



BRICS IN AFRICA: MORE OF THE SAME?

A comparative study of
investment treaties between
the BRICS and African countries

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A COMPARATIVE STUDY OF INVESTMENT TREATIES
BETWEEN THE BRICS AND AFRICAN COUNTRIES

Rio de Janeiro, January 2016

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FOREWORD

The Institute for Political Alternatives for the Southern Cone (*Instituto de Políticas Alternativas para o Cone Sul* - PACS) was established in 1986 as part of an initiative led by a group of exiled economists returning to their countries of origin. The PACS brings together a group of politically and socially engaged researchers and its work revolves around three interconnected axes: education, advocacy and information. Our work includes activities related to research, information, critical analysis and reflection (*information*), which are made available to civil society organizations, grassroots organizations and social movements through educational activities such as courses, seminars and workshops (*education*) designed to strengthen their work and qualify their arguments, thereby expanding their intervening capacity (*advocacy*). We are members of different local, national and international networks. Our perspective is that of contributing to building public opinion toward demanding the promotion and implementation of transformative, inclusive and democratic public policies.

In recent years, the PACS has been taking part in the International Alliance of People Affected by Vale, a network of social organizations and trade unions set up to address problems caused by the Brazilian mining company Vale do Rio Doce in Brazil and around the world. As part of this work, we have strengthened our relationship with civil society organizations and affected communities in Mozambique. In addition, the work carried out by the PACS is focused on issues related to debt, budgets, management approaches and to the social, economic and environmental impacts of megaprojects. As a result, the PACS took an active part in the BNDES Platform¹, a network of social organizations and movements set up to monitor and carry out advocacy-related activities in connection with the impacts of projects financed by the bank.

¹ - National Economic and Social Development Bank, known as BNDES, its acronym in Portuguese for *Banco Nacional de Desenvolvimento Econômico e Social*.

In 2012, the PACS conducted a field research in Angola and Mozambique with the aim of mapping out Brazil's participation in those two countries in terms of investment (of Brazilian companies such as Vale and Odebrecht), funding (especially from BNDES) and development cooperation policies. The study, entitled "The story told by the hunt or the hunter? Perspectives on Brazil in Angola and Mozambique" (*A história contada pela caça ou pelo caçador? Perspectivas sobre o Brasil em Angola e Moçambique*), demonstrated the impacts and implications of Brazil's interventions in Africa from the perspective of local actors². In 2014, the PACS carried out a new field research in Mozambique and Malawi to investigate the impacts of the Nacala Corridor³.

Given the growing importance of multinational corporations and financial institutions from the BRICS - Brazil, Russia, India, China and South Africa - operating in Africa, the study was intended to carry out a **first collection of data and information related to investment protection agreements involving the BRICS and African countries, with the aim of analyzing Bilateral Investments Treaties (BITs) from the perspective of political economy**. We asked ourselves how the BRICS countries behave under the international investment regime and more specifically, in Africa. Far from exhausting the subject, our aim in this study is to answer the following questions:

- How many treaties does each country have, with whom and in what year?
- Are the BRICS investment treaties similar to traditional BITs or are there signs that a new model is being developed?
- What are the main investments of each BRICS country in Africa in terms of volume, companies and sectors?
- How are the BRICS countries positioned in the international arbitration system and what problems and conflicts involve companies from BRICS countries in Africa?

2 - www.pacs.org.br/files/2013/03/Relatorio-Africa.pdf

3 - This research was carried out in the context of the "Human Rights and the Mining Industry" Project, which is coordinated by the organization *Justiça Global* along with PACS and the *Justiça nos Trilhos* network, supported by organizations from Mozambique, ADECRU and AAJC.

The research methodology involved identifying and analyzing the main characteristics of the treaties between BRICS and African countries. Academic papers and material prepared by social movements on BITs (in general and involving the BRICS more specifically) were also reviewed with the aim of understanding the contexts involved and discussions under way. The websites of the United Nations Conference on Trade and Development (UNCTAD) and of the International Center for Settlement of Investment Disputes (ICSID) were researched in detail. In addition, academic and journalistic papers on the role of BRICS in Africa, including critical papers by African authors, were reviewed. The results were documented and presented in the form of texts, figures, tables and maps, crossing data and information on BITs, investments in each country and investor-state arbitration cases brought before ICSID and other forums. Finally, all international arbitration cases involving the BRICS and BITs (beyond Africa) were documented in Annex 1.

INTRODUCTION

Although they date back to the post-war period, Bilateral Investment Treaties (BITs) peaked in the 1990s, when a boom in bilateral and regional Free Trade Agreements (FTAs)⁴ was recorded. After the fall of the Berlin Wall and the end of the Cold War, a “new world order” emerged through the liberalization of markets and a set of rules known as the “Washington Consensus.” During the same period, an international trade regime was established with the emergence of the World Trade Organization (WTO) in 1994. Since WTO rules must be negotiated and agreed upon multilaterally by all member countries through processes that naturally slow down negotiations on agreements and make them more difficult, the trading powers United States and the European Union, but not only them, chose to go ahead and propose bilateral and regional free trade and/or investment treaties⁵. There are currently 2,924 BITs in force in the world, as well as 358 other International Investment Treaties (IIAs)⁶. The figure below shows the evolution of IIAs in recent decades.

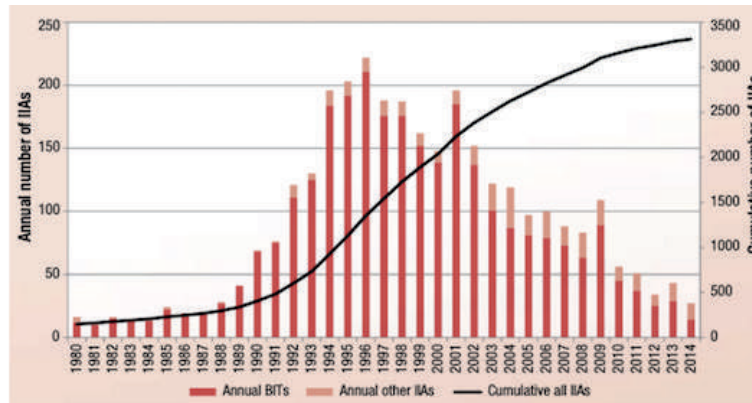
A Bilateral Investment Treaty (BIT) is an agreement between two countries for promoting and protecting investments by companies from the respective countries in each other's territory.

4 - The first BIT was signed between Germany and Pakistan in 1959. In the 1980s, there were approximately 400 treaties in force, a number that soared to approximately 1,800 in the 1990s (Guiotto, 2010).

5 - In the Americas, we had the North American Free Trade Agreement, known as NAFTA, and negotiations on the Free Trade Area of the Americas (FTAA). Other trans-regional agreements were signed recently, such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) between the USA and the European Union.

6 - According to UNCTAD, a Bilateral Investment Treaty (BIT) is an agreement between two countries designed to promote and protect investments made by investors from the respective countries in each other's territory. The large majority of International Investment Agreements (IIAs) are BITs. The IIA category includes the BITs, Free Trade Agreements (FTA) and other treaties containing structuring clauses on investment. See “Terminology” at investmentpolicyhub.unctad.org/IIA/

Figure 1. Evolution of International Investment Agreements, 1980-2014



Source: UNCTAD. Recent trends in IIAs and ISDS. IIA Issue Notes, Nr. 1, February 2015.

Consistent with the new trade regime and neoliberal globalization, **these treaties have created new rules to ensure international protection for multinational companies.** The most common ones include: national treatment and fair and equitable treatment to foreign investors (which prevents domestic investors from receiving differential treatment), the most favored nation principle (which allows international investors to take advantage of more favorable conditions under other treaties), intellectual property rights, stability of contractual terms after ratification (terms cannot be modified by the parties), prohibition on investor performance requirements by host states and residual treaty validity, which extends the protection provided for in a BIT for years after it expires (Guiotto, 2010).

The key element of BITs is the **dispute resolution clause**, which allows private investors to file an international arbitration claim against a state when domestic laws or public policies are seen as leading to “indirect expropriation” or “measures equivalent to expropriation” that can frustrate “legitimate profit expectations” (Godinho & Cozendei, 2015). It is referred to as the “**investor-state clause**.” Thus, changes in investment conditions in a given country - even if due to environmental reasons, public health needs or changes in the economic and political scenario – ensure multinational corporations the right to demand compensation and payments for profits

not realized at the time of the changes and for future profits, in the case of 20-year investment plans, for example. As shown in the final chapter of this study, BITs and FTAs usually provide that the World Bank's International Centre for Settlement of Investment Disputes (ICSID) will be their arbitration forum, thus avoiding domestic forums⁷. As a result, sovereign nation-states have lost power to multinational corporations, evidencing the huge international inequality between peripheral economies and corporations headquartered in the United States and Europe⁸, the traditional powers.

On the other hand, social movements and civil society organizations have accumulated knowledge and experience in resisting these agreements in recent decades, ranging from the Multilateral Agreement on Investment (MAI) and the WTO to the Continental Campaign against the Free Trade Area of the Americas Agreement (FTAA)⁹, the "Linking Alternatives" (*Enlazando Alternativas*) bi-regional network, the "Permanent Peoples' Tribunal against European transnationals in Latin America"¹⁰ and, finally, the current "Global Campaign to Dismantle Corporate Power." Social movements in Latin America have also been promoting the "No to ICSID and BITs" campaign (*campana No al CIADI y a los TBIs*) since 2010 (Valdomir, 2013).

According to social movements, BITs are part of a new ***Lex mercatoria*** (Hernandez, 2009) that ensures multinational companies binding and enforceable trade and investment rights that are not appropriately provided for in International Human Rights Law. No appropriate mechanisms and forums are available to hold corporate actors criminally accountable, at international level, for violations of human, environmental and labor rights. On the contrary, the United Nations' Global Compact consolidated a set of voluntary rules and codes of conduct without any legal effect. Such

7 - According to Godinho & Cozendei (2015), the 1965 Washington Convention laid the foundations of this system designed to protect foreign investors in the context of decolonization and national liberation struggles in the so-called "Third World." During this period, the argument was that the newly created judicial systems would not be impartial and that international forums would not be subject to political interference.

8 - According to UNCTAD (2015), the cumulative number of claims filed by investors against nation-states (at the ICSID and other forums) amounted to 608 between 1987 and 2014, 354 of which have been judged, with 101 countries being defendants in lawsuits filed by one or more investors.

9 - For a review of the 10-year period following the defeat of the FTAA, see www.alainet.org/es/articulo/173376

10 - www.enlazandoalternativas.org/spip.php?article73

inconsistency between legal rules is conducive to what Hernandez referred to as the “architecture of impunity” (Hernandez, 2013), under which corporations are ensured rights but no obligations are imposed on them for violations of human, environmental and labor rights¹¹.

The criticism against BITs and their contradictions are leading the nation-states themselves to redefine and reform their parameters. According to Arroyo & Guiotto (2015), the recognition is growing that there is no causal relationship between maintaining BITs and increased flows of foreign investments. Brazil is the main recipient of foreign investment in Latin America and yet it is not a party to any BIT so far. Similarly, China is the main recipient of foreign investments from the United States, but no BIT has been signed between the two countries. Additionally, countries such as Bolivia, Venezuela and Ecuador withdrew from the ICSID Convention and are revising their existing BITs (Arroyo & Guiotto, 2015)¹².

Different models

It is precisely in this context of reform that Brazil proposed a new model in the Agreement on Cooperation and Facilitation of Investments (ACFI). The country, which never ratified a BIT with traditional powers, drew up a new investment protection model to support and promote Brazilian multinationals abroad. The country inaugurated this new phase precisely with three African countries, namely, Angola, Mozambique and Malawi, where the mining company Vale and construction conglomerates such as Odebrecht have made large investments. According to Galina (2015), the new Brazilian model was strategically designed for non-developed countries with weaker economies, which are less likely to affect Brazil adversely.

With regard to other BRICS countries, India and South Africa have also reviewed the framework

11 - Social organizations are pressing the United Nations to create a binding treaty on transnational corporations and human rights. See: www.tni.org/en/publication/8-proposals-for-the-binding-treaty-on-transnational-corporations-and-human-right.

12 - Ecuador requested a full audit of investment treaties and of the arbitration system, which was carried out between 2014 and 2015 (Arroyo & Guiotto, 2015).

of their investment treaties, particularly questioning the investor-state clause. South Africa has terminated treaties with European countries and reformed its national legislation regarding investors' rights with the aim of ensuring more space for domestic policy. Along the same line, India tends to preserve its national interests in certain spheres of the economy and is reevaluating its BITs in the face of international arbitration proceedings. China has adopted three different variations of BIT models and its policy in relation to the inclusion of the most favored nation principle is relatively reluctant (Ibid.). Russia has opened up its economy widely in the 1990s, adopting a pro-investment stance to attract foreign capital and a flexible position in trade negotiations (Ibid.). The table below shows BITs among BRICS countries.

Table 1. Bilateral Investment Treaties (BITs) among BRICS countries

PARTIES		TYPE	SIGNED IN	IN FORCE SINCE
MERCOSUR	India	Preferential Trade Agreement	2003	2009
Russia	South Africa	BIT	1998	2000
Russia	India	BIT	1994	1996
Russia	China	BIT	1990	1991
Russia	China	BIT	2006	2009
India	China	BIT	2006	2007
China	South Africa	BIT	1997	1998

Source: Elaborated by the author based on data from UNCTAD.

The BRICS in Africa

BRICS was established as a group in 2009 during the global financial crisis¹³ and sparked the idea that it could be a counter-hegemonic alternative from the Global South in relation to Western powers. Because it proposed reforms in multilateral financial institutions (International Monetary Fund and World Bank) and created new institutions such as the New Development Bank, many

13 - The first BRICS Summit was held in Russia in 2009 to discuss, among other issues, common policies to tackle the international crisis. The group has been meeting annually since then.

saw the BRICS as a challenger of the status quo and of U.S. economic supremacy (Bello, 2014; Desai, 2013). Others are more skeptical about the ability and motivation of these countries to build a new global order from the South (Bond & Garcia, 2015).

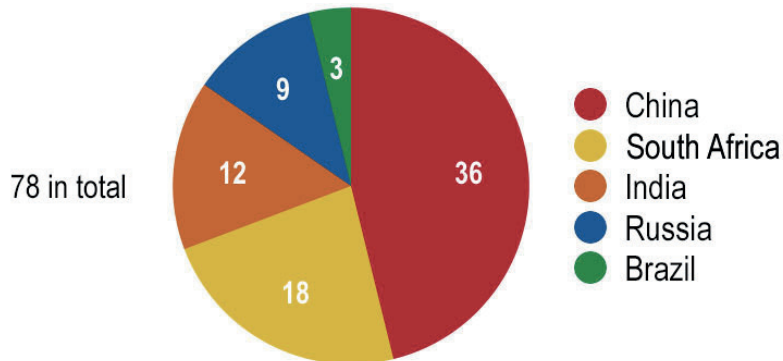
The activities of the BRICS in Africa are marked by a significant presence in the mining sector and in large infrastructure projects, opening new routes for the looting of resources and for deepening a growth model that has serious impacts on societies and on the environment. According to Amisi, Peek & Maguwu (2014, p.414), the “colonial scramble for Africa” has been renewed with the BRICS, considering the interests of the group in natural resources, mining, oil, gas, dam and electricity megaprojects, construction of railway and port infrastructure to transport raw materials to the international market. According to Lechini (2012), it is important to note that while the BRICS countries are seeking to establish themselves as a cohesive group in multilateral fora, in Africa each of them has adopted its own competitive strategy and approach to developing closer relations in the region. Thus, in a broader context of capitalist accumulation, the BRICS are acting based on a logic of competition over natural resources and market access that is imperialist in nature and is taking colonialism back to Africa in modern times.

“In a broader context of capitalist accumulation, the BRICS are acting based on a logic of competition over natural resources and market access that is imperialist in nature and is taking colonialism back to Africa in modern times.”

China is the most active BRICS country in Africa, as it is the main trade partner and largest investor on the continent, surpassing the United States in 2010 (Lechini, 2012, p. 141). As shown in the figure and map below (Figure 1 and Map 1), China’s BITs cover almost the entire African continent. South Africa only joined the BRICS in 2011 as a “gateway” to and representative of the group on the African continent. It also has treaties with several countries in the region to protect its businesses across the continent and is seen as a regional sub-imperialist power (Bond, 2015). India’s participation, in turn, is becoming increasingly strong in terms of BITs as it consolidates its presence in Africa in the mining, trade and technology sectors. Finally, Russia, which has always maintained historical relations with African countries since the Soviet period, also entered the race for resources and strategic investments recently and has been signing BITs on the continent since the 1990s. It is worth noting that trade between the BRICS and Africa increased

eightfold between 2000 and 2008 (from US\$ 21.9 to US \$ 164.6 million) and that China accounts for two thirds of this volume (Lechini, 2012).

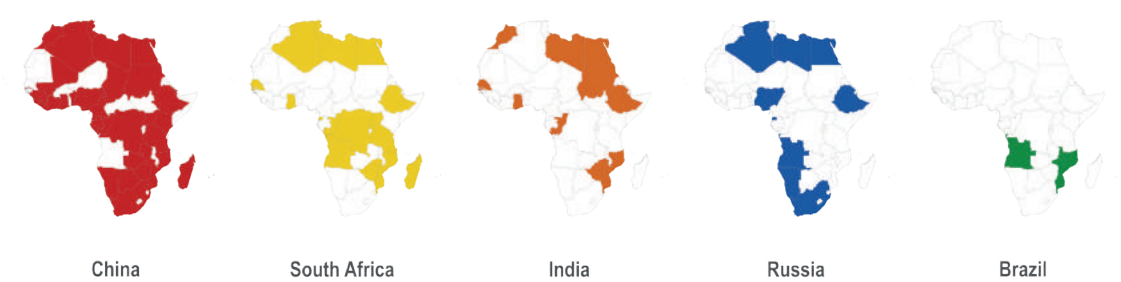
Figure 2. Total Bilateral Investment Treaties of the BRICS in Africa in 2015



This study addressed two major interconnected issues: the role of the BRICS in the international investment regime and the activities of its countries in Africa. Its objective is not one of exhausting these issues, but rather of offering an initial analysis of the problems involved. In the following section, we will analyze each BRICS country, starting with China, which has the largest number of treaties and volume of investments in Africa, followed in decreasing order by the remaining BRICS countries, ending with Brazil, which has fewer treaties and lower investments on the continent. We will begin with an overview of the BITs of each country with African countries, listing key features of those treaties and trying to determine differences and similarities in relation to traditional BIT models. We will then present an overview of the relationship between each BRICS country and Africa, discussing some of the main criticisms and conflicts related to the operations of their companies on the continent. The last chapter is dedicated to explaining what international arbitration forums are all about, also raising some critical views, especially with regard to the ICSID. In that chapter, we highlight arbitration cases involving BRICS companies in African countries. We conclude that the current situation of falling commodity prices and slowing down of the Chinese economy poses challenges to African economies, which have become more dependent on the exploitation of natural resources for the global market. Old “looting routes” have been renewed with the BRICS, and these end up reproducing enclave economies without

actually meeting the needs of local and domestic economies or involving the participation of their populations. Consequently, rather than leading to more social, environmental and economic justice in African societies, the operations of BRICS countries in Africa deepen the old unequal world order.

Map 1. Bilateral Investment Treaties of the BRICS in Africa



Source: Prepared by the author based on data from UNCTAD.

CHINA

China is a global economic power, the largest recipient of investments in the world and also a major global investor. It has 129 BITs and 19 IIAs around the world¹⁴, ranking only behind Germany in this regard and ahead of traditional powers like the United States, France, the United Kingdom and others. The first Chinese investment treaty was signed with Sweden in 1982. In the 1990s, China increased its investments mainly in developing countries. It also has a trilateral treaty with Japan and Korea (Sauvant & Nolan, 2015). On the African continent, China has BITs with 34 countries, which began to be implemented in the early 1990s.

Table 2. China's Bilateral Investment Treaties (BITs) in Africa

COUNTRY	SIGNED IN	IN FORCE SINCE
GHANA	1989	1991
EGYPT	1994	1996
MOROCCO	1995	1999
ALGERIA	1996	2003
MAURITIUS	1996	1997
ZAMBIA	1996	-
ZIMBABWE	1996	1998
CAMEROON	1997	2014
GABON	1997	2009
SUDAN	1997	1998
REP. DEM. CONGO (2 BITs)	1997 / 2011	-
NIGERIA (2 BITs)	1997 / 2011	-
ETHIOPIA	1998	2000
BOTSWANA	2000	-
CONGO	2000	-
KENYA	2001	-

14 - investmentpolicyhub.unctad.org/IIA/CountryBits/42#iialInnerMenu

Table 2. China's Bilateral Investment Treaties (BITs) in Africa (cont.)

COUNTRY	SIGNED IN	IN FORCE SINCE
MOZAMBIQUE	2001	2002
SIERRA LEONE	2001	-
IVORY COAST	2002	-
DJIBOUTI	2003	-
BENIN	2004	-
TUNISIA	2004	2006
UGANDA	2004	-
EQUATORIAL GUINEA	2005	-
GUINEA	2005	-
MADAGASCAR	2005	2007
NAMIBIA	2005	-
SEYCHELLES	2007	-
MALI	2009	2009
CHAD	2010	-
LIBYA	2010	-
TANZANIA	2013	2014

Source: Prepared by the author based on data from UNCTAD.

A brief analysis of the texts of Chinese BITs with African countries allows us to identify some of their features. China follows the international standards set out in investment protection treaties and similar wording in all of them, except for a few unique aspects in some cases. The Chinese treaties ensure companies equal treatment between international and domestic investors and the most-favored-nation principle¹⁵. The definition of investment includes products and services, as well as intellectual property assets, including industrial property, as in the case of Benin, Madagascar, Algeria, Ethiopia and Ghana.

15 - With the exception of benefits provided in the case of a customs union, free trade area, economic union and treaties on double taxation.

Expropriations, nationalizations or measures having equivalent effects are only contemplated for purposes of the public interest, under due process of domestic law, on a non-discriminatory basis and against compensation. China's BITs provide for transfer of funds and compensation for losses for investors, requiring actual and immediate payment based on market values. Regarding dispute settlement, Chinese treaties in Africa, as well as the BITs of Western powers, provide for investor-state arbitration. The ICSID has been present in all treaties entered into between China and African countries since 1998. China has been, since 1993, the only BRICS country that is a contracting member state of the ICSID. In some cases, the treaties also provide for the observance of the standards set by UNCITRAL - the United Nations Commission on International Trade Law, which establishes a set of conventions and standards as benchmarks for trade and investment laws - and by the Stockholm Chamber of Commerce (CCE).

China's BITs do not include clauses on corporate social responsibility. They provide for the establishment of a committee to evaluate their execution for merely functional purposes, to assess to what extent these agreements are yielding positive results for the parties or not. The treaties comprise investments made prior to their signing, and all their clauses valid, except for those related to dispute settlement. Their duration is 10 years and their investment protection provisions can be extended for 10 years after they are terminated.

In rare cases, China accepts certain exceptions to meet specific needs of a partner country in a BIT. This is the case of its treaty with South Africa, which provides for equal treatment for Chinese and South African investors while making an exception for public policies designed to mitigate the consequences of the apartheid by benefiting certain groups. It is worth noting that the South African policy of protecting and promoting the black population has already led investors from Luxembourg and Italy to file claims against the country with the ICSID based on the national treatment principle (Ferris, 2014).

China's official discourse establishes a relationship between investment and development aid. Its foreign policy is marked by five principles of peaceful coexistence: mutual respect for territorial integrity and sovereignty; mutual non-aggression; non-interference in the internal affairs of other countries; mutual and equitable benefits; and peaceful coexistence (Alves, 2010). With its

strategic *Going Out* program, implemented in the early 2000s, the Chinese government sought to expand frontiers for Chinese corporations (Johnston & Yan, 2014). Investment and aid are placed in the same “package,” such as investment in infrastructure, which involves the construction of roads, railways, hospitals, educational centers, etc. This “package” is linked to granting credit and finance to enterprises (Lopes, Nascimento & Vadell, 2013). In relation to African countries, China launched a debt relief policy in exchange for concessions to Chinese investors under which over 150 debts were pardoned in 32 African countries in 2009¹⁶. The Chinese Development Bank is the main source of funding for foreign investment and it also represents the Chinese state in other transactions. The bank set up a specific subsidiary in Africa - the China-Africa Development Bank (CAD Fund) - with an initial capital of US\$ 1 billion that could eventually reach US\$ 5 billion¹⁷.

The creation of the Forum on China-Africa Cooperation (FOCAC) in Beijing in 2000 (Enuka, 2011) was a milestone in China-Africa relations. Its official purpose is establishing and ensuring the Chinese policy for the African continent, which combines development aid with non-intervention policy. The FOCAC has held six ministerial conferences¹⁸ already, during which issues such as regional security and peace, economic cooperation, development aid, cultural cooperation and exchange, among others, were discussed¹⁹.

According to UNCTAD, Chinese investments in Africa amounted to approximately US\$ 21.7 billion in 2012, a figure that may be underestimated²⁰. The race for raw materials led to a boom in the mining, energy and oil sectors, on which most Chinese investments are focused. At the

16 - www.focac.org/eng/ltada/dscbjhy/FA32009/t623384.htm

17 - CAD-Fund: The company overview. www.cadfund.com/en/index.aspx

18 - The first conference was held in Beijing (2000), the second one was held in Addis Abeba, Ethiopia's capital city (2003), the third one was once again held in Beijing (2006), the fourth one was held in Sharm El Sheikh in Egypt (2009), the fifth one was again held in Beijing (2012) and the last conference was held in Johannesburg (2015). See www.focac.org/eng/ltada/dwjbzjhys/hyqk/t952503.htm.

19 - www.focac.org/eng/ltada/dwjbzjhys/hywj/t954620.htm,

20 - Data from UNCTAD's database (unctad.org/Sections/dite_fdistat/docs/webdiaeia2014d3_CHN.xls), prepared between 2003 and 2012 based on information provided by the Chinese Ministry of Commerce (MOFCOM). The numbers may be underestimated and outdated.

same time, China also invested in other relevant sectors such as manufacturing, construction, technology, finance, textiles and retail.

Most Chinese companies operating in Africa are large and medium enterprises, but small Chinese enterprises are also active there. Among large corporations, state-owned enterprises are ones in which most FDI in Africa is concentrated. The main investors include the Li Group, China Civil Engineering Co., China Non-ferrous Metal Mining Group, Sinopec, China National Offshore Oil Corporation (CNOOC), China National Petroleum Corporations (CNPC), PetroChina, Minmetals, Sinosteel, Hisense, Huawei Technologies, ZTE Corporation, Industrial and the Commercial Bank of China.

The giant Huawei Technologies expanded its operations to nearly 40 countries in Africa, becoming one of the strongest companies in the technology industry in the world. On the African continent, it operates jointly with ZTE Technologies in this sector. The Chinese state-owned oil companies CNPC and CNOOC are, along with Sinopec, present in more than 15 African countries, including Algeria, South Sudan, Libya, Egypt, Nigeria and others in strategic areas of the continent.

The operations of Chinese companies in Africa and their consequences are often criticized. According to Amisi, Peek & Maguwu (2014, p.420), China has four main interests in Africa: accessing raw materials, accessing new markets, exerting political influence, and isolating Taiwan from African countries. In exchange for massive oil exports to China from countries such as Angola, Sudan and Nigeria, the country imposes the principle of an indivisible China on the poorest African countries: “Taiwan remains a thorn in the side of Chinese Government” (Ibid., p.421). Therefore, the Asian power uses its economic and geopolitical force to shape its relations with African countries.

According to the above-mentioned authors, China needs the natural resources available in Africa, but its investments are not conditioned to any compliance with human rights requirements and democratic objectives (Ibid., p. 426). When it enters African countries with its extractive companies, China lowers their standards in the environmental, social and labor relations realms.

In Zimbabwe, where it is the main foreign investor, accounting for about 70% of all FDI in the mining sector (gold, diamonds and chromium), there have been reports of human rights abuses committed by Chinese employers against local employees. Chinese companies such as Anjin Investments and the Sino-Zimbabwe Holding joint venture have been accused of supporting the military and defense sectors in exchange for diamond mining concessions (Ibid., p. 427).

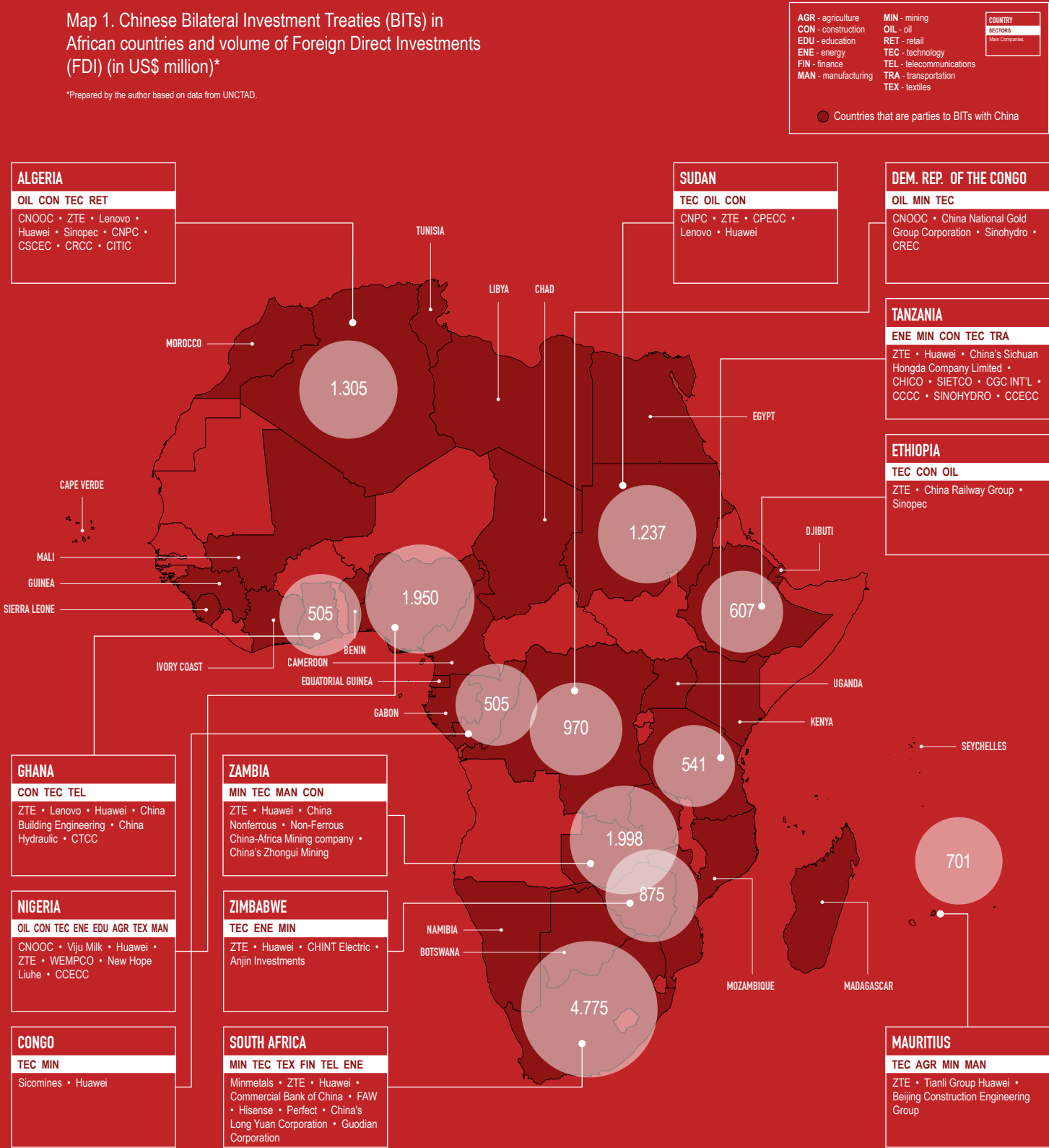
The environmental effects of the extractive industry are disastrous. WEMPCO, a Hong Kong-based timber company, was accused by NGOs of causing pollution due to the unrestrained extraction of timber along the Cross River in Nigeria, which provides drinking water and serves more than 300 communities, seriously affecting the health of this population. The company, which has been felling up to 50 ancestral trees a day, was granted a concession to explore 75% of a forest reserve and to build a gigantic sawmill on the banks of the river estimated at US\$ 10 million (Odigha, 1996). Projects funded by large Chinese banks also raise concerns about their environmental impacts, such as the Gibe 3 Dam in Ethiopia, which was granted a financing of US\$ 400 million from China's Industrial and Commercial Bank. The dam will affect a huge area of fragile ecosystems along the Omo River region and the Turkana valley, influencing their natural cycle of floods and reducing their flow into the Turkana River, which is now threatened by salinization. Approximately 300,000 people live off a lake in the area, where they carry out agricultural, fishing and grazing activities. Regional conflicts might arise over access to water resources. In this scenario, international non-governmental organizations are pressing the Chinese banking and financial sector to assume more environmental responsibilities with regard the financed projects (Zhang, 2010).

In Zambia, Chinese coal mining operations are marked by violations and abuses of workers' rights. The Chinese mine Collum has been accused of offering horrible working conditions and degrading treatment to its workers. In 2010, two managers fired at workers on strike and eleven of them were killed (Justo, 2012; Carmody, 2015). They were acquitted of all charges, outraging the population. Not long after that, a manager was killed during a strike (Justo, 2012). Low wages, bad health and safety conditions and limited freedom of association are part of the working culture in the mines of Chinese companies both in Africa and in China itself (Ibid.).

According to Carmody (2015), China's expansion and growth were supported by African elites, whose cooperation was sought around a non-interference policy. Large Chinese corporations (and from the other BRICS countries) have benefited greatly from the neoliberal regime and the economic liberalization of the African continent promoted under the auspices of the Bretton Woods financial institutions and of the WTO. The African commodity market was opened up to imports from China and other countries, providing resources and investment opportunities for global Chinese corporations. On the other hand, Chinese and African workers have been suffering the worst consequences of this process. According to Carmody (2015), the most important C in the BRICS acronym is not China, but rather capitalism.

Map 1. Chinese Bilateral Investment Treaties (BITs) in African countries and volume of Foreign Direct Investments (FDI) (in US\$ million)*

*Prepared by the author based on data from UNCTAD.



SOUTH AFRICA

South Africa is the largest economy in Africa, the second BRICS country after China in terms of economic presence on the continent and the largest investor and recipient of FDI in the area. With the end of the apartheid regime in 1994, South Africa increased its investments in other African countries significantly. This shift was also accompanied by the ratification of investment protection treaties. Currently, the country has 39 Bilateral Investment Treaties (BITs) and 10 International Investment Agreements (IIA) around the world, 18 of which with African countries²¹. The first treaties were signed in 1998 but only two of them are still in force: the BITs with Mozambique and Mauritius.

Table 3. South Africa’s Bilateral Investment Treaties (TBIs) in Africa

COUNTRY	SIGNED IN	IN FORCE SINCE
MOZAMBIQUE	1997	1998
EGYPT	1998	-
GHANA	1998	-
MAURITIUS	1998	1998
SENEGAL	1998	-
ALGERIA	2000	-
RWANDA	2000	-
UGANDA	2000	-
LIBYA	2002	-
TUNISIA	2002	-
REP. DEM. CONGO	2004	-
EQUATORIAL GUINEA	2004	-
ANGOLA	2005	-
CONGO	2005	-

21 - investmentpolicyhub.unctad.org/IIA/CountryBits/195#iialInnerMenu

Table 3. South Africa's Bilateral Investment Treaties (TBIs) in Africa (cont.)

COUNTRY	SIGNED IN	IN FORCE SINCE
TANZANIA	2005	-
MADAGASCAR	2006	-
ETHIOPIA	2008	-
ZIMBABWE	2009	-

Source: Prepared by the author based on data from UNCTAD.

Based on a brief analysis of some of the treaties between South Africa and other African countries, some of their features can be highlighted. The treaties follow the traditional model of investment protection, granting national and fair and equitable treatment to foreign investors and observance of the most favored nation principle²². At the same time, they safeguard the right of countries to foster equality and protect and promote people facing discrimination through domestic laws, in tune with South Africa's post-apartheid constitutional framework. Their definition of investment follows the model of traditional BITs and contemplates movable and immovable property, intellectual property rights, rights granted under domestic laws and all payments due under a contract of economic value between the two countries concerned. Like traditional BITs, they cover investments made before and after their entry into force and have a duration of ten years, remaining effective, in some cases, for over 20 additional years even after they are terminated. They have no corporate social responsibility clause.

South African BITs provide for investor-state arbitration in cases of expropriation, nationalization or measures having effects equivalent to expropriation and nationalization. With regard to dispute settlement, although South Africa is not a signatory state of the ICSID Convention, this body is provided for in its treaties through a complementary mechanism called additional facility, which allows countries to apply ICSID rules in international arbitration proceedings. In addition to ICSID rules, South African BITs provide that the arbitration rules set by UNCITRAL and by the Stockholm Chamber of Commerce (SCC) are to be used as a standard for conflict resolution purposes.

22 - An exception to this clause is made in cases involving a customs union, a free trade area, a common market, etc.

South Africa is one of the countries that are currently reviewing their BIT model. It canceled its treaties with some European countries after an international arbitration case initiated by a mining company from Italy and Luxembourg based on alleged expropriation under the Black Economic Empowerment program, designed to promote the participation of the black population in commercial enterprises. The South African government has been questioning the effectiveness of BITs in increasing investment flows to the country and the fact that they also limit public policies significantly (Ferris, 2014). A new domestic law for promoting and protecting investments that was passed in 2003 gives the South African State more leeway to act. Investment disputes and controversies are now to be referred to domestic, rather than international arbitration and more restrictions will be applied to compensation payments, which don't have to be "prompt, adequate and effective" any longer, as determined under traditional BITs (Ibid.). However, South Africa still seeks to remain "attractive" to investors by preserving obligations and investment protection mechanisms. According to Bond (2014), the South African government adopted a "talk left, walk right" posture, i.e. despite adopting a rhetoric of apparently defying the international status quo, it continues to ensure better conditions for corporations, regardless of the existence of investment protection treaties or not, by improving laws that favor transnationals.

After joining the BRICS at the invitation of China in 2010, South Africa has been presenting itself as the "gateway" to the continent for companies and has become the main trade partner of that country on the continent. South Africa is a regional economic and political force and is a member of continental and sub-regional organizations such as the New Economic Partnership for Africa's Development (NEPAD), the South African Customs Union (SACU) and the Southern African Development Community (SADC) (Lechini, 2012). Its investment policy is supported by a discourse based on the need to strengthen Africa and guarantee mutual development on the continent. According to UNCTAD, South African FDI in Africa reached approximately US\$ 23.5 billion in 2012²³. It is worth noting that, despite the lack of a BIT between Nigeria and South Africa, Nigeria is the main recipient of South African investments.

23 - Extracted from UNCTAD's database (unctad.org/Sections/dite_fdistat/docs/webdiaeia2014d3_ZAF.xls) based on figures disseminated by the South Africa Reserve Bank between 2001 and 2012. Some of the data for important countries such as Madagascar, Angola and Nigeria are outdated.

In terms of sectors, South African investments are focused on telecommunications, retail, manufacturing, mining and construction (Aldren, 2015). The largest companies involved include the MTN Group, Shoprite Holdings Ltd., Vodacom, Woolworths, Anglo American, De Beers, Naspers, Standard Bank, AngloGold and others. The Standard Bank is present in more than 15 African countries and is one of South Africa's most active institutions in the financial sector on the continent. DStv is a media giant that provides satellite TV throughout Africa. The retailer Shoprite is currently the largest one in the food industry, with approximately 1,500 supermarkets in the continent. The mining company AngloGold has expanded its operations to countries outside Africa (Latin America and Oceania) and has been carrying out mining activities in countries such as Tanzania, in this case under a joint venture with the Tanzanian company Geita. MTN is a monopoly of the telecommunications industry in Africa that also operates beyond the continent's borders (Shaw, 2015; Carmody, 2015 Maya, 2015).

The expansion of South African capital across the continent has given rise to criticism and conflicts. According to Amisi, Peek & Maguwu (2014, p. 422), the country has been playing an intermediary role between Western powers and poor, yet resource-wealthy countries such as the Democratic Republic of Congo, Mozambique and Zambia in particular. The aggressive actions of mining companies such as Anglo American, De Beers, BHP Billiton and African Rainbow Minerals and the oil company Sasol have led South Africa to play the role of a sub-imperialist power in the region (Ibid.). In Mozambique, the Cahora Bassa power plant built by the Portuguese on the Zambezi River has been exporting large amounts of energy through electricity distributor Eskom to South Africa at very low prices. The flooding along the Zambezi River caused by diversion tunnels of dams has been creating serious problems for the local population, as for a woman who was forced to give birth on the roof of a hospital because of a flood (Ibid, p. 423).

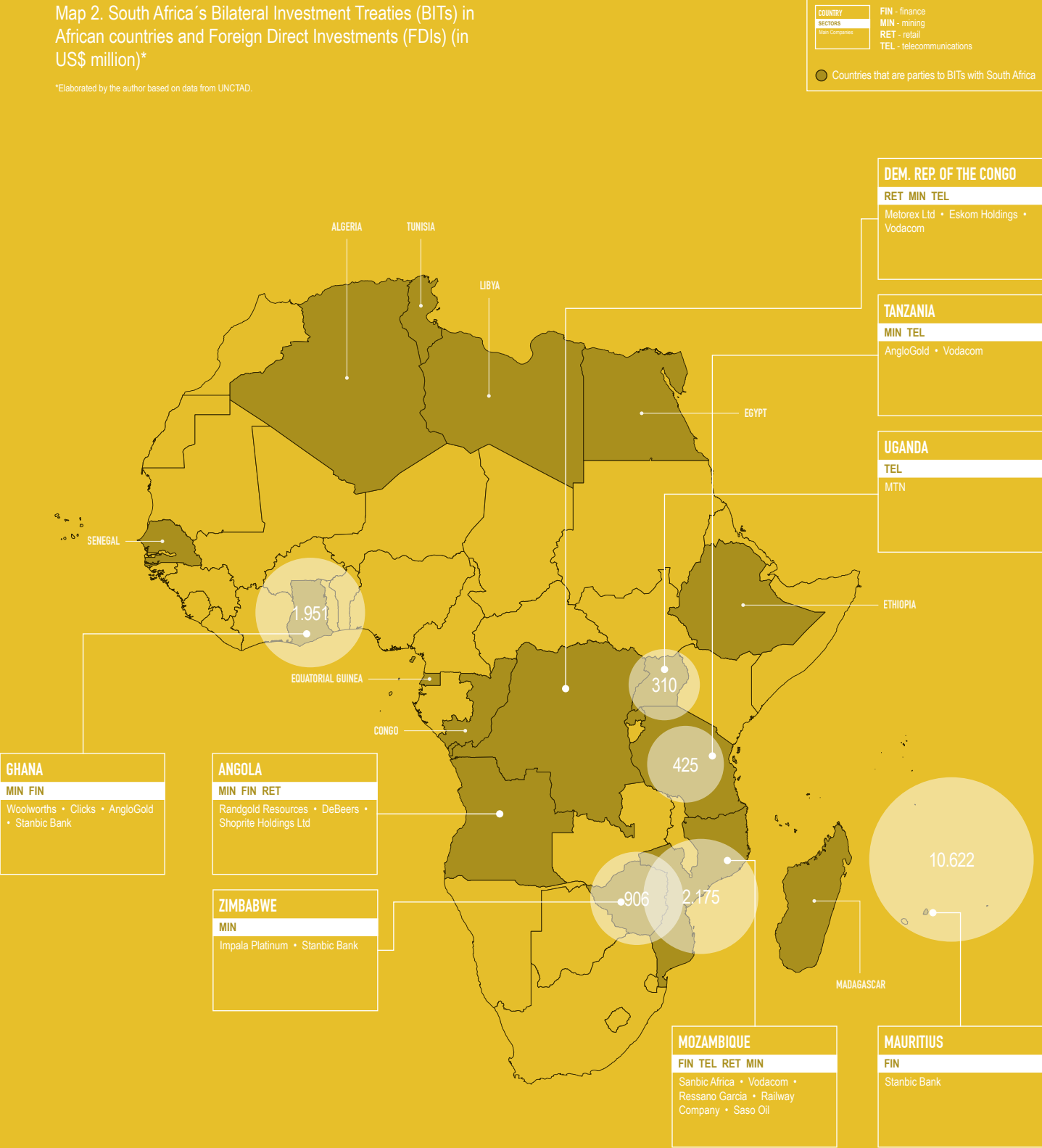
According to Carmody (2015), South African and Chinese capital act together to exploit natural resources and dominate markets in Africa. The largest FDI in Africa's history was one made by the Industrial and Commercial Bank of China in South Africa's Standard Bank in 2007. In Zambia, the South African retailer Shoprite, which is also controlled by Chinese capital along

with other South African companies, dominates the market to such an extent that local producers cannot participate in it. All profits are remitted back to South Africa.

At the same time, contradictions in the capitalist rise of South Africa lead to major examples of struggles and resistance, such as strikes and protests. New workers' organizations are being set up and local communities are being established to resist megaprojects and demand better management of the exploitation of natural resources and of the pollution caused by large companies. Some of these struggles have been brutally repressed by police and military forces, as in the case of a massacre of workers on strike at the Marikana mine in 2012 (Bond, 2014).

Map 2. South Africa’s Bilateral Investment Treaties (BITs) in African countries and Foreign Direct Investments (FDIs) (in US\$ million)*

*Elaborated by the author based on data from UNCTAD.



INDIA

India is a major player in the international investment market, especially in African countries. The country is party to 84 Bilateral Investment Treaties (BITs), 12 of which with African countries, and to 13 International Investment Agreements (IIAs). The first BIT was one signed with Zimbabwe in 1999, after which the process of entering into such treaties was intensified during the 2000s, and the most recent was one signed with the Democratic Republic of the Congo in 2010. Only three BITs with African countries are currently in force²⁴.

Table 4. India's Bilateral Investment Treaties (TBIs) in Africa

COUNTRY	SIGNED IN	IN FORCE SINCE
EGYPT	1997	2000
MAURITIUS	1998	2000
MOROCCO	1999	2001
ZIMBABUE	1999	-
GHANA	2002	-
DJIBOUTI	2003	-
SUDAN	2003	-
ETHIOPIA	2007	-
LIBYA	2007	-
SENEGAL	2008	-
MOZAMBIQUE	2009	-
CONGO	2010	-

Source: Prepared by the author based on data from UNCTAD.

Similarly to China and South Africa, India's treaties with African countries follow the rules of traditional BITs, such as those of ensuring national treatment for foreign investors and the most-favored-nation principle. Some treaties also include as parties companies from a third country con-

24 - investmentpolicyhub.unctad.org/IIA/CountryBits/96#iialnnerMenu

trolled by an entity of the signatory countries. The definition of investment includes movable and immovable property and rights in rem, participation in companies (through shares, stocks and debentures), credit rights or financial contracts, intellectual property rights and business concessions granted by law or contract.

The treaties guarantee the free transfer of investment funds, cover investments made before and after their signing and may or may not include the possibility of arbitration on such investments. Some of the treaties remain effective for 15 years beyond their duration after they are terminated.

Indian BITs with African countries contemplate expropriation, nationalization and measures having effects equivalent to expropriation and nationalization. They follow the traditional BIT model, providing for arbitration between investors and the state. Most of the treaties in force provide for dispute settlement based on UNCITRAL rules in ad hoc tribunals. They also provide for the possibility of using the ICSID as an arbitration forum through the additional facility complementary mechanism, since India is not a contracting member state. They don't provide for mechanisms to monitor them with the aim of preventing arbitration claims from being filed. In addition, they don't include social responsibility clauses.

India is currently reviewing its BITs with the aim of eliminating loopholes used by parties to file international arbitration claims against the country²⁵. For this purpose, the Indian government uses the argument that a large number of disputes contribute to lending a negative image to the country and that, in practice, the treaties are not essential for ensuring capital flows to India. The BIT model currently in force dates back to 1993 and is based on the OECD Convention on the Protection of Foreign Property of 1962. The Indian government believes that the new model will ensure greater state control over investments while upholding the rights of investors (Galina 2015, p.15).

India's efforts to get closer to the African continent are not new and they have entailed cooperation and technical assistance, participation in peacekeeping missions and cultural relations (Bhatia, 2010). The discourse adopted by India in relation to its investments in Africa is that it is

25 - The case that triggered this process involved the Australian mining company White Industries against the Indian State, which the company won based on the argument that India had violated the most favored nation principle. See: www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/

a “partner for development” seeking to consolidate an image of friendship. However, according to Paul (2012), the Foreign Direct Investment (FDI) of the Indian State or of Indian private companies is an important component of the relations between India and the African continent. The BIT with Sudan led to a significant increase in Indian investments in that country. With a BIT in force since 2010, Mauritius is the main recipient of Indian capital in Africa. As a tax haven, the Mauritius islands provide a major channel through which Indian investments enter the African continent and are directed to other countries (Ibid.).

According to UNCTAD, Indian investments in Africa totaled approximately US\$ 13.2 billion in 2012, but this figure may be underestimated²⁶. According to Paul (2012), Indian investments follow the pattern of countries seeking to exploit resources and a market that can be absorbed by investing companies. In some cases, Indian investments in Africa are focused on the exploitation of raw materials and natural resources to be taken to India. In other cases, such as in that of the company Tata Motors South Africa, investments are made to set up subsidiaries in the country with the aim of exploring the domestic consumer market and reducing logistics costs. Diplomatic, financial and legal incentives, linguistic and cultural similarities and the Indian diaspora in Africa (about 2 million people of Indian origin live on the continent) have been playing a major role in attracting Indian investments to the continent (Paul, 2012; Lechini 2012).

Indian FDI is based on direct credit lines from Exim Bank. African countries and companies can apply for funding by submitting projects to be selected by the Indian government. These credit lines have been made available to approximately 40 African countries and companies²⁷ operating in different sectors, particularly in the energy, agricultural, transportation, industrial and management industries. The Indian government has also developed other initiatives to promote the operations of Indian companies in Africa, such as those known as “Focus Africa”, “Team 9” and

26 - Data extracted from UNCTAD’s database. (unctad.org/Sections/dite_fdistat/docs/webdiaeia2014d3_IND.xls, Table 4). The figures were disseminated between 2010 and 2012 and may be underestimated or outdated.

27 - These include Angola, Benin, Burkina Faso, Burundi, Camerouns, Republic of Central Africa, Chad, Comoros, Ivory Coast, Democratic Republic of the Congo, Djibouti, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sudan, Swaziland, Tanzania, Togo, Zambia and Zimbabwe. See: www.eximbankindia.in/lines-of-credit. (Access January 2016).

the “India-Africa Forum Summit”²⁸. A six-year (2014-2020) initiative called Supporting India Trade and Investment for Africa (SITA) was also launched for the purpose of promoting exports to from five African countries (Ethiopia, Kenya, Rwanda, Tanzania and Uganda) to India through investments and the transfer of techniques from India to these countries²⁹.

The main Indian companies operating in Africa include the Essar Group, Tata Groups, Reliance Communications, Mahindra, Bharti Airtel, Sun Pharmaceutical Ltd., Oil and Natural Gas Corporation (ONGC), Jindal Steel and Power, Coal India and Ranbaxy Laboratories. The Tata Group conglomerate is worth highlighting due to its huge presence in the territory and the wide range of sectors in which it operates through its subsidiaries. In 2007, for example, Tata Steel invested US\$ 88.2 million in Mozambique’s mining sector. In 2002, ONGC invested US\$ 766 million in Sudan’s oil sector. In the same year, Reliance Industries invested US\$1 billion in Egypt’s petrochemical industry. In addition, in 2008 the Indian government invested US\$ 640 million through credit lines in the sugar industry in Ethiopia (Paul 2012, p.14). Finally, the country invested US\$ 1.2 million in Zimbabwe’s diamond mining industry and has uranium reserves in Malawi and Namibia (Amisi, Peek & Maguwu 2014, p.419). Trade between India and Africa soared from US\$ 9.5 billion in 2005 to over US\$ 50 billion in 2011 (Lechini, 2012, p. 144).

According to Anwar (2014), economic relations between India and Africa today can be compared to colonial relations between the UK and India, as the trade between the two regions is dominated by exports of African commodities to India, while India supplies Africa with low- and medium-technology products. India is in turn buying more and more land in Africa through its public and private companies. It is estimated that India is the fifth largest land investor in Africa. It is the largest land investor in Ethiopia already, accounting for over 70% of all land purchases in that country. These acquisitions have become the center of conflicts between local populations and private investors (Ibid.).

28 - Focus Africa is a Program launched in 2002 to promote closer relations between India and seven countries in Sub-Saharan Africa (SSA). Team 9 is an initiative launched by India in 2004 called Techno-Economic Approach for Africa-India Movement, whose aim is to promote closer relations between India and eight energy- and resource-wealthy African countries. The India-Africa Forum Summit is a meeting of the heads of states of African countries and of India that is held at three-year intervals to discuss issues of interest to the parties, in particular economic issues.

29 - www.intracen.org/sita/

Map 3. India's Bilateral Investment Treaties in African Countries and Volumes of Foreign Direct Investments (FDI) (in US\$ million)*

*Prepared by the author based on data from UNCTAD.

COUNTRY

SECTORS

Main Companies

AUT - automotive

CHE - chemical

CON - construction

ENE - energy

FLO - flower farming

HYD - hydraulic

IND - industry

INF - infrastructure

IRO - iron making

MIN - mining

OIL - oil

PAC - packaging

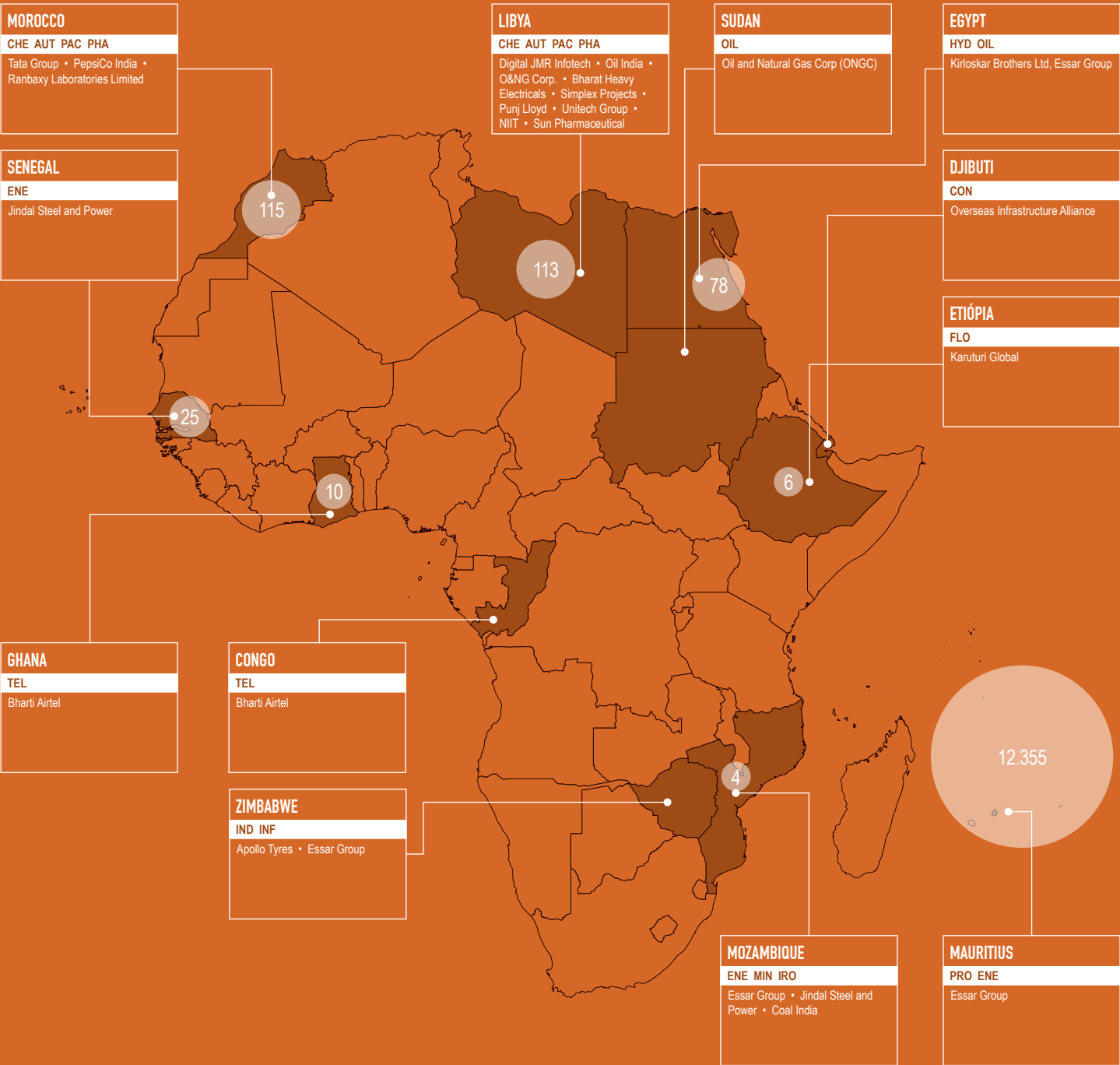
PHA - pharmaceutical

PRO - projects

TEL - telecommunications

TI - information technology

● Countries that are parties to BITs with India



RUSSIA

Russia signed its first investment protection treaties, with France, Canada and England, after the end of the Soviet period, in 1987. However, the opening of markets and a rapid liberalization and privatization process in the 1990s led Russia to enter the international investment market with the aim of attracting foreign companies to its market. The country has 78 BITs and 5 IIAs with countries around the world, nine of which are BITs with African countries. The first treaty was signed with Egypt in 1997, while the most recent BIT was one signed with Equatorial Guinea in 2011. Only four of its treaties with African countries are still in force³⁰.

Table 5. Russia's Bilateral Investment Treaties in Africa

COUNTRY	TIPO	SIGNED IN	IN FORCE SINCE
EGYPT	BIT	1997	2000
SOUTH AFRICA	BIT	1998	2000
ETHIOPIA	BIT	2000	-
ALGERIA	BIT	2006	-
LIBYA	BIT	2008	2010
ANGOLA	BIT	2009	2011
NAMIBIA	BIT	2009	-
NIGERIA	BIT	2009	-
EQUATORIAL GUINEA	BIT	2011	-

Source: Prepared by the author with data from UNCTAD.

A brief analysis of Russian treaties with African countries³¹ reveals that they follow the traditional BIT model, providing for national treatment for foreign investors and for the most-favored-nation

30 - Information extracted from the UNCTAD website. investmentpolicyhub.unctad.org/IIA/CountryBits/175

31 - The texts of most treaties between Russia and African countries that can be found at the UNCTAD website are only available in Russian. The Russian treaties with Egypt and Ethiopia have been reviewed, as well as those with China and India.

principle³², as in the other cases discussed above. The definition of investment includes movable and immovable property, as well as property rights, any form of participation in the capital of commercial organizations, capital or any other assets associated with an investment, intellectual property and its derivatives, and legally regulated concessions or contracts to exploit, extract or cultivate natural resources.

The rules apply to investments made before and after the BIT was signed and, as with traditional BITs, they protect investments made during the term of the treaty and for 15 years after its termination. They ensure the free transfer of investments related funds. Russian treaties do not include corporate social responsibility clauses.

Expropriation, nationalization or measures having effects equivalent to expropriation and nationalization are only provided for to meet public purposes, on a non-discriminatory basis and against prompt, adequate and effective compensation. In the case of disputes, Russia's BITs provide for investor-state arbitration in ad hoc tribunals based on UNCITRAL rules. Russia signed the ICSID Convention in 1992, but is not a member state. The country is a defendant in several international litigation cases before both the ICSID and other international courts, such as the Stockholm Chamber of Commerce and the Permanent Court of Arbitration (see Annex 1). Cases involving Russia and African countries were not found.

Although the volume of Russian investments in Africa is lower than that of other BRICS, such as China or India, Russia has been historically present on the African continent since the days of the former Soviet Union (USSR). Between the 1960s and the 1980s, the USSR strongly supported independence movements in Africa and contributed toward its decolonization and, subsequently, toward the end of the apartheid regime in South Africa. After the fall of the USSR in 1991, Russia began to reduce its relations with the African continent, turning toward Western countries. Nonetheless, Russia still has extensive diplomatic relations with Africa: there are 40 Russian embassies in 40 African countries and 35 of these countries have embassies in Russia. The country is involved in a wide range of activities in Africa, ranging from investment projects to peacekeeping missions (Arkhangelskaya & Shubin 2013).

32 - Except for free trade areas or economic unions, treaties signed by the Russian Federation with countries of the former USSR, and treaties against double taxation or treaties involving tax issues.

In 1999, Russia applied the policy of debt forgiveness for poor countries and released African countries from a debt of US\$ 904 million (Fidan & Aras, 2010). According to Amisi, Peek & Maguwu (2014), Russia is interested in maintaining good relations with Africa to ensure their support at the United Nations on issues such as the Chechnya and Crimea crises.

According to UNCTAD, Russian investments recorded a volume of approximately US\$ 2.1 billion in 2012, but this figure may be underestimated³³. The wide availability of natural resources on the continent is one of Russia's main motivations, apart from the size of its consumer market (Barka & Mlambo, 2011). The sectors in which it has been investing most are the oil, mining, natural resources, fuel, metallurgy, infrastructure, telecommunications, fishing, education, health, tourist and defense industries.

The main Russian companies operating in Africa include the oil company Lukoil (which has large investments in the Ivory Coast and Ghana), the diamond mining company Alrosa (which began to operate in Angola, Namibia and the Democratic Republic of the Congo back in 1992), the Sintez conglomerate (which has investments in the oil, gas, diamond and copper sectors in South Africa, Namibia and Angola), the state-owned company Gazprom (which exploits natural gas in Algeria and holds stocks in the Algerian oil company Sonatrach) and the state-owned nuclear power company Rosatom (which invested in the construction of the first nuclear power plant in Egypt) (Barka & Mlambo, 2011)³⁴.

Russia's share in the arms market in Africa is worrying, as it sold a total of US\$ 66.8 billion in arms in this market in 2011 (Amisi, Peek & Maguwu 2013). Russia sold arms to Libya when Gaddafi was in power and continues to do so today, besides investing in the construction of a railroad that cuts two Libyan cities through Russian Railways³⁵. From 2003 to 2012, Algeria, where Gaz-

33 - Data extracted from UNCTAD's database. (unctad.org/Sections/dite_fdostat/docs/webdiaeia2014d3_RUS.xls, table 4). Prepared with data disseminated by the Bank of Russia between 2009 and 2012. The figures may be underestimated or outdated.

34 - Arkhangelskaya & Shubin (2013, p.31) draw attention to the fact that it is difficult to identify certain Russian investments because Russian companies use subsidiaries in other countries to transfer investments to African countries, as is the case of the companies Renova Holding, Evraz plc and Gazprom International, which are registered in the Bahamas, in the UK and in the Netherlands, respectively.

35 - mepc.org/journal/middle-east-policy-archives/russian-libyan-rapprochement-what-has-moscow-gained

prom has a strong presence, spent nearly US\$ 54 million in military equipment, 90.8% of which were imported from Russia³⁶. Ethiopia, which is a recipient of investments from more than 30 Russian companies³⁷, maintains military cooperation projects with Russia, as well as cooperation projects involving geological surveys to find uranium reserves³⁸. According to Lechini (2012), Russia's share in the arms trade with Africa has roots in the Cold War, during which many African armies became dependent on Russian supply and military technology. Today, there is a trade-off between arms and oil trade: African countries transfer shares of their energy companies or authorize the management of mineral resources in exchange for Russian weapons (Ibid, p. 143.).

Russian companies are also involved in conflicts. In Zimbabwe, companies such as Alrosa, Ruschrome, Rostec and the Vneshekonombank bank control large diamond and platinum mining projects. Various claims have also been filed against DTZ-OZGEO (Private) Limited, a company jointly owned by DTZ-Development Trust of Zimbabwe (DRZ) and the Russian Econedra Limited engaged in gold and diamond mining projects. According to Amisi, Peek & Maguwu (2014, p. 429), DTZ OZGEO is not very transparent in its activities and weak in terms of environmental management and social responsibility.

The operations of DTZ OZGEO in the Penhalonga region have caused major environmental impacts, reducing the length of the Mutare River, where it mines for gold, from a three-kilometer stretch to a small canal. Its mining activities led to the disappearance of the riverine vegetation and caused the river water to become murky, destroying a major source of water for human and animal consumption. In 2013, the company had its operations temporarily suspended. The open-pit mining activities of DTZ OZGEO, which are carried out close to local elementary schools, directly affect the lives of local dwellers, exposing them to high levels of air pollution and to impassable roads (Ibid., P. 429 -430).

36 - www.usnews.com/news/articles/2014/04/25/with-world-watching-ukraine-russia-makes-energy-moves-in-africa

37 - www.geeskaafrika.com/ethiopia-russian-energy-companies-delegation-led-by-foreign-minister/5575/

38 - addisfortune.com/Vol_10_No_568_Archive/Economic%20Gain%20Brings%20Russia,%20Ethiopia%20Back%20Together.htm

Map 4. Russia’s Bilateral Investment Treaties in African Countries and Volumes of Foreign Direct Investments (FDIs) (in US\$ million)*

*Prepared by the author based on data from UNCTAD.

COUNTRY

SECTORS

When Companies

CON - construction

ENE - energy

GAS - gas

MET - metallurgy

MIN - mining

NE - nuclear energy

OIL - oil

RAI - railways

STE - steel making

Countries that are parties to BITs with Russia

ALGERIA

OIL GAS CON

Gazprom • Uralvagonzavod

LIBYA

GAS ENE OIL CON RAI

Gazprom • Gazprom Neft • Tatneft • RZhD (Russian Railways)

EGYPT

OIL GAS NE

Lukoil • Rosatom

ETHIOPIA

OIL

GPB Global

NIGERIA

OIL ENE GAS

RusAI • Gazprom

EQUATORIAL GUINEA

OIL

Zarubezhneft

NAMIBIA

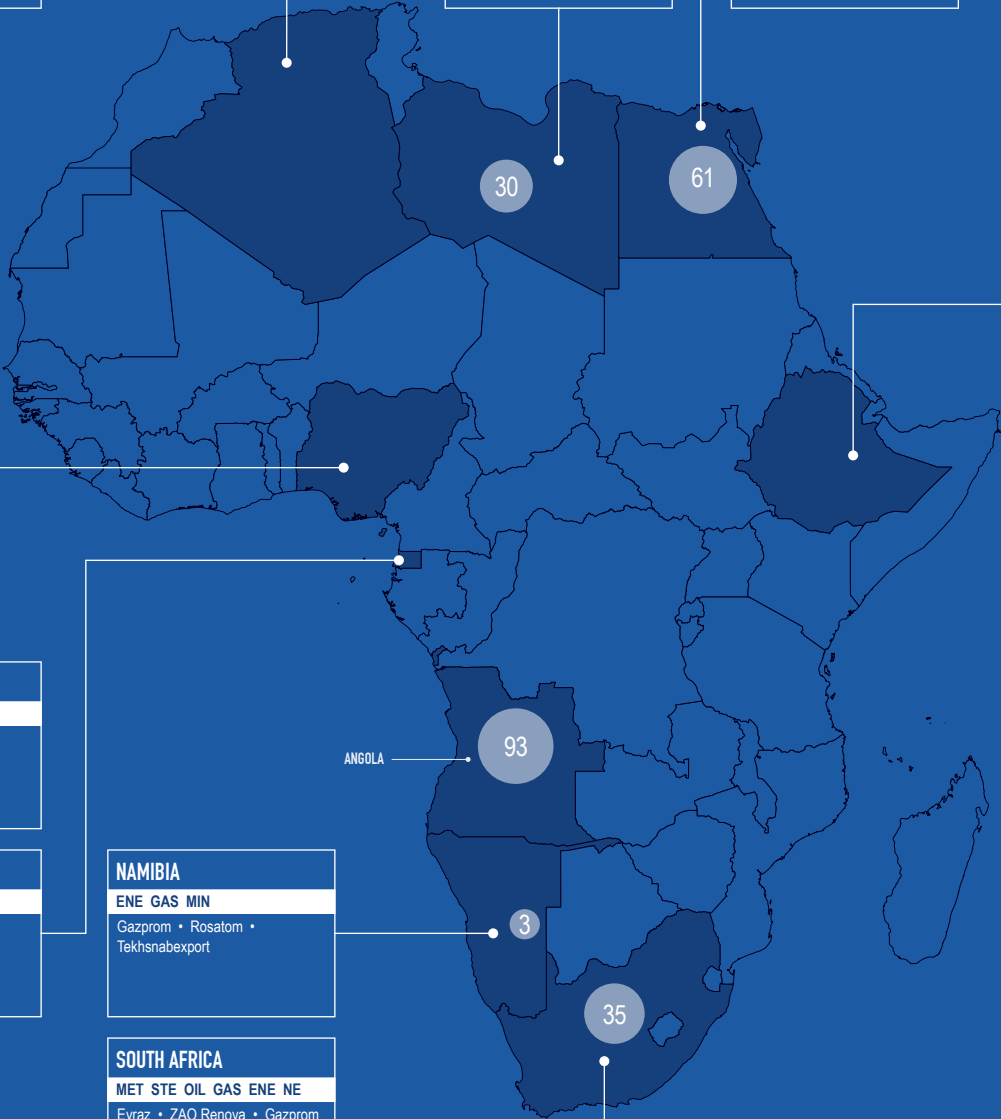
ENE GAS MIN

Gazprom • Rosatom • Tekhnabexport

SOUTH AFRICA

MET STE OIL GAS ENE NE

Evraz • ZAO Renova • Gazprom • RAO UES • Tekhnabexport



BRAZIL

Brazil is one of the main recipients of foreign investments and also a major investor in its own region, Latin America. Over the last two decades, Brazilian multinational corporations have experienced an intense process of internationalization to other continents and regions, such as Africa and Asia. Brazilian direct investments abroad hit the mark of US\$ 295.4 billion in 2013 (BCB, 2013). The country has a total of 14 Bilateral Investment Treaties (BITs) and 22 Agreements International Investment (IIAs)³⁹. Three of these treaties were recently signed with African countries: Angola, Mozambique and Malawi. These countries became Brazil’s partners in the so-called new model of Agreement on Cooperation and Facilitation of Investments (ACFI), signed in 2015. In addition, Egypt is a Mercosur partner in a Free Trade Agreement signed in 2010. These agreements have not become effective yet, as they are pending ratification by the Brazilian Congress.

Table 6. Brazil’s Agreements on Cooperation and Facilitation of Investments (ACFI) in Africa

COUNTRY	SIGNED IN	IN FORCE SINCE
ANGOLA	2015	-
MALAWI	2015	-
MOZAMBIQUE	2015	-

Source: Prepared by the author based on data from UNCTAD.

The BITs signed by Brazil in the 1990s were not ratified by Congress because they were based on the traditional BIT model, which contains clauses that violate the Constitution and the sovereign right of the state to implement public policies in its own territory⁴⁰. Nevertheless, Brazil continued

39 - investmentpolicyhub.unctad.org/IIA/CountryOtherIias/27#iiaInnerMenu

40 - The Brazilian legislature developed the understanding that these agreements favored foreign investors at the expense of domestic ones by, for example, allowing them to appeal directly to an international court of arbitration without resorting first to domestic mechanisms. They limit the regulatory autonomy of the states, as they allow foreign investors to challenge public policies and to file claims for “indirect expropriation” and frustration of “legitimate profit expectations,” which are seen as “measures equivalent to expropriation” (Godinho & Cozendei, 2015).

to pass national laws to guarantee foreign investments⁴¹. With the increasing international expansion of Brazilian companies, the country changed its position in relation to the international investment regime and is now making an effort to protect and promote its own companies abroad. This change came about after an extensive consultation with the private sector, which resulted in the development of the new agreement model (Morosini & Ratton, 2015). It is notorious that this new model was born precisely within the GTEX-Africa, the Technical Group for Strategic Studies on Foreign Trade with Africa, linked to Brazil's Foreign Trade Chamber (CAMEX) (Ibid.).

Some of the clauses included in ACFIs are similar to those of traditional BITs and are in tune with the rules set by the World Trade Organization (WTO), such as those providing for national treatment for foreign investors and for the most-favored-nation principle⁴². Similarly to traditional BITs, the Brazilian agreements ensure protection to all investments made before and after their ratification. With regard to the definition of investments and investors, the ACFI with Angola provides that such definitions must be in accordance with domestic laws, while the ACFI with Mozambique contemplates investments in production and services. Intellectual property is addressed within the framework of the WTO. The agreements ensure a free flow of capital, except when litigation is initiated or there is a crisis in the balance of payments, according to IMF rules. Expropriation and nationalization are permitted for public purposes, on a non-discriminatory basis and against compensation. However, unlike traditional BITs, the ACFIs don't provide for "indirect expropriation" (which may involve public policies in a given area) or for the notion of the "legitimate expectations" of a company, which according to Arroyo and Guiotto (2015) refer to profits not yet realized.

There are other significant differences, the first of which concerns the institutional governance mechanism that was created to coordinate and implement the agreements. It is a mechanism made up of a Joint Committee, which is a "steering body" made up of representatives of the

41 - Arroyo & Ghiotto (2015) clarify that, in 1995, the Brazilian Congress passed a constitutional amendment that eliminated any kind of discrimination against foreign investors, which would be equivalent to WTO clauses related to national treatment and fair and equitable treatment.

42 - ACFIs exclude the most favored nation principle and privileges granted for a customs union, free trade zone and treaties to avoid double taxation.

governments of both countries in charge of discussing, monitoring and coordinating the expansion of investments. Its “executive body” will act as an ombudsman composed of focal points of each country (CAMEX in Brazil). The executive body will follow the Committee’s guidelines and will actually implement the agreement by exchanging information, by working with the actors of the other party and by preventing or facilitating the resolution of disputes. It is worth noting that the texts of the agreements claim that they promote the participation of the private sector in the process. Therefore, ACFIs provide for a procedure intended to prevent disputes and mediate conflicts. In the case of nationalization, expropriation and investment losses, the focal points negotiate restitution and compensation in consultation with the private sector and other stakeholders, while final decisions are made by the Joint Committee. If a dispute cannot be settled between the parties themselves, the case is referred for international arbitration between the two states involved. A court is then defined for this purpose on an ad hoc basis, since Brazil is not a member of the ICSID. In this regard, ACFIs are different in relation to the most sensitive element of traditional BITs, namely, the investor-state clause. In dealing with conflicts involving Brazilian multinationals in African countries, it is up to the Brazilian state – and not to the company that caused the problem – to negotiate a solution with the host State. While on the one hand this can be seen as a positive step toward eliminating the possibility of a private investor gaining legal power against a state, on the other the risk of companies not being held accountable is worrying, since the Brazilian state is the one that will have to bear the political and economic burden of the dispute. The interests of Brazilian multinationals abroad end up being represented by the Brazilian government as “national interest” and the burden of disputes and conflicts between these multinationals and the host state also end up being placed on the shoulders of the Brazilian state.

Another major difference is that ACFIs include corporate social responsibility clauses related to the environment, human rights and labor⁴³. These agreements stipulate that investors should make their “best efforts” to abide by voluntary principles and standards of business conduct. However, they don’t include binding clauses to hold companies accountable for human rights violations and for failure to comply with labor and environmental standards. In this regard, Brazil has

43 - We emphasize that this is a recent trend in new BITs, such as the treaties elaborated by Canada. See: UNCTAD. Recent trends in IIAs and ISDS. IAA Issue Note, No. 1, February 2015, p. 4, table 1.

not made real progress in relation to existing voluntary codes of conduct, which have been found to be insufficient to deal with crimes committed by global corporations. Its intention seems to be that of “cleaning up its image” and of distancing itself from ongoing conflicts in Mozambique and Angola.

This is without any doubt one of the reasons why the first agreements were signed with African countries. Brazilian trade relations on the continent grew significantly since the Lula administration came to office and decided to give priority to South-South relations. According to UNCTAD, Brazilian investments in Africa totaled approximately US\$ 1.1 billion in 2012, but this figure may be underestimated⁴⁴. Between 2002 and 2012, trade between Brazil and Africa increased six-fold, from US\$ 4.9 to US\$ 26.5 billion. The BNDES is the main source of funding for this trade, as the bank has made US\$ 2.9 billion available for Brazilian investments in Africa since 2007 (BNDES, 2013). The bank also opened an office in Johannesburg to enhance this support. The increased presence of Brazilian companies in Africa has been accompanied by “development cooperation” in agriculture, education and health. While Angola is the main recipient of investments, Mozambique is the main recipient of cooperation projects. According to the text of the ACFI itself, “actual or potential Brazilian investments in Mozambique exceed the amount of US\$ 9.5 billion. The main projects being implemented in Mozambique are associated with mining, energy and construction. There is also major potential for increasing Brazilian investments in agriculture in the country.”⁴⁵

Furthermore, “Brazil’s corporate presence in Angola is very diverse, as Brazilian companies are active in sectors such as cosmetics, construction, retail networks, information technology and education. Investment of Angolan capital in Brazil, which is still incipient, is beginning to multiply”⁴⁶. Finally, the ACFI with Malawi is related to Vale’s investments in Mozambique, which need to

44 - Data extracted from UNCTAD’s database. (unctad.org/Sections/dite_fdostat/docs/webdiaeia2014d3_BRA.xls), prepared based on data disseminated by the Brazilian Central Bank between 2001 e 2012. Data related to major countries such as Mozambique and South Africa has not been disseminated, meaning that it may be underestimated and outdated.

45 - www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8511:acordo-brasil-mocambique-de-cooperacao-e-facilitacao-de-investimentos-acfi-maputo-30-de-marco-de-2015&catid=42&Itemid=280&lang=pt-BR.

46 - www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8520:acordo-brasil-angola-de-cooperacao-e-facilitacao-de-investimentos-acfi-luanda-1-de-abril-de-2015&catid=42&lang=pt-BR&Itemid=280.

cross the country's border to get to the Nacala port. In the words of the Foreign Ministry, "Brazilian companies are taking part in very important cross-border infrastructure projects in Malawi and Mozambique. The Nacala Development Corridor project involves the construction of a railway line linking the Moatize Coal Mine to the Nacala Bay, where a seaport will be built [...]. The total amount of investments in logistics is estimated at US\$ 4.4 billion."⁴⁷

The mining company Vale began to operate in Mozambique in 2004 in the Tete province, where it exploits and exports coal. Today, the company is taking part in a project to expand the infrastructure of the Nacala Corridor, which includes building a railway and a port to transport coal through the north region of Mozambique. Companies such as Odebrecht, OAS and Andrade Gutierrez were involved in a project designed to expand the logistics infrastructure in the area. Conflicts brought about by the activities of Vale in Mozambique have been widely covered in articles, reports and documents produced by non-governmental organizations and the media in recent years⁴⁸. These conflicts were caused by the removal and division of families of small farmers that occupied the area of the Moatize mine, which were resettled in areas not suitable for agriculture with little access to water and markets and unsafe housing conditions. These communities staged protests and blocked the railroad and entrance to the mine⁴⁹. With regard to workers, the wages and treatment provided to Brazilians and nationals are different, security systems and equipment are lacking in the workplace, and various accidents have been reported that resulted in several strikes (Garcia, Kato & Fontes, 2013).

Investments in infrastructure, which cut Malawi, are also partially intended to support a soybean production project called ProSavana, which is a cooperation project between Brazil, Japan and Mozambique that has also given rise to heated discussions and criticism from local farmers against

47 - www.itamaraty.gov.br/index.php?option=com_content&view=article&id=10333:acordo-brasil-malaui-de-cooperacao-e-facilitacao-de-investimentos-acfi&catid=42&lang=pt-BR&Itemid=280.

48 - Some examples include Mosca, J.; Selemane, T. Eldorado Tete: os megaprojetos de mineração. Centro de Integridade Pública (CIP), Maputo, 2011; Articulação Internacional dos Atingidos pela Vale. Relatório de Insustentabilidade da Vale 2012. atingidospelavale.files.wordpress.com/2012/06/relatorio-insustentabilidade-vale-2012-final1.pdf; Human Rights Watch. What is a house without food? Mozambique's coal mining boom and resettlements, 2013. www.hrw.org/sites/default/files/reports/mozambique0513_Upload_0.pdf

49 - adecru.wordpress.com/2013/04/17/atingidos-pela-vale-bloqueiam-e-forcam-a-paralisacao-da-mina-em-mocambique/;

the taking of their land by foreign actors and multinational companies (Schlesinger 2013; Justiça Ambiental & UNAC, 2011). Recently, social movements in the three countries launched a campaign called “Say No to the ProSavana Project.”⁵⁰ These two large projects involving Brazilian investment and cooperation (both of which have been accused of violating human rights) were the initial drivers of the ACFIs between Brazil and Mozambique and between Brazil and Malawi.

Petrobras and Odebrecht have been investing in Angola since the 1980s. More recently, Brazilian companies such as Vale, Andrade Gutierrez, Camargo Correa, Queiroz Galvao and other companies operating in the transportation sector (Marcopolo) and in the banking industry (Banco do Brasil and Bradesco) began to invest in the country, as well as smaller service companies focused on domestic and regional markets (such as Bobs, Ellus, Werner Cabeleireiros and others). Brazil’s influence in Angola is mainly led by Odebrecht. The company began to operate in the country in 1984 in a project to build the Capanda hydroelectric power plant in the Malanje province. The inputs for building the dam came almost exclusively from Brazil. Odebrecht has expanded its activities in Angola beyond the construction sector and it is now active in sectors such as sanitation, oil and gas extraction, agriculture (Capanda agroindustrial hub), diamond mining and even supermarket and garbage collection management. It is estimated that approximately 49% of BNDES funding to Angola have been allocated to projects carried out by Odebrecht. Many have reported lack of transparency in bids for public works and the low quality of services provided by the company (Garcia, Kato & Fontes, 2013), which was recently accused of adopting labor practices analogous to slavery and human trafficking at the Biocom plant in Malanje.⁵¹

50 - www.unac.org.mz/index.php/artigos/nacional/94-campanha-nao-ao-prosavana-mocambicanos-pedem-solidariedade-regional

51 - www.bbc.com/portuguese/noticias/2014/06/140616_mp_denuncia_odebrecht_jf

Map 5. Brazil's Agreement on Cooperation and Facilitation of Investments (ACFI) in African countries and volume of Foreign Direct Investment (FDIs) (in US\$ million)*

*Prepared by the author based on UNCTAD.

COUNTRY

SECTORS

Other Companies

ENE - energy

CON - construction

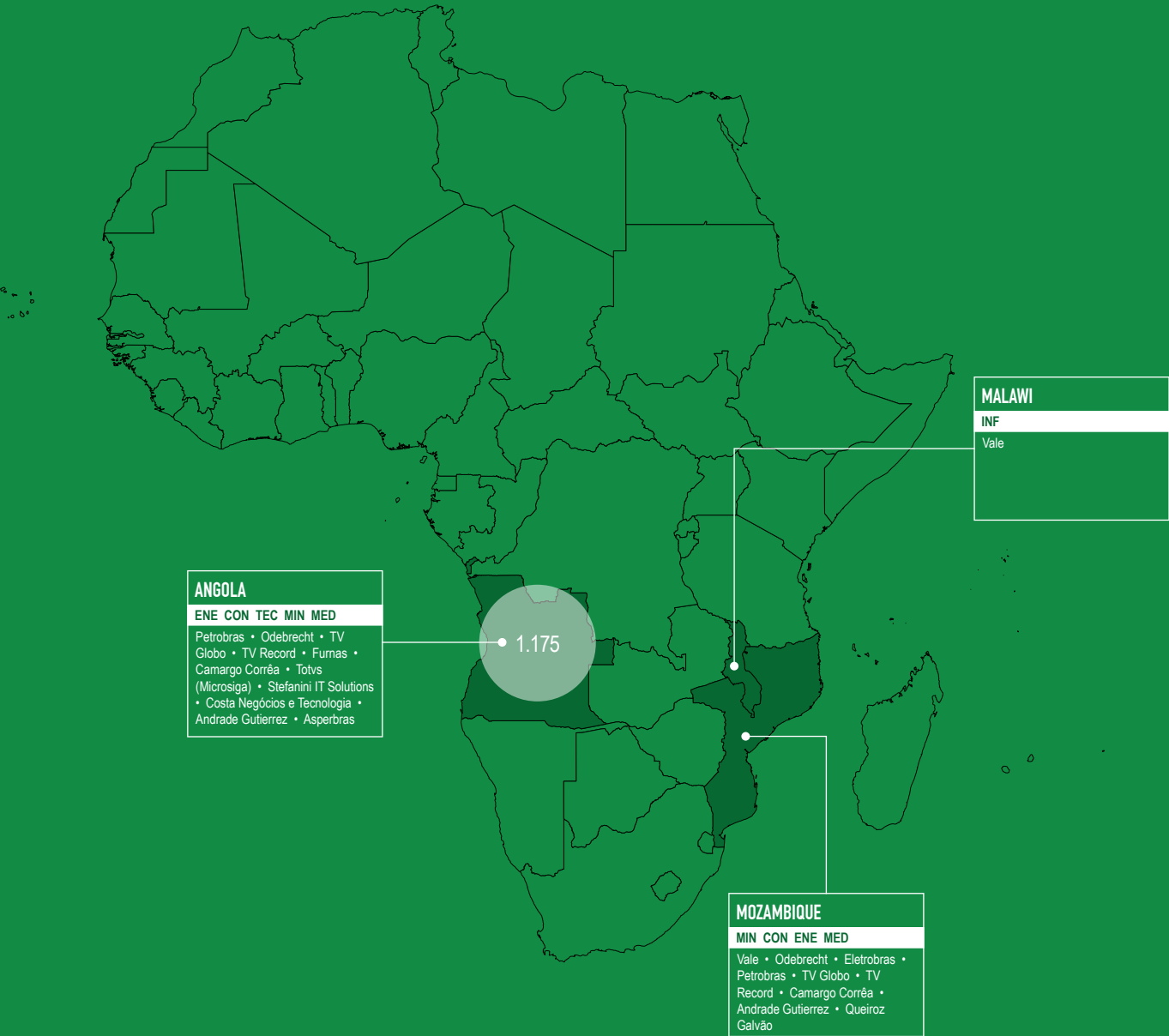
INF - infrastructure

MED - media

MIN - mining

TEC - technology

Countries that are parties to the ACFI with Brazil



INTERNATIONAL ARBITRATION

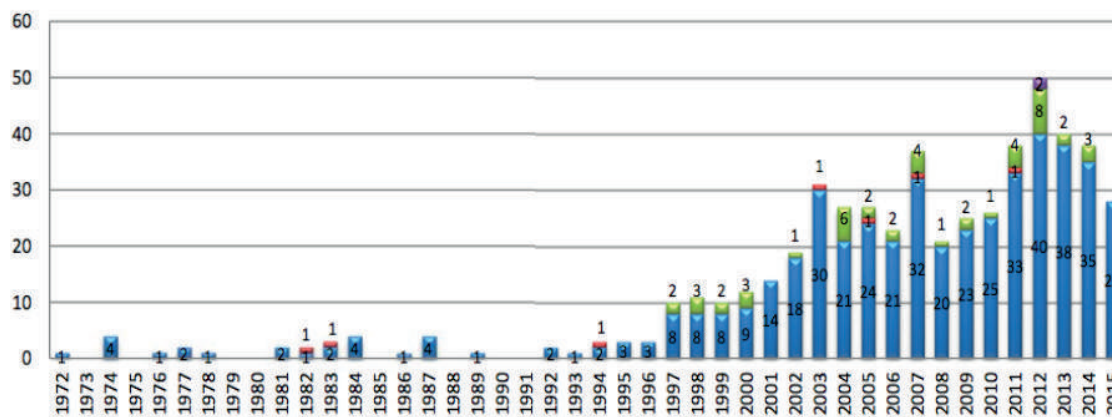
The International Center for Settlement of Investment Disputes (ICSID) is the main investment dispute settlement body in the world. Created in 1965 by the Washington Convention⁵², the ICSID Convention entered into force in 1966 as a multilateral treaty drawn up by the Executive Board of the World Bank with the aim of ensuring and promoting international investments. The applicability of the convention to investment protection treaties depends on countries becoming contracting member states and ratifying it. To date, approximately 143 countries have done so (Guiotto, 2010).

Among BRICS countries, only China has been a contracting member state of the ICSID since 1993, while Russia has been a signatory to the Convention since 1992 but has not ratified it yet. Nonetheless, a non-member country may indicate the ICSID as an arbitration forum in their treaties through the complementary additional facility mechanism, as India and South Africa have done (Galina, 2015). The vast majority of cases brought before the ICSID consist in disputes between investors and host states. Up till 2015, more than 60% of all cases brought before the court were related to Bilateral Investment Treaties that provided for investor-state arbitration⁵³. Figure 3 below shows the evolution of cases brought before the ICSID involving contracting member states through the complementary mechanism.

52 - According to Godinho & Cozendei (2015), this period is characterized by decolonization and struggles for independence. Western investors claimed lack of trust in the impartiality of newly-established legal systems and requested the establishment of an international arbitration process supposedly be free of political interference.

53 - icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf

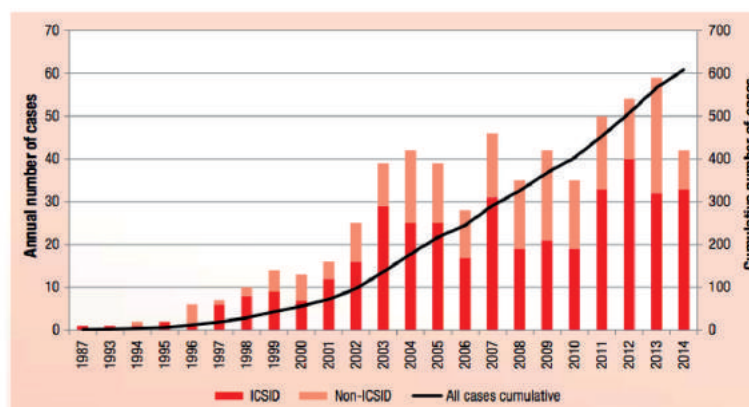
Figure 3. Number of cases brought before the ICSID between 1972 and 2015



Source: ICSID fact sheet

According to UNCTAD (2015), 608 arbitration cases were brought against states by investors, involving 101 countries. Developing countries continue to account for the vast majority of defendants in these disputes (about 70% of all cases in average), but 2014 saw a relative increase in cases against developed countries. In addition to BITs, most of these cases are based on the North American Free Trade Agreement (NAFTA) and on the Energy Charter Treaty (ECT) (Ibid.). Most cases are brought before the ICSID, as shown in Figure 4 below.

Figure 4. Evolution of investor-state arbitrations processed by the ICSID and other forums, 1987-2014



Source: UNCTAD. Recent trends in IIAS and ISDS. IIA Issue Notes, No. 1, February 2015

According to Guiotto (2010), the ICSID is presented as the “international guardian” of investments and is at the heart of thousands of BITs and FTAs entered into around the world. By transferring important decisions from domestic to supranational courts, distant from democratic control, resorting to the ICSID represents a de facto privatization of justice (Ibid.). Since the ICSID Convention entered into force, transnational corporations became subjects of international law, supported by a set of legally binding and effective rules, constituting a new *Lex Mercatoria* (Hernandez, 2009).

The possibility of international litigation poses an actual threat to states, which as a result often end up giving up or softening bills on designed to protect public health or the environment (Olivet, 2013). This led countries like Bolivia and Venezuela to initiate a process of withdrawal from the ICSID Convention. Social movements in Latin America launched a “Say No to the ICSID” campaign⁵⁴, accusing arbitral tribunals established by the ICSID of lacking impartiality, of being biased in favor of investors, of having a representative of the World Bank as a member, of adopting non-democratic decision-making processes (their decisions are mostly made behind closed doors) and of charging heavy administrative and arbitrator fees (Valdomir, 2013).

In addition to the ICSID, other relevant forums include the Stockholm Chamber of Commerce and the Permanent Court of Arbitration. The Arbitration Institute of the Stockholm Chamber of Commerce was established in 1917 as an independent body, despite being linked to the Chamber. It is made up of a board and a secretariat that provide services related to dispute resolution to both Swedish and international parties. The Institute was recognized in the 1970s by the United States and the Soviet Union as a neutral center for settling disputes. In addition to these countries, China also recognized institute in the same decade⁵⁵. The Permanent Court of Arbitration is in turn an intergovernmental organization with 117 member states established in 1899 to facilitate arbitration procedures and other dispute-related proceedings between states and has evolved into a multifaceted public-private arbitration forum. Today, the court settles disputes between various states, government entities, intergovernmental organizations and private entities⁵⁶.

54 - www.enlazandoalternativas.org/IMG/pdf/Campana_ICSID-TBI_s.pdf

55 - www.sccinstitute.com/about-the-scc/

56 - pca-cpa.org/en/home/

Finally, the procedural arbitration rules of UNCITRAL for setting up ad hoc tribunals constitute another important arbitration mechanism. UNCITRAL is the United Nations Commission on International Trade Law established in 1966 for the purpose of developing an international framework to assist in the harmonization of international trade rules. It developed a model of rules for drawing up and promoting the use of legislative instruments in sub-areas of international trade law⁵⁷. The texts prepared by the Commission are used as solutions applicable to different legal traditions and different countries. The Commission is made up of approximately 60 members. The UNCITRAL secretariat established a transparency record recently to be used as a repository of information and documents on investor-state arbitration (UNCTAD, 2015). UNCITRAL rules on transparency are an integral part of its arbitration rules and apply to investor-State arbitrations arising from treaties entered into after April 2014 (ibid.).

57 - These sub- areas are: international trade arbitration, international contract practices, transportation, insurance, insolvency, international payments, intellectual property, electronic commerce, movable property collateral and the purchase and sale of goods. See: www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf

The cashew case in Mozambique

The ICSID is a member of the World Bank Group, a major international financial institution that has been involved in drawing up and implementing economic policies in African countries for decades. The cashew industry in **Mozambique** provides an example of the disastrous outcomes of the interventions of the group in the country. Cashew is a strategic crop for the Mozambican economy and it plays a key role in its trade with **India**. In the 1970s, the African country was the world's largest producer of cashew nuts, making it possible to supply the local industry without harming exports. This raw material was a key input for the Indian cashew-processing sector. After Mozambique declared its independence, it created the state-owned company Caju de Moçambique, which began to impose limits on exports of raw cashew and to regulate its prices. Industry began to experience difficulties and inefficiencies, which led the World Bank to press for privatization of the sector and for the resumption of raw cashew nut exports in the 1990s. On the one hand, Mozambican cashew nuts were of better quality and cheaper; on the other, Indian agricultural production was insufficient to meet the needs of industry and industrial production costs in India were so low that they offset import costs. This led to the closing down of the state-owned Caju de Moçambique company and, consequently, of all related industrial facilities in the country. The effects of liberalization were disastrous for workers: thousands of them lost their jobs. The union movement launched a national and international campaign in favor of industrialization, rekindling the debate on the development model imposed by international financial institutions and giving visibility to other problems such as child labor in the Indian cashew industry. One of the campaign spokesperson, the journalist Carlos Cardoso, was assassinated in 2000. In 2013, India's cashew imports from Mozambique totaled US\$ 12.3 million.

The BRICS and international arbitration

Brazil is not a contracting or signatory party to the ICSID Convention and its new ACFI model does not contemplate any specific international forum or UNCITRAL rules. Except for Brazil, the other BRICS countries mention UNCITRAL rules in their treaties and are involved in international arbitration claims brought by investors under investment protection treaties. Annex 1 of this paper presents all registered cases, country by country. Only some of them involve BITs signed with African countries.

Backed by the BIT between India and Mauritius, India is a party in three arbitration cases being heard by international tribunals. The first one was brought by Bechtel Enterprises Holdings, Inc. and GE Structured Finance (FSGS) in 2003. These two U.S. companies used their African branches to file an international arbitration suit against the Indian government due to an alleged reversal in the local government's energy policy between the launch of the Dabhol power plant project, which received investments from the claimants, and its planned completion, as a result of a political change in the government⁵⁸. In the second case, initiated in 2012, the Indian company Devas Multimedia Private Limited used its subsidiaries in Mauritius to enter into a dispute with the Indian state in the Permanent Court of Arbitration. The case was based on a claim that the Indian government had called off an agreement to raise funds for the S-Band of the electromagnetic spectrum for the company's subsidiary to launch two satellites to provide multimedia services to users in India⁵⁹. Finally, the third case involves the Dubai company Khaitan Holdings Mauritius Limited, which filed an international arbitration suit against India based on a claim that the Indian Supreme Court had decided to cancel a telecommunications license held by a company that received investments from Khaitan and to hold a public auction for granting the license to a new bidder⁶⁰. Only the first case was completed, the others are still pending.

Backed by the BIT between South Africa and Mozambique, South African entrepreneur Oded

58 - investmentpolicyhub.unctad.org/ISDS/Details/104

59 - www.pcacases.com/web/view/46 and investmentpolicyhub.unctad.org/ISDS/Details/484

60 - investmentpolicyhub.unctad.org/ISDS/Details/553

Besserglik resorted to ICSID arbitration against Mozambique based on a claim of expropriation of fishing quotas. Together with other entrepreneurs, Besserglik had invested in shrimp fishing and trading operations in Mozambique. According to data provided by the ICSID, the arbitration suit was filed in July 2014 but is still pending, even though a tribunal has been already instituted to judge it⁶¹.

Finally, backed by China's BIT with Tanzania, the Chinese bank Standard Chartered Bank Hong Kong Limited brought an arbitration claim before the ICSID against the African government. The case boils down to a chain reaction of a dispute between two Tanzanian companies, IPTL and Tanesco, initially referred to the ICSID. IPTL is a large private electricity company hired by the Tanzanian government that is currently involved in a corruption case. Tanesco is the state-owned company in charge of electricity distribution throughout the country. The Chinese bank acted as an insurer of IPTL and as it was gradually harmed by court decisions in favor of Tanesco it decided to take the case to the ICSID. As the High Court of Tanzania ruled in favor of Tanesco, Standard Bank appealed to the ICSID against the Republic of Tanzania. This is a highly complex case that involves two arbitration claims against Tanzania currently, the first of which was filed in 2008 and the second one in September 2015⁶².

61 - [icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB\(AF\)/14/2&tab=PRD](https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB(AF)/14/2&tab=PRD)

62 - icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/10/20&tab=PRD

CONCLUSION

This study was intended to provide an overview of investment agreements between BRICS countries and Africa. We sought to describe the main features of investment treaties between these countries and discuss the main investments and companies operating in Africa. We showed how the operations of BRICS multinationals in Africa are conflict-ridden, especially in the extractive and infrastructure industries. We can conclude that most BITs signed by BRICS countries are similar to those involving traditional powers. In particular, China, which is a contracting member state of the ICSID Convention, has been playing an active role in the current global investment regime. Therefore, more than an alternative to the existing world order, the BRICS reinforce the *Lex Mercatoria*, guaranteeing the rights of large multinational conglomerates to the detriment of societies, workers and nation-states.

At the same time, Brazil has made an effort recently to innovate this regime by drawing up a new model agreement. The new Brazilian model was designed to promote and protect Brazilian multinationals abroad, mainly in weaker economies, such as in those of Africa countries, where conflicts have been recorded with Brazilian companies already. From this perspective, it can be said that the “innovation” proposed by Brazil is limited, as it continues to favor the rights of companies over those of local communities, small farmers and workers.

It should be noted that both the new Brazilian model and the reforms under way in India and South Africa have been weakening investor-state arbitration or making it impossible. However, this change may paradoxically lead to additional protection for the companies themselves if they cannot be held accountable for problems and conflicts brought about by their operations. The political and economic burden of negotiations lies with states, which are also characterized by large asymmetries in power and this situation ends up reproducing the inequalities prevailing in the international system.

China's current economic slowdown and the significant drop in the international prices of agricultural commodities, ores and oil constitute major challenges for the BRICS and African economies. In recent decades, African countries, like Brazil and South Africa, have been promoting a growth model based on the exploitation of natural resources and exports to foreign markets that is highly dependent on the Chinese market, one of the main consumers of commodities (specially iron ore, coal and soybeans) in the world. In addition, China, Russia and India are countries that rely on international markets to have access to land and other important natural resources for their economies.

As emerging countries, at times the BRICS cooperate with other to adopt common positions in decision-making bodies and request reforms in the international system, while at other times they compete for natural resources, market share and investment. Ambiguity is a strong feature of these countries, which combine efforts to promote greater autonomy and sovereignty with imperialistic and competition-oriented stances to have a "place in the sun" in the realm of capitalist accumulation.

In relation to Africa, China's aid package and the presence of "new donors" on the continent have changed the overall framework of international development cooperation, providing African countries with a wider range of international aid providers and making it possible for them to reduce their dependence on the omnipresent Western powers and on the World Bank. In addition to their cooperation, the lending and financing policy of the BRICS have become known for not imposing political conditionalities (such as human-rights related conditionalities) and macroeconomic and fiscal conditionalities (such as privatization) on African countries. This aspect distinguishes the BRICS from Western powers and multilateral financial institutions.

However, in competing for resources and markets, the BRICS countries act in ways that are similar to those of traditional powers and often align with them around cooperation policies and investments. The BRICS have been intervening in peripheral economies alongside Western countries in the "new scramble for Africa" for natural and energy-related resources, cheap labor and consumer markets for their products in a new arena of regional and global geopolitical competition. Thus, the BRICS have been playing an increasingly important role in the global value

chain as they expand the operations of their multinational corporations. Africa has become once again a territory of disputes that have been renewed with the entry of new players from the Global South (and East).

In this context, the BRICS have recently agreed on another commitment to launch the New Development Bank. Given its main characteristics and interests, the establishment of the Bank is intended to consolidate the role of the BRICS in fostering large infrastructure projects, a fundamental pillar for sustaining the current development model of these countries, which is increasingly linked to international markets. These investments have, in many cases, become “new paths for the plundering of resources,” as they establish large logistics hubs to connect territories and natural resources to foreign markets. Thus, the development model based on the exploitation of natural resources and on building the required logistics infrastructure to market them is still based on corporate interests supported by governments without the actual participation and involvement of society. The environmental, social and economic consequences of this model have proved devastating for local populations, workers and small farmers. The Nacala Corridor in Mozambique provides a good example of this fact.

The investments to be made by the New Development Bank will certainly play a relevant role in Africa. Based on our mapping and monitoring of BRICS investments on the continent, as described here, we have consistent elements to conclude that the provision of credit will often be conditioned on exports of mineral and energy resources, mainly oil and minerals. In this context, special mention should be made of the emergence of new forms of **South-South debt** as collateral for the financing of commodity exports. This form of debt can reinforce a productive matrix based on exports of primary goods and therefore annul or weaken opportunities for developing a more diversified production framework, with implications for future generations. Given the volatility of commodity prices, this means that African economies have become even more vulnerable.

One of the challenges faced by local communities, small farmers and social movements is that of coordinating struggles and resistance against the activities of BRICS transnationals in their territories. The International Alliance of Peoples Affected by Vale provides a very good example of this fact. However, developing alliances between social organizations from the BRICS is a

challenge. The idea of a **BRICS from below** is far from the reality faced by social movements in each country. It is worth mentioning that, by contrast, that the entrepreneurs involved are members of the BRICS Business Forum and of other alliances with African governments. At the same time, similar experiences of confrontation and resistance have been recorded in each BRICS and African country, such as those related to mega-events (the World Cup and the Olympics held in Brazil, Africa, China and Russia) and to socio-environmental conflicts around oil, gas, mining and infrastructure megaprojects. In other words, international solidarity and closer relations between the societies of BRICS and African countries will only be ensured through confrontation as these countries continue to promote a predatory development model that destroys the environment and the ways of living and livelihood of their populations.

While on the one hand the number of bilateral investment treaties and free trade agreements increased exponentially during the 1990s, when a “new world order” was proposed based on trade and investment liberalization, the BRICS Group was born in the century XXI with renewed expectations of changes in the world order through greater participation of the Global South. However, what we have witnessed so far is the consolidation of a new/old unequal world order. We must therefore ask ourselves what new world order we actually need. Are corporations actual subjects of development? The challenge of building a **BRICS from below** should not hide the need for building an actual new world order with people and communities, rather than corporations, at its center.

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Annex 1. Arbitration cases involving BRICS countries⁶³

Russia

CLAIMANT(S)	RESPONDENT	REGISTERED IN	VENUE	STATUS
Mobile TeleSystems OJSC (Russian)	Uzbekistan	2012	ICSID	Completed
Mobile TeleSystems OJSC (Russian)	Turkmenistan	2011	ICSID	Completed
Aeroport Belbek LLC and Mr Igor Valerievich Kolomoisky (Ukrainian)	Russia	2015	Permanent Court of Arbitration	Pending
Everest Estate LLC et al (Ukrainian)	Russia	2015	Permanent Court of Arbitration	Pending
Privatbank and Finance Company Finilion LLC (Ukrainian)	Russia	2015	Permanent Court of Arbitration	Pending
Stabil LLC et al (Ukrainian)	Russia	2015	Permanent Court of Arbitration	Pending
PJSC Ukmafta (Ukrainian)	Russia	2015	Permanent Court of Arbitration	Pending
Financial Performance Holdings BV (FPH) (Dutch)	Russia	2014	-	Pending
Luxtona (Cypriot)	Russia	2014	-	Pending
Yukos Capital SARL (Luxemburg)	Russia	2013	-	Pending
Sana Consulting & Management GmbH (German)	Russia	2012	Ad Hoc Tribunal	Decided in favor of the State or concluded
Cesare Galdabini SpA (Italian)	Russia	2009		Decided in favor of the State or concluded
Valle Esina S.p.A. (Italian)	Russia	2009		Decided in favor of the investor or completed
Renta 4 S.V.S.A. and Others (Spanish)	Russia	2007	Stockholm Chamber of Commerce	Decided in favor of the investor or completed
Hulley Enterprises Ltd. (Cypriot)	Russia	2005	Permanent Court of Arbitration	Decided in favor of the investor or completed

63 - Prepared by the author based on data found in the following websites: icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx; investmentpolicyhub.unctad.org/ISDS

CLAIMANT(S)	RESPONDENT	REGISTERED IN	VENUE	STATUS
RosInvestCo UK Ltd. (English)	Russia	2005	Stockholm Chamber of Commerce	Decided in favor of the investor or completed
Veteran Petroleum Limited (Cypriot)	Russia	2005	Permanent Court of Arbitration	Decided in favor of the investor or completed
Yukos Universal Limited (Isle of Man) (English)	Russia	2005	Permanent Court of Arbitration	Decided in favor of the investor or completed
Vladimir Berschader and Michael Berschader (Belgium)	Russia	2004	Stockholm Chamber of Commerce	Decided in favor of the State or concluded
UK Bank (English)	Russia	2000	Stockholm Chamber of Commerce	Completed
Mr. Franz Sedelmayer (German)	Russia	1996	Stockholm Chamber of Commerce	Decided in favor of the investor
Yuri Bogdanov and Yulia Bogdanova (Russian)	Moldavia	2012	Stockholm Chamber of Commerce	Decided in favor of the state
OAQ Gazprom (Russian)	Lithuania	2012	Permanent Court of Arbitration	Discontinued
Mikhail Nadel and Ithaca Holdings Inc. (Russian and North American)	Kyrgyzstan	2012	-	Discontinued
Tenoch Holdings Limited, Mr. Maxim Naumchenko and Mr. Andrey Poluektov (Russian and Cypriot)	India	2012	Permanent Court of Arbitration	Pending
Yury Bogdanov (Russian)	Moldavia	2009	Stockholm Chamber of Commerce	Decided in favor of the investor
OJSC "Tatneft" (Russian)	Ukraine	2008	Permanent Court of Arbitration	Decided in favor of the investor
Kaliningrad Region (Russian)	Lithuania	2007		Decided in favor of the state
Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company (Russian)	Mongolia	2007		Pending
Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC (Russian)	Moldavia	2005	Stockholm Chamber of Commerce	Decided in favor of the state
Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC (Russian)	Moldavia	2004	Stockholm Chamber of Commerce	Decided in favor of the investor

India

CLAIMANT(S)	RESPONDENT	REGISTERED IN	VENUE	STATUS
Louis Dreyfus Armateurs SAS (French)	India	2014	Permanent Court of Arbitration	Pending
Vodafone International Holdings (Dutch)	India	2014	-	Pending
Deutsche Telekom (German)	India	2013	-	Pending
Khaitan Holdings Mauritius Limited (Mauritius)	India	2013	-	Pending
CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited (Mauritius)	India	2012	Permanent Court of Arbitration	Pending
Tenoch Holdings Limited, Mr. Maxim Naumchenko and Mr. Andrey Poluektov (Russian e Cypriot)	India	2012	Permanent Court of Arbitration	Pending
White Industries Australia Limited (Australian)	India	2010	-	Decided in favor of the investor
ABN Amro N.V. (Dutch)	India	2004	-	Completed
ANZEF Ltd. (British)	India	2004	-	Completed
BNP Paribas (French)	India	2004	-	Completed
Credit Lyonnais S.A. (now Calyon S.A.) (French)	India	2004	-	Completed
Credit Suisse First Boston (Swiss)	India	2004		Completed
Erste Bank Der Oesterreichischen Sparkassen AG (Austrian)	India	2004		Completed
Offshore Power Production C.V., Travamark Two B.V., EFS India-Energy B.V., Enron B.V., and Indian Power Investments B.V. (Dutch)	India	2004	-	Completed
Standard Chartered Bank (British)	India	2004	-	Completed
Bechtel Enterprises Holdings, Inc. and GE Structured Finance (GESF) (Mauritius)	India	2003	-	Completed
Ashok Sancheti (Indian)	Great Britain	2006	-	-
Ashok Sancheti (Indian)	Germany	2000	-	Completed

China

CLAIMANT(S)	RESPONDENT	REGISTERED IN	VENUE	STATUS
Ansung Housing Co., Ltd. (Korean)	People's Republic of China	2014	ICSID	Pending
Ekran Berhad (Malaysia)	People's Republic of China	2011	ICSID	Completed
Ping An Insurance (Grupo) Company of China, Limited (Chinese), Ping An Life Insurance Company of China, Limited (Chinese)	Kingdom of Belgium	2012	ICSID	Decided in favor of the state
Standard Chartered Bank (Hong Kong) Limited (Chinese)	Tanzania Electric Supply Company Limited (Tanzania)	2010	ICSID	Pending
Standard Chartered Bank (Limited) Hong Kong (Chinese)	Republic of Tanzania	2015	ICSID	Pending
Tza Yap Shum (Chinese)	Republic of Peru	2007	ICSID	Decided in favor of the investor
Beijing Urban Construction Group Co. Ltd. (Chinese)	Republic of Yemen	2014	ICSID	Pending
China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. (Chinese)	Mongolia	2010	Permanent Court of Arbitration	Pending

South Africa

CLAIMANT(S)	RESPONDENT	REGISTERED IN	VENUE	STATUS
Daniela Contri (Italian), Franca Contri (Italian), Ida Laura de Carli (Italian), Finstone s.à.r.l. (Luxemburg), Dora Foresti (Italian), Piero Foresti (Italian), Maria Teresa Suardo (Italian), Paola Suardo (Italian)	Republic of South Africa	2007	ICSID	Completed
Oded Besserglik (Sul Africana)	Republic of Mozambique	2014	ICSID	Pending
Piero Foresti, Laura de Carli and others (Italianos e de Luxemburg)	South Africa	2007	ICSID	Suspensio

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