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Riding a "Friendly Elephant"? How African Nations Can Make the Best of Economic Partnership with China

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ABSTRACT

Modern China is a major trading partner with and investor in Africa. This Note examines its relationships with Nigeria and South Africa to evaluate whether the benefits they receive from Chinese involvement, like infrastructure or access to consumer goods, are outweighed by costs such as worsened corruption. It next discusses legal measures these countries have taken to mitigate any costs of Chinese involvement. At least in Nigeria and South Africa, the concrete benefits of Chinese trade and investment appear to outweigh the uncertain costs. However, legal protections adopted to reduce these costs are likely still inadequate. Given significant barriers to effective governance, especially in Nigeria, it is in the interests of all parties to renegotiate their bilateral investment treaties to promote host government rule of law. This would allow both African nations to better manage any costs associated with Chinese activities, while also assuring China of more stable economic relationships.

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I. INTRODUCTION

In November 2014, China Railway Construction Corporation, a large state-owned enterprise (SOE) in the People's Republic of China ("the PRC" or "China"), announced a twelve billion dollar plan to build over 1,400 kilometers of new rail lines.[1] However, the planned route is not in China at all; rather, it will connect the Nigerian cities of Lagos and Calabar on either end of that country's coastline.[2] In a press release, the corporation claimed that its deal with the Nigerian government would create "up to 200,000 local jobs."[3] This proposed railway is one example of how China has become Africa's key partner in economic development in the new millennium.[4] In particular,

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1. Koh Gui Qing & Adam Jourdan, *China Railway Construction Wins $12 Billion Nigeria Deal: Xinhua*, REUTERS (Nov. 20, 2014, 12:39 AM), http://www.reuters.com/article/2014/11/20/us-china-railway-construction-nigeria-idUSKCN0J40C420141120 [http://perma.cc/J4YA-YFZD] (archived Jan. 23, 2016) (noting that the company beat out a Mexican competitor in securing the contract).

2. *Id.*

3. *Id.* (citing the rail corporation's chairman's claim that the construction of the new line is expected to lead to an additional $4 billion in Chinese exports of goods like construction machinery, trains and steel products).

4. *See* Uché U. Ewelukwa, *South-South Trade and Investment: The Good, the Bad, and the Ugly—African Perspectives*, 20 MINN. J. INT'L L. 513, 535–36 (2011) ("Today, China is Africa's largest developing country trade partner, accounting for about 11% of the continent's external trade, and is Africa's largest source of imports. UNCTAD suggests that the expansion of trade between China and Africa is the main driver of the increasing share of developing countries in Africa's trade."); *see also China's Xi Arrives in South Africa for Talks with Zuma, Trade Summit*, REUTERS (Dec. 3, 2015), http://www.cnbcafrica.com/news/southern-africa/2015/12/03/chinas-xi-south-africa-zuma,-trade-summit/ [http://perma.cc/77YY-YLX2] (archived Jan. 23, 2016) ("China is Africa's largest trading partner with trade amounting to $220 billion in 2014, according to Chinese state news agency Xinhua. Its investments in Africa

investment and trade between China and the nations of sub-Saharan Africa offer a chance to lift much of the continent's one-billion strong workforce out of poverty.[5] This Note focuses on two international economic relationships, between: (i) China and South Africa, and (ii) China and Nigeria. This Note contributes to scholarship on China's growing involvement in Africa that, so far, has mainly emphasized continent-wide generalities and trends.[6] No prior works have attempted to comprehensively analyze the contours of China's involvement in specific African countries, or to evaluate the costs or benefits resulting from such involvement.

South Africa and Nigeria serve as viable cases through which to examine the effects of Chinese investment in and trade with Africa and how African nations have responded to such involvement. First, China has extensive economic relations with both countries. South Africa is the top destination of Chinese Foreign Direct Investment (FDI) in Africa, followed immediately by Nigeria.[7] South Africa is also China's largest trading partner on the continent by percentage of total imports and exports, though several African countries have more significant trading relationships with China than Nigeria.[8] Both African nations possess large reserves of primary resources that China requires—various mineral commodities for South Africa, and petroleum and natural gas in Nigeria.[9] They have dynamic and

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amounted to $32.4 billion at the end of 2014, according to London-based BMI Research.").

5. *See* Stephen Haggard, *Africa: Unemployable Millions or Global Talent Pool*, IBA GLOBAL INSIGHT, Apr.–May 2013, at 50 (suggesting Africa may be able to follow China's development model by fostering an educated workforce). The poster child for the successful developing country, China arguably provides these nations with an economic model worth emulating. *See* Ndubisi Obiorah et al., *"Peaceful Rise" and Human Rights: China's Expanding Relations with Nigeria*, *in* CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 272, 287–89 (Robert I. Rotberg ed., 2008) ("Many in African intellectual and political circles are impressed by China's seeming geometric economic progress since Deng Xiaoping initiated economic reforms in China in the 1980s. This success, often attributed to China's state-led development model, has rekindled the debate in Africa over appropriate paths to development.").

6. Though an excellent source, one example of this phenomenon of focusing primarily on the big picture of the China–Africa relationship is Uche Ewelukwa Ofodile, *Trade, Empires, and Subjects—China–Africa Trade: A New Fair Trade Arrangement, or the Third Scramble for Africa?*, 41 VAND. J. TRANSNAT'L L. 505 (2008) [hereinafter Ofodile, *Trade, Empires, and Subjects*].

7. *See* Margaret Egbula & Qi Zheng, *China and Nigeria, A Powerful South-South Alliance*, WEST AFR. CHALLENGES, Nov. 2011, at 3 (describing the broad strokes of Nigeria's economic relationship with China); *see also* U.N. Conference on Trade and Dev. [UNCTAD], Foreign Direct Investment (FDI), http://unctad.org/en/Pages/DIAE/Foreign-Direct-Investment-(FDI).aspx [http://perma.cc/6UKT-7DF2] (archived Jan. 22, 2016) (defining FDI as "an investment made to acquire lasting interest in enterprises operating outside of the economy of the investor").

8. *See* Egbula & Zheng, *supra* note 7, at 7 (providing a chart of China's trading partners in Africa, ranked by total trading volume and noting that, as of 2010, Nigeria is ranked fourth).

9. *See* SVEN GRIMM ET AL., CENTRE FOR CHINESE STUDIES, SOUTH AFRICAN RELATIONS WITH CHINA AND TAIWAN: ECONOMIC REALISM AND THE 'ONE-CHINA'

(especially in Nigeria's case) growing economies, and thus are better situated than most other sub-Saharan African nations to reap the benefits of FDI from, and trade with, China.[10] A more utilitarian reason to select these nations as subjects is that, since Nigeria and South Africa are among the most prominent African nations, the literature on their domestic policies and relationship with China should be more developed. Another is that South Africa and Nigeria are both democracies. [11] Intuitively, their governments should be more likely to treat Chinese involvement as an opportunity to improve the welfare of the electorate—or at least some subset thereof.

In examining the benefits and costs of Chinese involvement from the perspectives of Nigeria and South Africa, this Note will primarily explore the costs. The benefits, after all, are largely monetary and more easily quantifiable. This Note will evaluate the extent to which these nations' relationships with China have created a net benefit for them. It will also evaluate how these nations have responded to any problems caused by China, and explore how to maximize the benefits of Chinese trade and investment. Part II lays out the parameters of China's relationship with Africa, and in particular Nigeria and South Africa. It then presents two competing narratives of China's overall impact on the African continent. Part III examines the circumstances in which South Africa and Nigeria have possibly faced negative consequences from Chinese trade and investment in the form of human rights abuses due to environmental or labor abuse, competition or dumping by Chinese firms, and corruption or the

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DOCTRINE 18 (2014), http://www.ccs.org.za/wp-content/uploads/2014/02/Research-Report_FEB-2014_Formatting.pdf [http://perma.cc/LCL9-VG68] (archived Jan. 22, 2016) ("Chinese companies that invest in South Africa thus far have done so mainly in the mining industry."); Jennifer Reed, Student Submission, *South Africa Revolutionizing Foreign Investment Protection System*, 6 Y.B. ARB. & MEDIATION 295, 297 (2014) ("South Africa is a mineral rich nation that is a leading producer and exporter of gold, as well as coal, chrome, copper, diamonds, iron, manganese, nickel, silver, and uranium"); *cf.* Chris Nwachukwu Okeke, *The Second Scramble for Africa's Oil and Mineral Resources: Blessing or Curse?*, 42 INT'L LAW. 193, 200 (2008) ("The variety of crude found in places like Nigeria and the Gulf of Guinea is said to be 'light' and 'sweet.' It is low in sulfur and therefore easier and cheaper to refine than the Middle Eastern crude, which tends to be lacking in lower hydrocarbons and is very 'sticky.'").

10. *See Nigeria: Africa's New Number One*, ECONOMIST (Apr. 12, 2014), http://www.economist.com/news/leaders/21600685-nigerias-suddenly-supersized-economy-in deed-wonder-so-are-its-still-huge [http://perma.cc/D5DF-U7H7] (archived Jan. 22, 2014) ("[Nigeria's] economy has been growing at an average rate of around 7% a year over the past decade . . . . The clearest lesson is for sluggish, complacent South Africa, which has long taken its status as the continent's giant for granted."). In fact, South Africa and Nigeria also possess the two largest economies in Africa. *See id.* (describing how Nigeria corrected how it measures its GDP, and is now the largest economy on the continent).

11. *See African Democracy: A Glass Half-Full*, ECONOMIST (Mar. 31, 2012), http://www.economist.com/node/21551494 [http://perma.cc/BVR5-SBAR] (archived Jan. 22, 2015) (calling South Africa a "flawed democracy," and referring to recent efforts to prevent voter fraud in Nigeria's 2011 elections).

degradation of the rule of law.[12] Part IV explores the adequacy of legal measures South Africa and Nigeria have taken to curtail some of the problems described in Part III. It touches on the potential for bilateral investment treaties (BITs) to mitigate some these issues, but notes that at present China's African BITs may be worsening some of these problems. Part V starts by suggesting that, despite the issues discussed in Part IV, on balance South Africa and Nigeria have benefitted from their relationships with China. To the uncertain extent these countries are harmed by China's actions, however, this Part proposes that the re-negotiation of their BITs would be in the best interests of both China and its African partners. BITs are a more viable method of managing any downsides of Chinese trade and investment because they subject nations hosting investment ("host nations") to pressures and concerns beyond that of their domestic political processes.[13] In future BIT negotiations with China, African nations such as South Africa and Nigeria should try to increase their abilities to regulate Chinese investors but should not abandon beneficial aspects of these BITs, like international arbitration. China should consider placing additional policy conditions in its African BITs to improve the rule of law in host countries. By promoting long-term stability in this way, these countries can move their relationship closer to a true "win-win" ideal.

II. AN OVERVIEW OF CHINA'S RELATIONSHIP WITH AFRICA

This Part first describes early developments in the relationship between the PRC and Africa in general, with a particular focus on how ideology has shaped China's goals in Africa. It details the relatively limited contacts that China had with both Nigeria and South Africa prior to the 1990s. This Part then explores the current scope of China's relationship with South Africa and Nigeria. It suggests that China's political and economic liberalization has led it to seek pragmatic relationships focused more on economic development. At least in its rhetoric, China often attempts to differentiate itself from Western nations that are relatively more willing to intervene in Africa's internal affairs. Finally, this Part introduces the reader to two contrasting narratives of China's

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12. There are many definitions of the rule of law. In this Note, it will suffice to say the rule of law requires that the law is (1) publicly known and binding; (2) accepted and respected by the population; and (3) fairly enforced, such as by the courts. *See* John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT'L L. 959, 988–90 (2013) (drawing definitions from U.S. Supreme Court jurisprudence, various scholars and jurists, and the American Bar Association).

13. *See infra* Part V.

involvement in Africa, and provides some evidence of its positive impacts.

A. *Relations Prior to the New Millennium*

Formal relations between post-colonial African countries and the PRC began around 1955, after the first Asia-Africa Conference was held in Bandung, Indonesia (the "Bandung Conference").[14] Six African nations participated.[15] China and the growing number of newly independent African nations saw one another as sharing a common history of exploitation by Western powers.[16] The Bandung Conference helped establish the Non-Aligned Movement, which sought to "unite the developing countries in such a way that they adopted a neutral position in the Cold War between the then two superpowers."[17] A "Final Communiqué," drafted at the Bandung Conference, also set forth lofty principles that were meant to govern future Chinese engagement in Africa.[18]

In line with the tone at Bandung, China's first few decades of interactions with Africa were driven more by ideological concerns than economic ones.[19] Principally, China wanted to stave off diplomatic isolation; it sought new allies after falling out with the Soviet Union.[20] To that end, it supported socialist governments like that of Tanzania financially, and indirectly aided left-leaning guerilla groups, including some in South Africa.[21] China also negotiated

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14. *See* Ofodile, *Trade, Empires, and Subjects*, *supra* note 6, at 512 (noting that a trade agreement with Egypt was also signed shortly after the conference).

15. *Id.* at 513 n.28 (referring to "Egypt, Ethiopia, the Gold Coast (now Ghana), Liberia, Libya, and the Sudan.").

16. *See id.* at 512–14 (determining the major objective of Bandung I to be "to promote Afro–Asian economic and cultural cooperation and to oppose colonialism or neocolonialism by the United States, the Soviet Union, or any other imperialistic nation").

17. Okeke, *supra* note 9, at 198.

18. *See* Ofodile, *Trade, Empires, and Subjects*, *supra* note 6, at 513–14 n.34 (describing the Bandung Declaration of 10 Principles as including, among other things, respect for human rights and national sovereignty, racial equality, and non-aggression).

19. *See id.* at 514 (emphasizing the parties' "common desire to overcome the legacies of colonialism and forge closer ties with one another.").

20. *See* Timothy Webster, *China's Human Rights Footprint in Africa*, 51 COLUM. J. TRANSNAT'L L. 626, 644 (2013) (asserting that China turned to Africa in response to opposition from the United States and, after the Sino–Soviet split, the USSR as well).

21. *See* Joshua Eisenman, *China's Political Outreach to Africa*, *in* CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 230, 231 (Robert I. Rotberg ed., 2009) (suggesting China's influence with African guerillas is perhaps overplayed, but noting that they provided moral and rhetorical support as well as "modest arms shipments"); Jeremy Kelley, *China in Africa: Curing the Resource Curse with Infrastructure and Modernization*, 12 SUSTAINABLE DEV. L. & POL'Y 35, 37 n.71 (2012) (tying Chinese

several trade agreements and aid packages with various African nations and funded projects such as the "Tan-Zam railway" between Tanzania and Zambia.[22] This was a major public relations coup because it provided landlocked Zambia a connection to the Indian Ocean, and because the United States and United Kingdom previously declined to fund the project.[23] Chinese development aid during this period coalesced into the form that it maintains today, focusing on the "five pillars" of agriculture, light industry, utilities, infrastructure, medical support, and technical training.[24] In return, African allies became "instrumental to China's success" in taking Taiwan's place at the United Nations in 1971.[25]

Nigeria and China formally established diplomatic relations the same year that China gained UN recognition.[26] Though there were earlier attempts to bolster economic ties between the two nations, such as the establishment of a Nigerian-Chinese Chamber of Commerce in 1994, it was only after the democratic election of Olusegun Obasanjo in 1999 ended decades of military rule in Nigeria that trade between the two "began to develop in earnest."[27] President Obasanjo initiated a series of "oil-for-infrastructure" deals whereby Nigeria awarded favorable oil contracts to China in exchange for funding for various infrastructure projects.[28] By 2001, trade between the countries had reached 1.14 billion dollars.[29]

By contrast, until the 1990s relations between South Africa and China were unfriendly. South Africa had not been invited to the Bandung conference, in part due to its Apartheid policies.[30] Another significant ideological rift was that South Africa refused to adhere to the "One China" policy—the PRC's claim that it is the sole legitimate

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investments in Africa during this period specifically to opposition to the existing world order).

22. Ofodile, *Trade, Empires, and Subjects*, *supra* note 6, at 515.

23. *See* Webster, *supra* note 20, at 646 (referring to a report that found China "'had become the African countries' favorite donor in the early 1970s,' by funding a wide assortment of infrastructure projects"). The Tan-Zam railway cost $500 million in 30–year interest-free loans, and required 50,000 Chinese laborers to complete. *See* Kelley, *supra* note 21, at 37 (calling the Tan-Zam railway "one of the most costly infrastructure investments China has ever made in Africa.").

24. Webster, *supra* note 20, at 645.

25. Ofodile, *Trade, Empires, and Subjects*, *supra* note 6, at 515–16.

26. Egbula & Zheng, *supra* note 7, at 4.

27. *Id.*

28. *Id.* at 5.

29. *See* Obiorah et al., *supra* note 5, at 274 (asserting that the new millennium saw significantly expanded trade between Nigeria and China).

30. *See* Ofodile, *Trade, Empires, and Subjects*, *supra* note 6, at 513 (noting that Taiwan, Israel, and the Koreas were also excluded from Bandung); Bandung Int'l Conference, *Final Communiqué of the Asian-African Conference of Bandung*, at 6 (Apr. 23, 1955), http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf [https://perma.cc/73DJ-RAWV] (archived Feb. 8, 2016) (condemning South African apartheid specifically).

government of China and that Taiwan is inseparable from China.[31] Following the United Nation's 1971 acceptance of the PRC as the legitimate government of China, Taiwan and South Africa were both increasingly seen as international pariahs, and consequently developed closer ties with one another.[32] However, by 1996 South Africa relented. It transferred diplomatic recognition to the PRC in recognition of China's increased liberalization and international acceptance, as well as South Africa's own abolition of Apartheid.[33] Nevertheless, by that time South Africa already had 1.3 billion dollars worth of trade with China.[34]

B. Modern Developments in China–South Africa and China–Nigeria Relations

Anti-colonialism and socialism are no longer the touchstones of China's foreign relations policy in Africa.[35] While that country's leaders have continued to criticize western "hegemonism" and "imperialism,"[36] their priorities have evidently shifted toward

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31. *South Africa and Taiwan Sever Relations*, BBC (Jan. 1, 1998), http://news.bbc.co.uk/2/hi/43856.stm [http://perma.cc/CGJ7-3S8Z] (archived Jan. 22, 2016) (noting that the loss of South Africa's support cost Taiwan its last major supporter as the legitimate government of all of China). China's aforementioned aid to anti-government rebels and its ties with the South African Communist Party are a few forms that this hostility took. *See* Eisenman, *supra* note 21, at 231, 237, 240 (discussing training sessions that the Chinese Communist Party holds for "long standing" Party allies); Kelley, *supra* note 21, at 37 n.71 (explaining that the Tan-Zam railway was intended to "enable Zambia to be used as a base for guerillas fighting white regimes in Eastern and South Africa").

32. *See* GRIMM ET AL., *supra* note 9, at 24 ("The political catalyst which inevitably pressed South Africa and Taiwan into a more robust economic relationship with each other was that both faced growing isolation by the international community.").

33. *See id.* at 25 ("In the 1990s, when it became evident that South Africa was on the path to democratisation and regime change, the South Africa-Taiwanese relationship increasingly came under strain."); Donald G. McNeil, Jr., *Taiwan, Snubbed by South Africa, Ends Aid and Recalls Envoy*, N.Y. TIMES (Dec. 6, 1996), http://www.nytimes.com/1996/12/06/world/taiwan-snubbed-by-south-africa-ends-aid-and-recalls-envoy.html [http://perma.cc/JUY2-K8ZS] (archived Jan. 22, 2016) (describing the political fallout of South Africa's transferring of recognition from Taiwan to China).

34. *See* McNeil, *supra* note 33 (showing that this actually exceeded trade with Taiwan by 1996).

35. *See* Li Anshan, *China's New Policy Toward Africa*, *in* CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 21, 22–25 (Robert I. Rotberg ed., 2009) (providing a brief overview of the influence of socialist ideology on China's foreign policy).

36. *See* Ofodile, *Trade, Empires, and Subjects*, *supra* note 6, at 535 (quoting a statement by former General Secretary Hu Yaobang in the 1980s); *see also* Leslie Hook & Katrina Manson, *China Pledges More Investments to Africa*, FIN. TIMES (Mar. 25, 2013), http://www.ft.com/cms/s/0/a2bc930e-9517-11e2-a4fa-00144feabdc0.html#slide0 [http://perma.cc/6DVS-V4T3] (archived Jan. 22, 2016) ("Chinese diplomats routinely contrast China's approach [to Africa] with that of Western countries whose armies and aid are entangled across the continent.").

economic and diplomatic concerns.[37] This change occurred as China began to gradually introduce market reforms and liberalized politically around 1978, following the end of the Cultural Revolution.[38] The Asia–Africa Summit of 2005, to which the Presidents of Nigeria and South Africa were invited, "sought to reinvigorate the spirit of Bandung."[39] Heralding this shift, however, a "Declaration on the Asian-African New Strategic Partnership" signed there emphasized "the need to promote practical cooperation between the two continents in [many industries]" rather than political solidarity within the developing world.[40]

Despite recent events, the Chinese economy in the twenty-first century remains an engine of sustained and remarkable growth.[41] It

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37. *See* Wenran Jiang, *China's Emerging Strategic Partnerships in Africa, in* CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 50, 51 (Robert I. Rotberg ed., 2009) ("China's economic reforms have gradually moved China away from its radical revolutionary worldview."); *see also* Ofodile, *Trade, Empires, and Subjects*, *supra* note 6, at 532 (asserting that mutual need still drives the China–Africa relationship, but conceding that Chinese involvement should not be assigned a single motive).

38. *See* Martyn J. Davies, *Special Economic Zones: China's Developmental Model Comes to Africa, in* CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 137, 138 (Robert I. Rotberg ed., 2009) (describing the creation of the SEZs in the late 1970s). In the mid-1980s, Chinese Premier Zhao Ziyang announced "four principles" of South-South cooperation: "equality and mutual benefit, stress on practical results, diversity in form, and common progress." Deborah Brautigam, *China's Foreign Aid in Africa: What Do We Know?, in* CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 197, 203–04 (Robert I. Rotberg ed., 2009). Deng Xiaoping initiated these reforms in the 1980s; they continued despite the Tiananmen Square incident, accelerated under the leadership of Hu Jintao from 2002 to 2012, and continue under current Party Chairman Xi Jinping. *See, e.g.*, Phoenix X.F. Cai, *Trading with Foreigners: An Interdisciplinary Analysis of China's Core Interests in Trade and Foreign Policy*, 47 AKRON L. REV. 809, 815 (2014) ("Hu Jintao presided over China's phenomenal rise as a global economic power in just ten years."); Mark Magnier & Jeremy Page, *Xi Jinping: China's Economic Risks 'Not That Scary'*, WALL ST. J. (Nov. 9, 2014), http://www.wsj.com/articles/xi-jinping-chinas-economic-risks-not-that-scary-1415516936 [http://perma.cc/8YFV-C6ZA] (archived Jan 22, 2016) (reporting comments by Xi Jinping regarding improving China's social safety net, further opening capital markets, and shifting to a consumer economy). From these reforms has emerged an overall policy called "socialism with Chinese characteristics," or "market socialism," whereby the Chinese state has attempted to speed along economic growth through privatization, while avoiding the so-called economic and political "hurly-burly" of a totally free-market system. *See* Lan Cao, *The Cat That Catches Mice: China's Challenge to the Dominant Privatization Model*, 21 BROOK. J. INT'L L. 97, 110 (1995).

39. *See* Ofodile, *Trade, Empires, and Subjects*, *supra* note 6, at 520–21. Leaders from India, Indonesia, and Trinidad and Tobago also attended. *See id.* (listing the attending heads of state).

40. *See id.* Following this, a 2006 China–Africa Summit in Beijing fostered high-level talks between political and business leaders from many African countries. *See* Okeke, *supra* note 9, at 198–99 ("In terms of propaganda effect, there is no doubt that the summit catapulted China to greater fame in world affairs.").

41. Ben Carter, *Is China's Economy Really the Largest in the World?*, BBC (Dec 16, 2014), http://www.bbc.com/news/magazine-30483762 [http://perma.cc/J9MY-FKFZ] (archived Jan. 23, 2016) (referring, albeit skeptically, to recent IMF findings that China's purchasing-power-parity-adjusted Gross Domestic Product now exceeds

maintains centrally-planned aspects, the most relevant of which here are its transnational SOEs.[42] As a result, much of China's trade and investment activities are led by the state.[43] Perhaps surprisingly, the Chinese government has often vocally rejected opportunities to influence foreign domestic affairs.[44] China instead holds itself out as having a laissez-faire approach to its trading partners.[45] As will be discussed later in this Note, this approach is not necessarily mutually beneficial. China's high rate of economic growth depends on stable access to raw materials.[46] An efficient means to acquire such materials is through trade, and indeed the majority of China's imports from Africa are oil and other raw materials.[47] This is one

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that of the United States, with a growth rate of around 7 percent). *But see, e.g.*, Keith Bradsher, *Chinese Data Mask Depth of Slowdown, Executives Say*, N.Y. TIMES (June 22, 2012), http:// www.nytimes.com/2012/06/23/business/global/chinese-data-said-to-be-manipulated-understating-its-slowdown.html?pagewanted=all&_r=0 [http://perma.cc/C3GN-VXNP] (archived Jan. 23, 2016) ("[Chinese] [o]fficials at all levels of government are under pressure to report good economic results to Beijing as they wait for promotions, demotions and transfers to cascade down from Beijing. So narrower and seemingly more obscure measures of economic activity are being falsified, according to the executives and economists.").

42. *See* Lucas C. Jenson, Note, *The Restrictive Theory of Foreign Sovereign Immunity and the Chinese–African Economic Relationship*, 22 TRANSNAT'L L. & CONTEMP. PROBS. 563, 567–69 (2013) (explaining that modern SOEs are usually owned, but not managed, by the state).

43. *See, e.g.*, Patrick Munson & Zheng Ronghui, *Feeding the Dragon: Managing Chinese Resource Acquisition in Africa*, 2 SEATTLE J. ENVTL. L. 343, 361 (2012) ("SOEs carry out the vast majority of resource acquisition [outward FDI] from China into Africa."). This would suggest that responsibility for these SOEs actions should ultimately rest with the Chinese government itself, rather than private individuals.

44. *See* Elise Aiken, Note, *Energy Justice: Achieving Stability in Oil-Producing African Nations*, 22 COLO. J. INT'L ENVTL. L. & POL'Y 101, 111 (2011) ("At the same time, China 'fiercely repudiates the increasingly powerful notion that outside interference into the domestic affairs of a state can be legitimate,' and, therefore, is willing to deal with corrupt African governments.").

45. *See* Won Kidane, *Reflections on China–Africa BITs*, 107 AM. SOC'Y INT'L L. PROC. 225, 226 n.3 (2013) (citing a 2010 UNCTAD report contrast China with the approach taken by Africa's traditional western trading partners).

46. *Africa and China: More Than Minerals*, ECONOMIST (Mar. 23, 2013) [hereinafter *More Than Minerals*], http://www.economist.com/news/middle-east-and-africa/21574012-chinese-trade-africa-keeps-growing-fears-neocolonialism-are-overdone-more [http://perma.cc/AFP6-RWLP] (archived Jan. 23, 2016) (noting that China is now the top consumer of oil in the world). As of 2009, China has surpassed the United States as Africa's largest trading partner. *See id.* (noting that, as of 2012, China's trade with Africa was nearly $200 billion, approximately double the American trade with the continent).

47. *See* Mingwei Ma, *8 Facts About China's Investments in Africa*, BROOKINGS NOW BLOG (May 20, 2014), http://www.brookings.edu/blogs/brookings-now/posts/2014/05/8-facts-about-china-investment-in-africa [http://perma.cc/2QFM-QBGE] (archived Jan. 23, 2016) (citing statistics from a recent John L. Thornton China Center/Africa Growth Initiative paper showing that, as of 2011, 80 percent of China's $93 billion in imports from Africa were "crude oil, raw materials and resources").

major reason why China has such substantial trading and investment relations with Nigeria and South Africa.[48]

As of 2010, around 87 percent of China's imports from Nigeria were petroleum or natural gas products, while Nigeria imports a variety of manufactured goods from the PRC.[49] The two countries have signed a series of trade agreements since 2001, including a BIT that year.[50] China has also invested heavily, though not exclusively, in Nigeria's oil industry.[51] Based on 2012 data, there are sixty-seven ongoing Chinese investment projects in Nigeria.[52] In all, the Chinese government operates over thirty companies or joint ventures with Nigeria.[53] Its state-owned oil companies, like Petrochina International and China National Offshore Oil Corporation (CNOOC), have signed major deals with their Nigerian counterparts.[54] One set of deals in 2005–2006, involving both crude oil sales and drilling rights, was worth approximately 7 billion dollars.[55] In 2010, the two countries signed a deal worth 23 billion dollars to jointly finance construction of additional refineries in Nigeria,[56] and in 2014 another Chinese firm agreed to provide 10

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48. *See* Egbula & Zheng, *supra* note 7, at 4, 7, 9 (providing UN data on Chinese trade and investment in Africa; other major partners are Angola and Sudan).

49. *Id.* at 8.

50. *Id.* at 4 (listing ten "major agreements" from 2001 to 2010). This followed on the heels of Nigeria's failure to ratify a more restricted BIT in 1997. *See* Amos Irwin, *Crossing the Ocean by Feeling for the BITs: Investor-State Arbitration in China's Bilateral Investment Treaties*, at 10 n.30 (Global Econ. Governance Initiative, Paper No. 3, 2014) (noting that, ironically, the 1997 deal was probably more favorable to Nigeria).

51. *See id.* at 9 ("Chinese FDI stocks in Nigeria totaled USD 1.03 billion in the period [of 2003 to 2009] . . . . Chinese investments are concentrated in the oil industry, manufacturing, construction and telecoms."). Nigerian investments in China are far more limited. *See id.* (discussing how several Nigerian banks have opened branches in China).

52. *But see* Miria Pigato & Wenxia Tang, China and Africa: Expanding Economic Ties in an Evolving Global Context 14, (World Bank, Working Paper No. 95161, 2015) (noting that China's projects in Nigeria only account for 2.21 percent of projects in sub-Saharan Africa that year).

53. *See* S.N. YADAV, CHINA–AFRICA STRATEGIC ENGAGEMENT 103 (2010) (describing projects spearheaded by Chinese firms to expand railways and built sports stadiums, among other things).

54. *See* Ofodile, *Trade, Empires, and Subjects*, *supra* note 6, at 527–28 (discussing the role of China National Petroleum Corporation (CNPC), the China Petroleum and Chemical Corporation (Sinopec), and the CNOOC in expanding that country's access to African oil sources).

55. *See id.* at 528 (describing the most recent deals between Nigeria and China at the time the article was written).

56. *Nigeria and China Sign $23bn Deal for Three Refineries*, BBC (May 14, 2010), http://www.bbc.com/news/10116945 [http://perma.cc/27H6-7P4R] (archived Jan. 23, 2016) ("The two [state-run oil firms] will jointly seek financing and credits from Chinese authorities and banks to build three refineries and a fuel complex in Nigeria.").

billion dollars for offshore oil exploration projects.[57] China has also financed the construction of two special economic zones (SEZs) in Nigeria.[58] These zones are not only meant to garner goodwill for China by developing local infrastructure for specialized purposes, but also shorten supply lines and allow Chinese businesses to benefit from domestic treatment.[59] On the other hand, President Umaru Yar'Adua cancelled these "oil-for-infrastructure" deals in 2007.[60]

China's trade with South Africa is also extensive, accounting for over 22 percent of its total trade with Africa,[61] approximately 25 billion dollars as of 2010.[62] South Africa mainly exports various raw materials—such as coal, iron, or other "industrial bulk commodities"[63]—and imports manufactured goods from China.[64] Beyond the size of South Africa's market and relative wealth, its political stability as compared to many of its neighbors makes it a more attractive investment destination.[65] The countries have

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57. *See Nigeria: Chinese Firm Invests U.S. $10 Billion in Bida Basin*, ALL AFRICA (Jan. 8, 2014), http://allafrica.com/stories/201401080277.html?aa_source=slideout [http://perma.cc/LGV4-UF4K] (archived Jan. 23, 2016) ("[A] Chinese firm has agreed to invest over $10 billion in the exploration and exploitation of oil and gas in Bida Basin.").

58. *See* Egbula & Zheng, *supra* note 7, at 14–16 (describing SEZs in Ogun state and the Lekki peninsula near Lagos).

59. *See id.* at 15–16 (asserting that China established these and other zones abroad to "showcase the effectiveness of its development model and to share its experience with friendly nations.").

60. *See id.* at 5, 9 (citing concerns over a lack of transparency in cancelling these deals). Possibly this change in policy was in fact due to pressure from Western companies or the government's desire to seek out more lucrative deals. *See* Emeka Umejei, *Nigeria: Why Did China's Infrastructure for Resources Deal Fail in Nigeria?*, AFR. ARGUMENTS (Sept. 2, 2013), http://africanarguments.org/2013/09/02/why-did-chinas-infrastructure-for-resources-deal-fail-in-nigeria-by-emeka-umejei/ [https://perma.cc/HHN8-4BBC] (archived Feb. 8, 2016).

61. *Cf.* Egbula & Zheng, *supra* note 7, at 7 (noting that Angola, China's second largest trading partner, accounts for 17.5 percent of total African trade).

62. *See China Becomes South Africa's Biggest Export Destination: Ambassador*, XINHUA (Aug. 21, 2011) [hereinafter *Biggest Export*], http://en.people.cn/90883/7575556.html [http://perma.cc/7YR5-PD4L] (archived Jan. 23, 2016) (referencing Chinese customs statistics). *But see* GRIMM ET AL., *supra* note 9, at 18 (estimating the volume of trade much more conservatively, at $11 billion as of 2011).

63. Dewald van Rensburg, *Sun Sets on SA's Coal Exports to China*, CITY PRESS (Oct. 19, 2014), http://www.news24.com/Archives/City-Press/Sun-sets-on-SAs-coal-exports-to-China-20150429 [http://perma.cc/S2Y4-YVXP] (archived Jan. 23, 2016) (noting that otherwise high coal sales to China unexpectedly dropped in 2014 due to fluctuations in the commodities markets).

64. *See* GRIMM ET AL., *supra* note 9, at 19 (suggesting South Africa may be able to begin exporting manufactured or "semi-finished" goods soon, due to Chinese investment in the production sector).

65. *See id.* at 18 ("South Africa is arguably also seen as a springboard and convenient base from which China can expand its influence to other countries in the region; this is particularly the case for industries which require sound and reliable governance structures, such as financial services, for instance.").

maintained a BIT since 1997.[66] Investment between the countries in 2010 exceeded 7 billion dollars.[67] In 2011 alone, the Development Bank of South Africa and the China Development Bank agreed to invest 2.5 billion dollars in South African development projects.[68] By 2013, around one hundred Chinese SOEs were operating within South Africa.[69] Unlike Nigeria, South Africa and South African corporations also invest significantly in China.[70]

C. *China's Influence in Africa: Benign or Malign?*

Beyond the bare statistics, whether China's involvement is a net positive for these countries remains controversial.[71] On one hand, China's involvement in Africa may be viewed as an exercise of "neo-colonial" power. Some authors have even described this as the "dominant narrative of China in Africa.[72] In this narrative, China is siphoning off Africa's natural resources to support its own growth without providing equivalent benefits to its African partners, and is supporting despotic regimes, feeding conflicts, and "degrading the people, land and water of Africa through predatory labor practices, environmental destruction and violent suppressions."[73] Some scholars contend that China's apparent commitment to non-interference and state sovereignty is merely a "guise" to "legitimize human rights abuses and undemocratic practices" in the countries in

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66. *See* LUKE E. PETERSON, FRIEDRICH–EBERT–STIFTUNG, SOUTH AFRICA'S BILATERAL INVESTMENT TREATIES: IMPLICATIONS FOR DEVELOPMENT AND HUMAN RIGHTS 7 (2006), http://library.fes.de/pdf-files/iez/global/04137-20080708.pdf [https://perma.cc/P6W3-8P9C] (archived Feb. 27, 2016) (listing all of South Africa's BITs).

67. *See Biggest Export*, *supra* note 62 (citing a statement by South African ambassador Bheki Langa).

68. *See* GRIMM ET AL., *supra* note 9, at 16 (referencing "mining, infrastructure, transport, communication, energy, and agricultural projects.").

69. Jacob Zuma, President, S. Afr. Address by President Zuma During the China–South Africa Business Forum Meeting, on the Occasion of the State Visit to the People's Republic of China, Beijing (Dec. 5, 2014) [hereinafter Zuma Address], http://www.dfa.gov.za/docs/speeches/2014/jzum1205.html [perma.cc/XJ7W-FZX3] (archived Jan. 26, 2016) (discussing plans for expanding South Africa-China relations in 2015).

70. *See* Harry G. Broadman, *Chinese–African Trade and Investment: The Vanguard of South-South Commerce in the Twenty-First Century*, *in* CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 87, 106 (Robert I. Rotberg ed., 2009) (noting South African FDI in China surpassed $100 million as of 2004).

71. *See generally* Webster, *supra* note 20 (controverting the "copious commentary from the West, much of it negative" on China's engagements in Africa).

72. *See id.* at 627 (noting this view has been adopted by various "[i]nternational media, think tanks, NGOs, bloggers, academics, government officials (elected and appointed), [and] international financial institutions"); *Wikileaks: US Monitors 'Aggressive' China in Africa*, BBC (Dec. 9, 2010), http://www.bbc.com/news/world-africa-11955516 [perma.cc/XK9V-GV9E] (archived Jan. 26, 2016) (quoting a U.S. diplomat in Nigeria who described China as "a very aggressive and pernicious economic competitor with no morals").

73. Webster, *supra* note 20, at 628.

which it invests.[74] Accusations of exploitation have come from Western as well as African officials—notably in Zambia and Nigeria.[75]

On the other hand, China may in fact be a benevolent partner and attractive alternative to continued dependence on the West. Unsurprisingly, the Chinese government espouses this view, calling itself "a friendly elephant."[76] In a 2014 visit to Ethiopia, Nigeria, Angola, and Kenya, Premier Li Keqiang emphasized his country's desire to improve standards of living on the continent and to partner with African nations in areas such as agriculture, manufacturing, and infrastructure—not just oil and minerals.[77] Li described recent disputes, such as those surrounding strikes at Chinese-funded petroleum facilities in Chad and Niger, as merely "growing pains" in the Sino-African relationship.[78] China's outward stance toward Africa is part of a larger narrative of its "peaceful rise," which it has promoted since the 1990s.[79] Unlike nineteenth century imperial powers, China asserts that its involvement in Africa follows "a path

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74. Robert I. Rotberg, *China's Quest for Resources, Opportunities, and Influence in Africa*, *in* CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 1, 15 (Robert I. Rotberg ed., 2009).

75. *See, e.g.*, Barry Sautman, *The Chinese Defilement Case: Racial Profiling in an African "Model of Democracy"*, 14 RUTGERS RACE & L. REV. 87, 93–95 (2013) (describing the anti-Chinese rhetoric of Michael Sata, President of Zambia from 2011 to 2014); David Smith, *Hillary Clinton Launches African Tour with Veiled Attack on China*, GUARDIAN (Aug. 1, 2012) http://www.theguardian.com/world/2012/aug/01/hillary-clinton-africa-china [perma.cc/5J99-WK8D] (archived Jan. 26, 2016) (interpreting then-Secretary of State Clinton's remark that "America will stand up for democracy and universal human rights even when it might be easier to look the other way and keep the resources flowing" as referring to China). In another recent example in Nigeria, a central bank governor reportedly "excoriated the Chinese for exuding 'a whiff of colonialism.'" *More than Minerals*, *supra* note 46. According to that former central bank governor, "[i]n much of Africa, [the Chinese] have set up huge mining operations. They have also built infrastructure. But, with exceptions, they have done so using equipment and labor imported from home, without transferring skills to local communities. So China takes our primary goods and sells us manufactured ones. This was also the essence of colonialism." WENJIE CHEN ET AL., BROOKINGS INST., WHY IS CHINA INVESTING IN AFRICA? EVIDENCE FROM THE FIRM LEVEL 2 (2015), www.brookings.edu/~/media/research/files/papers/2015/08/why-china-is-investing-in-africa/why-is-china-investing-in-africa.pdf [perma.cc/T9CK-QZGB] (archived Jan. 26, 2016).

76. Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 995 (2011).

77. *See* Ben Blanchard, *China Says Premier's Africa Visit About More Than Just Oil Deals*, REUTERS (Apr. 30, 2014 6:53 AM), http://www.reuters.com/article/2014/04/30/us-china-africa-idUSBREA3T0B520140430 [perma.cc/2KWJ-K4XK] (archived Jan. 26, 2016) (asserting that "China is also keen not to be perceived as an imperial master.").

78. David Stanway, *China Premier Says Sino-Africa Disputes Just "Growing Pains"*, REUTERS (May 4, 2014, 1:29 AM), http://www.reuters.com/article/2014/05/04/us-china-africa-idUSBREA4300L20140504 [perma.cc/5WGC-Q3YA] (archived Jan. 25, 2016).

79. Yu, *supra* note 76, at 993–94.

based not on aggressive changes to the international order, but instead on benevolent principles of mutual benefit."[80]

Whichever side is correct overall, one must concede that China has provided some concrete forms of assistance to its African partners, both directly and incidentally. China has improved standards of living in Africa by providing infrastructure, jobs, and consumer goods.[81] In Nigeria specifically, Chinese-funded roads, airports, railways, and power plants may rectify "one of the major impediments" to the modernization of the Nigerian economy.[82] Along the way tens of thousands of Nigerians have received technical training in China, and the two nations have engaged in several high profile technology transfers.[83] Trade with China has improved access to consumer goods in Nigeria, particularly telecommunications equipment like cell phones.[84] At least one study concluded "[t]here is no question that low prices for imported Chinese goods have benefitted African consumers, as well as producers who rely on imported inputs and capital goods."[85] Chinese companies directly employ Nigerians in the oil industry, as well as in agriculture and the manufacture of products like plastics, ceramics, leather, building materials, pharmaceuticals, or food and beverages.[86] All of this helps to alleviate Nigeria's unemployment rate, which was at least 19.7 percent as of 2011.[87]

Less has been written about the benefits of Chinese trade and investment in South Africa. This is perhaps because, compared to Nigeria, South Africa does not have as far to climb in its

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80. *Id.*

81. *See, e.g.*, Webster, *supra* note 20, at 649–62 (discussing how Chinese involvement in Africa has actually helped bolster socioeconomic rights to food, water, medicine, education, and infrastructure).

82. *See* Egbula & Zheng, *supra* note 7, at 14 ("China Civil Engineering Construction Corporation (CCECC), the biggest Chinese construction company in Nigeria, currently has more than 50 projects underway and has invested more than USD 10 billion in the country.").

83. *See* David Haroz, *China in Africa: Symbiosis or Exploitation?*, 35 FLETCHER F. WORLD AFF. 65, 75 (2011) ("Between 2000 and 2006, 16,000 African professionals were trained in China, and another 15,000 received training from 2007 to 2009. At the 2009 FOCAC, China pledged to train 20,000 more African professionals in various sectors from 2010 to 2012. As one Nigerian official noted, 'The Western world is never prepared to transfer technology—but the Chinese do, [and] while China's technology may not be as sophisticated as some Western governments', it is better to have Chinese technology than to have none at all.").

84. *See* Egbula & Zheng, *supra* note 7, at 12–13 (reporting that phones manufactured by Chinese companies Huawei and ZTE are between 5 percent and 40 percent cheaper than those made by European or American companies).

85. Pigato & Tang, *supra* note 52, at 7–8.

86. *But see id.* at 11, 14 (noting that most positions with Chinese companies are low-skill jobs).

87. *See id.* at 18 (referring to other scholars who believe this number is "a gross underestimation").

development. Its per capita income is significantly higher than China's, and is among the most developed nations on the continent.[88] Nonetheless, South Africa has also received quantifiable economic benefits from Chinese trade and investment.[89] The South African government certainly appears to believe it is benefiting from this relationship. In a speech in late 2014, President Jacob Zuma announced plans to "advance [South Africa's] economic partnership" with China significantly in 2015.[90] While for the first half of 2015, Chinese investment in Africa actually flagged by more than 40 percent, in December of that year the PRC agreed to invest 6.5 billion dollars in South Africa, and the SOE Beijing Automotive Group announced plans to invest 11 billion to construct a major auto plant in the country.[91] One other particularly interesting area of Chinese investment in South Africa is the renewable energy sector.[92] Recent joint ventures with Chinese utilities and manufacturers have helped South Africa, which produces by far the most greenhouse gasses on the continent, to transition to cleaner technologies by building six wind farms and setting up a wind turbine manufacturing plant.[93] Continued access to Chinese capital and new jobs remains important in South Africa, which faces a 25 percent unemployment rate.[94] China also grants aid packages like those previously described to both countries, along with concessional and commercial loans.[95] Concessional loans are low-interest loans made by the Chinese

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88. *See* Brautigam, *supra* note 38, at 200 (citing Mauritius, Botswana, and South Africa as examples of nations that have higher per capita income than China, yet still receive aid from it).

89. *See supra* Part II.C.

90. Zuma Address, *supra* note 69.

91. *See* Franz Wild & Amogelang Mbatha, *China's Xi Pledges $6.5 Billion to Support S. Africa Economy*, BLOOMBERG BUS. (Dec. 2, 2015), http://www.bloomberg.com/news/articles/2015-12-02/xi-s-south-africa-visit-starts-with-6-5-billion-in-agreements [perma.cc/CPX3-TYRG] (archived Jan. 27, 2016) (describing how the investment would go to various energy and railway projects, as well as extend a 2.5 billion dollar line of credit to South Africa).

92. *See* Ruth Gordon, *The Environmental Implications of China's Engagement with Sub-Saharan Africa*, 42 ENVTL. L. REP. NEWS & ANALYSIS 11109, 11122 (2012) (referring to Chinese-owned wind and solar plants in South Africa).

93. *Id.* at 11122, 11123 n.184.

94. *See* Ann Bernstein, *South Africa's Key Challenges: Tough Choices and New Directions*, 652 ANNALS AM. ACAD. POL. & SOC. SCI. 20, 25 (2014) (blaming this problem on persistent slow job growth and lack of educational opportunities).

95. *See, e.g.*, Deborah Brautigam, *Chinese Development Aid in Africa: What, Where, Why, and How Much?*, *in* RISING CHINA: GLOBAL CHALLENGES AND OPPORTUNITIES 203, 206–07 (Jane Golley & Ligang Song eds., 2011) ("According to [a] 2010 interview [with a China Development Bank official], the largest proportion of the [commercial] loans issued so far has gone to South Africa, Angola and Botswana."); Obiorah et al., *supra* note 5, at 276 (discussing one $2.5 billion loan to Nigeria by China's Eximbank in 2006, of which $500 million was concessional).

government to developing countries. [96] They are used to fund development projects, but are subject to very few conditions.[97]

This Note, at least in part, examines which of these two narratives is more accurate—that of "neo-colonial" exploitation, or of mutual benefit. Though both are simplistic, they possess elements of truth and serve as useful framing devices. The truth, most likely, is somewhere in between the two extremes.[98] Perhaps the first narrative is relatively true for some African nations, the second more so for other nations. In any case, following on the heels of this question is another: What should African nations do about China?

III. DOWNSIDES TO CHINESE INVOLVEMENT IN NIGERIA AND SOUTH AFRICA

This Part examines the accuracy of the "neo-colonial" narrative in South Africa and Nigeria.[99] There is a shortage of scholarly work on this topic, perhaps because China's dealings in Africa are often not very transparent. [100] As a result, this Note's discussion of any

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96. *But see* Paul Hubbard, *Chinese Concessional Loans*, *in* CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 217, 217–27 (Robert I. Rotberg ed., 2009) (noting, however, that the nature of these loans and where precisely they go suffer from a lack of transparency).

97. *See id.* at 218 ("Multilateral banks are 'losing projects in Asia and Africa to Chinese because [the Chinese] don't bother about social or human rights conditions.'").

98. Both sides have strong motives to "spin" a narrative. *Cf.* Stephanie Rupp, *Africa and China: Engaging Postcolonial Interdependencies*, *in* CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 65, 67 (Robert I. Rotberg ed., 2009) ("China expands its interests in Africa at the expense of the United States and the EU, eliciting reactions in Washington and in European capitals that reflect this potential displacement.").

99. *Cf.* Patrick J. Keenan, *Curse or Cure? China, Africa, and the Effects of Unconditioned Wealth*, 27 BERKELEY J. INT'L L. 84, 112 (2009) (positing that unconditional aid to countries like Nigeria encourage rent–seeking behavior by local officials); Munson & Zheng, *supra* note 43, at 349–50.

100. *See, e.g.*, Hubbard, *supra* note 96, at 218 ("In interviews, Chinese officials have been either unwilling or unable to provide details of loans. Scholars and policymakers are left to speculate on the details of Chinese aid."). This is probably not a deliberate obfuscation tactic as much as it is a failure to make such materials accessible to non-Chinese readers, however. *See id.* at 226 (conceding that even the published information is far from comprehensive). Nevertheless, the lack of any "systematic sharing of data" between Chinese and international lenders has stoked Western fears that "Chinese lending practices may encourage the rapid recurrence of unsustainable debt in Africa." Chin-Hao Huang, *China's Renewed Partnerships with Africa: Implications for the United States*, *in* CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 296, 303 (Robert I. Rotberg ed., 2009). Likewise, there are significant barriers to accessing public records or economic data in nations like Nigeria. *Cf.* TRANSPARENCY INT'L, CORRUPTION BY COUNTRY/TERRITORY: NIGERIA, http://www.transparency.org/country#NGA_DataResearch [perma.cc/Q947-HJKQ] (archived on Jan. 27, 2016) (listing Nigeria's budget openness as of 2010 as "scant or none"). Some speculation and reliance on non-scholarly sources are therefore unavoidable.

negative externalities imposed by China will be incomplete; it is very difficult to link specific Chinese policies to specific injuries to its trade partners. Nonetheless, this Part proposes that there are some circumstances where Chinese involvement probably harms the interests of South Africa and Nigeria.[101] First, this Part attempts to determine whether Chinese companies in particular are (i) contributing to environmental degradation in Nigeria, or (ii) mistreating workers in both countries. Next, it discusses the macroeconomic fallout from the dumping of Chinese goods and the out-competing of domestic labor and firms. This is a more complicated issue, as Chinese imports can have both negative and positive effects. Finally, this Part covers the nature of corruption in South Africa and Nigeria, and whether it is tied to China. As Chinese investment and aid is often unconditional or unmonitored, there is perhaps good reason to believe it fosters corruption and worsens the "resource curse" in both Nigeria and South Africa, even absent direct evidence that Chinese firms engage in bribery or other corrupt practices.

A. *Potential Human Rights Violations*

1. Environmental Damage in Nigeria

Much of Nigeria's oil wealth is situated around the deltas of the Niger River and offshore in the neighboring Gulf of Guinea.[102] The nation has serious problems with pollution and environmental degradation, largely because of development in the oil and gas

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101. It is worth noting that this section does not discuss one area where China has received extremely harsh international criticism: providing aid to despotic regimes while turning a blind eye to how it is used. These concerns, however, are not at play in South Africa and Nigeria. *See, e.g.*, Webster, *supra* note 20, at 641 (arguing China's failure to concern itself with the domestic politics of its trading partners has resulted in its aid propping up strongmen like Robert Mugabe in Zimbabwe, Omar al-Bashir in Sudan, Moussa Didis Camara of Guinea, and Jose Eduardo dos Santos of Angola). Especially notorious has been China's longstanding sales of arms and military equipment to Sudan, which may have been used in the Darfur genocide. *See* Stephanie L. Kotecki, *The Human Rights Costs of China's Arms Sales to Sudan—A Violation of International Law on Two Fronts*, 17 PAC. RIM L. & POL'Y J. 209, 232 (2008) (arguing China's actions violate § 16 of the Draft Articles on State Responsibility for Internationally Wrongful Acts).

102. *See* Aiken, *supra* note 44, at 105 (noting that "despite the country's rich deposits of natural resources, two-thirds of Nigerians live in poverty"). Nigeria is the third largest producer of liquefied natural gas in the world, and is currently vying for the number two spot. *See* Emeka Duruigbo, *The Global Energy Challenge and Nigeria's Emergence as a Major Gas Power: Promise, Peril or Paradox of Plenty?*, 21 GEO. INT'L ENVTL. L. REV. 395, 416–17 (2009) (describing Nigeria's export-driven growth in the natural gas sector, with China being a major purchaser).

sector.[103] In hundreds of separate incidents, around eleven million gallons of oil—"equivalent to an Exxon Valdez"—are spilled in Nigeria each year.[104] By 2008, over two thousand sites across the country were contaminated, often due to burst pipelines and wellhead explosions.[105] Companies operating the sites often blame "social instability," especially sabotage by "militants, thieves, or individuals hoping to collect remediation costs."[106] However, a significant portion of spills are probably due to concealed "equipment or operational failures" on the part of the refineries.[107] The environmental and health-related impacts of these spills can be quite severe. They have contaminated the water supply of the Niger Delta with heavy metals and other toxins, killing fish and increasing incidences of cancer, respiratory, and skin-related ailments among locals.[108] The spills also kill crops, render large areas "unusable for agriculture for several years," and hamper the long-term productivity of the soil in a region that is heavily dependent on agriculture.[109]

Another practice with various negative consequences is "gas flaring," the deliberate ignition of spouts of natural gas produced as waste during oil extraction.[110] Nigeria is second only to Russia in

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103. *See* Lisa Stevens, *The Illusion of Sustainable Development: How Nigeria's Environmental Laws Are Failing the Niger Delta*, 36 VT. L. REV. 387, 406–07 (2011) (urging the Nigerian government to follow through on its 1989 sustainable development pledge).

104. Reagan R. Demas, *Moment of Truth: Development in Sub-Saharan Africa and Critical Alterations Needed in Application of the Foreign Corrupt Practices Act and Other Anti-Corruption Initiatives*, 26 AM. U. INT'L L. REV. 315, 328 (2011); *see Shell Agrees $84m Deal over Niger Delta Oil Spill*, BBC (Jan. 7, 2015) [hereinafter *Shell Agrees*], http://www.bbc.com/news/world-30699787 [perma.cc/GS9G-ECFJ] (archived Jan. 28, 2016) (reporting on a settlement Royal Dutch Shell made to fishermen in Ogoniland region, equivalent to $3,300 for each).

105. *See* Stevens, *supra* note 103, at 392 (discussing briefly the causes of oil-related environmental disasters in Nigeria).

106. *Id.* Despite its oil wealth, the Niger Delta is one the poorest regions in the world. *See* U.N. DEV. PROGRAMME, NIGER DELTA HUMAN DEVELOPMENT REPORT 35–39 (2006) (discussing the increasing incidence of poverty in the region, as well the population's growing dissatisfaction with the status quo).

107. Stevens, *supra* note 103, at 392; *see also* Larisa Wick, *Human Rights Violations in Nigeria: Corporate Malpractice and State Acquiescence in the Oil Producing Deltas of Nigeria*, 12 MICH. ST. J. INT'L L. 63, 72 (2003) (asserting that spills are more often caused by the use of faulty pipes, resulting in continuous leaks).

108. Stevens, *supra* note 103, at 392–94 (referring to "grease, phenolic compounds, cyanide, sulphide, suspended solids, chromium, and biological oxygen–demanding organic matter.").

109. *Id.*; *see* U.N. DEV. PROGRAMME, *supra* note 106, at 25–26 (noting that "[l]inks between their operations and human deprivation in some areas of the delta has local raised [sic] expectations that the oil companies should contribute to physical and human development in affected communities.").

110. *See* Stevens, *supra* note 103, at 393 ("Over 70% of natural gas is still flared in the Niger Delta, and Nigeria is the site of 25% of the gas flared in the world. In many places, gas flaring has occurred '24 hours a day for over 35 years.'").

amount of gas flaring.[111] Gas flares release large amounts of greenhouse gasses into the air, promote acid rain, and disrupt ecosystems and peoples' lives because of their extreme noise and heat.[112] A somewhat-dated report from 2005 estimated that gas flaring from seventeen sites in just one Nigerian state contributed to forty-nine premature deaths, eight cancer cases, thousands of respiratory ailments, and hundreds of thousands of asthma attacks annually.[113]

These environmental concerns cannot easily be laid at China's feet, however. It is far from the only country to have large operations in the Niger Delta.[114] Activities like gas flaring by ExxonMobil, Chevron, or especially Shell have received media attention in recent years.[115] Various Chinese petroleum firms operating in Nigeria[116] may be creating similar problems, but if so they have escaped much attention. Furthermore, any connection between Chinese operations in South Africa and environmental problems in that country are even more attenuated.[117] In fact, the opposite appears to be true due to China's investments in clean energy there.[118] Nevertheless, Chinese firms have shown a greater willingness to accept risks in setting up

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111. *See* BIRNUR BUZCU-GUVEN ET AL., BAKER INST. FOR PUB. POL'Y, GAS FLARING AND VENTING: EXTENT, IMPACTS, AND REMEDIES 16, 21 [hereinafter GAS FLARING REPORT] (discussing trends in gas flaring practices around the world).

112. *See* Stevens, *supra* note 103, at 393 (describing the environmental and human rights consequences of gas flaring).

113. *But see* GAS FLARING REPORT, *supra* note 111, at 11 (noting that this was a conservative estimate).

114. *See* Stevens, *supra* note 103, at 390 (noting that "Royal Dutch Shell remains the country's dominant oil company."); Howard Mustoe, *Shell 'Warned Nigeria Pipeline Could Leak Before Spills'*, BBC (Nov. 13, 2014), http://www.bbc.com/news/business-29997074 [perma.cc/J9B5-W6L4] (archived Jan. 28, 2016) (discussing an environmental disaster caused by a Shell pipeline in the Ogoniland region of Nigeria).

115. *See* Monica Mark, *Nigeria's Penalty for Gas Flaring Will Not Curb Emissions, Say Campaigners*, GUARDIAN (May 31, 2012) http://www.theguardian.com/environment/2012/may/31/nigeria-penalty-gas-flaring [perma.cc/73X2-32BW] (archived Jan. 28, 2016) ("Oil companiess [sic] ExxonMobil, Shell and Chevron between them flared 23.5bn cubic feet of gas in January [2012] alone, according to the state oil firm, the Nigerian National Petroleum Company.").

116. *See* Ofodile, *Trade, Empires, and Subjects*, *supra* note 6, at 528 (discussing longstanding ties between Nigeria and both Petrochina and CNOOC); Géraldine Amiel, *Total Sells Stake in Nigerian Project to Sinopec for $2.5 Billion*, WALL ST. J. (Nov. 19, 2012, 12:35 PM), http://www.wsj.com/articles/SB10001424127887323353204578128710317897372 [perma.cc/K4YM-XCYT] (archived Jan. 28, 2016) (discussing Sinopec's new interest in Nigerian offshore oil).

117. *See, e.g.*, Brittany D. Botterill, Comment, *South Africa's Electricity Crisis: The Need to Reconcile Environmental Policy Decisions with International Treaties*, 4 SAN DIEGO J. CLIMATE & ENERGY L. 225, 237–44 (2013) (discussing South Africa's continued extensive use of coal power and its inability, or unwillingness, to adequately reduce its greenhouse gas emissions under the Kyoto Protocol).

118. *See supra* Part III.

new operations in Nigeria.[119] After all, Chinese demand for Nigerian oil had been "expected to rise tenfold to 200,000 barrels a day by 2015"[120]—though it may not have reached that level due to the country's economic slowdown that year.[121] Beyond the oil industry, Chinese firms in Nigeria have also allegedly dumped "untreated effluents" from logging into rivers, and violated numerous other occupational health and pollution standards.[122] Thus, one could infer that China's increased interest and investment in Nigerian oil has likely contributed to environmental degradation in the Niger Delta, [123] but only to an uncertain extent. It is very difficult to point to precise incidents or determine the scale of their contributions to Nigeria's environmental woes.

2. Labor Rights Violations

Chinese companies involved in a range of industries, particularly construction, have established presences in South Africa.[124] Because

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119. *See* Kelley, *supra* note 21, at 38 ("Unlike many Western companies, Chinese companies are willing to take more risk and will work in more politically unstable regions."); Stevens, *supra* note 103, at 391 ("Nigeria is negotiating with the Chinese National Offshore Oil Cooperation (Cnooc Ltd.), the third largest national oil company in China, to develop onshore oil blocks that other companies consider too dangerous due to militant attacks.").

120. *China and Nigeria Sign $1.1bn Deal*, BBC (July 11, 2013), http://www.bbc.com/news/world-africa-23269004 [perma.cc/4LB6-CJMK] (archived Jan. 28, 2016). However, due to the downturn in the Chinese economy and the fall in oil prices in 2015, future sales to China are up in the air. *See* Julia Payne & Libby George, *UPDATE 2—Nigeria's NNPC Issues 2016 Crude Oil Contracts Worth $13.5 Billion*, REUTERS (Dec. 17, 2015, 12:15 PM), http://www.reuters.com/article/nigeria-crude-contracts-idUSL8N14628L20151217 [perma.cc/D9WP-8NMJ] (archived Jan. 28, 2016) (noting that Nigeria has yet to release how many barrels per day it will contract to China in 2016); *see also Five Ways China's Economic Crisis Will Affect Africa*, BBC (Aug. 27, 2015), http://www.bbc.com/news/world-africa-34060934 [perma.cc/BF9U-NVME] (archived Jan. 28, 2016) (predicting what impact China's financial distress might have on its African partners, particularly South Africa); Patrick McGroarty et al., *Fall in Oil Prices Threatens Africa's Economic Growth*, WALL ST. J. (Dec. 11, 2014, 8:30 PM), http://www.wsj.com/articles/fall-in-oil-prices-threatens-africas-economic-growth-1418347811 [perma.cc/UG3L-ZLU7] (archived Jan. 28, 2016) (discussing the impact of falling oil prices on the Nigerian economy).

121. *See* Andrew Walker, *China's Slowdown and Cheap Oil*, BBC (Aug. 26, 2015), http://www.bbc.com/news/business-34060921 [perma.cc/D692-7CQ3] (archived Jan. 28, 2016) (suggesting Nigeria may face financial hardships as China's decreasing demand impacts oil prices).

122. Obiorah et al., *supra* note 5, at 291.

123. *See* Stevens, *supra* note 103, at 391 ("[China's] continued development in already unstable areas of the Niger Delta will inevitably lead to further instability and environmental degradation.").

124. *See* Tonya Rodgers, Note, *The Center Cannot Hold: Assessing the Reach of China's Labor Protections to Migrant Workers in Africa*, 35 FORDHAM INT'L L.J. 1075, 1094 (2012) (listing "energy, mining and metallurgy, electronics, telecommunications, commercial banking, shipping, light manufacturing, and automobiles" as well as textile factories).

of the latter country's extremely high unemployment rate, employees at Chinese firms there have little bargaining power without union support.[125] Local employees are reportedly "routinely" paid below minimum wage and denied benefits and skills training.[126] Ironically, the workers treated most poorly at these firms are often themselves Chinese.[127] Skilled or semi-skilled Chinese migrant laborers are frequently shipped overseas to work in South Africa without direct access to either their passports or their salaries.[128] Though they are paid higher wages than laborers employed in China proper, migrant workers report being forced to work twelve to sixteen hours a day every day, being denied overtime pay, and having their movement limited to onsite housing.[129]

Similar labor abuses have reportedly occurred in Nigeria,[130] though again the precise of these occurrences scale is unclear. Major Chinese firms operating in Nigeria include multiple state-owned oil companies as well as various telecom, manufacturing, and construction companies.[131] These firms' Nigerian operations "have been increasingly accused of engaging in poor labor practices, harsh treatment of employees, low, wages, and poor standards of corporate governance."[132] Chinese migrant laborers face similarly poor conditions in Nigeria at the hands of Chinese firms.[133] Nigerian labor unions have also vociferously complained that Chinese companies discriminate against Nigerians in terms of both salary and the possibility of advancement.[134] While China certainly faces frequent criticisms for its labor practices in South Africa and Nigeria,

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125. *See id.* at 1095, 1095 n.101 (admitting that this is rather anecdotal, based on the comments of "local workers and business owners").

126. *Id.* at 1095.

127. *See id.* at 1087–88 ("Where a project demands even minimal skill or experience, however, Chinese companies rely heavily on Chinese laborers."). There are at least several hundred thousand Chinese immigrants living in South Africa. *See id.* at 1096 (claiming Chinese workers "represent a smaller part of the workforce[,] but maintain a significant presence in Chinese companies").

128. *See id.* at 1089–91 ("Despite the fact that labor contracts and legislation . . . are designed to regulate Chinese employers and the treatment of their employees, this is commonly not the case.").

129. *See id.* at 1090 n.78 (noting such treatment occurred in Mauritius, as well as South Africa).

130. Obiorah et al., *supra* note 5, at 280.

131. *See* Egbula & Zheng, *supra* note 7, at 11–15 (describing the various sectors of the Nigerian economy in which Chinese companies operate).

132. Obiorah et al., *supra* note 5, at 280.

133. *See* Rodgers, *supra* note 124, at 1090 n.77 (citing SERGE MICHEL & MICHEL BEURET, CHINA SAFARI: ON THE TRAIL OF BEIJING'S EXPANSION IN AFRICA 71–94 (2009)).

134. *See* Egbula & Zheng, *supra* note 7, at 18 ("Chinese companies vehemently deny discriminating against Nigerian workers, arguing that salaries for both Chinese and Nigerian employees are low, but in line with pay rates in Nigerian manufacturing companies.").

most accusations are apparently based on anecdotal evidence. Nonetheless, reports concerning migrant laborers are especially indicative of labor rights violations occurring under the noses of South African and Nigerian authorities, even if most documented abuses are against non-citizens. Fortunately, Chinese labor practices in South Africa and Nigeria involve fewer blatant labor rights violations than in other African nations.[135]

B. *"Ruinous" Competition and Other Economic Concerns*

The frequency with which cheap Chinese goods are "dumped" on domestic markets is a growing concern among many African firms.[136] As African nations have reduced barriers to trade to better integrate with global markets, the possibility of dumping has become much more acute.[137] Some researchers suggest that Chinese dumping is beneficial because "a broader spectrum of the population can now afford certain consumption or household items[,] and in this way trade with China has contributed to people's well-being."[138] Those

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135. *See* Brian Chama, *Economic Development at the Cost of Human Rights: China Nonferrous Metal Industry in Zambia*, 17 HUM. RTS. BRIEF 1, 2, 3–6 (2010) (describing human rights and labor abuses allegedly perpetrated by the company China Nonferrous Metal Industry against Zambian miners in the early 2000s, such as locking them into the mine at night and killing striking workers). Chinese firms' treatment of mine workers in nations such as Zambia have stirred outrage domestically, and have been reported extensively abroad. *See id.* ("[Zambian] Regional Minister Alice Simango, who visited the [China-owned Collum Coal Mine Industries mining] site, reported that '[t]he workers are kept like pigs and subjected to a dangerous environment. They are kicked and beaten as though they are not human beings.'"); *see also China Mines in Zambia 'Unsafe' Says Human Rights Watch*, BBC (Nov. 3, 2011) [hereinafter *China Mines*], http://www.bbc.com/news/world-africa-15569310 [perma.cc/Z9Q3-47AB] (archived Jan. 28, 2016) (reporting on numerous alleged violations of Zambian work hour limits and safety rules by China Non-Ferrous Metals Mining Corporation).

136. *See* Ofodile, *Trade, Empires, and Subjects*, *supra* note 6, at 577 (noting that one-seventh of all anti-dumping cases before the WTO between 1995 and 2004 involved Chinese products). "Dumping" is the importation or sale by foreign-owned firms of goods at prices far below what domestic firms can sustain. *See* Christian C.D. Petersen, *African Dumping Grounds: South Africa's Struggle Against Unfair Trade*, 14 B.U. INT'L L.J. 375, 379–83 (1996) (describing some of the rationales for and against antidumping policies).

137. *Cf.* Ofodile, *Trade, Empires, and Subjects*, *supra* note 6, at 577 (questioning whether African nations have the institutional capability to resist dumping). Liberal economists frequently argue that for African nations to accumulate capital, keep skilled workers, and improve their technology base, they must resist protectionist impulses and relinquish direct controls on domestic markets. *See* Alec R. Johnson, Comment, *Rethinking Bilateral Investment Treaties in Sub-Saharan Africa*, 59 EMORY L.J. 919, 953–54 (2010) ("Market forces encourage specialization by those producers that have a comparative advantage; and this specialization—rather than the redistribution of existing wealth—fuels development through the creation of new wealth.").

138. GRIMM ET AL., *supra* note 9, at 17.

opposed to dumping argue that it is unfair to domestic industries and distorts markets.[139] Others counter that anti-dumping policies shield inefficient companies, discourage trade, and waste resources.[140]

Nigerian companies are increasingly complaining of dumping by Chinese companies, though both nations have accused the other of selling substandard products.[141] Chinese firms' apparent disregard of import/export regulations has also supported the Nigerian black market.[142] Many of these affordable Chinese imports are very low quality—for example, faulty Chinese wiring and power strips may be causing dozens of fires a year in Lagos.[143] Nigeria's textile industry has been particularly vulnerable to the importing of cheap Chinese cotton products.[144] The industry has shrunk from around 175 plants employing 250,000 people in the 1980s, down to only twenty-six plants and 24,000 workers by 2007.[145] The decline has largely been blamed on China.[146] Though around 300,000 Nigerians are employed by Chinese companies, allegedly over 350,000 manufacturing jobs have been lost in recent years due to Chinese competition,

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139. *See* Petersen, *supra* note 136, at 381–82 (noting that "antidumping duties remain an important mechanism for governments to prevent harmful and trade distorting practices.").

140. *See id.* ("Antidumping duties have a protectionist effect which hinders global trade, particularly when a nation persists in bringing antidumping actions even though 'the alleged dumper is acting in an economically rational manner.'").

141. This resulted in a 2009 agreement against fake products exported to Nigeria from China. *See* Egbula & Zheng, *supra* note 7, at 18 ("While China acknowledges the problem, it says that Nigerian importers often pressure Chinese suppliers to produce lower quality products in order to reduce the prices to a level Nigerians can afford.").

142. *See* Obiorah et al., *supra* note 5, at 280 (including in CDs, stamps, and computer equipment).

143. *See* Keith Bradsher & Adam Nossiter, *In Nigeria, Chinese Investment Comes with a Downside*, N.Y. TIMES (Dec. 5, 2015), http://www.nytimes.com/2015/12/06/business/international/in-nigeria-chinese-investment-comes-with-a-downside.html?_r=0 [https://perma.cc/UZK2-NAMA] (archived Jan. 28, 2016) (detailing a variety of downsides of Chinese investment in Nigeria, including shoddy or counterfeit products, possible corruption, and unemployment).

144. *See* Obiorah et al., *supra* note 5, at 279–80 (describing the closure of large numbers of Nigerian textile plants in the 1990s and 2000s); Dulue Mbachu, *Nigerian Resources: Changing the Playing Field*, 13 S. AFR. J. INT'L AFF. 77, 80 (2006) ("Chinese exporters have been accused of dumping goods, particularly textiles, in Nigeria."); *The Chinese in Africa: Trying to Pull Together*, ECONOMIST (Apr. 20, 2011), http://www.economist.com/node/18586448 [https://perma.cc/PKE5-632W] (archived Jan. 28, 2016) ("Hundreds of textile factories across Nigeria collapsed in recent years because they could not compete with cheap Chinese garments. Many thousands of jobs were lost.").

145. Obiorah, et al., *supra* note 5, at 280 (noting that the number of active, Nigerian-owned textile mills was projected to fall below six by 2008).

146. *See id.* at 292 (suggesting the continued dumping of Chinese manufactured goods "could provoke a public backlash against the growing Chinese immigrant community" in Nigeria).

particularly in that industry.[147] But it is also worth noting that Nigeria's population is around 177 million, indicating these are not truly disastrous changes.[148]

Since the mid-1990s, as textiles and similar industries have declined, South African firms have likewise alleged they are suffering due to the dumping of Chinese products.[149] The textile industry has lost an estimated 75,000 jobs in recent years.[150] By contrast, South African regulations—more robust than in many neighboring countries—have caused many Chinese firms to retreat from the country over time.[151] As previously mentioned, China is very interested in accessing South Africa's mineral resources. However, South Africa hosts several well-established multinational corporations, such as the mining corporation Anglo-American, that have maintained competitive advantages over their Chinese counterparts.[152] Overall, its manufacturing sector has proven more resilient to Chinese advances than other nations due to its greater capacity.[153] Nonetheless, in the period from 1992 to 2010, Chinese imports have adversely affected employment in forty-four separate labor-intensive industries in South Africa.[154]

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147. *See* Egbula & Zheng, *supra* note 7, at 18 (providing the caveat that these figures were supplied by Nigerian labor unions).

148. *See* CENTRAL INTELLIGENCE AGENCY [CIA], WORLD FACT BOOK: NIGERIA (2016), https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html [https://perma.cc/K67C-FLJR] (archived Jan. 28, 2016) (providing Nigeria's vital statistics as of June 2014).

149. *See* Petersen, *supra* note 136, at 377 n.11, 393 (specifically referring to Chinese towels and Acetaminophenol); *see also* GRIMM ET AL., *supra* note 9, at 17 (describing the "multifaceted implications for South Africa's domestic economy" trade with China has brought).

150. *See* GRIMM ET AL., *supra* note 9, at 17.

151. *See* Rodgers, *supra* note 124, at 1095 (contrasting South Africa's more well-established firms with the relative lack of strong competition and governance in other African nations).

152. *See, e.g.*, *Launching Pad: Chinese Firms Have Stumbled Before in South Africa, but the Country's Gateway Position Keeps Drawing Them Back*, CHINA ECON. REV. (Mar. 1, 2011), http://www.chinaeconomicreview.com/content/launching-pad [https://perma.cc/8MK9-2SNS] (archived Jan. 28, 2016) ("Yet the Chinese mining firms that dominate entire economies elsewhere on the continent are often mere bit-players in South Africa.").

153. *See* GRIMM ET AL., *supra* note 9, at 19 ("South Africa, which has better a [sic] manufacturing capacity than other African countries, has more competitive advantages vis-á-vis China.").

154. *See* Pigato & Tang, *supra* note 52, at 7–8 (finding that Chinese firms have been able to undercut South African firms in everything from animals to wood products).

C. *Promoting Corruption and Hampering the Rule of Law*

It is especially difficult to determine the extent to which Chinese involvement has supported corruption in Nigeria and South Africa as most such under-the-table deals are not likely to be discovered or reported.[155] The existence of a relationship between Chinese investment practices and perceived corruption remains murky. Nonetheless, certain generalities regarding Chinese practices in Africa that encourage corruption are perhaps applicable to South Africa and Nigeria. It is highly likely that Chinese companies engage in widespread bribery throughout Africa.[156]

Corruption in Africa "cuts across all facets of the society—public and private—and exists in the political, economic, social, religious, and cultural spheres."[157] "Grand" corruption, calling to mind "rapacious dictators who bleed their countries dry of valuable natural resources and shelter their ill-gotten gains in Swiss bank accounts," is not the primary concern in (admittedly imperfect) democracies like Nigeria and South Africa.[158] Corruption in these countries is more often "petty": tax evasion, bribery, turning a blind eye to regulations, and general "gift-giving, favoritism and influence peddling."[159] This petty corruption is more severe in Nigeria than South Africa—though again, it is endemic throughout the continent.[160]

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155. Thus, "perceived" corruption is a more reliable metric. *See generally* TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2014 (2014), https://www.transparency.org/cpi2014 [https://perma.cc/ADK7-Z45U] (archived Jan. 28, 2016) (ranking countries by perceived corruption, with the highest score the most corrupt). "The 2014 [Corruption Perceptions Index] draws on data sources from independent institutions specialising in governance and business climate analysis." TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2014: IN DETAIL (2014), http://www.transparency.org/cpi2014/in_detail#myAnchor1 [https://perma.cc/SNK4-M9PS] (archived Jan. 28, 2016).

156. *See* Won Kidane & Weidong Zhu, *China-Africa Investment Treaties: Old Rules, New Challenges*, 37 FORDHAM INT'L L.J. 1035, 1075–76 (2014) ("It is fair to assume that much of that money comes from western multinationals but it is also clear that Chinese companies are increasing their share on that front. For example, a recent TI report ranks Chinese firms towards the bottom of the transparency scale.").

157. Nsongurua J. Udombana, *Fighting Corruption Seriously? Africa's Anti-Corruption Convention*, 7 SING. J. INT'L & COMP. L. 447, 450 (2003); *see also* Osita Nnamani Ogbu, *Combating Corruption in Nigeria: A Critical Appraisal of the Laws, Institutions, and the Political Will*, 14 ANN. SURV. INT'L & COMP. L. 99, 101 (2008) ("The World Bank has defined corruption as 'the abuse of public office for private gain.'").

158. Thomas Kelley, *Corruption as Institution Among Small Businesses in Africa*, 24 FLA. J. INT'L L. 1, 35 (2012).

159. *Id.*

160. *Compare* CORRUPTION BY COUNTRY/TERRITORY: NIGERIA, *supra* note 100 (reporting that, as of 2013, Nigeria ranks 144 out of 177 countries on the Corruption Perceptions Index), *with* TRANSPARENCY INT'L, CORRUPTION BY COUNTRY/TERRITORY: SOUTH AFRICA, http://www.transparency.org/country#ZAF [https://perma.cc/NMK5-U7VN] (archived Jan. 28, 2016) (reporting that, as of 2014, South Africa ranks 67 out of 175 countries on the Corruption Perceptions Index).

South Africa's problems with corruption are much less serious than those of either China or Nigeria.[161] However, corruption there is perhaps more visible than in other African nations, due to South Africa's free press and the fact that many scandals involved top officials. For instance, the term of current President Jacob Zuma has been rocked repeatedly by corruption scandals.[162] Bribery rates are low by African standards; 15 percent of South Africans paid a bribe in 2013 compared to an average of 30 percent across the continent.[163] Nonetheless, bribery remains a serious concern to South Africa in general.[164] The diversion of public funds is an even more serious problem.[165] The non-governmental organization Corruption Watch has estimated that in 2011 as much as 25 to 30 billion rand (approximately 1.5 to 1.8 billion in today's dollars) was lost from the procurement budget due to this form of corruption.[166] However, there is so far no direct evidence of a connection between Chinese practices in South Africa and these concerns.

Nigeria has a far more serious corruption problem.[167] Its judiciary has proven particularly vulnerable to intimidation by wealthy individuals, bribery, and political pressures.[168] The nation

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161. *See* CORRUPTION PERCEPTIONS INDEX 2014, *supra* note 155 (giving South Africa a rank of 67 in perceived corruption, China a rank of 100, and Nigeria a rank of 136). Note that both South Africa and Nigeria were perceived as less corrupt than in 2013.

162. Prior to the 2009 elections, charges of "corruption, bribery, money laundering and racketeering" were brought against Zuma, but were later dropped. Mark Tran, *Prosecutors Drop Jacob Zuma Corruption Charges*, GUARDIAN (Apr. 6, 2009), http://www.theguardian.com/world/2009/apr/06/zuma-corruption-charges-dropped [https://perma.cc/9KTA-HASM] (archived Jan. 28, 2016). In 2014, his presidency was again shaken by reports he used public funds in a multi-million-dollar refurbishment of his residence. *Zuma's South African Nkandla Home Upgrade 'Unethical'*, BBC (Mar. 19, 2014), http://www.bbc.com/news/world-africa-26645400 [https://perma.cc/38AZ-2Q4V] (archived Jan. 28, 2016) ("In a more than 400-page report, Public Protector Thuli Madonsela accused Mr. Zuma of unethical conduct. She said that Mr. Zuma, who faces re-election in May, should repay costs for some of the unnecessary renovations.").

163. *See* Gareth Newham, *Why Is Corruption Getting Worse in South Africa?*, CORRUPTION WATCH (Jan. 17, 2014), http://www.corruptionwatch.org.za/why-is-corruption-getting-worse-in-south-africa/ [https://perma.cc/6UZQ-5WRA] (archived Jan. 28, 2016) (comparing South Africa favorably to Sierra Leone, where 63 percent of people have to pay bribes each year).

164. *See* Demas, *supra* note 104, at 356 n.217 (referring to a report describing the systematic failure to prosecute bribery-related offenses in South Africa).

165. *See* Newham, *supra* note 163 (arguing that public awareness of fraud on this scale has driven the country's worsening corruption perception scores).

166. *See id.* (citing former head of the Special Investigating Unit, Willie Hofmeyer).

167. *See* Demas, *supra* note 104, at 323 (quoting Hillary Clinton, then the U.S. Secretary of State, calling Nigeria's corruption problem "unbelievable").

168. *See* Okechukwu Oko, *Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria*, 31 BROOK. J. INT'L L. 9, 24–39 (2005) (describing the many sources of judicial corruption that led to it being the norm in Nigeria).

loses an estimated 40 percent of its wealth each year to "corruption and government mismanagement."[169] Though Nigeria is projected to have taken in 52 billion dollars in revenue from oil exports in 2015, this amount is significantly lower than revenue in 2014 due to the decline in oil prices, and it is impossible to know exactly how much the country produces or refines each year because hundreds thousands of barrels are stolen every day.[170] Oil revenues make up over 70 percent of the government budget, and because the state-owned Nigerian National Petroleum Company (NNPC) is a partner in every petroleum-related project, officials have easy access to that revenue.[171] Incumbent politicians are able to skim money for re-election, and many such projects are apparently set up more for political points than profit.[172] As recently as October 2015, the country's minister of petroleum from 2010 to 2015 was arrested in London for bribery and money laundering,[173] and an audit recently determined that 19 billion dollars in oil revenue is simply missing from the government's accounts.[174] Even nominally-foreign ventures are typically up to 60 percent state-owned, with the foreign company

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169. Demas, *supra* note 104, at 321.

170. *See* INT'L MONETARY FUND [IMF], IMF COUNTRY REPORT NO. 15/84, at 10 (2015) [hereinafter IMF REPORT ON NIGERIA] (noting the decline in revenue has reduced GDP by six percentage points); *Can Nigeria's President Defeat Oil Industry Corruption?*, BBC (Oct. 21, 2015), http://www.bbc.com/news/world-africa-34580862 [https://perma.cc/XPB8-FMWE] (archived Jan. 28, 2016) (describing how new president Muhammadu Buhari has taken personal control of the oil ministry in an attempt to combat corruption).

171. *See* IMF REPORT ON NIGERIA, *supra* note 170, 3 n.10 (using 2013 numbers for government revenue); Demas, *supra* note 104, at 328 (concluding this single-minded focus on the oil and natural gas industry is not sustainable); Keenan, *supra* note 98, at 112 ("Such an ownership structure is perfectly rational from the perspective of a politician concerned with *staying* in power, but it can undermine political accountability for two primary reasons. First, only incumbent politicians (and their allies) have access to resource rents . . . . Second, potential challengers to incumbents see the same landscape as do incumbents.").

172. *See* Keenan, *supra* note 99, at 118–19 ("Politicians have an incentive to champion such projects, even when the projects lose money, because they demonstrate a politician's ability to channel resources to his allies. This problem is exacerbated when states such as China provide financing for projects that are directed by politicians.").

173. *See Nigeria's Ex-Oil Minister 'Arrested in London'*, BBC (Oct. 2, 2015), http://www.bbc.com/news/world-africa-34430597 [https://perma.cc/GJD7-ULPC] (archived Jan. 28, 2016) ("Recently, new Nigerian President Muhammadu Buhari vowed to trace and recover what he called the 'mindboggling' sums that have been stolen from the oil sector.").

174. *See* Drew Hinshaw, *Nigerian Oil-Revenue Audit Report Published*, WALL ST. J. (Apr. 27, 2015, 3:49 PM), http://www.wsj.com/articles/nigerian-oil-revenue-audit-report-published-1430164157 [https://perma.cc/QU2C-H8XN] (archived Jan. 28, 2016) ("The report caps a year-long political debate over how Africa's top oil exporter manages its revenue, a debate that help lead [sic] to President Goodluck Jonathan's ouster last month.").

usually bearing most or all costs, including paying royalties.[175] Chinese firms must frequently give the Nigerian government concessional loans in exchange for the right to drill a promising oil block.[176] This suggests that China may be, in part, a victim of Nigerian corruption.

However, China's operations in Nigeria likely provide many opportunities for local officials to divert public funds. Lines of credit it has provided for drilling rights or infrastructure projects are typically unconditional—the money is not required to be spent or accounted for transparently, as other donors sometimes require.[177] Nor does China generally monitor whether individuals have inappropriately enriched themselves with funds from Chinese projects.[178] Thus, some scholars have argued that Chinese investments prop up poorly managed projects and encourage rent-seeking by African officials, including in Nigeria.[179] Progress on many of the infrastructure projects China agreed to undertake in the last decade in that country has been slow, as "much of the money has disappeared into Nigeria's notoriously corrupt political machines."[180] In this light, Chinese investments in Nigeria function more like "political slush funds than arms-length investments designed to generate a financial return."[181] It is unclear how many and to what extent Chinese investments in Nigeria are illusory like this.

The potential for Chinese investment to foster corruption is one facet of the "resource curse": nations with abundant natural resources, especially oil, may nonetheless see their industries

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175. *See id.* at 115–16 (referring specifically to the arrangement Nigeria typically has with Chinese firms)

176. *See id.* at 118 (describing the ease with which government investments may be diverted to the pockets of corrupt officials).

177. *See* Demas, *supra* note 104, at 345–46 (noting that project loans are occasionally conditioned upon the host nation purchasing equipment from other Chinese companies, but also that this is usually arranged in secret). The only common condition is that all of China's partners must accept its "One China" policy. *See* Ofodile, *Trade, Empires, and Subjects*, *supra* note 6, at 533–34 (citing FORUM ON CHINA-AFRICA COOPERATION, CHINA'S AFRICAN POLICY (2006), http://www.focac.org/eng/zt/zgdfzz cwj/t230479.htm [https://perma.cc/UPF8-NF8J] (archived Feb. 7, 2016)) ("The one China principle is the political foundation for the establishment and development of China's relations with African countries and regional organizations.").

178. Keenan, *supra* note 99, at 94–96 ("China's approach not only provides potentially corrupt leaders more opportunities to enrich themselves, it also does not hold accountable those leaders who do so.").

179. *See* Demas, *supra* note 104, at 346 ("The opaqueness of China's engagement in Africa therefore facilitates corruption in states where the rule of law is already severely inhibited. Furthermore, by offering 'no questions asked' cash deals to regimes, China erodes African states' incentives to implement a rule of law or combat corruption.").

180. Obiorah et al., *supra* note 5, at 292.

181. Keenan, *supra* note 99, at 118.

collapse, inequality rise, and development stall.[182] In Nigeria, China's unconditional investments in the oil and gas industry exacerbate problems caused by the "presence of natural resources in a country without strong public institutions and accountability for public officials."[183] The resource curse is also a problem in South Africa despite its relatively high level of development, due to the country's substantial mineral reserves.[184] "[T]he negative socio-political effects of resource endowment . . . remain prevalent in South Africa, including; corruption, a loss of natural capital, disaffection in mining communities, mine-related violence and the increasing application of military expenditure to the control of domestic law and order."[185] In this way, fostering corruption is less of a deliberate choice by Chinese firms, and more of an unavoidable consequence of how they are presently engaged in the Nigerian and South African economies.[186] In nations dependent on "the extraction and exportation of natural resources and resulting influx of foreign currency," this often leads to a "frenzied political contest for the incoming cash."[187] On the other hand, China lacks an equivalent to the U.S. Federal Corrupt Practices Act and often fails to enforce anti-

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182. This is often ascribed to economic overspecialization, in addition to the corruption that such wealth can incentivize. *See* Halvor Mehlum et al., *Cursed by Resources or Institutions?*, 29 WORLD ECON. 1117, (2006) ("On average resource-rich economies have lower growth, worse institutions and more conflict than resource–poor economies. Thus, empirically, being rich in natural resources is associated with being poor in material wealth—the 'paradox of plenty.' Behind this pattern we find the usual suspects such as oil-rich . . . Nigeria."); *'The Resource Curse': Why Africa's Oil Riches Don't Trickle Down to Africans*, KNOWLEDGE@WHARTON BLOG (Oct. 31, 2007), http://knowledge.wharton.upenn.edu/article/the-resource-curse-why-africas-oil-riches-dont-trickle-down-to-africans/ [https://perma.cc/H39S-WMLW] (archived Jan. 28, 2016) ("Even Nigeria, where the oil industry has operated for decades, probably wouldn't be able to adapt the Norwegian model [of saving a portion of oil revenues in a national pension fund] . . . . Little of the oil wealth gets invested back into the [Niger] delta and few of the companies employ local people.").

183. Demas, *supra* note 104, at 347.

184. *See* Ainsley D. Elbra, *The Forgotten Resource Curse: South Africa's Poor Experience with Mineral Extraction*, 38 RESOURCES POL'Y 549, 549–57 (2013) (concluding that South Africans continue to have unequal access to the nation's mineral wealth, resulting in slower-than-expected growth, despite its status as a middle income nation).

185. *See id.* at 550, 554 ("In addition to the economic effects of mineral extraction, and the inability for resource wealth to alleviate poverty, South Africa suffers from many incarnations of the rentier state outlined in the literature [such as 'myopic spending, weakening of institutions aimed at ensuring checks and balances and even the increased likelihood of civil conflict].'").

186. *See, e.g.*, Aiken, *supra* note 44, at 111 ("China, in particular, could increase instability in West and Central African oil–producing nations . . . . While Western policies towards oil development in Africa have historically been less than ideal, 'there is virtually no way around the conclusion that China's massive return to Africa presents a negative political development' that is unlikely to create lasting stability.").

187. Demas, *supra* note 104, at 326.

corruption standards on the operations of its own companies on the continent, which worsens the problem.[188]

IV. LEGAL CONSTRAINTS ON CHINESE INVOLVEMENT IN NIGERIA AND SOUTH AFRICA

It is difficult to account for legal reactions by Nigeria and South Africa specifically to Chinese actions. Therefore, this Part focuses on domestic legal measures these countries have taken to resist the overall problems to which China may be contributing, based on the issues explored in Part III. In particular, it discusses environmental laws in Nigeria and the role of the courts, labor laws, and unions in both countries, as well as their various attempts to curb corruption. These legal measures have often been unsuccessful because of structural flaws or a lack of respect for the rule of law in these countries. Additionally, this Part discusses the BITs between China, Nigeria, and South Africa and their potential use as regulatory tools. BITs can be used to encourage positive political changes within host nations that might reduce some of the aforementioned costs of Chinese involvement, or promote the rule of law such that domestic solutions to these problems become more viable. However, China's current BITs with Nigeria and South Africa were not written with such purposes in mind.

A. *Environmental Regulation in Nigeria*

On paper, at least, Nigeria has extensive environmental protections.[189] The centerpiece of its regime is the National Environmental Standards and Regulations Enforcement Agency (NESREA), which centrally enforces environmental laws and promotes sustainable development.[190] However, the oil and gas industry, on which Nigeria's growth is dependent, is largely excluded from oversight by NESREA.[191] Instead, the Department of Petroleum Resources (DPR), charged with developing that sector, has sole oversight and regulatory power over it.[192] This relationship is

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188. *See id.* at 337.

189. *See* Stevens, *supra* note 103, at 395 ("Nigeria has an impressive number of environmental statutes for a developing country.").

190. *See id.* (describing the succession of Nigerian environmental laws leading up to the creation of the NESREA).

191. *See id.* at 397 ("Nigeria's sole environmental agency is thereby bafflingly prevented from participating in the cleanup of any pollution caused by the oil and gas industry.").

192. *See id.* at 398 (citing Amnesty International, which argues this partnership "fundamentally conflicts with the concept of an independent body regulating the industry").

not conducive to stringent environmental regulation. All of the country's oil and mineral resources are government property, and foreign firms must be licensed by the DPR to "ensure compliance with the applicable laws and regulations in line with good oil producing practices."[193] Perhaps due to cozy relations between the DPR and oil companies, the actual number of spills may be much higher than reported; many spills are never reported.[194] The DPR has authority to oversee cleanups, but the sanctions available to it in case of noncompliance vary by circumstances.[195] A 1992 Environmental Impact Assessment Decree requires the DPR to "impartially review" most oil and gas development activities (including those by Chinese firms).[196] These assessments are subject to similar requirements to assessments in the United States, including examining all likely impacts, considering alternatives, determining if mitigation would be possible, noting any uncertainties, and determining if the activities would adversely affect parties outside Nigeria.[197] However, it is unclear if this really amounts to a constraint on pollution.[198] Though the assessments are supposed to encourage public engagement in projects that affect the environment, in practice most Nigerians are unaware of their right to object such projects, and many cannot even read the assessments.[199]

Still, Nigeria's response to its environmental problems has been more effective at times. Nigeria has actually had more success in reducing the incidence of gas flaring since banning the practice in the 1984, investing in a satellite tracking system and imposing nearly one billion dollars in fines a year.[200] Between 1994 and 2009, flaring volume declined by 15 billion cubic meters.[201] The courts have

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193. ORGANIZATION ROLES, DEP'T OF PETROLEUM RESOURCES, http://www.dprnigeria.com/dpr_roles.html (last visited Feb. 22, 2015).

194. *See* Wick, *supra* note 107, at 72.

195. *See* Stevens, *supra* note 103, at 398–402 (discussing the inconsistent and often lax penalties oil companies may face for violating various environmental statutes).

196. *Id.* at 401.

197. *See* Peter Eddie Aldinger, *Addressing Environmental Justice Concerns in Developing Countries: Mining in Nigeria, Uganda and Ghana*, 26 GEO. INT'L ENVTL. L. REV. 345, 366 (2014) (stating that public participation is supposed to be encouraged during these assessments).

198. *See* Stevens, *supra* note 103, at 401–02 (expressing skepticism about how zealously the DPR enforces this law).

199. *See* Aldinger, *supra* note 197, at 367 n.116 (claiming that these assessments are highly vulnerable to "exclusionary practices").

200. *See* Daniel Magnowski, *Nigeria Employs Satellite to Chase $1 Billion Gas Flaring Fines*, BLOOMBERG BUS. (Nov. 27, 2014), http://www.bloomberg.com/news/articles/2014-11-27/nigeria-employs-satellite-to-chase-1-billion-gas-flaring-fines [https://perma.cc/Q84H-GA39] (archived Jan. 28, 2016) (noting the United Kingdom is providing funds for the satellite project).

201. *See* GAS FLARING REPORT, *supra* note 111, at 15–16, 21 (showing that Nigeria was among seventeen countries exhibiting a downward trend in gas flaring

provided some recourse to many victims of environmental destruction.[202] In 2005, for instance, the Federal High Court of Nigeria held in *Gbemre v. Shell Petroleum Development Corporation* that the constitution guaranteed a "right to [a] clean, poison-free, pollution-free and healthy environment," and that Shell had violated the petitioner's rights through gas flaring.[203] More recently, Shell settled with the victims of oil spills in 2008 and 2009 for 84 million dollars.[204] Typically, however, Nigerian courts have "seemed to prefer corporate economic concerns over environmental protection."[205] Thus, such outcomes appear to be rare and, as the number of spills continues to rise,[206] do not seem to have had much deterrent effect. Indeed, the appellate courts have since restrained *Gbemre*'s sweeping constitutional pronouncement, and that case ground to a halt after the presiding trial judge was transferred and the case file lost.[207]

B. *Labor and Other Rights Protections*

South Africa has some of the most advanced labor rights protections on the continent.[208] In fact, its 1996 Constitution (drafted in response to the injustices of the Apartheid system) is one of the only constitutions in the world to expressly establish fair labor practices as an affirmative right.[209] The 1995 Labour Relations Act (LRA) and the 1997 Basic Conditions of Employment Act (BCEA)

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over this period). Nigeria accounted for ten percent of gas flaring worldwide in 2009. *See id.* (comparing this to 146 billion cubic meters of total gas that year).

202. *See* Stevens, *supra* note 103, at 403 ("The courts may also provide compensation to victims of environmental destruction, ordering cessation of the environmentally harmful activity or even requiring legislation to prohibit further activity of that sort.").

203. *Id.*

204. *See Shell Agrees, supra* note 104 ("The deal, which ends a three-year legal battle, is the first of its kind in Nigeria.").

205. Stevens, *supra* note 103, at 403.

206. *See id.* at 392 ("Shell admits that it spilled more than 14,000 tons of crude oil in the Niger Delta in 2009, twice what it spilled in 2008 and more than four times what it spilled in 2007. Shell attributes this increase to social instability in the Niger Delta and claims that the majority of the oil spilled resulted from two incidents in which militants bombed the Trans Escravos pipeline, a twenty-four-inch-wide pipeline intended to channel oil across the Sahara Desert.").

207. *But see* Eferiekose Ukala, Note, *Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Promises*, 2 WASH. & LEE J. ENERGY, CLIMATE & ENV'T 97, 109–11 (2011) (noting that, shortly thereafter, an Alien Tort Statute action in New York did effectively restrain Shell).

208. *See* Rodgers, *supra* note 124, at 1107–08 ("Where [positive labor] laws do not expressly provide a cause of action [for violation of a right], complainants may find protections under common law and international law.").

209. *See id.* at 1107–08 (referring to § 23(1) of the 1996 Constitution, which states that "[e]veryone has the right to fair labour practices").

define labor rights and provide for dispute resolution.[210] The statutes mandate "in painstaking detail" substantive conditions, such as wage, overtime, and rest interval provisions, that must be included in all employment contracts.[211] Employment contracts in violation of these statutes are invalid, and labor protections are supposed to extend to all workers regardless of immigration status.[212] Thus, the country seems capable of preventing exploitative labor practices.[213] The Minister of Labour has "general authority to monitor and report on individual labor sectors, [though] exposure of violations largely depends upon individuals or collective groups utilizing South Africa's dual conciliation and court systems."[214] Beyond positive law, South African labor unions are also politically strong.[215]

Nonetheless, Chinese migrants and local laborers for Chinese firms continue to face problems in South Africa. Often this is because "[l]anguage and culture present seemingly insurmountable barriers" to dispute resolution or conciliation, "as does fear of retaliation by employers."[216] Resentment of migrant laborers, who are often blamed for the high unemployment rate, may cause the justice system to move less urgently to redress their complaints.[217] The broader problem is simply that the Ministry of Labour is "[c]hronically understaffed and underfunded," and "cannot effectively monitor labor practices, especially when it comes to foreign workers."[218] Even for South African workers, access to conciliation is often inconsistent, possibly attributable to a "[l]ack of institutional memory, insufficient resources, and fear of alienating large transnational corporations."[219] Though the fundamentals of the

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210. *See id.* at 1109. ("[T]he LRA and BCEA give effect to the constitutional guarantee to fair labor practices, in part, by explicitly defining employee rights and employer obligations.").

211. *See id.* at 1110 (explaining that workers can also claim common law protections; thus, "[w]hen the statutes fall short of providing legal coverage to Chinese workers, the common law can extend fair labor protections").

212. *See id.* at 1108–09 (explaining that South African laws governing labor contracts are more protective of workers than equivalent Chinese laws).

213. *See id.* at 1108 (noting that employment contracts in South Africa, even if governed by foreign law, are null if in violation of statute).

214. *Id.* at 1109–10.

215. *See, e.g.*, Bernstein, *supra* note 94, at 22 (referencing the political alliance between the Congress of South African Trade Unions and the dominant African National Congress political party). However, this is less helpful as Chinese firms are hostile to unionization. *See, e.g.*, Rodgers, *supra* note 124, at 1096 n.104 (citing Thulani Guliwe & Skhumbuzo Mkhonta, *Chinese Investments in South Africa, in* CHINESE INVESTMENTS IN AFRICA: A LABOUR PERSPECTIVE 320–29 (Anthony Yaw Baah & Herbert Jauch eds., 2009)).

216. Rodgers, *supra* note 124, at 1116.

217. *See id.* at 1113 (suggesting anti-Chinese sentiment exacerbates an institutional inability to address labor grievances).

218. *Id.* at 1112.

219. *Id.*

system appear sound on paper, enforcement remains intermittent and access to dispute resolution remains difficult at times, even for locals.

Nigerian labor and employment laws appear similarly well-developed on paper. The most important statute governing the treatment of workers is the Labour Act.[220] Among other things, Nigerian law establishes minimum work hours, requires termination notice, prohibits most forms of discrimination, and sets up rules for payment methods and collective bargaining.[221] The extent to which these laws are actually enforced against Chinese companies, however, remains somewhat unclear. As in South Africa, Nigeria's labor movement and unions are politically well established and appear genuinely "rights-conscious, sensitive to economic and social rights, and focused on the biting poverty that afflicts the Nigerian underclass."[222] Labor unions may be serving as an effective check against abuses by Chinese firms. For instance, to protest "dehumanising treatment" by construction companies like China Railway Construction Corporation, in mid-2014, the National Union of Civil Engineering, Construction, Furniture and Wood Workers gave the Nigerian federal government a fourteen-day "ultimatum" to address its concerns, or else it "would not hesitate to shut down the entire industry."[223] On the other hand, the union leader argued these actions were only necessary because the government has failed to properly monitor Chinese companies and enforce compliance with Nigeria's laws in the first place.[224]

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220. *See* Kunle Obebe & Dayo Adu, *Nigeria*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: EMPLOYMENT & LABOUR LAW 2011, at 178, 178 (2011) (noting that, along with the Labour Act, employment law is governed by "received English law" and Nigerian case law).

221. *See id.* at 178–79 (breaking down how Nigerian law governs the terms and conditions of employment, employee representation, industrial relations, and discrimination).

222. Obiora Chinedu Okafor, *What Should Organized Human Rights Activism in Africa Become? Contributory Insights from a Comparison of NGOs and Labor-Led Movements in Nigeria*, 16 BUFF. HUM. RTS. L. REV. 113, 123–129 (2010).

223. Linda Eroke, *Nigeria: Labour Issues 14-Day Ultimatum to FG over Exploitation by Chinese Companies*, ALL AFRICA (Jul. 9, 2014), http://allafrica.com/stories/201407091106.html [perma.cc/5NKK-GT86] (archived Jan. 27, 2016). The union cited "casualisation, victimisation of workers, expatriate quota abuse, non-adherence to safety standards and refusal of workers to organise" as the most serious unfair practices by Chinese employers. *Id.* It is unclear whether or how these disagreements were subsequently resolved.

224. *See id.* (arguing that "factory inspectors under the labour ministry had failed in their responsibilities to monitor project sites and ensure that contractors comply with the health and safety standards.").

C. *Anti-Corruption Efforts and Accountability*

One important reason corruption persists in South Africa and Nigeria is the inability of both countries to establish monitoring bodies that are both effective and independent.[225] Some scholars have argued that an even more fundamental cause, particularly in Nigeria, is a pervasive lack of will to end corruption. After all "it is difficult to expect political will from people who manipulated their way into power" in the first place.[226] At present in both nations, comprehensive domestic solutions to the problem of corruption seem a long way off.[227]

In Nigeria, following the creation of the 1999 Constitution, all judicial appointments are screened by a National Judicial Council for the "requisite competence and integrity."[228] While this process is meant to curb corruption in the courts and promote their independence, it is deeply flawed. More often than not, the main criteria for appointments are seemingly the "personal prejudice and ethnic and political considerations" of the Council.[229] These problems have now "so infused the selection process that some people who are demonstrably ill-qualified to serve as judges have been appointed."[230] The Council may also impose criminal and professional sanctions on corrupt judges, as a post-appointment means of promoting accountability.[231] These efforts have been aggressive and relatively more successful—though perhaps because Council members use this mechanism to harass their political opponents.[232]

Outside of the judicial context, there is also an Independent Corrupt Practices and Related Offenses Commission (ICPC), established by the Corrupt Practices and Other Related Offenses Act (CPORO Act) of 2000.[233] ICPC agents have "broad authority to search, seize, investigate, inspect, and examine" evidence to root out

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225. *See* Udombana, *supra* note 157, at 479–80 (describing the weaknesses in the South African Special Investigating Unit for corruption, as well as the Nigerian anti-corruption laws).

226. Ogbu, *supra* note 157, at 148.

227. *Cf.* Demas, *supra* note 104, at 359–61 (predicting that true governance reforms will be unsuccessful unless nations like China join the West in policing "their" companies operating in Africa).

228. Oko, *supra* note 168, at 49–50.

229. *Id.*

230. *Id.*

231. *See id.* at 54–56 (noting that judges may incur both forms of sanctions simultaneously, providing for a substantial deterrent).

232. *See id.* at 60–64 (admitting that the prevalence of this problem is unknown).

233. *See* Obgu, *supra* note 157, at 116–17 ("[T]he Corrupt Practices and Other Related Offenses Act of 2000 . . . recognized the power of the Independent Corrupt Practices and Related Offenses Commission ("ICPC"), created by the Act, to prosecute persons who violate existing laws on corruption.").

corruption.[234] Nevertheless, the ICPC has had only limited success: some scholars argue that it is not authorized to mete out sufficiently harsh punishments, and that its enforcement efforts have been inadequate.[235] The CPORO Act also lacks any provisions protecting whistleblowers.[236] Early in its existence the ICPC was often criticized as a creature of the president,[237] and a 2002 amendment to the CPORO Act dramatically reduced its investigative powers even as it made it more independent.[238] The Economic and Financial Crimes Commission (EFCC) is similarly in charge of investigating and prosecuting officials for various financial crimes.[239] Established in 2002, the EFCC immediately made several high-profile arrests and asset seizures; however, "it is a well-known secret that the President's approval is required before any top political office holder can be investigated."[240]

Beyond these domestic agencies, Nigeria also now complies with the Extractive Industries Transparency Initiative (EITI)[241] under which Chinese firms operating within the country must follow

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234. Some aspects of the Corrupt Practices and Other Related Offenses Act of 2000 have been held unconstitutional. *See id.* at 125 (citing Nigerian Supreme Court decisions striking down a portion of the law allowing for lengthy detentions, and another that it found interfered with the powers of the judiciary).

235. *See id.* at 127–28 (relaying the criticisms of "renowned Professor of Criminal Law, Cyprian O. Okonkwo").

236. *See id.* at 127 ("A whistleblower's law is a desideratum for any meaningful fight against corruption.").

237. *See id.* at 127–31 (recounting an incident where the ICPC failed to investigate clear allegations of corruption against a political ally of President Obasanjo).

238. *See id.* at 130–31 (criticizing the amendment for divesting the Commission of prosecution authority and instead vesting it solely with the Attorney General).

239. *See id.* at 131 ("Financial crimes include any form of 'fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal [sic], smuggling, human trafficking and child labour, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods.'").

240. *Id.* at 131–35.

241. Eli G. Burton, Comment, *Reverse the Curse: Creating a Framework to Mitigate the Resource Curse and Promote Human Rights in Mineral Extraction Industries in Africa*, 28 EMORY INT'L L. REV. 425, 441–42 (2014) ("[T]he Extractive Industries Transparency Initiative ("EITI") [is] a global framework that promotes revenue transparency at the local level of production . . . . [T]he self-implementation aspect involves adopting the general EITI framework and adapting it to suit a state's particular needs and circumstances (e.g., level of development). This customizable facet gives EITI the flexibility to work at many different levels of both state development and the extraction chain of production. Such flexibility enables each state to meet base standards of transparency and expand upon them for maximum effectiveness, while not constraining them to standards they may not be able to achieve due to a lack of resources.").

reporting requirements.[242] EITI is an international body that "monitor[s] and reconcil[es] company payments and government revenues at the level of individual countries; to be deemed 'EITI compliant,' each country needs to implement EITI compliant regulations and establish a multi-stakeholder group of civil society, government, and private industry representatives to oversee implementation."[243] EITI thus serves as a check on both corruption and abusive labor practices. However, EITI compliance alone is not enough to stem the tide of corruption in Nigeria: it can still fester in a transparent government that is not being held accountable.[244] Some scholars suggest the "culture of corruption" there has thrived because the country's oil wealth has severed any "fiscal nexus of accountability . . . that is entailed by public taxation."[245] The status quo may just be too profitable.

South Africa has major advantages over Nigeria in combating corruption and promoting rule of law. First, it has a comparatively robust civil society, including many non-governmental organizations that can serve as an "important check" on corruption.[246] In addition, the country "is home to vibrant journalists' and press freedom advocacy organizations" that have widely publicized corruption scandals despite defamation suits against them.[247] The primary anti-corruption law is the Prevention and Combating of Corrupt Activities Act (PACCA), which proscribes bribery and other forms of public corruption.[248] The police and National Prosecuting Authority enforce these laws, though their successes have also been limited.[249] Criminal penalties are attached to violations of PACCA, as well as

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242. *See* Kelley, *supra* note 21, at 40 (approving of China's acquiescence to the principles behind EITI). "China could benefit from further support of EITI as it would provide more political stability when challenging operational environments and would allow Chinese companies to compete at an equal level with Western companies." *Id.*

243. *Id.* at 39.

244. *See id.* at 40, 40 n.141 (suggesting mass protests may be required to actually hold entrenched politicians accountable if corruption is seen as so normal that transparency alone does not actually discourage it).

245. Rotimi T. Suberu, *The Travails of Nigeria's Anti-Corruption Crusade*, *in* CORRUPTION, GLOBAL SECURITY, AND WORLD ORDER 260, 260–61 (Robert I. Rotberg ed., 2009).

246. Mbaku, *supra* note 12, at 961.

247. FREEDOM HOUSE, FREEDOM OF THE PRESS 2013: SOUTH AFRICA (2013), https://freedomhouse.org/report/freedom-press/2013/south-africa [perma.cc/7X8A-5WL8] (archived Jan. 27, 2016).

248. *See* Pamela R. Davis, *The FCPA Is No Longer the Only Game in Town: Recent Anti-Corruption Enforcement Trends in the BRICS*, 2014 WL 10500, at *7 (2014) (describing whistleblower protections and common law fraud as part of South Africa's anticorruption framework, as well).

249. *See id.* at *8 ("While the framework to address corruption is in place, enforcement of anti-bribery regulations in South Africa remains inconsistent. Regulatory agencies often struggle with investigating complex cases and rely heavily on active assistance from whistleblowers.").

the knowing failure to report corruption.[250] Finally, the government has created many other specialized institutions to combat corruption.[251] Chief among these is the Anti-Corruption Task Team of the Special Investigating Unit, which has extensive powers to investigate, take civil actions against wrongdoers, and coordinate with police and prosecuting authorities in criminal matters.[252]

Corruption (or at least the perception of corruption) in South Africa has actually been increasing in recent years, however, which suggests these measures have not been particularly effective.[253] Various forms of financial misconduct have cost South African taxpayers increasing amounts over the years, from around 350 million rand in 2009/10 (about twenty-one million in today's dollars) to almost 1 billion rand in 2011/12 (around 61 million dollars).[254] Despite the country's multifarious enforcement bodies, most of these funds have never been recovered and the responsible parties are apparently not often prosecuted.[255] This may be, in part, because corruption may extend all the way to the National Prosecuting Authority itself.[256]

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250. *See id.* ("Compliance programs are not mandated by South African law. However, regulators often consider the existence and scope of such programs in bringing charges and crafting penalties.").

251. More than a dozen separate agencies exist to monitor or combat corruption in South Africa. *See* Newham, *supra* note 163 (asserting that South Africans rightly perceive increasing problems with corruption, in spite of these agencies). In addition, the country has signed onto a variety of treaties and adopted a slew of laws since the 1990s. *See South Africa: Anti-Corruption Task Team Intact*, ALL AFRICA (Jan. 27, 2015), http://allafrica.com/stories/201501271357.html [perma.cc/JL9L-FEED] (archived Jan. 27, 2016) (listing anti-corruption measures and discussing South Africa's goals for reducing corruption, as articulated in its Medium Term Strategic Framework).

252. *See Who We Are*, SPECIAL INVESTIGATING UNIT, http://www.siu.org.za/who-we-are [perma.cc/UHT4-QJN2] (archived Jan. 27, 2016) (laying out the agency's "primary mandate . . . to recover and prevent financial losses to the state caused by acts of corruption, fraud and maladministration.").

253. *See* Elbra, *supra* note 184, at 555 (citing to Transparency International, which gave South Africa steadily decreasing scores from 2007 to 2011, on a scale of ten as the least corrupt to zero as the most corrupt). Elbra then goes on to describe a "low level of successful prosecution" for corruption against politicians, as well as in the defense and mining industries, blaming it on "incomplete evidence or the conclusion that allegations were politically motivated." *Id.*

254. *See* Lorraine Louw, *The Real Cost of Corruption—Part Two*, CORRUPTION WATCH (Jul. 9, 2013), http://www.corruptionwatch.org.za/the-real-cost-of-corruption-part-two/ [perma.cc/4RHR-DBJL] (archived Jan. 27, 2016) (citing a report by the law firm Edward Nathan Sonnenbergs).

255. *See id.* (asserting that in 2010 and 2011, officials investigated for financial misconduct faced no prosecution in 76 percent of cases, in 43 percent of cases suffered only a written warning, and that only 12.8 percent of lost funds were recovered in 2009 and 2010).

256. *See* Jeremy Kutner, *In South Africa, Corrupt Prosecutors an Ever-Larger Problem*, CHRISTIAN SCI. MONITOR (Jan. 2, 2014), http://www.csmonitor.com/World/Africa/2014/0102/In-South-Africa-corrupt-prosecutors-an-ever-larger-problem [perma.cc/22HN-B5DM] (archived Jan. 27, 2016) (claiming that the political appointees

D. *International Treaties*

Bilateral and multilateral treaties are an additional framework by which China's interactions with Africa can be policed. For instance, disputes over dumping are currently governed mainly by "multilateral commitments" under the World Trade Organization, though these commitments are beyond the scope of this Note.[257] Nigeria and China do not yet have a full free trade agreement.[258] China is, however, currently negotiating a free trade agreement with the Southern African Customs Union.[259] On the other hand, a trend toward increased liberalization of trade could worsen dumping problems in Nigeria and South Africa.[260]

BITs allow nations that desire to host foreign investment, but otherwise might appear too risky for investors, to attract funds by agreeing to certain constraints to safeguard the rule of law and encourage investment.[261] BITs basically act as a commitment mechanism for less-developed nations.[262] Their use may provide substantial economic opportunities for Sub-Saharan Africa, a region that is badly in need of reliable sources of capital.[263] One

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at the head of the National Prosecuting Authority often irrationally refuse to prosecute well-connected officials).

257. Ofodile, *Trade, Empires, and Subjects*, *supra* note 6, at 579.

258. *See* Egbula & Zheng, *supra* note 7, at 4 (noting a host of other agreements between the countries).

259. *See generally* Jonathan Munemo, *Trade Between China and South Africa: Prospects of a Successful SACU-China Free Trade Agreement*, 25 AFR. DEV. REV. 303 (2013) (suggesting that such an agreement is necessary to further South Africa's trade integration with China).

260. *See id.* at 326 ("Achieving these opportunities will not be easy for China due to growing opposition from industry and trade unions in SACU who fear that more competition from China's manufactured goods will lead to serious job losses and exacerbate the serious unemployment problem they currently face, especially in South Africa.").

261. *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 681 (1998) ("[Under a BIT framework,] the cost of investing is reduced, more investment will take place, and the investment that does occur will be allocated in an efficient manner. BITs, therefore, yield an efficient allocation of capital.").

262. *See id.* at 658 (arguing that BITs solve the "dynamic inconsistency" problem that "future policy decision that forms part of an optimal plan formulated at an initial date is no longer optimal from the viewpoint of a later date, even though no new information has appeared in the meantime"). Ultimately, they "represent a 'bargain,' whereby a host country promises to protect home-country FDI in exchange for the prospect of increased foreign capital in the future." Johnson, *supra* note 137, at 924.

263. *See* Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 MICH. J. INT'L L. 131, 139 (2013) [hereinafter Ofodile, *Africa-China*] ("The benefits of FDI for a capital-importing nation include: access to new technologies and opportunity for technology transfer; expanded tax base and related opportunity for increased revenue; reduced dependence on foreign aid and external debt; access to new sources of financing for development; and support for local business suppliers through linkages.").

particularly attractive argument to host nations is that BITs should primarily be structured as "connective bridge[s] between the commercial sphere and the human rights sphere," to draw investors to mutually beneficial ventures while also holding them accountable for exploiting or ignoring weak regulatory regimes in host nations.[264]

BITs were originally created by Western nations to support their former colonies while protecting their own investors.[265] Common sense suggests, however, that BITs will tend to reflect the interests of the more-powerful partner. Indeed, Western BITs are often long on investor protections and short on investor obligations.[266] In particular, BITs usually protect the following six key investor rights:

> (1) right to fair, equitable and non–discriminatory treatment; (2) right to freely transfer capital out of host–country; (3) protection from expropriation and measures tantamount to expropriation[,] and right to prompt and adequate compensation in the event of expropriation; (4) right to international arbitration if and when disputes arise; (5) limitation on performance requirements; and (6) right of investors to select top managerial personnel.[267]

In the first few decades of Chinese-African relations, China's BITs tended to avoid such strict protections of investor rights, instead allowing its partners "considerable policy space."[268] However, Chinese BITs signed with African nations in the last twenty years have become increasingly more like Western BITs and now contain more pro-investor provisions.[269] The 2001 China-Nigeria BIT, for instance, provides for "fair and equitable treatment" of investors and investments, guarantees free repatriation of investments and returns, and prohibits "unreasonable or discriminatory" measures as

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264. Sharon Hang, Comment, *Investing in Human Rights: Using Bilateral Investment Treaties to Hold Multinational Corporations Liable for Labor Rights Violations*, 37 FORDHAM INT'L L.J. 1215, 1260 (2014).

265. *See id.* at 138–39 ("BITs were specially designed by Western nations in the wake of decolonization in the 1950s and 1960s to protect their investors and the investment of their investors in developing countries.").

266. *See* Ofodile, *Africa-China*, *supra* note 263, at 138–39 (noting that such protections were necessary due to a lack of comprehensive international investment rules).

267. *Id.* at 141.

268. *Id.* at 155. For instance, early Chinese BITs contained no dispute resolution provisions, thereby letting the host country resolve investment disputes on its own terms. *See id.* at 155–56 (concluding this trend only began to change around the late 1990s).

269. *See id.* at 159–60 ("[T]he key features of China-Africa BITs are: a broad asset-based definition of investments; absolute standards of treatment (for example, fair and equitable treatment) clauses; relative standards of treatment (for example, National Treatment and Most-Favored-Nations) clauses; protection against expropriation; protection against wars, riots, and related civil disturbances; State-State dispute settlement as well as Investor-State dispute settlement procedures; subrogation clauses; and clauses guaranteeing the right of investors to freely transfer funds.").

well as expropriation, unless it is performed "(a) for the public interests; (b) under domestic legal procedure; (c) without discrimination; [and] (d) against fair compensation."[270] It also requires arbitration of all disputes between Nigeria and China that cannot be resolved within a year.[271] Disputes between either China or Nigeria and an investor will be arbitrated if they cannot be resolved within six months.[272] While the BIT does stipulate that "[e]ach Contracting Party shall promote economic cooperation and encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and regulations," and recognizes investors have a "duty to respect the host country's sovereignty and laws," it does not provide enforcement mechanisms other than arbitration.[273] The terms of the 1997 China-South Africa BIT are substantially similar.[274] Both BITs were signed after China acceded to the International Centre for the Settlement of Investment Disputes (ICSID), and "provide for open access to ICSID arbitration."[275]

China's agreements with African nations, including BITs, are problematic because they put no real pressure on these nations to institute internal reforms.[276] They do not address issues like human

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270. Agreement Between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments, China-Nigeria, Aug. 27, 2001 [hereinafter China–Nigeria BIT], http://tfs.mofcom.gov.cn/article/h/aw/201002/20100206795412.shtml [perma.cc/K4MQ-XLB8] (archived Jan. 27, 2016).

271. *See id.* (allowing each party to appoint one arbitrator, with the two arbitrators then appointing a third party national to chair the tribunal). Otherwise, "[t]he arbitral tribunal shall determine its procedure." *Id.*

272. *See id.* (requiring the tribunal to adjudicate in accordance with the laws of the contracting nation involved).

273. *Id.*

274. *See* Agreement Between the Government of the People's Republic of China and the Government of the Republic of South Africa Concerning the Reciprocal Promotion and Protection of Investments, China-S. Afr., Dec. 30, 1997, http://tfs.mofcom.gov.cn/article/h/aw/201002/20100206778967.shtml [https://perma.cc/B8RX-6CA3] (archived Feb. 27, 2016).

275. Won Kidane, *The China-Africa Factor in the Contemporary ICSID Legitimacy Debate*, 35 U. PA. J. INT'L L. 559, 563–64 (2014) [hereinafter Kidane, *The China-Africa Factor*]. The World Bank-affiliated ICSID was established in 1966 to serve as a truly neutral option for investment dispute resolution; *See* Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 697 (2014) (arguing that ICSID arbitration has "fulfilled its promise of increasing foreign direct investment where it has been most acutely needed and curbing gunboat diplomacy."); *see also* INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES [ICSID], ABOUT ICSID, https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx [https://perma.cc/U2FX-CLZC] (archived Feb. 27, 2016) (explaining what ICSID does and its history).

276. *See* Yu, *supra* note 76, at 1003 (arguing that this approach has been very popular with developing nations because "many of the reforms advocated by the

rights, environmental protections, or labor issues in host countries, and do not include provisions to encourage corporate social responsibility.[277] This practice is an extension of China's historical policy of non-intervention.[278] "Chinese leaders have stated explicitly and frequently that China is not interested in achieving 'regional hegemony or international leadership (except perhaps in the context of promoting the interests of the developing world).'"[279] In this way, China is very different from most Western states that, when acting as donors and lenders to developing countries, usually "require the recipient countries to introduce political and economic reforms, such as 'restrictions on macroeconomic policy, reductions in public spending and commitments to transparency as well as, in some cases, the holding of democratic elections.'"[280] Thus, current Chinese-African BITs, including those with Nigeria and South Africa, do not address any negative externalities that investment might impose on host countries, and in fact may further promote instability and allow for exploitative measures by Chinese firms.[281]

V. CHINA: THE PROBLEM OR THE SOLUTION?

This Part first summarizes the downsides to Chinese involvement discussed in Part III, and determines that on balance the evidence in support the "neo-colonialism" narrative is not particularly strong with regard to South Africa and Nigeria. Nonetheless, some downsides do exist for these countries. This Part proposes that they should approach these problems from a new direction, because their prior attempts to remedy them purely through domestic law, as seen in Part IV, have not been very successful. It addresses but then

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traditional donors or lenders have not greatly alleviated poverty in the less-developed world").

277. *See* Kidane & Zhu, *supra* note 156, at 1066–80 (suggesting that Chinese BITs are in serious need of updating); Ofodile, *Africa-China*, *supra* note 263, at 191–92 (arguing that modern Chinese BITs scarcely address host country development rights or investors' obligations). By contrast, the U.S. Model BIT includes provisions addressing environmental and labor standards in the host country. *See* Hang, *supra* note 263, at 1246–47 (adding that the United States appears to be more concerned about host nations "lowering their labor standards in order to draw in more investments" than acting out of humanitarian concerns). However, often investors are merely admonished to respect local labor rights, with the treaty imposing no additional penalties on violators. *See id.* at 1258–59 (describing this as "preambular language").

278. *See* Hang, *supra* note 264, at 1258–59. ("As a Chinese diplomat chortled: 'Non-intervention is our brand, like intervention is the Americans' brand.'").

279. Yu, *supra* note 76, at 994–95.

280. *Id.* Chinese aid and concessional loans also lack political reform conditions. *See* Hubbard, *supra* note 96, at 217–18 (noting this practice may enhance China's soft power).

281. *See* Ofodile, *Africa-China*, *supra* note 263, at 197–98 (concluding that, as a result of such costs, African nations should not seek to renew BITs with China until they can find a better negotiating position).

rejects the solution of "re-statification"—namely, that BITs are part of the problem and that greater power over foreign investors should be given the host nations. Instead, this Note recommends that reform of China's BITs with South African and Nigeria is a better and more feasible path to repairing any negative externalities of Chinese investment and trade.

Based on the issues explored in Part III, the amount of harm that Chinese activities have caused Nigeria or South Africa appears uncertain at best. Nigeria is suffering significant environmental degradation because of the activities of multinational oil companies—yet China is, at most, one of many potential culprits.[282] China may also be engaged in abusive labor practices in both South Africa and Nigeria but, with the exception of the treatment of migrant laborers, most evidence is anecdotal.[283] Cheap Chinese goods have hurt the countries' domestic industries, but, considering the countervailing employment opportunities provided by investment, to a smaller degree than might be expected.[284] Finally, there is certainly evidence to suggest China supports corrupt practices in these countries, [285] but accurately tracking that phenomenon or accounting for specific instances is much more difficult. Thus, criticisms of China—at least with respect to Nigeria or South Africa—are based more on anecdotes or inferences than hard data.

Given this lack of concreteness, any anxieties about China's influence in these countries should probably be discounted.[286] Of course, this does not negate the fact that real people have been harmed as a result of Chinese involvement.[287] However, the benefits of Chinese involvement are much easier to trace, which suggests that the "neo-colonial" narrative likely does not accurately describe China's overall relationships with these countries. This conclusion does not necessarily extend to other countries like Zambia and Sudan, where the connections between China and human rights abuses appear to be more tangible.[288] This discussion has also uncovered significant failures in both South Africa and Nigeria to remedy the

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282. *See supra* Part IV.A.1; *supra* Part V.A.

283. *See supra* Part IV.A.2.

284. *See supra* Part IV.B.

285. *See supra* Part IV.C.

286. Presumably, those costs that may not even exist or that may in fact be exaggerated should be given less weight in a cost-benefit analysis. *Cf.* White House Office of Management and Budget, Circular A-94, *Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs* (Oct. 29, 1992) (providing guidelines for how U.S. federal agencies should treat uncertainty when engaging in expected value determinations and cost-benefit analysis).

287. Consider the all too concrete case of Chinese migrant laborers. *See generally* Rodgers, *supra* note 124.

288. *See, e.g.*, Kotecki, *supra* note 101, at 232; *China Mines*, *supra* note 135.

general problems that might be attributable to China.[289] Conceivably, these failures could one day prove an obstacle to China's continued relationships with South Africa and Nigeria.[290]

A. *The Potential for BITs to Mitigate Government Failures*

If any common thread connects the legal and regulatory shortcomings in these countries, it is a worrying lack of respect for the rule of law.[291] Both countries' governments have at times shown a marked unwillingness or at least inability to enforce their laws, and this impedes their abilities to curb any potential downsides of Chinese involvement.[292] African nations frequently lack the strong rule of law that might be found in a Western country.[293] This is true in South Africa and especially Nigeria.[294]

BITs are sometimes seen as contributing to these problems, though this Note argues these criticisms are unfair. First, their terms are sometimes criticized for being too "boilerplate," and not varying sufficiently across different countries.[295] This is probably a legitimate concern regarding the current BITs between China and South Africa and Nigeria, as they are quite similar. Second, investor-state arbitration in general might be inequitable as a dispute-resolution mechanism.[296] Some nations and scholars have argued

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289. *See supra* Part V.

290. *Cf.* Chen Huiping, *Recent Approaches in China's BITs and Impact on African Countries*, 107 AM. SOC'Y INT'L L. 228, 229–30 ("Chinese investors in Africa have suffered great losses arising from the geopolitical risks of investing in Africa, such as the revolutions in Libya and Egypt.").

291. *See supra* Part IV.C; *supra* Part V.

292. Proper rule of law could serve as a significant barrier to the negative externalities described above, by facilitating more effective regulation of harmful activities. Especially important are the concepts that no one should be above the law and that individuals' rights should be protected by the courts. *Cf.* Mbaku, *supra* note 12, at 983–84 (discussing various definitions of the rule of law).

293. *See id.* (describing the role of colonialism and its legacy of institutional failure in Africa).

294. *Compare* CORRUPTION BY COUNTRY/TERRITORY: NIGERIA, http://www.transparency.org/country#NGA_DataResearch [https://perma.cc/WEF7-EHXC] (archived Feb. 27, 2016) (giving Nigeria a score of 11 percent in the Rule of Law category as of 2010), *with* CORRUPTION BY COUNTRY/TERRITORY: SOUTH AFRICA, http://www.transparency.org/country#ZAF [https://perma.cc/B7B3-VZV4] (archived Feb. 27, 2016) (giving South Africa a score of 61 percent in the Rule of Law category as of 2010).

295. *See* Johnson, *supra* note 137, at 928–29 ("But Africa is a large and diverse continent, and liberalizing BIT provisions that attract FDI in one African country may be inappropriate or unworkable in another."); Ofodile, *Africa–China*, *supra* note 263, at 206 ("China-Africa BITs do not take into account the fact that most countries in Africa are at their early stages of development and that African LDCs are least likely to benefit from such agreements.").

296. *See* Brower & Blanchard, *supra* note 275, at 709 ("There are two variants of the argument that investor–State arbitration is one-sided: one contends that

that arbitration, particularly when under the auspices of ICSID, favors multinational corporate investors to the detriment of host nations.[297] Third, this arbitration is also somewhat "opaque," allowing investors and hosts to avoid reputational fallout from bad behavior in disputes.[298] Finally, one particularly crucial dispute is whether BITs "limit state discretion" to the extent they cannot protect their own interests or the interests of their citizens.[299]

Some scholars have thus proposed that host nations should exert greater domestic control over investor-state disputes, on the assumption that international arbitration does not sufficiently constrain investor abuses.[300] These jurists recommend "re-statification" to protect the interests of host nations—scrapping all or part of BITs and replacing them with host nation regulation or adjudication.[301] South Africa's pending Promotion and Protection of Investment Bill (PPI Bill), exemplifies this "re-statification" argument.[302] It would terminate many of South Africa's BITs

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arbitrators are biased and the other that treaty protections and investor-State arbitration structurally favor investors.").

297. *See, e.g.*, Brower & Blanchard, *supra* note 275, at 709–10; Hang, *supra* note 264, at 1255–59 ("The use of private arbitration [in BITs] is . . . problematic because, since cases are decided on an ad hoc basis, this leads to uncertainty over what an MNC's obligations are in relation to a host state. The arbitrators used in these arbitrations have also been criticized for being primarily investment-oriented and inexperienced in the human rights area. This bias in favor of investors is made worse by the fact that some arbitrators have acted or later will act as legal counsel for the investors involved in the dispute."). A related position is that, even if BIT arrangements are efficiency-producing, they reduce the overall welfare of developing nations by over encouraging competition for investment between them. Guzman, *supra* note 261, at 680–84 ("In the absence of BITs, international law currently yields the same economic result as would an agreement among developing countries to never negotiate with potential investors before the investment. Such collusion would force investors to either invest without knowing the final terms under which they have to operate or refrain from investing. The practical effect is to increase the 'price' at which the resources of developing countries are sold.").

298. *See* Brower & Blanchard, *supra* note 275, at 717–20.

299. *See id.* at 721–27; Ofodile, *Africa-China*, *supra* note 263, at 206 ("[I]n many respects [Chinese BITs] limit the capacity of governments in Africa to use policy instruments that China used in the past to regulate FDI in order to build up national industry.").

300. *See* Ofodile, *Africa-China*, *supra* note 263, at 136 ("[A]cross the globe there is a growing revolt against standard BITs, with their exclusive emphasis on investor protection but not investor obligations.").

301. *See* Brower & Blanchard, *supra* note 275, at 696, 697–99 ("What all of these proposals by states, academics, and NGOs have in common is the urge to return investment dispute settlement to the control of states and thereby dispense with the present rule-based system of independent and impartial, hence apolitical, investment dispute resolution.").

302. *See* Reed, *supra* note 9, at 295 (calling the PPI Bill "a radical approach" to tensions between domestic policies and foreign investment). As of September 16, 2015, the PPI Bill is still in committee. *See* Xolelwa Mlumbi-Peter, South Africa's Promotion and Protection of Investment Bill (PPIB), Presentation to the Parliamentary Portfolio Committee on Trade and Industry (Sept. 16. 2015), https://www.thedti.gov.za/

(though not with China), and impose other domestic regulations on them.[303] The PPI bill would also narrow the definition of expropriation by permitting actions that have merely "incidental or indirect" effects or are "aimed at protecting or enhancing legitimate public welfare objectives, such as public health or safety, environmental protection or state security."[304]

Yet, proposals to protect individual rights and enforce investors' obligations simply through domestic law like this are probably misguided. Even if the PPI bill were to be passed, South Africa's capacity to "re-statify" is much greater than that of Nigeria or most of China's other African trading partners. South Africa is unusual on the continent because its judiciary's independence is relatively intact and properly respected. [305] There, a repudiation of BITs might truly allow the government additional freedom to reign in abuses by foreign investors. On the other hand, South Africa's own problems with corruption could twist the PPI and make matters worse.[306]

In either case, such results probably could not be replicated in nations without strong judiciaries. In Nigeria for instance, frequently "the outcome of a case depends not on the merits and strength of the case but on the whims and caprices of the presiding judge."[307] In such an atmosphere, as in other countries in Africa with similar problems, even an imperfectly-neutral international arbitral process would enforce the law better.[308] In the realm of environmental

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parliament/2015/dti_Response_PPIB.pdf [https://perma.cc/MY77-9S8E] (archived Feb. 27, 2016).

303. *See* Reed, *supra* note 9, at 295, 298 (noting the South African government cancelled BITs with Belgium, the Netherlands, Luxembourg, Spain, Germany, and Switzerland following a mineral rights expropriation suit with the International Convention for the Settlement of Investment Disputes, and plans to follow do the same with the rest of its European BITs). Stated briefly, the PPI Bill "provides fewer protections for foreign investors by containing an ambiguous definition of 'investment,' lack[s] an FET [Fair and Equitable Treatment of Investors] provision, narrow[s] the definition of expropriation, and exclude[s] disputes from international arbitration." *Id.* at 299.

304. Promotion and Protection of Investment Bill of 2013 (proposed) (S. Afr.), http://www.tralac.org/files/2013/11/Promotion-and-protection-of-investment-bill-2013-Invitation-for-public-comment.pdf [https://perma.cc/H7MB-MCLW] (archived Feb. 27, 2016).

305. *See* Mbaku, *supra* note 12, at 1007 (discussing several opinions of the Constitutional Court of South Africa regarding the extent of judicial independence in the country). This may be a result, at least partially, of South Africa's common law heritage. *See id.* at 1022–23 ("In countries in which the common law is the foundation for the legal system, 'courts contribute to the rule of law through their authority to make common law rules and to interpret legislation and constitutions; those actions shape the legal environment in which citizens order their economic and personal affairs.'").

306. *See, e.g.*, Elbra, *supra* note 184, at 555 (citing to Transparency International, which gave South Africa steadily decreasing scores from 2007 to 2011).

307. Oko, *supra* note 168, at 28–29.

308. *Cf.* Brower & Blanchard, *supra* note 275, at 716, 716 n.103 (referencing disputes in Kenya, Uzbekistan, and Venezuela where "tribunals have rejected investors' contract and treaty claims on the grounds that the investments were secured

protections, for instance, investment arbitration is generally not "pro-polluter" but often "reveals great respect for environmental protection efforts and national policy discretion."[309] If this is the case generally, the "re-statification" of investment disputes may actually be harmful for nations like Nigeria.[310] The absence of credible commitment mechanisms like those required by BITs might allow African nations to extract greater rents from foreign investors in the short run.[311] However, over the long run this behavior will likely drive foreign investors away.[312]

This Note proposes that external pressures on Nigeria and South Africa imposed through their BITs with China will be more successful in mitigating any problems China might cause them.[313] Some scholars have pushed back against the so-called "meme" that BITs are harmful or ineffective, or that arbitration is inherently biased.[314] In fact, well-crafted BITs can promote the rule of law in developing countries through international arbitration and various other conditions.[315] In nations like South Africa and Nigeria, "'internal' political methods for resolving disputes, whether through recourse to dependent judicial systems or attempts to settle with domestic political actors, open doors for the entrenched corruption that exists in many states with weak rule of law."[316] Furthermore, the investor

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by corruption in violation of domestic law and international public policy or that the investor violated its contractual obligations to the host state").

309. *Id.* at 725–26.

310. *Id.* at 697.

311. *See* Guzman, *supra* note 261, at 677 ("The host [nation] is able to extract rents because once the investment is made, the host is in the position of a monopolist. It can choose to set the 'price' for its resources at the level that maximizes its own return.").

312. *See* Brower & Blanchard, *supra* note 275, at 704 (asserting that "investors remain deeply concerned about political risk and expropriation abroad and actively seek ways to reduce their exposure").

313. *See* Demas, *supra* note 104, at 359–61 (suggesting actions by China may be key to improving the rule of law in Africa).

314. *See* Brower & Blanchard, *supra* note 275, at 699 ("[O]bjections that began as ideologically driven polemics have come to be widely, but inaccurately, presumed as truths"). Recent statistical evidence and case studies have failed to find any "systematic and glaring bias against or purposeful disadvantage to the positions of African states" within the ICSID, suggesting instead that outcomes are "surprisingly balanced." Kidane, *The China-Africa Factor*, *supra* note 275, at 623.

315. *See* Brower & Blanchard, *supra* note 275, at 778 (contrasting arbitration, which "motivate[s] developing host countries to improve domestic administrative practices and laws in order to avoid future disputes," with domestic dispute resolution, which "open[s] doors for the entrenched corruption that exists in many states with weak rule of law"). In this interpretation, "[r]ather than facing a tradeoff between 'corporate profit' and 'human rights and the environment,' States must balance various objectives that serve the public interest, including the maintenance of a stable legal environment necessary for healthy economic functioning and other political and regulatory objectives." *Id.* at 755. "Beyond discouraging foreign investment, an unstable political and legal environment hampers domestic development and the ability of citizens to plan their futures." *Id.*

316. *Id.* at 756–57.

rights protected by BITs can be made to "overlap substantially with the rights protected in human rights treaties," complementing international humanitarian law.[317] BITs are binding once signed and can promote reforms relatively quickly, since they are less likely to be bogged down in domestic political processes.[318] Reforms carried out through BITs also make the host nation more attractive to other investors over the long term.[319] It stands to reason that BITs with China—after all the continent's "largest infrastructure financier"—can be particularly influential in this regard.[320] In China itself, for instance, the evidence suggests developed countries' BITs do promote the rule of law.[321]

What is needed in Nigeria, and potentially South Africa, is a BIT framework with China that provides greater structure and specifically promotes the rule of law. Such a framework would put these countries in a better position to handle any negative externalities caused by Chinese involvement. The new BITs should put pressure on both countries to reform, as Western BITs do. Even language in the preambles may be beneficial.[322] The Model International Agreement on Investment for Sustainable Development is somewhat instructive.[323] It stipulates that host nations cannot "waive or otherwise derogate from" labor, health, and safety standards to encourage investment, and "shall ensure that its laws and regulations provide for high levels" of labor and environmental protections.[324] These requirements are vague, however, and probably do not go far enough. Imposing penalties on host nations unable to

317. *Id.* at 758.

318. *See* Johnson, *supra* note 137, at 928 ("Many African countries are in urgent need of economic growth to combat extreme poverty but have no alternative other than relying on external financing to fuel this development. And while certain African countries have encouraged FDI by improving their general business climates, this usually requires a long–term commitment to reform.").

319. *See id.* ("A BIT's signaling and stabilizing effects enhance the credibility of a country's reforms and indicate a meaningful commitment to protecting FDI.").

320. Kidane, *The China-Africa Factor*, *supra* note 275, at 563.

321. *See* Kate Hadley, Note, *Do China's BITs Matter? Assessing the Effect of China's Investment Agreements on Foreign Direct Investment Flows, Investors' Rights, and the Rule of Law*, 45 GEO. J. INT'L L. 255, 309–11 (2013) ("BIT programs of developed democracies have been successful in promoting stronger property rights foreign investors [sic] and some reforms that promote consistency and transparency in China's legal system.").

322. *See* Ofodile, *Africa-China*, *supra* note 263, at 193 ("Under the Vienna Convention on the Law of Treaties, preambles do not create legally binding rights. However, they constitute part of the context of an agreement and can become important in the event a particular treaty is interpreted.").

323. *See* Kidane & Zhu, *supra* note 156, at 1074 ("The IISD Model has many features that make it more suitable for China–Africa relations.").

324. INT'L INST. FOR SUSTAINABLE DEV. [IISD], IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT (2005), https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf [https://perma.cc/SP7Y-B23B] (archived Feb. 27, 2016).

meet those standards would probably be a draconian overcorrection. However, provisions that limit aid or loans until certain conditions are met, such as for proper adjudication of ongoing labor disputes or corruption charges, could incentivize a cascade of political pressures to mitigate such problems. At the same time, new BITs should put additional obligations on Chinese investors, such as by requiring them to monitor funds to ensure they are not simply pocketed by corrupt officials, or to adhere to higher corporate governance or social responsibility standards.[325] A particularly bold renegotiated BIT might emulate the PPI in part by narrowing the definition of expropriation. In this way, renegotiated BITs would promote the rule of law while not doing away with necessary investor protections.

B. *Feasibility: What About China's Interests?*

Renegotiating China's BITs with South Africa and Nigeria is feasible so long as doing so is in the interests of the parties, especially China. The PRC's position as a major investor and trading partner to South Africa and Nigeria gives it substantial leverage.[326] China is so attractive in part because its aid and investment is largely unconditional.[327] If it begins to push for internal reforms, these countries' governments will likely be hard-pressed to find more lenient investors of similar means.[328] China has already begun to prefer the Western BIT model.[329] If that trend continues, China might be able to improve the rule of law in its trading partners considerably.

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325. *Cf. id.* (laying out investor obligations to host countries: in order to avoid complicity with corruption and subjection to liability, monitor investments for compliance with domestic and international law, adopt more transparent practices, and adhere to international corporate social responsibility standards).

326. *See* Haroz, *supra* note 83, at 79 ("While China has helped to spur African economic growth, many African countries lack a strategic focus in their engagement with China—or a long-term vision that could ensure the partnership supports broader poverty alleviation on the continent .... [E]ven among resource-rich African nations [such as Nigeria], which have greater leverage in their dealings with the Chinese, 'this advantage is [often] not converted into negotiating power.'").

327. *See* Keenan, *supra* note 5, at 94–97 (arguing that Chinese investment is often preferred over other sources of funds because of their non-interference policies).

328. *Cf. id.* ("Not surprisingly, as [western] conditions became more intrusive, recipient states became eager to identify other sources of financial support.").

329. *See* Ofodile, *Africa-China*, *supra* note 263, at 156 ("[Post-1998] BITs involving China exhibit characteristics, which together suggest a more liberal, pro-investor approach to BITs, including more comprehensive substantive provisions, automatic and compulsory dispute settlement by international arbitration, broader national treatment clauses, and considerably fewer restrictions on the transfer of funds.").

This Note suggests that China should accept its mantle as a major economic power and pull further back from its non-interventionist policies, if only out of self-interest. One of China's core foreign policy interests is its "continued economic development and stable social order."[330] Resource scarcity threatens this. Even if Chinese firms profit from the status quo in the short term, in the long term it would let opportunities go to waste.[331] Promoting increased respect for the rule of law in China's African trading partners would benefit China by securing its access to key resources over the long term, especially in the case of Nigeria. Regardless of whether China is currently hampering the rule of law, working to improve it would help stabilize the South African and Nigerian governments, improving the safety of Chinese nationals and the security of investments.[332] Less corrupt host countries are also less likely to extort Chinese firms and more able to pay back loans.[333] The purpose of BITs is to "reduce risk for investors by stabilizing the legal framework within which the investment will operate," [334] but China's agreements are not doing enough currently. This new policy direction is also arguably in line with Chinese rhetoric of taking a leadership role in the context of "promoting the interests of the developing world."[335] It would also complement China's increased diplomatic assertiveness.[336]

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330. Cai, *supra* note 38, at 813, 818–19.

331. *See, e.g.*, Demas, *supra* note 104, at 328 (describing the millions of barrels of oil lost in Nigerian oil spills).

332. Chinese oil workers run the risk of being kidnapped by militants in Nigeria. *See* Rodgers, *supra* note 124, at 1091–92 (describing multiple kidnappings of Chinese nationals in Nigeria over the last several years); *see also* Tansa Musa, *Suspected Boko Haram Attack Chinese Workers in Cameroon; 10 Missing*, REUTERS (May 17, 2014, 11:40 PM), http://www.reuters.com/article/2014/05/18/us-nigeria-violence-cameroon-idUSBREA4H00K20140518 [https://perma.cc/7MMH-LPK3] (archived Feb. 8, 2016) (reporting the abduction of ten Chinese construction workers by Boko Haram from a site in neighboring Cameroon).

333. *See, e.g.*, Keenan, *supra* note 99, at 118 (arguing that when China provides funding for projects directed by politicians in Africa, often the investments are not profitable).

334. Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 525 (1998).

335. Yu, *supra* note 76, at 994–95.

336. *See* Cai, *supra* note 38, at 815 (discussing Chinese foreign policy under Hu Jintao, which emphasized a "readiness to undertake a stronger role in international governance," and recognized that "fulfilling their domestic needs of economic growth demands a more activist global strategy").

The weaker bargaining positions of South Africa and Nigeria vis-à-vis China may make it more difficult for them to get what they want in renegotiated BITs. Given the importance of the resources they provide to China, however, they may not be totally at China's mercy.[337] One obvious criticism of these proposed BIT renovations is that they make it harder to convince investors that it is safe to invest their money in an otherwise-volatile country.[338] However, China, South Africa, and Nigeria maintain friendly relations[339] and the proposed modifications to China-Africa BITs could make up for regulatory concessions to the host nations with conditions, described above, to reduce the chance of arbitrary or unfair enforcement. Ultimately, neither side can force this renegotiation unilaterally; the eventual terms must be a product of South Africa's and Nigeria's overall alignment of interests with China. This Note has established, however, that these countries largely benefit from Chinese trade and investment. It is therefore likely they will be able to reach mutually beneficial arrangements.

VI. CONCLUSION

In the twenty-first century, China is a critical trading partner of and investor in African nations like Nigeria and South Africa. However, there are conflicting narratives about whether China is actually helping these countries or engaging in a new form of colonialism. In Nigeria and South Africa at least, the benefits of Chinese involvement are clear—clean energy, jobs, infrastructure, and the like—whereas it is unclear whether and to what extent China is actually violating human rights, damaging the local economy, or promoting corruption in these countries.

To whatever extent China is actually causing any problems, however, it appears these countries' domestic legal responses have been inadequate and reflect a host of governmental failures. One method by which Nigeria and South Africa could improve their ability to reign in Chinese activities, and by which China could secure access to resources for the foreseeable future, would be for the parties to renegotiate their bilateral investment treaties to better promote rule of law in the host nations. This method of promoting the rule of law

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337. *See* Ma, *supra* note 47 ("More than 80 percent of China's $93.2 billion in imports from Africa in 2011 were crude oil, raw materials and resources.").

338. *Cf.* Brower & Blanchard, *supra* note 275, at 704 ("In 2011, at least 38% of respondents to the Multilateral Investment Guarantee Agency's annual political risk survey had withdrawn existing investments or cancelled planned investments because of political risk in the previous twelve months.").

339. *See, e.g.*, Zuma Address, *supra* note 69 ("The discussions reaffirmed the warm and wonderful relations between South Africa and China, which date back many years ago during the struggle for liberation in our country.").

in host countries would be more likely to succeed because it is not only mutually beneficial to the countries involved, but is also less vulnerable to the corruption to which reforms might fall prey if carried out purely within domestic political processes.

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