Power and Justice in International Investment Law: China’s Rise and Its Extraterritorial Human Rights Obligations vis-à-vis the African Host State Population

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Abstract

The increasing economic engagement of emerging states such as China raises concerns, especially in Western scholarly work, as to the growing influence and negative impact of China on international law. South-South investment relations are especially being put under heightened scrutiny. In this regard, it has been argued that the rise in economic legalisation efforts, for instance the signing of BITs, would politically alter the balance of power between developed and developing states. The present article intends to take a closer look at the human rights implications of Chinese investment agreements with African states. It, therefore, firstly identifies a lack of justice-based provisions that hinders the systemic integration of human rights law and international investment law. Secondly, it suggests that China’s human rights approach when engaging in investment relations does not necessarily differ from investment approaches of traditional partners since China utilises the underlying power implications by Westernising its investment treaties. Yet, the overall failed integration of justice considerations into international investment law must rather be considered a result of both structural deficiencies and colonial legacy, a legacy that till today hinders essentially the implementation of policy space, human rights and the right to development.
Introduction

The economic rise of the People’s Republic of China (hereafter China) in international law has been studied from various perspectives. According to the 2016 World Investment Report and against a general downward trend in 2015, a limited number of developing economies registered an increase in their outward foreign direct investment (FDI); China’s FDI increased from US$ 123 billion to US$ 128 billion (UNCTAD, 2016). China, thereby, remained the third largest investor worldwide, after the United States (US) and Japan, and became a major investor in other developing states. With regard to Africa, China overtook South Africa in being the largest investor in the region. The rise of Chinese FDI in Africa has been described as a subject of profound curiosity (Kidane and Zhu, 2014). Particularly, emerging economies such as inter alia China or India appear to have an increasing demand for Africa’s natural resources and engaging in extensive South-South investment relations (ECOSOC, 2015).

With such an economic power shifting towards China, the West seems to observe an increasing impact of China on the international normative order (see Fenby, 2014; Jacques, 2009; Shambaugh, 2013). In particular, a growing concern is being voiced in international legal scholarship about China’s negative impact on the international human rights law regime (Ahl, 2015; Subedi, 2015). This Western concern or even “anxiety” revolves around China allegedly engaging in neo-colonial activities, for example, its deployment of numerous state-owned enterprises (SOEs) or the vast investments in infrastructure (see Anthony, 2013; Kidane, 2014) while at the same time playing an increasingly significant role in international law and within international (human rights) institutions (Ahl, 2015). The anxiety is, however, also based on the potential for China, a communist state that is seen as a threat to Western democratic values, to restructure the international legal society (Subedi, 2015).

Till today, China has ratified 25 human rights treaties (Ahl, 2015), while also being a state with the second most international investment agreements in place, namely, 129 bilateral investment treaties (BITs) and 19 other treaties with investment provisions. China’s human rights approach, having signed, yet not ratified the International
Covenant on Civil and Political Rights (ICCPR), differs substantially from those of other major capital-exporting states. China prioritises community rights, the right to development and lastly economic, social and cultural rights (ESC rights); rights whose extraterritorial application have been marginally studied in international legal scholarship and is rather considered an approach de lege ferenda (Langford et al., 2013).

Home state responsibility in a foreign investment scenario could almost exclusively arise in the context of extraterritorial human rights application. While extraterritorial application of civil and political rights of, for example, the ICCPR, the European Convention on Human Rights (ECHR) or the American Convention on Human Rights (ACHR) are commonly accepted (Coomans and Kamminga, 2004; Borelli, 2005; Dennis, 2005; Wilde, 2005; Milanovic, 2011), given the prerequisite of effective control ESC rights appear to fall short of such an extraterritorial dimension. Accordingly, it does not come as a surprise that ambiguity remains with regard to extraterritorial human rights obligations in international investment law: Is China under a duty to safeguard the non-infringement of human rights in case inventors hold the Chinese nationality? Uncertainty arises, firstly, because the degree of sufficient home state control is questionable and secondly, because the rights potentially infringed in a foreign investment situation are typically those of economic, social or cultural quality (Desierto, 2015).

This article, therefore, aims at taking a closer look at the historic and systemic implications of international investment law, a law that was designed to restrict state sovereignty in favour of foreign investments. It argues that power within international investment law hinders the full realization of justice-based rules such as human rights. In particular, power-based investment rules that are inherently asymmetric contribute to the failure of systemic integration of international investment law and human rights law. The study then aims to evaluate the Chinese approach to human rights law, especially within its investment treaty practice with African states, in order to conceptualise the impact of rising powers on the current legitimacy crisis, a crisis that conceptualises in states distrusting the dispute mechanism system, re-evaluating investment treaties and the partial termination
Studies suggest that while China is not desiring to undermine the current human rights system since China indeed works with the system and within the system, it may nevertheless potentially try to (re-) shape the normative order to suit both its political and economic needs (Subedi, 2015). Admittedly, political considerations are to a certain degree inherent to any legislative policy (Abi-Saab, 1962).

This article proposes that in contrast to expressed Western anxieties, today’s concern is not rooted in ideological differences (communism vs. democracy), but rather in a quest for economic supremacy. The failed systemic integration of human rights into international investment law consequently is only partly exacerbated by rising powers and their human rights approach, but rather fundamentally due to underlying power tendencies inherent in international investment law.

**Conceptualising human rights law and international investment law – prospects and limits**

Economic globalisation and its implications currently pose a challenge to the international normative order (Bunn, 2012). Not only is power shifting towards emerging economies, but it also entails the reduction of the role of the state (Aguirre, 2008), either through privatisation or deregulation (ECOSOC, 1999). Likewise, the rise of private power and cross-border state activity infringes the effective realisation of human rights, since the main duty bearers are territorial states. In 1998, the Committee on Economic, Social and Cultural Rights (the Committee) held a general session on “Globalisation and its impact on the enjoyment of economic, social and cultural rights”, in which the Committee observed a risk to especially ESC rights (ECOSOC, 1999). Trade, finance and investment seem to have a negative impact on particularly the right to work, the right to just and favourable working conditions, the right to unionize, and the right to have social security (Bunn, 2000).

**The issue: fragmentation of international law – BITs and pieces**

International law consists of many sub-regimes such as “international human rights law”, “international environmental law” or “international investment law” that
contain highly specialised rules with regard to content of obligations, compliance and enforcement. The problem arises in cases of no clear hierarchy or relationship of those systems. For example, international environmental law entails no provisions with regard to its relationship to international economic law. Nevertheless, in certain situations, for example, a state fulfilling its obligation to undertake an environmental impact assessment (EIA), could thereby possibly violate its obligations owed to the private sector.

Today’s fragmentation of international law is rooted in the emergence of highly specialised and to a degree independent rules, institutions and spheres of legal practice (ILC, 2006). Especially in international investment law the bilateralisation of treaty-law exacerbates the fragmentation of the international society, with the consequence of lawyers having to deal with sub-regimes (ILC, 2006). General international law can only to a certain extent support the implementation of such specialised regimes. The International Law Commission’s Fragmentation Report identifies the problem as one of isolated law-making, disregarding the other sub-regimes. Consequently, conflicts arise, “deviating institutional practices and, possibly, the loss of an overall perspective on the law” (ILC, 2006). Also investment arbitration raises concern in the eyes of international lawyers, since they fear continued inconsistency in international investment decision-making and thus the producing of fragmented and illegitimate international law (Alvarez and Khamsi, 2009).

Numerous investment tribunals have dealt with the relation of host states’ human rights obligations towards its own population and obligations owed to the foreign investor. In the case of Suez v. Argentina concerning a concession agreement for water distribution, the investment tribunal held that Argentina had violated its fair and equitable treatment (FET) obligation by disrupting investors’ “reasonable expectations” to regulatory stability. In its decision on liability, the tribunal saw Argentina under an obligation to satisfy both human rights and investor rights “equally”, yet failed to explain how to reconcile such obligations, for example, by interpreting the investment treaties in light of Argentina’s human rights obligations pursuant to Article 31(3)(c) Vienna Convention on the Law of Treaties (VCLT).
Considering the case law of arbitration tribunals generally, it seems questionable whether the jurisprudence of investment tribunals reconciles those conflicts of obligations in a systemic way, for instance, through a *lex specialis* approach (Viñuales, 2012). Is FET *lex specialis* right to water in the specific case and can a state simultaneously fulfil its investment and human rights obligations in times of economic crisis? Due to a recent wave of progressiveness in international law, a few new generation BITs contain clauses, which obligate host states to respect human rights and environmental law. Recent BITs, for example, the 2015 Burkina Faso-Canada BIT, the China-Republic of Korea Free Trade Agreement (FTA), the Japan-Uruguay BIT and the China-Australia FTA have taken the approach of incorporating clauses protecting, for example, labour rights that help clarify host state and investor obligations (see UNCTAD, 2016). However, it remains unclear whether this really solves the compelling issue between conflicting regimes that are substantially drafted to satisfy a completely different obligation. Those new clauses often remain vague in language and potential human rights infringements continue to not fall under the jurisdiction of investment tribunals. Incorporating rules into investment agreements can, therefore, be considered beneficial only to a certain extent. In conclusion, such an approach does not, however, solve the *systemic* question of conflict of obligations, investors’ obligations and extraterritorial application of human rights.

**Host states’ conflicting obligations**

BITs and similar investment chapters in FTAs limit sovereignty, in particular, home states’ policy space. This means the state is limited in its decision-making powers to regulate in the public interest, which includes economic matters, but also human rights questions (Dolzer, 2006; Kaushal, 2009). The dilemma in international investment law is that up-to-date international law does not pose binding obligations on private entities (Dumberry, 2016; Kinley and Tadaki, 2004), except with regard to gross human rights abuses or norms *jus cogens* (Vázquez, 2005). This lack of international legal accountability is regardless of the influence and leverage that a private investor might have.

With regard to home states, only a few BITs incorporate obligations for the capital-
exporting state (Van Harten, 2016); for instance, the obligation to regulate activity of their nationals abroad or enhancing programs for insurances. Thus, regulatory risk is shared between host and home state in case of economic, environmental or social necessity (Van Harten, 2016).

Several suggestions have been made as to incorporate human rights aspects in the negotiation process of investment agreements. The UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises suggested that “[s]tates in fulfilling their duty to protect against corporate-related human rights abuses avoid unduly and unwittingly constraining their human rights policy freedom when they pursue other policy perspectives” (quoted in Simons, 2012). He thereby places the sole responsibility on the host state, ignoring the fact that BITs allocate power, in particular government decision-making power from the state to both private actors and international tribunals (Davitti, 2012; Jackson, 2003; Kaushal, 2009). In other words, he suggests: “don’t allocate power to third parties”, thereby failing to approach the question of systemic integration, shared responsibilities and the underlying reasons for developing countries to enter into unfavourable BITs (see Kaushal, 2009).

The failed reconciliation of human rights law and international investment law is also due to the uncertainty of BITs’ application and inconsistency of tribunal’s methodology. Furthermore, it is an overall trend in international law, due to globalisation, that we experience a wave of denationalisation, meaning a shift of power towards other entities, for example, multinational enterprises, other than the state (see Bogdandy, 2003; Vázquez, 2005).

The primary human rights responsibility continues to lie with the host state that enters into sovereignty restricting treaties (Vandenhole and Benedek, 2013). Yet, the failure to reconcile human rights and investment law is also a consequence of underlying systemic inadequacy of international investment law itself, a law that is not based on factual reciprocity. BITs are reciprocal in so far as their application between states is concerned, yet with regard to investor-state relations, no such reciprocity can be determined. Despite the underlying systemic errors, international
investment law does, however, not shift sovereignty *per se* to the foreign investor. Host state sovereignty is rather restricted with regard to the exercise of that authority, yet does not entitle the private actor to exercise the state’s authority instead (Kaushal, 2009). In this regard, the sovereign responsibility to protect its citizen from human rights abuses by third parties continues to lie primarily with the host state and perhaps also with the home state.

This article tries to shed some light on power implications of a failed reconciliation of human rights and investment law. It accordingly identifies three key aspects: Firstly, the conflicting investment and human rights obligations of host states as discussed above; secondly, the lack of investor-accountability and thirdly, the ambiguity when it comes to extraterritorial home states’ obligation, especially with regard to ESC rights. In the following, this paper seeks to answer the question of home state responsibility, in particular applying the findings to Sino-African investment relations. This paper, therefore, concentrates on the issue of extraterritorial application of ESC rights, or alternatively, justice-based solutions.

**Power and justice in international investment law**

Power has always been an essential aspect of international law. It has even been argued by “Third World” scholars (see Sornarajah, 2006) that international law was created *in order to* safeguard Western power, *inter alia* through colonialism, thereby both creating and upholding hegemonic structures (Anghie, 1999; Koskenniemi, 2001). According to Antony Anghie, those power implications in the historical evolution of international law continue to shape international law and the conceptualisation of sovereignty (Anghie, 1993; Anghie, 1999), particularly international investment law (Lipson, 1985). At its height of unity, Third World states articulated norms on behalf of peoples that were justice-based in order to counter power-based norms. Such norms are for instance the right to self-determination, the (some might say failed) quest for a New International Economic Order which advocated national control over foreign investments or permanent sovereignty over natural resources (Sornarajah, 2006; Sornarajah, 1997; Sornarajah, 2015).
Specifically, the evolution of laws and regulations on foreign investment was inherently power-based. Although investment agreements were drafted in formally reciprocal terms, the application of international standards was based on the assumption that developing countries do not accord sufficient protection to FDI (Sornarajah, 1997). For example, despite Article 42 International Centre for Settlement of Investment Disputes-Convention (ICSID-Convention) establishing a primacy of national law, international law was applied to cases despite parties to an arbitration proceeding did not agree to it. Today’s concept of the Third World refers to a state of mind, a justice-based approach, and is not meant as an economic concept, considering also that developing countries are now major capital exporters (Sornarajah, 1997). From a Third World perspective, justice became the prerequisite for legitimacy in international law. In the following, this article takes a justice-oriented approach in answering the question of today’s power-implications and lack of legitimacy in investment law.

The importance of history and a Third World approach to international investment law

The question of legitimacy in international investment law, or even international law in general, always arises in Third World scholarship due to the regime’s colonial history (Miles, 2010; Sornarajah, 1997) and its implications for developing countries today. Yet, as scholar Abi-Saab phrased it: “That is why I would discard from the discourse of legitimacy any attempt to use it as a means to dodge or get around the law; as a passé-droit, a license trumping legality or a ‘justification’ of its violation” (Abi-Saab, 2008). Third World scholarship and justice approaches may not serve as a shield from criticism; it is rather an approach to dismantle old power-based structures, but also to dismantle the adaptation by developing countries thereof.

While most Western scholars reject the approach of decolonising international investment law through a historical analysis (Sornarajah, 1997), Third World scholars regard international investment law as suffering from a deeply-rooted legitimacy crisis that it intertwined with the historical origins of international
investment law, a regime that was created in order to secure Western assets in newly independent states (Lipson, 1985). This view of power implications inherent to investment protection is supported by various facts, for instance, the historical trend in which developed-country investors have accounted for over 80 per cent of all known claims (UNCTAD, 2016).

Indeed, the historiography of international law, even when half a decade has past, is crucial in dismantling current structural deficiencies (Chan, 2014; Davitti, 2012; Miles, 2010; Sornarajah, 1997; Sornarajah, 2006). Such a critical approach is necessary to potentially create a more legitimate and balanced system. It is likewise necessary in understanding specifically South-South legal relations and developing states’ attitude towards specific concepts of international law. Susan Marks for example stated that

... when we treat international law as a redemptive force that could save the world if only it were properly respected and enforced, we obscure the possibility that international legal norms may themselves have contributed to creating or sustaining the ills from which we are now to be saved. We also mischaracterize the processes of emancipatory change as redemption or deliverance. And we weaken our capacity to criticize international law, and make it more useful to those by whom liberatory processes are actually carried forward (Marks, 2006).

Other authors (Kaushal, 2009) have argued that the inability or unwillingness to address the historical context leads to what is described as recent “backlash” (Caron and Shirlow, 2016). Both developed and developing states are being more and more sceptical towards the system and its enforcement mechanisms, due to an alleged erosion of democratic principles (Alvarez and Khamsi, 2009). In order to understand the underlying structural deficiencies, especially with regard to the fragmentation of human rights law and international investment law, it is essential to factor history and critical scholarship into the analysis (Miles, 2010). The inherent power implications continue to influence the relationship between investment and human rights, and can only be conceptualised when engaging in a justice-based analysis.
(Davitti, 2012).

**Understanding the legitimacy crisis – a critical approach**

Since 1959, when the first BIT was concluded between Germany and Pakistan, capital-exporting, developed states have engaged in a practice of negotiating BITs, typically with developing states (Peterson and Gray, 2003). The evolution of BITs can be traced back to both failure of negotiating a multilateral agreement and disagreement as to the customary international law standards with regard to foreign investments (Peterson and Gray, 2003). The treaties were designed to protect primarily Western assets in states that later became newly independent. Western fears of nationalisation or arbitrary treatment in newly-independent states was accordingly the main motivating force (ECOSOC, 2015). Furthermore, African states concluded first generation BITs primarily to assert their status as sovereign states, not considering perhaps due to a lack of experience and expertise, the distinctive needs for their young societies (ECOSOC, 2015).

International investment law, particularly its dispute settlement mechanism, has been harshly criticised, especially for its public/private divide and contribution to fragmenting international law. Developing states increasingly condemn the current system, by either reviewing their BITs or limiting the jurisdiction of investment tribunals. The backlash that international investment law is facing manifests itself on the one hand in the re-evaluation, re-negotiation and termination of international investment treaties, but also in the increase of private power in international investment law, namely the exclusion of investors from the list of duty-bearers.

States recently expressed their distrust in the dispute mechanism system and no longer view ICSID as the preferred mechanism to deal with disputes arising between a foreign investor and the host state (UNCTAD, 2010). Countries such as Bolivia, Nicaragua, Ecuador, South Africa, India and Indonesia are limiting ICSID’s power by denouncing consent to investment arbitration, reviewing and partly terminating their BITs. Finally, China altogether has limited trust in international adjudication, which is why it granted limited jurisdiction to ICSID and international arbitration (Ofodile, 2013).
There are structural aspects that shift power towards the private sphere through disengagement of the state (Davitti, 2012; Des Rosiers, 2003): Firstly, investment arbitration, based on a model of private commercial arbitration, generally excludes the necessity of initiating proceedings before national courts prior to arbitration, thereby allowing investors to bypass national and most importantly public law institutions (Davitti, 2012). Secondly, private entities in investment law, while being beneficiaries, do not hold any legal obligations such as human rights obligations vis-à-vis the host state population (Davitti, 2012).

Another concern explicitly revolves around the growing diversity of BITs and the risk of incoherence (UNCTAD, 2007). According to the United Nations Conference on Trade and Development (UNCTAD), the risk of incoherence is especially great for developing countries that lack expertise and bargaining power. Consequently, they are more likely to conduct treaty negotiations on the basis of the BIT model of their negotiating partner, following the trend of whatever approach the developed capital-exporting country takes in its treaties (UNCTAD, 2007). This could result in BITs leaving policy space for public policy reasons, while other BITs of that same state are excluding such policy considerations (UNCTAD, 2007). The implications for developing countries are enormous and power continues to play into law-making in international investment law. In this regard it seems striking, especially when analysing South-South agreements, that the overall increase in bilateralisation juxtaposes “the historical collective resistance of developing countries towards pro-investment principles and their resistance to a multilateral investment agreement” (Kaushal, 2009).

**China vis-à-vis “Western” principles: understanding resistance**

According to Sornarajah,

*China, though not a state created through the processes of self-determination, played a leading role through solidarity with the newly independent states of Africa and Asia in advancing the causes espoused by these states which, together with the developing states of Latin America, collectively came to be described as the Third World*
China’s international law approach and general scepticism has been explained with China’s exposure to Western oppression and the legitimation of this oppression by international law (Chan, 2014). It has been argued that China was denied equality in international law in the 19th century as “Western powers, supported by their legal theorists whose work justified colonialism and Western legal norms and principles, devised the notion that only they constituted the ‘family of nations’”, from which China was excluded on account of its alleged inferior standards of civilization (Chan, 2014).

This perception or Third World “trauma” explains China’s strong emphasis on egalitarian principles, non-interference and state sovereignty. It is rhetoric that till today constitutes a decisive aspect of China’s foreign policy and which Western states perceive to be contrary to modern human rights law. China’s approach, therefore, feeds the Western anxiety of China as “the other” in international law.

Sovereignty and legitimacy in international investment law

China always placed great emphasis on its sovereignty and non-infringement. In the evolution of international investment law, sovereignty played a key role. The UN General Assembly (UNGA) Resolution 1803 on the permanent sovereignty over natural resources or UNGA Resolution 3218, an appeal for a New International Economic Order especially marked a significant change in the balancing of sovereignty and the protection of foreign investment from a Third World perspective. In particular, Article 2 of UNGA Resolution 3218, prioritised national sovereignty over property rights of foreigners and allocated disputes for that matter to national courts and tribunals, leaving the host state in full control over foreign investments on its territory (Kaushal, 2009). In the 1990s, also due to the rapid bilateralisation of international investment law, the priority (at least the treaty texts suggested such assumptions) shifted towards a stronger protection of foreign investments (Kaushal, 2009). The uncertainty of the aforementioned balance (sovereignty vs. protection of foreign investments) as well as the uncertainty of priorities is partly responsible for the recent legitimacy crisis (Kaushal, 2009). In this
regard, it seems remarkable that Third World states, including China, extensively concluded BITs since the 1970s (Kaushal, 2009).

Yet, China’s attitude with regard to state sovereignty might not be as antiquated as current scholarly works suggest. Developed countries, as much as developing countries, are demanding greater respect for sovereign regulatory measures (Kaushal, 2009). The US for instance argues in the Methanex v. US case:

_A doctrine of restrictive interpretation should be applied in investor-state disputes. Wherever there is any ambiguity in clauses granting jurisdiction over disputes concerning states and private persons, such ambiguity is always to be resolved in favour of maintaining State sovereignty_ (Methanex v. US).

“Justice” in the sense of protecting public policy space is not exclusively a Third World concern and sovereignty considerations are leading to a re-evaluation of the current BIT-regime also in developed states (UNCTAD, 2007).

**Hypocrisies in the current legitimacy debate?**

Third World scholars perceive current debates about and heightened scrutiny of _inter alia_ human rights’ validity, normativity and implementation as being abused and even “manipulated” by the Western world (Chan, 2014). China specifically, “the other”, seems to be under heightened scrutiny due to its emergence in economic strength and ambiguous behaviour within its international relations; a behaviour that the majority of Western actors has yet to comprehend. It has been suggested that rising powers such as China, India and Brazil “may contribute to the creation of this new alternative international law in opposition to the law created by the hegemonic power and its pliant allies” (Sornarajah, 2006). Still, eyebrows are raised as to whether such an approach may erode the current international legal system, especially human rights law. Such an alternative approach in international law seems to cause what this author refers to as “Western anxieties” - anxieties that hinder an unbiased evaluation of South-South agreements and approaches.

Particularly, investment protection through the formulation of binding, power-based
rules that systemically excluded human rights and justice considerations is a crucial aspect in the maintenance of economic power (Sornarajah, 2006). Therefore, an analysis that deals with underlying structural deficiencies of South-South agreements and a Third World approach to international investment and human rights law needs to include historical evolution of such power-based rules. An unbiased analysis must also include the fragmentation of the Third World itself, namely emerging economies such as China on the one hand and other, lesser developed countries on the other hand. It seems that international investment law today falls short of an overall Third World resistance, meaning the incorporation of justice-based rules such as human rights. One reason might be the lack of common interests shared by capital-exporting developing states such as China and capital-importing other developing states.

Third World scholarship is not a shield against criticism for any violations of international law by Third World states. In particular, the fact that underlying legitimacy errors impede the realisation of human rights does not justify Third World states condoning such a law-making process. Accountability for human rights abuses is not limited because other states engage in similar abuses (see Peerenboom, 2005). Such a perception would indeed unveil hypocrisies of both Third World states and Western states alike, however, it would not, in fact, improve international human rights standards.

**Home state ESC rights obligation – state responsibility for conduct of private investors abroad**

A rise in FDI within developing states demonstrates the increasing vulnerability of the individual in a globalising world (Coomans and Kamminga, 2004). The idea of human rights and its codification after World War II was to constrain any arbitrary exercise of state power (Coomans and Kamminga, 2004). Today, however, we see global power shifting, diffusing and in the context of private investors even privatising, leading to legislative loopholes and an increase in uncertainty. Such an uncertainty arises for instance in the case of home states’ human rights responsibility.
Western economic interests expanded significantly as a result of globalisation. In this regard, international law was used to secure hegemonic power and Western interest especially in developing states (Sornarajah, 2006). As a consequence, power, whether governmental or private, was not merely exercised within a state’s territorial borders, but impacted and still impacts individuals in receiving states.

Generally, under international human rights law, states have the duty to *inter alia* protect individuals from violations by both public authorities and non-state actors (Peterson and Gray, 2003). However, in a foreign investment scenario *home* state responsibility could only arise in the context of extraterritorial human rights application. International courts and treaty bodies (ICJ, 2000; ICJ, 2004; ICJ, 2005; ICJ, 2008; HRC, 2004) as well as scholars (Borelli, 2005; Coomans and Kamminga, 2004; Dennis, 2005; Gibney and Skogly, 2010; Gondek, 2009; Milanovic, 2011; Skogly, 2006; Wilde, 2005) welcome the idea of civil and political rights of, for example, the ICCPR, the European Convention on Human Rights (ECHR) or the American Convention on Human Rights (ACHR) as applying extraterritorially, given the prerequisite of jurisdiction, which is presumed to be exercised when the state or its agents are exercising authority or control or otherwise public powers (ECtHR, 2011). Yet, ESC rights’ extraterritorial dimension, apart from the international assistance requirement of Article 2(1) of the International Covenant Economic Social and Cultural Rights (ICESCR), even though suggested by scholars (Maastricht Principles 2011), must be seen as *de lege ferenda* (Coomans and Kamminga, 2004). The field is said to be embryonic (Langford and Darrow, 2013) especially due to lack of extraterritorial state practice.

The following gives a short overview about the different legal approaches to extraterritorial ESC rights’ obligations. Legality of such approaches has not necessarily emerged in international law. Nevertheless, when one considers morality and justice, the question of normative legitimacy goes beyond the question of mere legality (Langford and Darrow, 2013). Moral theory in this regard can be utilised in deconstructing the underlying reasons for systemic errors and, thus, might serve to answer the question of legitimacy.
Extraterritorial application of ESC rights in the jurisprudence of international courts, tribunals and committees and literature

Traditionally, the state duty of realising human rights was limited to a state’s territory (Langford et al., 2013). In today’s globalised reality, however, a state might engage in activities abroad for which it needs to be held accountable in case of potential human rights abuses and exercises of control. In the wake of powerful extraterritorial actors, it appears that they operate with immunity due to legal uncertainty (Langford et al., 2013). Legal uncertainty of extraterritorial ESC rights can be traced back to states that on the one hand engage in activities abroad, yet, are on the other hand reluctant to accept the extraterritorial application of human rights (Wilde, 2013). Hence, state practice with regard to the extraterritorial dimension of especially ESC rights treaties is non-existent.

The UN Committee on Economic, Social and Cultural Rights and extraterritorial scope of the ICESCR

The Human Rights Committee (HRC) uses the term “effective control” when establishing state responsibility for abuses of civil and political rights (HRC, 2004). Most human rights treaties that codify civil and political human rights expressly require state parties to ensure the rights enshrined in the conventions to all persons subject to their jurisdiction (see for example, ACHR, Art. 1(1), Art. 1 ECHR and Art. 2(1) ICCPR). The term jurisdiction allows for an interpretation in line with the HRC (HRC, 2004) and the International Court of Justice (ICJ), for civil and political rights to apply extraterritorially (ICJ, 2004). According to the HRC, “a State party is under an obligation to respect and ensure the rights laid down in the Covenant within the power or effective control of that State Party”, even extraterritorially (HRC, 2004). Therefore, in exceptional circumstances jurisdiction can be assumed when the state in question exercises power or authority outside its territory (ECtHR, 1996, Borelli, 2005).

A similar approach has been taken by the UN Committee on Economic Social and Cultural Rights with regard to ESC rights, when assessing state duties (CESCR, 1997; CESCR, 1999; CESCR, 2004). In particular, Article 2(1) ICESCR, while
lacking a jurisdictional clause, includes an extraterritorial aspect, namely the duty to take steps individually and through international assistance and cooperation, especially economic and technical. In its General Comment No. 3, the Committee notes

that in accordance with Articles 55 and 56 of the Charter of the UN, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States (CESCR 2004).

In its General Comment No. 12 on Article 11 ICESCR, the right to adequate food, the Committee further concretises the obligation of international cooperation by inviting state parties to “take steps to respect the enjoyment of the right to food in other countries” (CESCR 1999). The Committee, accordingly, does not limit the state duty of cooperation to an omission but sees states under a somehow positive obligation to act, even when outside its territory. To what extent the Committee perceives foreign states as being under a positive obligation remains ambiguous.

The International Court of Justice and ESC rights

The ICJ, a significant judicial organ when it comes to human rights despite not being a “human rights court” (Wilde, 2013), dealt with the question of extraterritorial human rights application. Cases such as the 2004 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories Advisory Opinion; the 2005 Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda) judgment of 2005; and the 2008 Order Indicating Provisional Measures in the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) case all revolve around the interpretation of human rights treaties, especially their extraterritorial application (ICJ, 2000; ICJ, 2004; ICJ, 2008; ICJ, 2005).

With regard to the ICESCR, the ICJ held in the Wall Advisory Opinion that the lack of a clear provision on the scope of application
… may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction (ICJ, 2004).

The ICJ then applies its finding to Israel and the occupied territories (ICJ, 2004). Yet, it fails to make a systemic argument why it assumes the possibility of extraterritorial application. It fails to argue whether the lack of a jurisdictional clause either waives the requirement of territorial connectivity or a fortiori supports extraterritorial application, which could be assumed when interpreting Article 2(1) ICESCR in accordance with Article 31(1) VCLT\textsuperscript{10}. The ICJ merely concluded that the wall and its associated regime impede “the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights...” (ICJ, 2004). This reduced analysis of applicability of the ICESCR led to some authors questioning the appropriateness of the ICJ on deciding human rights issues, considering that there are more suitable and specialized treaty mechanisms in place to deal with such violations (Higgins, 2004).

The reduced elaboration of the ICJ in its Wall Advisory Opinion on extraterritorial ICESCR state obligations could also be read as the ICJ treating all human rights treaties as if they entailed a jurisdictional clause (Wilde, 2013). It assumed that due to state “power” (ICJ, 2004) being exercised, Israel was under an ICESCR obligation. Hence, power or influence could be the relevant factor in establishing extraterritorial state obligations, also in the case of foreign investments.

\textit{Article 2(1) ICESCR – jurisdiction and the duty to respect, protect, fulfil extraterritorially?}

Although there is currently no treaty practice in place, home states that are parties to the ICESCR are according to Article 2(1) ICESCR under an obligation to \textit{respect, protect} and \textit{fulfil} the human rights contained in the treaty, as stipulated by the Report of the Special Representative of the Secretary-General on the issue of human rights
and transnational corporations and other business enterprises (UN Framework Report 2008; Desierto, 2015) as well as by the Committee (CESCR, 2014). Accordingly, at least this is what the UN Framework Report suggests, contracting states are under an obligation to also ensure that its nationals who are third parties are not violating the rights enshrined in the ICESCR (UN Framework Report 2008). The UN Framework Report further considers the duty to protect to encompass a legal as well as a policy dimension (UN Framework Report, 2008).

According to the UN Framework Report, one problematic aspect in the context of foreign investments remains as to what extent home states are under a duty to prevent human rights abuses abroad by national corporations (UN Framework Report 2008). In this regard, the UN Framework report firstly concentrates on the question of jurisdiction, as in control or authority; secondly, the actions of the home state must meet an overall reasonableness test, which includes non-intervention in the internal affairs of other states (UN Framework Report 2008).

There is increasing encouragement at the international level, including from treaty bodies, for home states to take regulatory action to prevent abuses by their companies overseas. Yet, jurisdiction, which triggers the extraterritorial application of civil and political rights, as for example exercised in a situation of foreign occupation or military detention, could hardly be assumed on grounds of mere nationality of the investor. Even in the event of an extraterritorial dimension of ESC rights, some degree of “influence” must be exercised by the home state in the specific case, either legal or political (Gondek, 2009). Such an influence could only be seen in the negotiation process of BITs (Gondek, 2009), the regulation of investor activity in domestic law or potentially in case of an SOE.

In this regard, most moral legal theories offer an interesting alternative approach to jurisdiction and influence. Namely, they do not focus on or even disregard completely the prerequisite of legal jurisdiction and control, and rather focus on effects of a certain conduct (Langford and Darrow, 2013). The threshold for extraterritorial human rights obligations does thereby not revolve around the question of state control but rather on the analysis of justification (Langford and Darrow, 2013).
Due diligence obligations – bridging the gap between public/private divide

Some authors, courts and treaty bodies suggest another solution to the extraterritorial application of human rights. The Committee (CESCR, 2000), the Inter-American Court of Human Rights (IACtHR, 1988) as well as scholarly work (Davitti, 2012; Desierto 2015) assume a due diligence obligation of home states. Daria Davitti, for example, identifies common elements deployed in international investment law as well as in international human rights law. She stipulates that the customary (Reinisch, 2005) due diligence principle constitutes a common element and may serve as a solution for the reconciliation of investment law and human rights law (Davitti, 2012). Accordingly, international law must experience a transformative change in order to include those most vulnerable that have been excluded from the international legal system (Davitti, 2012). Justice considerations must bear the potential for a reconceptualization of the current order.

Due diligence entails an obligation of states to protect other states from harm through domestic legislative or administrative action, thereby, bridging the gap between the public/private divide that allows investors to operate carefree (Davitti, 2012). In contrast to attribution, where a state is responsible for acts that were exercised in state authority, due diligence allows for state responsibility of private acts (Davitti, 2012; Hessbruegge, 2003).

Power and justice in investment arbitration?

One suggested reconciliation of human rights law and international investment law is the consideration of human rights in investment arbitration. Investment tribunals, however, only have limited jurisdiction under the given BITs (Peterson and Gray, 2003). Yet, tribunals can, when interpreting the substantive provisions of an investment treaty, take human rights norms into consideration, in accordance with Article 31(3)(c) VCLT (Peterson and Gray, 2003). Investment tribunals consequently are in a position to reconcile host states’ conflicting obligations. Such an approach would, however, exclude any evaluation of home state responsibility, since home states are usually excluded from the proceedings. This exclusion is being justified with the alleged depoliticisation of investment arbitration. It conversely also
contributes to power increasingly shifting towards private actors and, therefore, exacerbates underlying power structures as outlined below.

Developing states and Third World scholars criticise the international system of investment dispute mechanism for various reasons (Van Harten, 2007; Gómez, 2012). In particular, it is argued that public policy issues should not be settled by arbitrators due to both a tendency of inconsistency and biased decision-making (Van Harten, 2007). It is further pointed out that non-commercial interests are generally not adequately taken into consideration such as human rights or environmental protection (Gómez, 2012; Odumosu, 2007).

One critique of investment arbitration is its apparent conceptualising of old power structures in favour of private investors. According to Sornarajah (1997), this constitutes one of the reasons, why stakeholders, especially developing states, lose trust in the system of investment arbitration. Sornarajah further stipulates that the system of international arbitration needs to

… move away from the view that it exists to create principles which protect foreign investment and into a position in which it evolves as a system that evinces a sufficient neutrality, which indicates that principles favourable to the interests of the host State also receive a balanced acceptance (Sornarajah, 1997).

Soranajah's notion on the legitimacy of modern investment arbitration is that the current system is more power-oriented than genuinely justice-oriented - justice being the refuge of Third World states while power is securing economic structures of the “rich” states. While the current BITs, including Chinese BITs, do not grant jurisdiction in cases of mere human rights abuses by investors, arbitrators can nevertheless consider the aforementioned abuses when deciding on admissibility of claims. Yet, it rarely appears that arbitrators evaluate such accuses.

Before the system of investment dispute settlement was in place, any claim by a foreign investor had to be solved with means of diplomatic protection. By shifting the dispute from the inter-state level to a level of private arbitration, international investment was supposed to depoliticise since power politics between host state and home states would no longer effect the relation between the foreign investor and the
host state. Yet, power-based formulations of rules by investment arbitration tribunals remain dominating international investment law (Sornarajah, 1997). If we consider such power-based rules, for instance, a rule that only grants investors the right to bring a claim, the question remains if the system can be genuinely considered depoliticised. Investors that bring claims due to an unjustified expropriation might as well find themselves enforcing their human rights that were accorded to them in the respective BITs. Nevertheless, if compared to human rights claimants, investors are awarded extensive privileges such as the exemption to exhaust local remedies and the right to appoint an arbitrator (Alvarez, 2010). Consequently, such power-based rules do not become “power-based” merely through their application. Power implications are rather inherent to the rules themselves. Further, private power especially has been used in the past as leverage to pressure host state governments (Kentin, 2004). This constitutes one crucial critique of the current system of foreign investment arbitration: foreign investors use their ability to bring proceedings against a home state and the threat of huge sums of compensation as a tool for influence into domestic regulatory space (Kentin, 2004; Schneiderman, 1996). In conclusion, there is a general tendency of power in investment arbitration impeding the implementation of human rights and, thus, the implementation of justice.

**China’s approach to human rights, FDI and extraterritoriality – are South-South agreements different?**

Chinese South-South investment agreements, in particular, those entered into with African states, supposedly differ from Western approaches (Kidane and Zhu, 2014). According to the UNCTAD,

new partnerships often have established forums and dialogue platforms and are generally supported by frequent high-level official visits. Furthermore, they are based on the principle of non-interference in the internal affairs of partner countries. Consequently, they are not associated with policy conditionality as has been the case in relations with traditional partners (UNCTAD Africa Report, 2010).
This does not necessarily imply greater justice considerations in South-South agreements in spite of the sovereignty considerations in China’s Africa-approach. While investment treaties have traditionally been concluded predominantly between developed, capital-exporting countries and developing, capital-importing countries\textsuperscript{11}, more and more South-South agreements are being concluded due to an increase in South-South FDI flows (Ofodile, 2013). Yet, those BITs have not been under the same scrutiny as the traditional North-South agreements, since they were assumed to be fairer, more just and sensitive to mutual benefit and development goals (Ofodile, 2013). Hence, their evaluation of appropriate policy space, human rights and development considerations seems to fall under the table in the global debate about legitimacy of international investment law. Yet, such an assessment remains crucial, since we find ourselves in a time where Third World states especially re-evaluate, renegotiate or even terminate foremost their North-South agreements while perceiving South-South agreements as just\textsuperscript{12}. The overall critical attitude towards power-based investment rules by Third World states, which is also to a certain extent shared by Western societies, might, however, also be inherent in South-South agreements.

\textit{China’s human rights approach}

In the late 1970s, the Chinese approach to human rights seemed to change substantially. This was due to factors such as China replacing the Republic of China within the UN in 1971 (UNGA Res. 2758), domestic economic developments and China’s increasing engagement in international affairs (Kent, 1993). China’s official activities with regard to human rights, its decision to join the UN Human Rights Commission, its later acceptance of the UN Human Rights Council, all suggested China’s continuous liberalisation of its position on international human rights. In 1988, the Chinese Foreign Minister made a statement with regard to the Universal Declaration of Human Rights, emphasising its far-reaching influence and overall positive role on the international human rights activities (Kent, 1993). The post-Tiananmen phase marked another crucial chapter in a changing Chinese attitude towards human rights, also due to a policy of naming and shaming, as well as the negative image that was associated with China (Chen, 2004; Kent, 1993).
While China’s new human rights approach materialised into an overall innovative and proactive direction, some authors, such as Ann Kent, predict a negative impact of China’s growing engagement in the field of human rights (Kent, 1999). It has even been further argued that China’s approach, in particular, the emphasis on ESC rights over civil and political rights, is watering down Western human rights standards or at least slowing down the further development into *jus cogens* (Ahl, 2015) and, thus, eroding the current legal system.

*State sovereignty, state-centrism and non-interference - conceptual conflict with human rights realisation?*

After the phase of decolonisation, numerous developing states that were under former colonial rule and in particular its people, rejected the idea of restricting their hard-won sovereignty, which was also considered the basis for the right to self-determination, thus the Third World’s liberation (Chan, 2015). Newly independent states found themselves in the dilemma of voicing criticism to a set of rules that had justified colonial oppression, while at the same time enabled their emancipatory process (Abi-Saab, 1962). Consequently, the strong stance on sovereignty resulted in Western criticism of Third World states as being “state-centric”.

The criticism of state-centrism generally encompassed three aspects: state-centrism firstly would exclude any non-state actor from international subjectivity. Secondly, it would give weight to state sovereignty when in conflict with individual rights. Thirdly, its association with power politics would diminish international law as a governing and power constraining regime (Marks, 2006). The criticism that China’s approach to international law in this regard faces, is the alleged prioritising of state sovereignty over humanitarian concerns such as the Chinese passivity with regard to African conflicts.

In its Africa approach, China largely remained silent on issues such as human rights. In this regard, the critiques often cite the Chinese voting behaviour within the UN Security Council (UNSC), its arms supply to African states, as well as its veto used as leverage in order to water down UNSC Resolution that would impose economic sanctions on African states. China for instance abstained from voting in favour of
resolutions regarding the Darfur crisis such as UNSC Resolution 1556, 1672 and 1706, and its voting behaviour within the UNSC was generally guided by hesitation when authorising UN-led peacekeeping missions. China’s passivity was heavily criticised, perhaps not due to legality concerns, but rather with regard to morality, which might have led to today’s change in attitude towards UN-led mission within Africa.

Yet, while China remains a firm defender of state sovereignty when it comes to human rights, and in this regard may only accept limitations in exceptional circumstances, its economic treaty practice became more liberal over the years and suggests a greater Chinese trust in international investment law. The concept of state-centrism seems to be especially loosely applied to matters such as economic development, while conversely, China continues to uphold a strict policy of non-interference in the area of human rights. For instance, China perceives human rights as being in conflict with state sovereignty, and thus made several reservations to the human rights treaties it has signed and ratified, especially with regard to the complaint mechanism under the respective treaties (Peerenboom, 2005). Western scholars reject such an absolute form of state sovereignty, as applied by China, since they see potential of abuse, namely the potential abuse of human rights (Chan, 2015).

Although state sovereignty should not outweigh humanitarian aspects and responsibilities of the international community (Marks, 2006), state sovereignty also safeguards rights, such as the right to self-determination; at least in the process of decolonisation self-determination was crucial to the protection of Third World people as a justice-based rule that enabled liberation. It is, therefore, understandable that a certain trauma accompanies any attempts at restricting this sovereignty, especially when the restriction of sovereignty is found to be the result of securing power.

Overall, state sovereignty is fundamental to the implementation and enforcement of human rights (Jennings, 2002) since state sovereignty is the starting point of any decision-making process in international law (Chan, 2015) - a law that is a product of state power but at the same time limits its exercise (Marks, 2006). While a strong
emphasis on state sovereignty may be legitimate, the Chinese tendency of applying different standards of sovereignty to different sub-regimes of international law, might contribute to a further fragmented development of international law and, thus, to the illegitimacy of international law.

_Prioritising ESC rights over civil and political rights_

Replacing the Republic of China within the UN in 1971 meant that China, at least on paper, adhered to core principles of the UN such as human rights principles (Kent, 1993). Yet, China abstained a long time from voting in favour of resolutions that emphasised the importance of human rights and did sign but not ratify the ICCPR up until today. Its emphasis remained for a long time on group rights, the right to self-determination, granting independence to colonial countries, and its opposition of the South African apartheid regime, while abstaining from votes with regard to resolution that dealt with human rights abuses in other parts of the world (Kent, 1993).

In 1985, China voted in favour of UNGA Resolution 40/114 that dealt with the indivisibility and interdependence of ESC rights and civil and political rights. While China for the first time implicitly acknowledged the importance of civil and political rights, its involvement at the UN level in favour of civil and political rights continues to remain inconsistent (Kent, 1993). Additionally, China’s core human rights approach has not changed over the years: China still puts great emphasis on collective rights and favours ESC rights over civil and political rights (Kent, 1993; Webster, 2013). Furthermore, when making statements on human rights performances of other states, China exclusively addresses ESC rights on international platforms (Ahl, 2015). In particular, China officially rejects the allegedly “Western idea” of human rights being foremost individual rights that entitled the individual’s right to prevail against the community and even state authority (Peerenboom, 2005; Webster, 2013). In its position paper at the 66th Session of the UNGA, China stated that: “The international community should recognise that all human rights are indivisible and attach equal importance to the realisation of the economic, social and cultural rights, civil and political rights and
realisation of the economic, social and cultural rights, civil and political rights and the right to development” (Lijiang, 2012). Likewise, the Chinese Constitution refers to inter alia the right to work, rest, education, scientific research, cultural activities as well as to some extend the right to health (Peerenboom, 2005). China itself even took part in the adoption of the 1993 Bangkok Declaration, a declaration that aimed at clarifying the Asian position on human rights (Bangkok Declaration, 1993). The declaration again emphasised ESC rights as well as the right to development and prescribed it as “a universal and inalienable right and an integral part of fundamental human rights.” From a Chinese perspective, the right to development especially is seen as a precondition for the realisation of human rights, rule of law and democracy. Thus, it is surprising that China, when engaging in South-South investment relations, is not putting a stronger emphasis on including the right to development into its BITs, for instance leaving policy space in favour of human rights.

**Home state responsibility in Sino-African investment relations - towards extraterritorial human rights obligations?**

With China’s economic rise, it is increasingly playing a proactive role within the international society. Scholarly works suggest that China’s attitude might be changing with regard to its stance on non-interference, at least this is what its increasing contribution to peacekeeping operations (Anthony, 2013) would suggest. Also, its human rights approach and rhetoric is said to be one of “tactical learning” (Ahl, 2015), describing China as being more and more vocal about human rights law. On 18 October 2011, China’s representatives made a statement at the Third Committee of the 66th UNGA on the implementation of human rights instruments: “China believes that general comments should be faithful to the original intention of the treaty, and in their preparation, attention should be given to the views and suggestions of state parties, and over-broad interpretations of treaty provisions should be avoided” (Lijiang, 2012). Accordingly, a broad interpretation of jurisdiction or application clauses, especially when not supported by state parties through state practice, but rather “imposed” by treaty bodies, is unlikely to have China’s support.
Committee on Economic, Social and Cultural Rights’ Concluding Observations on China

In its Concluding observations on the second periodic report of China, including Hong Kong, China and Macao, China (CESCR, 2014), the Committee addressed the issue of extraterritorial state obligations under the ICESCR. In particular, while the Committee welcomed China providing economic and technical assistance in accordance with Article 2(1) ICESCR to over 2,100 projects in approximately 120 developing countries, the Committee expressed concern “that some of such projects have reportedly resulted in violations of economic, social and cultural rights in receiving countries (arts. 2 and 11)” (CESCR, 2014). The statement by the Committee, however, does not indicate whether or not the Committee assumes extraterritorial state responsibility as a result. It merely indicates a causal connection between the technical assistance and human rights abuses in the receiving states. Overall the language of the Committee remains vague with regard to China’s extraterritorial state responsibilities. It made the following recommendation, namely that China should “adopt appropriate legislative and administrative measures to ensure legal liability of companies and their subsidiaries operating in or managed from the State party’s territory regarding violations of economic, social and cultural rights in their projects abroad” (CESCR, 2014). This suggests that the Committee perceives China to be at least under a due diligence obligation in its foreign investment relations, an approach that was discussed above.

Chinese BIT practice with African states – lack of human rights provisions in Chinese BITs

China has 32 BITs with African states, of which half are currently in force. Sino-African BITs generally do not enshrine human rights obligations for host states, home states or private investors (Ofodile, 2013). Although Sino-African BITs cannot be considered development-hostile in absolute terms, they also do not include explicit provisions that would encourage home states to achieve human rights or other development goals (Ofodile, 2013). In particular, the treaties lack provisions that acknowledges and give appropriate policy space to a state’s development exigencies
(Ofodile, 2013), which would constitute one possibility to include human rights considerations or at least the collective public interest into international investment law. Further, with regard to least developed countries, Chinese BITs do not significantly take into account distinctive levels of economic development (Ofodile, 2013). In this regard “the fact that Southern partners engagements are based on the principle of non-interference in the internal affairs of partner countries has given African countries some policy space and reduced the influence of traditional partners on domestic and regional issues” (UNCTAD Africa Report, 2010). This constitutes a rather bold statement, bearing in mind that non-interference might a fortiori lead to infringements of human rights of the host state population.

Indeed, non-interference seems to be in line with the Third World’s strong stance on sovereignty. However, policy space is not exclusively diminished through “interference”, but also through an economically-driven treaty practice that disregards regulatory host state power. It also seems to be contrary to the justice-based approaches shared by Third World states and fosters a fragmenting dynamic among developing states, namely the fragmentation into powerful and not so powerful developing states, thereby utilizing power entailed within the system. South-South agreements can likewise be regarded as asymmetrical, as one (slightly more developed) state remains the almost exclusive capital exporter, while the other (less developed) state signs the treaty in the hope of economic development (Sornarajah, 2015).

As discussed previously, one suggested approach of reconciling human rights and investor rights is the systemic reconciliation of both regimes in arbitration proceedings. Yet, with regard to investor-state arbitration, China does not grant tribunals jurisdiction over human rights issues. Since China was predominantly a FDI recipient up until the year 2000 (Qi, 2012), it was rather reluctant in its first generation BITs to include broad investor-state arbitration clauses and limited jurisdiction mostly to “disputes relating to the amount of compensation”, for example, Article 7(4) China-Malaysia BIT (1988) and Article 11 China-Japan (1988) BIT. Likewise, the first Sino-African BIT, namely, between China and Ghana in 1989, reduces the subject matter of arbitration to compensation (Article 10[1] China-Ghana BIT, 1989). This reluctance stemmed on the one hand from the Chinese desire to protect and
promote inward rather than outward investment (Qi, 2012). In particular, China with its long history of emphasising state sovereignty and non-interference in its international relations, always kept a cautious attitude towards international adjudication (Qi, 2012). Consequently, Sino-African BITs leave little room for potential human rights consideration by investment tribunals.

**Changing Chinese attitude as opening up for a broader spectrum of subject matters?**

The second generation of Sino-African BITs (1990 to 2000) indicates a change in the Chinese approach towards investor-state arbitration. Article 9(1) of the China-Botswana BIT (2000), for example, contains a broader provision, determining that “any dispute … in connection with the investment” would be permissible for arbitral proceedings. China, thereby, continuously adapts to European BITs’ consent clause with regard to dispute resolution (Qi, 2012). The reason for this changing approach is on the one hand, the increase of Chinese capital export, but also to sustain a certain degree of ambiguity on the other hand (Qi, 2012). Subject matters such as development and human rights remain excluded from tribunals’ jurisdiction.

The number of cases involving Chinese investors or China as the respondent state are rare and do not make reference to systemic integration of human rights, considering that China up until its 2005 China-Germany BIT generally restricted jurisdiction. Only four cases have ever been registered, none of them involving African investor or states. The cases include firstly, *Tza Yap Shum v. Republic of Peru* under the 1994 China-Peru BIT (Tza Yap Shum v. Peru), secondly, *China Heilongjiang International et al. v. Republic of Mongolia* (Heilongjiang International v. Mongolia), and thirdly, *Philip Morris Asia Ltd. v. Australia* under the Australia-Hong Kong BIT (Philip Morris v. Australia). Fourthly, the first arbitral proceeding that was initiated against China as a respondent state, *Ekran Berhad v. People’s Republic of China* (Ekran Berhad v. China), was filed in 2011 at ICSID, yet was suspended the same year in accordance with the parties’ agreement (Qi, 2012). Considering China’s reluctance, it remains unclear whether the proceeding is being settled at a later point. Accordingly, it seems more likely that China wishes to not set a precedent to investors initiating proceedings against it as a respondent state, thereby restricting power of arbitra-
tion tribunals, while, and this needs to be emphasized, maintaining ambiguity and its own power advantages.

**Liberalisation of Chinese investment agreements**

With an increase in outward FDI, China places more emphasis on concluding and updating its BITs, in particular with other developing countries, in order to guarantee Chinese investors a more comprehensive legal protection abroad (Wei, 2015). China’s investment approach evolved from a restrictive to a liberal or legalised approach, including stronger provisions for substantive and procedural investment protection (Berger, 2013), thereby adapting essentially to Western BIT standards (Schill, 2007; Zhang, 2008). Some authors argue that the increasing Chinese liberal treaty practice is due to “China’s increased confidence in providing sufficient protections to foreign investors, its increasing outbound FDI, and its more sophisticated legal system” (Wei, 2015).

Several Chinese BITs with other developing countries such as the China-Seychelles BIT (2007), the China-Costa Rica BIT (2007), the China-Mexico BIT (2008) and the China-Colombia BIT (2008) even go so far as to include references to the concept of the customary minimum standard of treatment. This appears to be a significant change in China’s treaty approach since China as well as other Third World states generally prioritised treaty law over customary international law (Berger, 2013). Nevertheless, Chinese BITs with developed countries provide for slightly higher levels of substantive investment protection than Chinese BITs with developing countries. This is due to the fact that China generally accepts the model agreements put forward by European states (Berger, 2008), thus contributing to inconsistency within its Sino-foreign BITs. Overall, China’s BIT stance appears to continuously adapt to liberal patterns and can thus be described as an emerging “powerhouse in trade and investment” (Sornarajah, 2015), utilising economic treaties as a tool for economic, maybe even political supremacy.

**Right to development as integrating motor for human rights in business?**

China strongly advocates the consideration of its “national realities/conditions”,

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when evaluating the universality of human rights (China, 2016). A state’s development, hence, seems to be a crucial point in China’s human rights rhetoric (National Report, 2008). Further, on 29 October 2014, the Chinese Ambassador made a statement at the General Discussion on Items of Human Rights at the 3rd Committee of 69th UNGA, stating that

[r]ealizing the rights to subsistence and development is the top priority for the developing countries in the field of human rights. […] Countries differ in terms of value, cultural tradition, political system and level of economic and social development. Governments and peoples of various countries have the right to choose a path of human rights development most suitable to their national conditions and set their own priorities in the field of human rights (Wang, 2014).

China is, thereby, not explicitly referring to its internal system of communism, yet it bases its justification on its identity, namely the identity as and solidarity with any Third World state. China’s emphasis on development as the core aspect of realisation of human rights is quite apparent in any statements made within an international institution. In its statement made at the 68th Session of the UNGA, the Chinese Counsellor, Yao Shaojun, even referred to development as being “the basis for the promotion of human rights, and human rights are the safeguard of development” (Yao, 2014). The right to development could create connectivity of human rights and investment law. Yet, when analysing Sino-African BITs no such reference can be found in the treaties. The emphasis remains on mutual benefit in economic development, yet does not seem to include human rights considerations, even when contracting with least developed countries in Africa.

Future trends of Sino-African BITs

Up until its third generation (2000 until today) of Sino-African BITs, China did not implement human rights provisions, incorporated due diligence provision into its domestic law or otherwise engaged in an approach to reconcile human rights law with investment policies. The fact that Sino-African BITs lack specific human rights references is also admittedly due to the fact that they were concluded in a time of a-
not-as-developed Chinese human rights awareness. Nonetheless, if one analyses current trends in Chinese BIT law-making, consistency and a clear policy aim are lacking. The 2015 China-Korean FTA, for instance, includes references to the protection of *inter alia* health and safety, labour rights, environment or sustainable development in its preamble (UNCTAD, 2016). To the contrary, the 2015 Australia-China BIT has no references in its preamble as to human rights, but includes a general exceptions clause, for example, for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources, which is a clause not included in the China-Korean FTA (UNCTAD, 2016). This might be due to the fact that China negotiates BITs in order to pursue aims outside the economic context, and is generally investing irrespective of whether or not a BIT is in place (ECOSOC, 2015).

As outlined above, international investment law historically shifted power extensively from the receiving state to private actors. It thus, till today, hinders a state from excising its power in order to implement or enforce human rights. However, Chinese activities within Africa are generally carried out by SOEs, such as, for instance, National Oil Companies (Anthony, 2013), enterprises that, while not necessarily being state organs, or exercising governmental authority (see Vázquez, 2005), are under a certain control of the home state. The exercise of governmental authority would then lead to state responsibility according to Article 9 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. When compared to the European-employed companies during the colonial period, similar implications could be drawn from China deploying SOEs across Africa (Anthony, 2013). The deployment of such SOEs goes hand in hand with both economic and state interest overlapping (Anthony, 2013). With regard to human rights, one thus could make the moral argument that power or influence has not shifted towards private entities, but to a certain extent to the home state itself, namely China, thus causing the re-politicising of investment-relations. Consequently, it might be adequate, perhaps not in the sense of legality, but with regard to legitimacy, to assume complementary human rights obligations in the sense of “do no harm”, an approach of moral legal theories (Langford & Darrow, 2013). China, while admittedly not being the root of the legitimacy crisis, contributes to it by imitating Western treaty patterns, remaining ambiguous in its
investment arbitration approach and essentially profiting from power shifts towards the private sector.

**Concluding remarks**

China’s investment engagement in Africa has been under scrutiny in recent scholarly work. The accusation reaches from exploitation of natural resources to disregarding international environmental and human rights law. Yet, the present analysis has shown that the lack of a systemic human rights integration into Chinese BITs does not necessarily differ from BITs by traditional partners. The failed integration of human rights into international investment law is rather a result of both structural deficiencies and colonial legacy, and moreover, it is the result of an increased-isolated what Axel Berger calls “legalisation” of international investment law (Berger, 2008), a legalisation that essentially disregards policy space, human rights and the right to development.

Moreover, ambiguity remains with regard to Chinese investors themselves in the context of either home state responsibility or even private responsibility. In 2008, China issued an advisory opinion to its SOEs, making recommendations with regard to corporate social responsibility (CSR) and *inter alia* labour rights (SASAC, 2008; Lin, 2010). The document is crucial in understanding the Chinese attitude towards CSR. It appears that there is a growing Chinese sensitivity towards human rights implications in business. Nonetheless, while many Chinese SOEs are operating abroad, China rather ‘privatises’ state responsibility with regard to human rights violation in host states, while conversely still exercising influence. China accordingly channels the power implications entailed in international law in order to benefit from it. In this regard it further failed to implement due diligence provision, in order to regulate domestically. The Committee for instance notes that China did not adopt adequate and effective measures to ensure that Chinese companies both state-owned and private, respect ESC rights, including when operating abroad (CESCR, 2014). The changing Chinese attitude and liberalisation of its stance on human rights is therefore poorly reflected in its domestic legislation, in particular if it concerns extra-territorial activities.
Yet, China is not the sole source of “evil”, as commonly shared Western anxiety suggests. China is not exacerbating the overall negative impact of extraterritorial business conduct on human rights, but rather profiting from both a system that benefits extraterritorial activities and a system that upholds underlying power tendencies. The fragmentation of international human rights and investment law is a result of a lack of justice-based approaches, the lack of an inclusion of development considerations and the failed systemic integration of both sub-regimes, a consequence of power implications in both treaty law and jurisprudence.

Concluding, what does the future hold for justice in international investment law and especially South-South relations? A number of BITs are the result of leverage and thus politically motivated irrespective of intention to invest (ECOSOC, 2015). Therefore, a greater reflection on a systemic approach is inevitable rather than the mere inclusion of human rights provisions into BITs which might again be inconsistently applied by arbitration tribunals. Bearing in mind that the Chinese decision to invest in African states is not driven by the fact that a BIT is in place (ECOSOC, 2015) indicates that the question of home state responsibility can only be solved by a comprehensive and reformative approach.

Endnotes

1. In this paper “the South”/ “the Global South” refers to the less developed countries, in contrast to “the North” as the developed countries.


3. Economic, social and cultural rights are enshrined in various human rights treaties; however, this article focuses on the International Covenant on Economic, Social and Cultural Rights.

4. Bolivia denounced the ICSID-Convention in 2007, followed by a withdrawal of Ecuador’s consent to arbitration under ICSID. Likewise, Nicaragua no
longer views ICSID as the preferred mechanism and Venezuela officially announced its withdrawal in January 2012. Ecuador, South Africa, India and Indonesia are limiting ICSID’s power by reviewing and partly terminating their BITs. China’s overall approach is a rather sceptical one with regard to international adjudication.

5. See, for example, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22; Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01; Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic.

6. ESC rights are typically infringed when it comes to foreign investments. Furthermore, China is a state party to the International Covenant on Economic, Social and Cultural Rights, which is why the present paper will focus on ESC rights.

7. The term “Third World” refers to a common belief and conception of justice in international law and the decolonization thereof, shared by a group of developing states.


9. The rhetoric can be traced back to the 1954 Five Principles of Peaceful Coexistence set out in a bilateral treaty with India, and which still govern contemporary China’s approach to international law.

10. See also Article 29 VCLT.

11. The first modern investment treaty was concluded in 1959 between Germany and Pakistan.
12. While South Africa, for example, re-evaluated and terminated numerous of its BITs with Western states, it did not yet terminate its BITs with China.


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