005 AT Page 40
[326] Ofodile Uche E, *Africa-China Bilateral Investment Treaties: A Critique*, 35 Michigan Journal of International Law 131 (2013) https://repository.law.umich.edu/mjil/vol35/iss1/5
[327] Peterson E, *Bilatreral Investment Treaties and Development Policy-Making: International Institute for Sustainable Development* 27 (2004)
[328] UNCTAD 2007, at 7

and regulations of the host country. He states that there are other options available to host countries as well, including a closed-list definition of investment and a definition that expressly exclude specific types of assets and transaction.[329] Whether a closed-list or an open-list definition is used, the key is for host state negotiators to pay careful attention to the details of the agreements in order to avoid an overly broad concept of investment and to ensure that certain types of assets and transactions are excluded from the definition.[330]

In the BITs reviewed, contracting states assume a general and vague commitment to promote investment. Since BITs do not necessarily translate into increased FDI inflows for capital-importing nations, stronger investment promotion clauses are advisable. Newer models of BITs require contracting states to exchange information on investment opportunities available in their territory.[331] The nuances of an investment promotion clause could be fleshed out by inserting provisions requiring the contracting parties to exchange information regarding investment opportunities, to facilitate the granting of work permits, visas, and licenses, and to provide incentives to promote investment. [332] Given the asymmetries in information and the poor job done by these African States of providing business development services, particularly to small and medium-sized enterprises, the private sector in Africa needs more information about trade and investment opportunities to better access Chinese markets. A strengthened investment promotion clause may work in their favour.

4.4. TOWARDS AN AFRICAN BIT PROGRAM

Despite the rhetoric of mutual benefit, win-win outcomes, and solidarity that pervades South-South discourse, Africa-China BITs appear to mirror Africa-North BITs and do not deviate from the standard model that has developed over time to any significant degree. There is presently no evidence to suggest that BITs negotiated within the framework of South-South cooperation will not fail Africa as previous BITs.

[329] Ofodile at page 181
[330] Ofodile at page 182
[331] Agreement for the Promotion and Reciprocal Protection of Investment Argentina and Mexico article 7, November 13, 1996 available at http://www.unctad.org/sections/dite/iia/docs/bits/mexico_argentina_sp.pdf
[332] Agreement for the Promotion and Reciprocal Protection of Investment, Finland-Kuwait, article 2 March 10, 1996, available at http://www.unctad.org/sections/dite/iia/docs/bits/finland_koweit_eng_fn.pdf

Furthermore, there is no evidence in negotiating BITs with Southern partners, countries in Africa have pushed for BITs that account for and adapt to each country's individual and changing circumstances and there is presently no reason to believe that development-oriented BITs will be possible in the context of South-South cooperation. The critical question to ask is why countries in Africa continue to ratify BITs that do not deviate from the standard model.

BITs are important both from the perspective of capital-exporting countries and capital-importing countries. Investors need assurance that their property is safe in the countries that they invest in. Given the intense competition for foreign sources of development capital, capital-importing countries use BITs to attract FDI as well as signal their willingness to create a safe environment for foreign investment. As with Western nations, capital-exporting developing countries need assurance about their investment in Africa. South-South cooperation does not mandate that capital-exporting developing countries ignore market and political risks associated with foreign direct investment in countries in the South.

The growing presence of Chinese companies in Africa means they will increasingly encounter a variety of risks and will seek ways to avoid and manage these risks.[333] From the perspective of China, therefore, an argument could be made that BITs with African countries are not only very important but are absolutely essential. Congyan[334] questions whether China's existing BITs are effective in protecting Chinese FDI. Hunter,[335] however, opines that when evaluating an investment's risk and profitability, Chinese investors need to consider the essential supplementary legal protection and remedies that BITs provide, especially in the case of perceived inadequacy, unfairness, or ineffectiveness in the host state's domestic legal framework.

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[333] Van Der Lugt S, Hamblin V, et al., Centre for Chinese Studies at Stellenbosch University, *Assessing China's Role in Foreign Direct Investment in Southern Africa 25(2011)* ("However, by focusing on risks when assessing the political environment in Africa, prospective foreign investors are in danger of missing a substantial business opportunity. Both the government and Businesses in the PRC have minimized this, by using a tool of forecasting, logically following an analysis of identified variables in a risk model, determining their relationships, and establishing their influence on certain situations, to protect and weigh up the outcome of their FDI in Africa.")

[334] Congyan C, *Outward Foreign Direct Investment Protection and Effectiveness of Chinese BIT Practice*, 7 Journal of World Investment and Trade 639 (2006)

[335] Hunter R*, Strategic Suggestion on Using China's Bilateral Investment Treaties to Protect Outbound Investment*, Corporate Legal Affairs 40 -48 (2010) Argues that the protective function provided by BITs should play a key role in every Chinese investor's strategic planning.

For Africa, the continent's failure to attract FDI and the failure of FDI in Africa to promote development are major challenges. African leaders have in the past, expressed concern at the continent's poor performance in attracting FDI.[336] In a 2005 Decision, the Executive Council of the African Union requested Member states and the African Union Commission to "review the investment promotion strategies pursued by African Countries in order to eliminate existing constraints to FDI inflows" and called on international organisations to "support African countries to review their investment policies and identify more focused and targeted investment promotion strategies."[337] Thus for Africa, the fact that foreign investment and foreign aid are often the only sources of financing for the continent, [338] that Africa still attracts less FDI than many other regions, and that available data indicates that the continent is one of the riskiest regions in which to do business[339] all combine to put pressure on African government to hastily negotiate and ratify very liberal BITs without due regard to their development implications.

4.4. CONCLUSION

Given the vague language of the many clauses in the BITs reviewed estimations about their development implication are only best guesses. Terms such as "full protection and security" "fair and equitable" treatment or "measures having effects equivalent to nationalisation or expropriation" cannot be easily defined and their scope depends on individual arbitrators and will likely vary from one case to the another.

Thus, the full implication of the BITs reviewed will ultimately depend on the arbitrators chosen to interpret a given agreement in a given case. Uncertainty regarding the meaning and precise scope of the treaty terms is heightened by the fact that stare decisis is not a recognised principle in international investment law.

[336] African Union Executive Council, Decision on Trade Facilitation, June 28-July 2, 2005, 7th Ordinary Session. Executive Council Decision 205 (VII)
[337] African Union Executive Council, Decision on Trade Facilitation, June 28-July 2, 2005, 7th Ordinary Session. Executive Council Decision 205 (VII)
[338] De Wet AH & Van Eyden R *Capital Mobility in Sub-Saharan Africa: A Panel Data Approach*, 73 South African Journal of Econo0mics 22, 22 (2005)
[339] The World Bank, 2022 Doing Business Indicators (2022)

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1. INTRODUCTION

China's rapid progress is confusing traditional policymakers and traditional investment trends especially as it pertains to their investments in Africa. Over the past few decades, few developments in the world economy have been more important and influential than the sudden change of China's policy to open to the rest of the world. China's economic progress during the reform era that began in 1978 has been one of the greatest economic success stories of the last three decades. Starting from an almost completely isolated economy in the mid-1970s, China gradually and systematically liberalised its international trade and investment policies.

Since launching the economic reforms and calling for foreign capital participation in its economic development, China has received an extremely large part of the international direct investment flows. Growing concern over development aid provided by China in Africa lies mainly in the unpublished actual bilateral aid numbers. Concessional loan disbursements or loan repayments that are not published raise concerns about putting developing countries in danger of slipping into a major debt crisis. There is no official data on Chinese loans and all published figures are estimates given the fact that the PRC is not a member of the OECD and does not take part in the OECD's Creditor Reporting Systems. In addition, the Chinese state banks seldom release information concerning detailed financing contracts while recipients of such loans invariably fail to completely divulge the information about the finances they are obtaining.[340]

The imposition of One China as a condition of China's cooperation with countries is a type of coercion and neocolonial practice towards developing countries in Africa. Such attitudes create an area of influence manipulating the ideal aim of development aid, which coincides with the point of view of dependency advocates. In addition, allegation of neocolonialism is enhanced further because Chinese foreign assistance is currently

[340] Taylor I and Zajontz T, *"In a Fix: Africa's Place in the Belt and Road Initiative and the Reproduction of Dependency"* (2020) South African Journal of International Affairs, vol 27 No. 3, page 277-295

provided mostly on a state-to-state basis, concentrated in physical infrastructure construction, and aimed at further access to natural resources and overseas markets.

This study's main aim was to critically analyse to what extent the China-South Africa BIT and the BRICS engagement influence the neocolonial practices of Chinese investors and what interventions can be implemented to ensure that Chinese-South African investment is strengthened.

5.2. KEY RESEARCH FINDINGS

The analysis indicates that the growing relationship between South Africa and China is a form of interdependent relationship that is expected to get increasingly complex in the future, which relatively indicates the synergy South Africa has with China. Chapter 2 of this study delved into the definitions of the terms "Investment, Neocolonialism and Debt Trap." It is from those discussions that we could further analyse the China-South Africa relationship especially as it pertains to investment and how this could be viewed as predatory and how scholars view it as neocolonial.[341]

Existing literature and relevant information about China in South Africa, has demonstrated that there is a contradiction in China's growing presence in RSA. [342]While there are contradictions China continues to show goodwill to African states including South Africa. This is emphasised by China's BRI policy which shows efforts to develop an equal and win-win partnership with South Africa instead of following the colonial path that other major powers used to take.

On the other hand, there is literature that regards the partnership China is having with South Africa as problematic. There are proponents even in South Africa that are gradually regarding the relationship as a threat to the South African population and society due to its for-nothing-but-profit behaviour and attitudes towards Africa.[343]

This is arguably one of the reasons why there are various, and times conflicting findings about China in South Africa. An observer who focuses on China's official policy toward South Africa would be more likely to find that China seems to have no

[341] Jones L and Hameiri S, *"Debunking the Myth of Debt Trap Diplomacy: How Recipient Counties Shape China's Belt and Road Initiative"* August 2020 Asia-Pacific Programme

[342] Chapter 2 and 3 of this Study discusses the China-South Africa relationship and how it has been perceived as predatory because it is about China's Dominance and China is utilising its economic muscle for political leverage.

[343] Chapter 2.3 of this study elaborates on the Interdependence Theory as it pertains to the China-South Africa relationship.

intention of being a new coloniser or any kind of threat to South Africa. By contrast, an observer who pays more attention to the words and deeds of the Chinese in South Africa would be more likely to reach a conclusion that China is behaving like a coloniser and posing a real threat to South African people.

In addition to causing confusion in the academic debate with regard to China in South Africa, this contradiction in China's growing presence in South Africa might actually cause damage to Sino-South Africa in general and China's efforts to develop that equal win-win partnership with South Africa.

Allegations of neocolonialism minimise the role of countries' will and the institutional framework governing many aid provision schemes with developing countries. The mutual consent between South Africa and China in terms of investment enhances the relationship and indicates a complex interdependence between the two countries in the future that would transcend into a more political synergy, which has been emphasised in the past years through the South African National Development plan.

To make the relationship between South Africa and China more balanced, on the South African side, South Africa needs to focus more on improving its investment policies and access to markets to compete in the Chinese huge market and start to develop the technological base required for production. Furthermore, RSA can provide advantages to Chinese investors when they invest in South Africa and benefit from bilateral and multilateral trade and investment agreements signed between South Africa and other states in Africa.

5.3. RESEARCH QUESTIONS AND AIMS

This Study has examined the bourgeoning interest of China in the African continent, especially South Africa. This relationship has seen huge capital and infrastructural investment on the continent and in RSA, both by Chinese SOEs as well as private investors. This study narrowed down its examination of the growing relationship between Bilateral Treaties and BRICS engagement. The aim was to see how BITs and BRICS have evolved, in light the light of several misgivings expressed by countries in the Global South.

China has more economic power than most developed countries. In the area of investment law, China's rapid ascent coupled with its unique ideological past appears to have deprived it of the opportunity to deliberate on options, refine theory, and pursue a systematic BIT program like most developed states. The reality is that the China-Africa BIT regime is sporadic, outdated and uninformed by recent developments, incoherent and even purposeless. Although some recent BITs show traces of North-South characteristics the evidence is insufficient to conclude that China is purposefully attempting to mimic Africa's traditional Northern partners. If anything, China's BIT program appears to be a simple benign, and convenient replication of existing text.[344]

The current leading decision on the definition of investment in ICSID arbitration, Salini has existed for more than a decade. It laid down a test that requires an investment to have four qualities. The South African government has attempted to bring some balance to the country's investment regime by enacting the Protection of Investment Act. It is a fact that they have left a substantial amount of policy space for themselves to regulate in the public interest.[345]

The theoretical examination makes it clear that the Act and the termination of some BITS has generally reduced the level of investor protection in RSA. However, the **China-South Africa** BIT is still in force thus China is still enjoying protection in terms of the BIT as well as the Act in section 14 of the Act. The rhetoric that China is therefore utilising BITs to further their neocolonial practices is unfounded. the narrative is to the contrary as the RSA government has widened its policy space and increase home state protection by promulgating the Act.

As it pertains to debt trap recipients' governments cannot expect China to carry out due diligence on their behalf. Since Chinese development financing is recipient led, RSA must take greater responsibility to ensure that projects are viable and financially sustainable. RSA must bargain harder and more judiciously with Chinese partners, who are primarily driven to make profits, and must take the lead in ensuring developmental benefits for its residents. Tendering should be open to minimise corruption. Chinese regulation continues to rely on host-country governance, RSA must bolster its domestic regulations and their inspection and enforcement capacities.

[344] Chapter 4 discusses the wording of the China-South Africa BIT
[345] Chapter 2 and 4 Discusses the text of the BIT and how South Africa has further protected itself by enacting the Protection of Investment Act

However, there is no evidence to support the preposition that China is intentionally creating a debt trap. The key issue to consider is how to deal with issues as it pertains to the Chinese loans and how they are negotiated. The loan facilities provided by the Chinese government are neither good nor bad but rather the success of the investment in such developmental projects depends on RSA AND its ability to negotiate and implement these loans. South Africa should not use Chinese loans to offset poor governance and irresponsible policies as such would lead to further problems.[346]

South Africa's inclusion into the BRICS forum has elevated its position in international relations and has helped the country to further voice global issues and of course its "gateway to Africa" role. It should be noted that the political implications for South Africa's inclusion into the group are that it legitimised the group in terms of representation making sure that leaders from all regions of the world are included. Although the inclusion of South Africa was strategic in that the group had the benefit of the African market through the bilateral and multilateral investment treaties South Africa had signed with other African States and possibly the largest trading bloc the African Continental Free Trade Area.[347]

However, there is little to no evidence to support the rhetoric that China uses the BRICS bloc to further its neocolonial practices in Africa. It therefore becomes an impossible task to determine to what extent is China utilising the BIT and BRICS as tools for neocolonialism. The proponents of the neocolonialism rhetoric are of the view that evidence is there in the development loan contracts but which are shielded by the South African government as well as the Chinese Government.

5.4. CONTRIBUTIONS OF THIS STUDY

Notwithstanding all the criticism, China's engagement in Africa certainly contributes to Africa's economic development and can aid in opening the continent and making business more competitive. The cooperation of BRICS members with African nations provides an enormous potential for the development of the continent, especially as China attaches an ever-increasing importance to BRICS and its African relations.

[346] Brautigam D, *"A Critical Look at the Chinese 'Debt-Trap Diplomacy': the Rise of a Meme"* Johns Hopskins 2019 School of Advanced International Studies
[347] Chapter 3

Although some critics stated that BRICS have hit a wall in which major emerging markets are suffering, BRICS trade and investment volume has seemingly increased over the years. Chinese investment has been growing tremendously during the last decade with the focus on resource rich countries like Sudan, Nigeria, and Zambia as well as South Africa as the leading African Economy. Not only is China interested in raw materials that the African Continent has to offer, but it also seeks to exploit Africa's potential as an emerging market with an immense consumer base.

However, it is not certain that Africa profits from Chinese investments. From an economic perspective, the sustainability of Chinese investment is very questionable. Most Chinese investments go into the natural resources sector with the result that many countries are becoming more and more dependent on these resources. If African countries want to make their investment relations with China more sustainable, it is essential that they attract investment in other areas as well. With regards to existing investment African countries should place more emphasis on performance requirements.

5.5. RECOMMENDATIONS

Although FOCAC provides business opportunities for investors from both sides, it mainly focuses on a political partnership. To attract a need-based investment, sound regulatory governance, and a politically stable-business friendly environment are guarantees of a successful Sino-South Africa collaboration in investment and development. At the initial stage, preferential investment policies need to be adopted while regulations are necessary to manage relevant risk, as well as sufficient legal safeguards offered to investors.

With regards to the Sino-South African BIT, it might be advisable that South Africa review the China-South Africa BIT in order to ensure that what was overlooked in the initial negotiation is included and implemented. It is highly recommended that the language used in the BIT be more specific and highlight the fact that investment promotion and protection should not undermine other important values such as human rights, environmental concerns, and labour concerns, and that investment should always try to promote sustainable development.

More clarification is also required to such provisions dealing with expropriation or fair and equitable treatment. There is still a lot of room for improvement, especially with regards to recent development in international investment treaty design.

It is pertinent to have a nuanced approach to China's involvement in South Africa, turning the "black and white" neocolonial criticism into catalyst for change. Endemic and systematic issues associated with Chinese SOEs may exist, which may be partly attributed to their lack of internalisation. Identifying those issues allows for a maximisation of benefits from both the Chinese SOES and South African Counterpart.

5.6. CONCLUSION

What conclusion can be drawn from the analysis of the China-South Africa BIT? Although the China-South Africa BIT departs from the model used by the Western States in some respects it is not markedly differently from those Africa-North BITs in terms of its objective, coverage of investment issues, and development dimension. The China-South Africa BIT is based on reciprocity and is geared towards providing maximum protection to investors.

The China-South Africa BIT does not consider that at the time of signing South Africa was in the early stages of democracy and South Africa was the least likely to benefit from such an agreement. It does not circumscribe the ability of the RSA Government to take measures aimed at promoting domestic development objectives. It did limit the capacity of the RSA government to use policy instruments that China used in the past to regulate FDI to build national industry.

The broader lesson is that despite the rhetoric of mutual benefit and win-win outcomes that pervades South-South cooperation discourse, South-South BITs do not appear to offer a different legal framework for FDI. Like North-South BITs South-South BITs are not designed to account for and adapt to each country's individual and changing circumstance and development needs.

The South Africa government understood the need to protect itself from risky investment, and debt-trap disguised as development aid and filled the investment lacunae by promulgating the Investment Act.

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