

Comparative Legal Developments Governing Foreign Investments in China and Mozambique: A Case for Consideration to Revamp China-Mozambique Bilateral Investment Regime?

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Abstract: As China-African economic relations continue to consolidate, it is crucial to constantly assess and advance relevant legal regimes governing bilateral investments to sustain and strengthen a vibrant investment relation. Especially, when any of involved states rejuvenate and modernize foreign investment legal standards to attract investment from worldwide, the need for the parties in bilateral investment relation to compare and bolster existing bilateral legal standards is crucial. The present paper aims to investigate whether the current China-Mozambique BIT 2001 calls for a revision in response to certain other legal measures and some recent reforms impacting foreign investments in both these countries. The paper identifies the fundamental features of the 2001 BIT and assesses the critical treatment and protection standards governing mutual investments. As the current China-Mozambique BIT is more than two decades old, the paper makes a comparative assessment of their 2001 BIT standards with newer BITs agreed by the two countries with third states. The paper concludes with an emphasis on the need to rejuvenate the 2001 BIT, in the light of

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findings of the analysis of contemporary features in modern BITs as well as the new foreign investment laws introduced in China and Mozambique in 2020 and 2023 respectively.

Keywords: China, Mozambique, investment law reform, BIT, revision, comparative law.

1. Introduction

Since the COVID pandemic adversely started to impact economies around the world foreign direct investment flows have witnessed a tumultuous time. Albeit a moderate recovery after the first year of COVID was witnessed in 2021, the same was not sustainable. Foreign direct investment fell again in the subsequent year at around 12% and since then, the gloomy environment continued to persist specifically for the developing countries⁷⁶⁹. Although, 2023 is found to have witnessed a marginal growth of 3% of foreign direct investments worldwide, the situation in case of developing countries continued to be in the negative territory, with a decline of 9% in average investment flows. For developing countries in certain region, like for example Asia, the decline was even more, and it matched the previous year's level of decline for developing countries namely 12%.⁷⁷⁰. The World Investment Report 2023 (WIR-2023) published by the United Nations Commission on Trade and Development (UNCTAD), concluded that developing countries are particularly being affected by a growing investment deficit, potentially impacting key developmental goals. From the systematic and intelligible documenting of UNCTAD, it is evident that worldwide movement of foreign investments in a period may not be indicative of the level of investment flows to different groups of economies like developing countries in the same period. Therefore, it is vital to carry out a more focused assessment of foreign investment flows, which should

⁷⁶⁹ For 2022 foreign direct investment trend see UNCTAD, *World Investment Report 2023*, (United Nations: New York), 2023, PP. 208.

⁷⁷⁰ For the figures on continued decline see UNCTAD, "Global foreign direct investment grew 3% in 2023 as recession fears eased" 17 January 2024 available online at <https://unctad.org/news/global-foreign-direct-investment-grew-3-2023-recession-fears-eased> (accessed online on 20 February 2024).

transcend beyond the context of developing countries as a group and be studied at the level of individual countries, especially in the light of the specific characteristics and situation of their respective economies. Such a country specific assessment will not only provide a more realistic picture of foreign investment fluctuations in individual economies, which will in turn enable them to determine necessary course of action like introduction of pertinent economic policies and laws for the purpose of stabilization and improvement of foreign investment flows.

In the light of the significance of the above, the present paper aiming to assess the legal regimes governing foreign investments in two specific markets namely China and Mozambique and their bilateral investment relations, first examines how the recent foreign investment flow fluctuations have impacted the two economies and why reinforcing the legal regime governing their bilateral investment relation is essential. Secondly, the paper systematically assesses the scope and limitation of the China-Mozambique Bilateral Investment Treaty (BIT) 2001. To determine whether a need to consider the revision of their BIT has arisen, the paper reviews the related legal developments in two distinct stages. In the first stage, the paper selects some specific BITs entered by China with third countries in more recent times to identify modern provisions governing bilateral investments and analyzes their unique scope and limitations. In the second stage, the paper chooses three recent BITs agreed by Mozambique with third countries and reviews them systematically to determine the unique features and expanded scope.

The choice of the three BITs examined in the two stages are made methodologically. Firstly, two comprehensive BITs agreed by China and Mozambique with third countries are chosen for analysis to serve as a pragmatic reference to determine the depth and breadth of any potential

investment accord between the two states. The paper undertakes a comprehensive review of China-Canada BIT 2012 and Mozambique-Japan BIT 2013 in this regard. Secondly, two recent BITs entered into by China and Mozambique respectively with an African country are chosen for analysis to reveal whether any region-specific modern provisions manifest in such accords. China-Tanzania BIT 2013 and Mozambique-Angola BIT 2015 are the two African related BITs analyzed in the present paper. Finally, two recent BITs concluded by China and Mozambique respectively with a same country are chosen to identify comparative difference in related obligations. The BITs examined in this regard are China-Turkey BIT 2015 and Mozambique-Turkey BIT 2017. Based on the findings of the two stages, the paper concludes by examining the need for consolidating the legal regime governing China-Mozambique bilateral foreign investment relations in the light of various legal instruments and developments wielding influence upon foreign investment in both the states. The findings of the paper will contribute to the strengthening of the protection of mutual foreign investment interests of both the economies as well as to the fostering of a strategic partnership between the two investment markets in the future.

2. Foreign Investment in China and Mozambique and the Bilateral Investment Flows

To determine the significance of bilateral investment relations between China and Mozambique, it is relevant to review the foreign investment flows in both the markets in recent times. The inward and outward foreign direct investment trends in China and Mozambique in the span four years from 2018 to 2022 reveals some distinct characteristics that are crucial to gauge how both markets could play a complementary role to sustain investment flows. Firstly, in case of China although the inward foreign di-

rect investment has remained in the positive territory since 2018, the rate of growth has been mostly marginal. In the four-year period ending in 2022, except in the year of 2021 the rate of growth of inward foreign direct investments has witnessed only a single digit growth. While a growth rate of 4.5 percent has been achieved in the year 2022, the year of 2019 and 2020 have witnessed a growth of 2.1 percent and 5.7 percent respectively⁷⁷¹. During the same period of four years, the outward for direct investments of China have witnessed negative growths twice namely in 2019 and 2022. Especially, in the latter year, the negative growth of outward foreign direct investments of China had seen a sharper fall of minus 18.1 percent⁷⁷².

Secondly, the foreign direct investment flows in Mozambique in the span of the same four years creates concerns of capricious changes. Regarding inward foreign direct investments in Mozambique, a growth in the successive years of 2020 and 2021, can be seen as a total contrast to the negative growth witnessed during the preceding and following years of 2019 and 2022 respectively. Among the two years, in comparison with the 2019 negative growth of 18.1 percent, the fall in 2022 increased by threefold due to a whopping 61.3 percent negative growth⁷⁷³. Interestingly however, the outward foreign direct investment flows from Mozambique

⁷⁷¹ See, UNCTAD, “Country Fact Sheet: China Foreign Direct Investment (FDI) Overview-Selected Years” in WIR 2023 Factsheet China available online at https://unctad.org/system/files/non-official-document/wir_fs_cn_en.pdf (accessed on 12 March 2024).

⁷⁷² Ibid.

⁷⁷³ See, UNCTAD, “Country Fact Sheet: Mozambique Foreign Direct Investment Overview-Selected Years” in WIR 2023 Factsheet Mozambique available online at https://unctad.org/system/files/non-official-document/wir_fs_mz_en.pdf (accessed on 10 March 2024).

have been consistently progressive in the last three years, especially reaching a massive growth of 191 percent in 2022⁷⁷⁴. The comparison of inward and outward foreign direct investment trends in China and Mozambique in the four-year period discussed above, raises the question whether the two investment markets could play any supplementary role in support of each other. In case of China, during the two years of limited growth of inward foreign direct investments witnessed in 2020 and 2022, it is relevant to note that the overall outward foreign direct investments from Mozambique witnessed huge leaps. Any efforts to enhance the attraction of China as a host market, targeting the increasing Mozambican outgoing investment flows, has the potential to strengthen the growth rate of incoming investment flows into China. As a part of such efforts, it is crucial to constantly review and revamp the legal framework governing bilateral investment flows, including the China-Mozambique BIT that came into force more than two decades ago.

In contrast to the situation of China discussed earlier, when Mozambique had a dearth of inward foreign direct investment flows during 2019 and 2022, the overall outward foreign investments from China was also falling. This might have casted doubts regarding any potential benefit Mozambique could have expected from targeting Chinese outward foreign investments in those years. Although, whenever the overall outward foreign direct investment from China falls, the interest on Mozambique as an investment destination for Chinese investments could diminish, any conspicuous efforts to enhance the attraction of Mozambican investment market, including consolidating the legal environment governing bilateral investments between the two markets, will be effective in sustaining or even

⁷⁷⁴ Ibid.

enhancing the level of investment flows from China into Mozambique. As the total value of the outward foreign direct investments every year from China are substantially huge, even in situations when it falls in comparison with any previous year, as happened in years 2019 and 2022, Mozambique could strive to get a larger size of the pie with focused efforts aiming to improve factors affecting bilateral investment relations between the two markets. In this regard, efforts to review and improve legal factors affecting their bilateral investments should gain a particular significance. The reminder of this chapter will explore various aspects prompting the need to review and identify the scope and limitations of China-Mozambique BIT and examine how any relevant improvements could be achieved.

3. Treaty Standards Governing China-Mozambique Bilateral Investments

China and Mozambique signed their BIT in 2001 aiming to promote and reciprocally protect their mutual investments. The 2001 BIT also aims at enhancing favourable environment to facilitate increased investment flows between the two markets. For the purpose of the present chapter, it is relevant to note that the 2001 BIT recognizes the significance of two important attributes essential for fostering the growth of business initiatives and prosperity in both markets. The attributes explicitly recognized by the 2001 BIT are ‘encouragement’ and ‘reciprocal protection’ of mutual investments. While creating attractive investment opportunities may be able to ‘encourage’ more bilateral investment flows⁷⁷⁵, the sustenance of

⁷⁷⁵ In this regard, it is interesting to note that there is an explicit obligation under the 2001 BIT that mandates each contracting party to the BIT to encourage investors from the contracting party to make investments in its territory. See Article 2 (1) of China-Mozambique BIT, 2001.

the latter attribute of reciprocal protection necessarily requires periodical review and revision of relevant legal standards governing bilateral investment flows between the two markets.

The two key definitions in the 2001 BIT that determine the scope and coverage of the 2001 BIT protection namely the ‘investment’ and ‘investor’ indicates that the former encompasses various forms of assets invested and the latter comprehends both natural and legal persons. To bring within the purview of the 2001 BIT, any form of asset in question should have been invested within the territory of the relevant host state and in accordance with its relevant laws and regulations. Interestingly, the explicitly recognized forms of assets includes direct investments like movable and immovable properties as well as other rights in rem, claims of monetary nature or of performance with economic value, industrial and intellectual property rights, and business concessions granted by contract or law⁷⁷⁶. In addition, the definition also comprehends indirect investments like shares, debentures, stocks and other forms of company participation. Investors as per the 2001 BIT includes both natural and legal persons. However, the both categories of investors should possess some specific characteristics. Natural person investors should be holding the nationality of either of the state party to the 2001 BIT and legal person investors should be economic entities constituted and incorporated in either of the state party to the BIT. However, such economic entities could be with or without limited liability or profit motive.

⁷⁷⁶ It is relevant to note that a change in the form of the invested asset does not deprive its status as an investment within the purview of the 2001 BIT. See Article 1 (2) of China-Mozambique BIT, 2001.

The substantive legal standards governing investments under the 2001 BIT are confined to certain fundamental aspects of treatment, protection and remedies relating to foreign investments between the two states. The scope of treatment and protection under the 2001 BIT covers certain basic matters that are generally addressed in typical bilateral investment regimes. Unique or unconventional provisions that are custom made to consolidate or maintain sustainable long term investment flows specifically between the two states are arguably absent. Noticable treatment, protection and dispute settlement provisions of the 2001 BIT should be delineated first before any comparative enquiry with reference to other BIT regimes or national investment protection laws can be examined.

By virtue of 2001 BIT, investments are shielded against unreasonable treatment or discrimination by the host state with regard to its various operative aspects ranging from begetting to disposal of the underlying investment⁷⁷⁷. Moreover, a fair and equitable treatment is warranted not only for the investments made but also the related returns on such investments. Although a national treatment is sought for those investments and returns, such a treatment is subjected to the any exceptions recognized under the relevant laws and regulations of the host state. Moreover, a most favoured nation treatment for investments and related returns is also guaranteed under the 2001 BIT. With regard to both the national treatment and most favoured nation treatment obligations, the BIT recognizes some standard exceptions in the context of certain other agreements or treaty obligations undertaken by China or Mozambique with third states. Beneficial or pre-

⁷⁷⁷ The protection against unresonable or discriminatory treatement spans across distinct aspects of an investment cycle including the maintenance and management of the investment as well as its use, enjoyment and disposal.

ferential or privileged treatment accruing from such agreements and obligations need not be extended to the investors governed by the 2001 BIT⁷⁷⁸. In addition to the broad treatment standards, the 2001 BIT also imposes a specific obligation upon the host state party to offer assistance and facilities to nationals of the other state party in securing necessary visas and permits to facilitate their activities associated with the related investments made in the host state's territory.

Investments originating from one state party enjoys constant protection and security in the other state party's territory. The foremost protection pertaining to expropriation manifest in an exclusive provision that explicitly prohibits not only direct nationalization or expropriation but also any other acts that could indirectly have such effects. The typical exception of nationalization or expropriation intended to serve public interest is maintained, which however is subjected to conditions of non-discrimination, compliance with domestic legal procedure and payment of compensation⁷⁷⁹. The 2001 BIT also confers upon the related investors a right to seek a review of the impugned act of the host state based on the above principles

⁷⁷⁸ These agreements and obligations mainly pertain to customs union, free trade area, common market, taxation agreements and facilitation of frontier trade. See Article 3 (4) (a-c) of China-Mozambique BIT, 2001.

⁷⁷⁹ The nature of the compensatory relief is also prescribed by the 2001 BIT, which mandates the compensation to commensurate with market value of the investment as of the period immediately prior to the impugned act. The compensation so granted should be dispensed without any delay and be effectively realizable, which is supplemented with a prescribed interest for the period until the payment of the compensation is completed. See Article 4(1) of China-Mozambique BIT, 2001.

and such a review should be carried out promptly by a judicial process or bodies acting independently and impartially.

In addition to the compensation for taking of the foreign investments, the 2001 BIT also envisages various situation of losses that could be faced by foreign investors and imposes relevant obligations upon the host state to indemnify or compensate or offer restitution or other forms of settlement for such losses. They should be in similar lines to such relief measures granted to national investors or investors from third states. The situation of losses contemplated by the 2001 BIT includes incidences any situation of national emergency and various acts affecting peace or law and order like war, armed conflict, revolution, insurrection, and riot. In addition, for certain other losses arising from possible requisitioning or destruction of invested property by the official forces or authorities of the host state, the 2001 BIT mandates relevant restitution or compensatory measures that matches similar reliefs offered to investors of national origin or third states. The other major interest of the investors protected under the 2001 BIT pertains to the right to repatriate the investments, various income and profits accruing from those investments⁷⁸⁰ as well as any compensation paid, or relief measures granted pursuant to expropriation or losses or requisitioning, or destruction related to the investments.

⁷⁸⁰ Specific types of income and profits protected under the 2001 BIT includes dividends, interests, other payments made pursuant to investment related loan agreements, income from sale or liquidation of investments, prescribed royalties, certain payments and fees, and earnings of home state nationals arising from their work rendered to investments made in the host state. For details see Article 6 (1) (a-g), China-Mozambique BIT, 2001.

Two potential disputes and their resolution are sought to be addressed by the 2007. Firstly, regarding the disputes involving the investor and a host state, negotiation as a method of resolution is given primacy, followed by a resort to the court of host state or international arbitration, if the negotiations do not yield a result within a prescribed period. If international arbitration is chosen to be the preferred method, then the host state may require the investor to exhaust the remedy of administrative review provided under the host state national laws before resorting to the above arbitration. The international arbitration panel could be ad-hoc in nature or constituted under the auspices of the International Center for Settlement of Investment Disputes (ICSID). Any of the above two arbitral mechanism is required to decide the disputes in accordance with the law of the host state including its conflict of law rules, the provisions of the 2001 BIT as well as the relevant principles of international law.

Secondly, in case of potential inter-state disputes that may arise between China and Mozambique in relation to the 2001 BIT, they are required to be resolved using negotiations or in case of its failure within a prescribed period, the resolution could be sought through constitution of an ad-hoc arbitral tribunal. Apart from the provisions for the resolution of interstate disputes, the BIT also recognizes the right of subrogation of the home state or its agency when they indemnify their investor in relation to the investments made in the host state⁷⁸¹. By virtue of such subrogation, the host state is bound to recognize the assignment of relevant rights and claims of the indemnified investor to the home state or its relevant agency.

⁷⁸¹ See Article 9, China-Mozambique BIT, 2001.

Finally, it is important to accentuate some of the other notable features of 2001 BIT, which is crucial for any assessment of the need to rejuvenate the same. In this regard, the provisions recognizing the scope of application of other foreign investment related rules and obligations to the bilateral investments and the possible subjugation of the provisions of the 2001 BIT under certain circumstances are relevant to note⁷⁸², which will be alluded specifically in the conclusion of this paper. Regarding the question of temporal scope of the 2001 BIT, it is evident that the same is articulated distinctly for China and Mozambique. While the application of the 2001 BIT is guaranteed for all investments made in China prior and subsequent to the entry into force of the BIT, such an application in case of investments made in Mozambique is subjected to the conformity with its past and future domestic legislation governing investments. At the same time, the 2001 BIT proclaims its application irrespective of the existence of bilateral diplomatic or consular relations between the two contracting states. Finally, the several distinct features contemplating periodical consultation between the two contracting states arguably provides prima facie evidence of the resolve of the founders of the BIT to constantly take stock of the contemporary developments impacting investments to ensure a continued existence of effective bilateral investment relations and protection between the two states.

⁷⁸² See the provisions governing the ‘application of other rules’ under the 2001 BIT under its Article 10. The said subjugation is contemplated under circumstances when the application of other rules could accord a more favorable treatment to the foreign investments and the relevant returns than what is provided by the 2001 BIT.

4. Comparative Legal Standards Arising from BIT with Third States

To determine how the 2001 BIT between China and Mozambique holds in modern times, it is crucial to evaluate its key legal standards identified in the last section in the light of the subsequent development in foreign investment regimes governing investment flows to the two states. In this regard, two sets of legal developments relating to the two investment markets merits consideration namely the BITs concluded with third states and the domestic legislation governing foreign investments. While this section chooses and compares more recent BITs concluded by China and Mozambique with third states, the next section of this paper will review the most recent domestic legislation governing foreign investments in the two markets. For the first purpose, some select BITs that are concluded by the China and Mozambique respectively with third states, at least a decade after the 2001 BIT entered into force⁷⁸³ were chosen for comparison⁷⁸⁴. In case of China, although four major BITs signed since the year 2012 were identified, three concluded with Canada, Tanzania, and Turkey respectively were chosen for the purpose of the present study. In case of Mozambique, out of the six BITs concluded since 2012 were identified, three of them entered with Japan, Angola, and Turkey were shortlisted for the present study⁷⁸⁵.

⁷⁸³ China-Mozambique BIT was signed on 10/07/2001 and entered into force in the very next year on 26/02/2002.

⁷⁸⁴ To investigate whether the 2001 BIT requires revision, it is necessary to compare with the BITs entered with third states after a considerable period has lapsed since 2001. So, the year 2012 was set as the cut-off period and selected BITs entered with third states by China and Mozambique since that year were chosen for the study.

⁷⁸⁵ The three new BITs of China and Mozambique respectively were purposefully selected

4.1 Comparison of Contemporary Chinese BITs with Third States

China-Canada BIT 2012 is a very comprehensive accord aimed at promoting and reciprocally protecting investment flows between the two countries. In comparison with the China-Mozambique BIT 2001, this BIT is much wider in scope not only about the various issues covered but also the depth of such issues. The very preamble distinguishes itself with an emphasis on core principles like sustainable development and equality. The definition of investment covered is very expansive⁷⁸⁶ in comparison with the 2001 BIT and the definition also includes provisions of clear exclusions of what cannot qualify as an investment. Two conspicuous distinctions could be noted regarding the definition of investors between the China-Canada BIT 2012 and the China-Mozambique BIT 2001. In comparison, the former introduces a more inclusive definition, with natural person investor defined to include permanent residents of the contracting states and the legal person defined to include branches. The China-Canada BIT 2012 provides a much longer list of definitions with various related terms specifically defined like ‘intellectual property rights’, and ‘confiden-

to form a set of representative and comparable countries. The Chinese BIT with Canada and the Mozambique BIT with Japan are representation of BITs entered with developed economies and hence comparable. Similarly, the Chinese BIT with Tanzania and Mozambique BIT with Angola are representation of BITs entered with African economies and are therefore comparable. Finally, the last BIT chosen in the two sets namely the BITs entered by China with Turkey and Mozambique with Turkey represent BIT concluded with the same country and hence merits comparison.

⁷⁸⁶ It is interesting to note that in addition to the general definition of what is an investment, the BIT also strives to contextualize the term by providing a specific definition of “investment of an investor of a contracting party” and ‘covered investment’. See Article 1 (3) and (4) of the China-Canada BIT 2012.

tial information' whereby providing clarity and consequentially averting potential disputes attributable to terminological disagreements.

The China-Canada BIT 2012 delineates its scope of application specifically thereby bringing within its purview the host states and provincial governments as well as any entities to which certain governmental authority is delegated by the former. A minimum standard of treatment for investments is prescribed and the same must be provided in accordance with international law. A much-detailed set of provisions enumerating the two pillars of MFN and national treatments to be accorded by the host state to the covered investments are presented in two distinct articles under the BIT. Such an approach not only signifies the indispensable role of the two principles but also provides for the enumeration of the scope and limitation of the application of the principles in different context. The 2012 BIT unconventionally seeks to limit the prerogative of the contracting states' possible prescription on nationality requirement regarding the senior management and directors of the board in their enterprises that qualify as covered investments.

A dedicated set of provisions enlisting exceptions to above obligations including MFN, national treatment and nationality prescription builds in a useful flexibility within the BIT structure. This enables China and Canada to carve out certain derogations to balance with other relevant needs and international obligations like the compliance requirements with their respective intellectual property rights obligations in related international instruments⁷⁸⁷. Similarly, the BIT interestingly embeds specific performan-

⁷⁸⁷ For the whole set of exceptions and the specific context in which derogations from certain fundamental BIT standards are permitted see Article 8 of China-Canada BIT 2012.

ce requirements that not only reaffirms the obligations of the state parties under the Trade-Related Investment Measures (TRIMs) Agreement of the World Trade Organization (WTO), but also incorporates certain parts of the TRIMs Agreement within the BIT.

On the issue of protection against expropriation, some noticeable differences exist including about the question of timing for determination of the market value of the expropriated investments and the exclusion of certain matters relating to intellectual property rights from the purview of protection against expropriation like compulsory licensing. The right to transfer of investment, and related returns and profits are more or less guaranteed in a similar manner albeit the exception in this regard recognizing the possibility of prevention of such transfers in certain circumstances of operations of domestic law in instances like bankruptcy, insolvency, issuance of securities and related deals, commission of offences and enforcement of judgements⁷⁸⁸. Moreover, a contracting state could also restrict transfers relating to investments in circumstances of its economy experiencing balance of payment difficulties. The BIT also addresses the issue of taxation by incorporating provisions that seek to conserve the freedom and obligations of the contracting states in the field of taxation. For example, the BIT recognizes the precedence of obligations of the contracting states under tax conventions signed by them in cases of any inconsistency between such conventions and the BIT. At the same time, the freedom of taxation by the host state is subdued to the BIT provisions offering protection against expropriation⁷⁸⁹.

⁷⁸⁸ See Article 12 (3) of China-Canada BIT 2012.

⁷⁸⁹ The China-Canada BIT 2012 specifically articulates the extension of the protection against expropriation to tax measures under Article 14 (4).

At the same time, the freedom of taxation by the host state is subordinated to the BIT provisions offering protection against expropriation⁷⁹⁰. On the issue of dispute settlement, the BIT mainly recognizes consultation through diplomatic channels and ad-hoc arbitration to resolve disputes between contracting states. In addition, consultation between the contracting states is also contemplated for various purposes related to the BIT like the review of its interpretation and implementation, encouragement, and facilitation of bilateral investments⁷⁹¹, addressing of investment disputes, and exchanging of legal information. The investor-state dispute settlement on the other hand is covered by an exclusive and elaborate part of the BIT. Despite mainly recognizing arbitration as the mechanism for the investor to seek redressal against the host state, this part preemptively addresses a wide range of specific issues that could typically arise in investment arbitration, which has the potential to promote a smooth and effective process of arbitral resolution⁷⁹².

The issues addressed by the provisions governing investor state dispute settlement includes typical matters like grounds giving rise an investment claim, and unconventional features like the recognition of the

⁷⁹⁰ The China-Canada BIT 2012 specifically articulates the extension of the protection against expropriation to tax measures under Article 14 (4).

⁷⁹¹ However, the BIT provides precedence to certain priorities like health, safety, and environment by denouncing any encouragement of bilateral investment flows that could impinge upon or derogate from such priorities. See Article 18(3) of the China-Canada BIT 2012.

⁷⁹² See Part C of the China-Canada BIT 2012, which contains fourteen separate articles enumerating various issues relating to investment arbitration ranging from entitlement to initiate arbitration to enforcement of the ultimate award.

possibility of engaging contracting states during the process of investor-state arbitration process⁷⁹³. Other notable elements covered by the dispute settlement section of the BIT includes prescription of certain conditions to be satisfied prior to raising an investment claim, the options and process of submission of such claims to arbitration, qualifications of arbitrators and agreement to appoint them⁷⁹⁴, causes for consolidation of claims, possibility of disputing contracting state to seek for public hearing of the arbitral proceedings and the dissemination of related documents to the public⁷⁹⁵, determination of the governing law, grant of interim measures, and enforcement of the resulting award.

The China-Canada BIT 2012 permits the possibility to deny the guaranteed benefits to the investors under the BIT in certain circumstances like the investing enterprise in question is owned or controlled by the investors of a non-contracting party. The 2012 BIT also aspires to enhance the transparency of policies and national legal regimes governing investments

⁷⁹³ For the contemplated role of the contracting states in the process of investor-state arbitration See Article 20 (2) (a-c) of the China-Canada BIT 2012. In addition, BIT even recognizes the role of non-disputing contracting state and its right to participate the hearings in investor-state arbitration. See Article 27 (1) and (2) of the China-Canada BIT 2012.

⁷⁹⁴ It is relevant to note that the BIT prescribes certain rules governing the appointment of arbitrators not only for constituting a tribunal under the ICSID Convention but also under its Additional Facility Rules. See Article 25 of the China-Canada BIT 2012.

⁷⁹⁵ The provisions seeking public participation and public dissemination are arguably some of the pioneering features of the China-Canada BIT 2012, which notably are even prior to some key international efforts aimed at enhancing transparency in treaty-based investor-state arbitration like the Mauritius Convention on Transparency 2014. See United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 2014 available online at <https://uncitral.un.org/en/texts/arbitration/conventions/transparency> (accessed on 15 March 2024).

by imposing relevant obligations on the contracting states. To categorically determine the scope of application of the treatment and protection standards mandated by the BIT, it sets out a clear list of exceptions and exclusions to which the provisions of the BIT do not apply. Exceptions recognized pertains to various activities, measures and purposes in different fields including activities in cultural industry, environmental measures, prudential measures, general measures of any public entity related to monetary, credit and exchange rate purposes and policies, security interests, maintenance of international peace and security, maintaining privacy and confidentiality for prescribed purposes, certain activities of competition authority and protection of privileged information under competition laws, and measures adopted to comply with WTO decisions made under WTO Agreement. Exclusions recognized are confined to the application of dispute settlement related provisions of the BIT, which are mainly related to issues of initial approval of an investment or national security review under the relevant national investment laws of the contracting states⁷⁹⁶.

Finally, it is important to note that the China-Canada BIT 2012, in addition to prescribing an elaborate set of provisions governing foreign investments, has adopted a systematic model of expanding specific provisions and legal standards using several annexes enclosed to the BIT. Such annexes are related to various matters addressed by the BIT including issues of expropriation, exceptions and exclusions, transfer and exchange, requirements to be satisfied prior to submission of an arbitral claim, and procedures for non-disputing party submissions⁷⁹⁷.

⁷⁹⁶ See Article 34 and Annex D.34 of the China-Canada BIT 2012.

⁷⁹⁷ See Annexes B.8, B.10, B.12, C.21, C.29, and D.34 of the China-Canada BIT 2012.

The next BIT of China relevant for the purpose of the present study is the one concluded with Republic of Tanzania in 2013. In addition to the typical objectives like constructing favourable investment climate, as well as encouraging, promoting, and protecting investment that are enshrined in the preamble, certain unconventional values like respecting economic sovereignty and corporate social responsibility, and promoting sustainable economic development and standard of living of nationals are distinctly present. The definition of investment in China-Tanzania BIT 2013 is more comprehensive, which includes certain categories of investments that are not explicitly included in the China-Mozambique BIT of 2001⁷⁹⁸. It is also interesting to note that the China-Tanzania BIT 2013 clarifies certain defining characteristics of what constitutes an investment. Three fundamental characteristics identified includes capital commitment, risk assumption and profit expectation. Certain monetary claims exclusively arising from commercial contracts, as well as such claims arising in the context of marriage or inheritance that lack investment characteristics are excluded from the purview of protected investments under the BIT. Similarly, short term loans, bonds, and debentures spanning less than three years are also kept outside the scope of protected investments. In defining an investor, the China-Tanzania BIT 2013, distinctly encompasses enterprises beyond private ownership and includes those that are controlled or owned by the government. In addition, the BIT progressively recognizes even legal entities constituted under non-contracting state laws as an investor, provided that such an entity is owned or controlled by a recognized natural or legal person investor from a contracting state.

⁷⁹⁸ The categories of assets that are expressly included are bonds, debentures, various forms of debts and relevant rights derived, as well as rights derived from distinct contracts like turnkey contracts, construction contracts, management contracts, production or revenue sharing contracts.

Three fundamental treatment standards are guaranteed in distinct provisions enumerating the respective standards in detail. National, Most Favored Nation, and fair and equitable treatments are guaranteed to the investors that fall within the purview of the BIT. Regarding the national treatment, however, the prerogative of the state parties to provide incentives or preferences to its nationals to develop and stimulate entrepreneurship without any significant adverse effect on the covered investments is recognized as an exception. Similarly, exceptions are also recognized in most favored nation treatment obligation, whereby certain treatments offered as part of establishment of an area or union for the purpose of free trade, customs, economic or monetary cooperation need to be extended to the covered investors. In addition, treatments offered as part of the arrangements in the fields of taxation and small-scale frontier trade are also excluded. Finally, it is interesting to note that the scope of fair and equitable treatment clause is extended to comprehend provision of full protection and security⁷⁹⁹.

One of the clear articulations of the protection measures under the China-Tanzania BIT 2013 pertains to expropriation, which expands the ban beyond expropriation or nationalization to comprehend measures that could produce equivalent adverse effects. It also follows up with categorical prescription of relevant method and factors to be employed in determining such indirect expropriation⁸⁰⁰. Nevertheless, the BIT recognizes certain ex-

⁷⁹⁹ While the former obligation is defined to mainly guarantee fair judicial proceedings, the latter obliges the state parties to take prescribed police measures ensuring the protection and security of the covered investments. See Article 5(2) and (3) of the China-Tanzania BIT 2013.

⁸⁰⁰ The prescribed method warrants a case-by-case and fact-based inquiry considering a set

ceptions regarding indirect expropriation by excluding certain legitimate regulatory measures aimed at promoting public health, safety, and environment⁸⁰¹. The BIT also offers investment protection against damages and losses resulting from armed conflicts, state of emergency, insurrection, or other analogous situations by prescribing specific remedies or settlements. While protecting the freedom of transfer of legitimate returns and proceeds resulting from investments, the BIT recognizes the possibility of denial or restriction of such transfers in prescribed set of justifiable circumstances⁸⁰².

Regarding settlement of disputes, while the BIT prescribes the typical methods consultation and ad-hoc arbitration for interstate disputes, for investor-state disputes various interesting avenues of settlement are recognized. Firstly, the BIT recognizes not only negotiation but also conciliation for resolution of investor-state disputes. Secondly, various resolution options for the investor to resort to the courts of the host state, ICSID Arbitration, ad-hoc arbitration under UINCTRAL Arbitration Rules, and any other institutional or ad-hoc arbitration are recognized. Moreover, for the investor-state dispute settlement process, the BIT provides a comprehensive set of provisions governing various matters relating to arbitration including a limitation period for the right to resort to arbitration, recognition

of four factors. For the four factors see Article 6 (2) (a-d) of the China-Tanzania BIT 2013.

⁸⁰¹ Moreover, China-Tanzania BIT 2013 also seeks to uphold these three priorities at a higher pedestal by imposing an express prohibition on relaxing any relevant measures promoting the three priorities for certain purposes including encourage of investment flows and retention of investments. See Article 10 (1).

⁸⁰² See for the circumstances recognized Article 8 (3) and (4) of the China-Tanzania BIT 2013. It is relevant to note that this is prescribed distinctly and outside the scope of a general denial of benefit clause that is present in the BIT.

of precedence to the BIT provisions over applicable arbitration rules in the event of their conflict, prescription of distinct sources of governing law for different types of BIT claims, types and exclusivity of arbitral remedies that could be granted, lapse of a prescribed period or completion of some related proceedings subsequent to the rendering of different arbitral awards before their respective enforcement is sought and allocation of costs⁸⁰³.

The China-Tanzania BIT 2013 also recognizes potential situations of more favourable treatment to the covered investments arising from other international obligations or national legislation of the contracting states and confirms that any such better treatment will not be affected by the provisions of the BIT. The BIT also mandates periodical consultation between contracting states for taking stock of various related matters arising from the BIT and includes a progressive provision recognizing the need for studying various issues in connection with bilateral investments⁸⁰⁴. Finally, it is very interesting to note that the China-Tanzania BIT 2013 concludes with an unconventional provision recognizing the possibility of the contracting states providing a combined decision interpreting the BIT in an arbitration proceeding of an investor-state dispute and subjugating the arbitral tribunal to such a combined decision.

The final BIT relevant for the purpose of the present paper is the China-Turkey BIT 2015, and its distinct features will benefit any comparative assessment. At the very outset, it is noticeable that the preamble of this

⁸⁰³ See Article 13 (1-10) of China-Tanzania BIT 2013.

⁸⁰⁴ It is arguable that such an explicitly recognized mandate should enable the upkeep of the BIT to ensure that its provisions remain updated to meet the changing circumstances and realities of investment world.

BIT is not only seeking to stimulate investment flows in general but also technology and economic development in particular. Similarly, the term investment is defined to include components that are typically considered as investment as well as certain noticable categories like reinvested returns arising from original investments, natural resource concessions, and range of rights arising under contracts. However, the BIT does not recognize shares or voting powers acquired from stock exchanges constituting less than ten percent of a company and lacking lasting economic relations as investments. The BIT also has clear definitions of other pertinent terms like investors, returns and territory, along with specific examples provided as part of the respective definitions. In terms of protection and treatment standards, the 2015 China-Turkey BIT provides for a ‘fair and equitable treatment’ as well as ‘full protection and security’ to covered investments. However, it is interesting to note that the scope of the former is defined to include a guarantee of fair access to the judicial proceeding and the latter providing necessary police measures⁸⁰⁵.

Unlike some of the BITs examined earlier in this paper, the treatment standards in this BIT are furnished in a comprehensive article which combines various treatments including MFN and national treatment. At the same time, various exceptions to the mandated treatment standards are recognized in the same article especially in matters involving certain taxation treatment arising from obligations under other international agreements, treatments arising from certain obligations like those relating to customs or monetary unions or FTA or common market or small scale frontier trade as well as on matters relating to dispute settlement. In addition to the specific treatment related exceptions above, the BIT also recognizes a set

⁸⁰⁵ See Article 2 (3) and (4), China-Turkey BIT, 2015.

of general exceptions to the application of the whole BIT provisions. Such exceptions pertain to matters like life, health, environment, and conservation of natural resources. Similarly, obligations arising under this BIT will not bind state parties on matters like disclosure of information relating to security interests and freedom to adopt measures to protect such interests, or adoption of actions discharging duties to main international peace and security under the UN Charter.

With regard to issue of expropriation, while recognizing the exception of public purpose, the BIT distinctly demands due process of law along with prompt and effective compensatory measures⁸⁰⁶. While the BIT prohibits indirect expropriation, it provides a detailed set of rules to determine occurrence of indirect expropriation. For such a determination, a case by case inquiry based on actual facts is prescribed, which is required to consider a specific set of factors. The factors to be considered includes the economic influence of a measure in question, discriminatory effect of the measure, the impact of the measure on reasonable expectation of the investors, the character and public interest purpose of the measure as well as its proportionality relating to the purpose. The clear set of guidelines provided by this BIT will serve as a significant source of reference in addressing the complexities of acts or measures that are alleged to have the effect of an expropriation in an indirect manner. Beyond expropriation, the BIT also recognizes the right to compensation for losses that could potentially rise in circumstances like acts of war, insurrection, emergency, and other situations of armed conflicts. Outside the purview of conflicts and similar

⁸⁰⁶ In addition, the compensation sought should also made in accordance with domestic law and the key standards of treatment prescribed by the BIT. See Article 5 (1) of the China-Turkey BIT 2015.

situations, the BIT also recognizes restitution or compensation for losses arising from requisitioning or destruction of the covered investments by the armed forces or the authorities of the relevant state party.

The BIT recognizes the right to repatriation and transfer of various proceeds arising from the investments including returns, proceeds of sale and liquidation, compensation, and payments made pursuant to investment dispute settlement. At the same time, state parties are allowed to impose restrictions on transfers on permitted grounds including for the typical purpose of domestic law enforcement as well as to address balance of payment situations. Finally, regarding investor-state disputes settlement, the BIT explicitly recognizes the role of domestic administrative procedures as well as good faith consultations and negotiations. Following these avenues, the role of domestic courts of the host state and ICSID or adhoc arbitration are recognized. The access to ICSID arbitration is limited only to disputes involving investment activities that have obtained necessary permission from the host state. Moreover, the role of ICSID is excluded in disputes related to property and real rights, where the exclusive jurisdiction of host state's courts is recognized. The BIT also prescribes the nature of relief that could be granted by the arbitral tribunal, which gives the prominence to monetary damages and interest payments, even in situations when restitution of property is ordered by the tribunal⁸⁰⁷. For the inter state disputes between the contracting states, the BIT prescribes negotiation followed by an adhoc arbitration that is required to complete its proceedings with prescribed time limits.

⁸⁰⁷ See Article 9(7) of China-Turkey BIT 2015. It is also interesting to note that the BIT provides some detailed rules governing allocation of costs of the arbitral proceedings. See Article 9(8) of the BIT.

4.2 Comparison of Recent BITs Concluded Between Mozambique and Third States

As in the case of China's comprehensive BIT with Canada discussed earlier, the BIT concluded by Mozambique with Japan in 2013 also reveals a much-enlarged scope of coverage of foreign investment related issues clearly evidencing the limitations of the 2001 BIT between China and Mozambique. Similarly, the more recent BITs concluded by Mozambique with Angola and Turkey also provides evidence of a more modern approach, again reinforcing the need to revisit the 2001 China-Mozambique BIT.

Similar to the comprehensive BIT China concluded with Canada in 2012, Mozambique also entered into an extensive investment protection accord with Japan in the following year of 2013. The Mozambique-Japan BIT 2013 contains a wide range of specific obligations evidencing a comprehensive treatment to various legal issues surrounding bilateral investment protection in comparison with China-Mozambique BIT 2001. However, instead of comparatively analyzing all the additional provisions present in the 2013 BIT, it is sufficient to focus only on the features that are distinct from those already identified and examined from the more recent BITs of China discussed in the last section. As a more modern investment instrument concluded by Mozambique, its 2013 BIT with Japan contains notable features from the very outset. Its preamble, for example, emphasizes on certain unique values like stability and equity in creating conditions to enhance investment flows between the two contracting states.

The preamble also highlights the significance of 'progressive liberalization' of investments, a value that is also present in some other core

international economic law instruments like the WTO General Agreement on Trade in Services (GATS). Reflection of this core value can also be found in the title and focus of the BIT, which transcends beyond promotion and protection of investments and uniquely calls for its reciprocal liberalisation. Moreover, the preamble underscores the significance of congenial labour management relationship for investment promotion and expressly prohibits the compromise labour standards for the purpose of achieving enhanced investment flows. Finally, the preamble also believes that achievement of its core values of investment liberalization and promotion can be met without compromising any measures pertaining to health, safety and environment.

Some interesting characteristics arising from the definitions of Mozambique-Japan BIT 2013 are relevant to note. In defining the term investment, in addition to the typical elements that form part of the term, the BIT includes certain distinct categories of assets. For example, in enumerating the category of intellectual property rights as an asset category the definition interestingly includes rights arising from utility models, layout designs pertaining to integrated circuits, new plant varieties, source or geographical indications and even undisclosed information⁸⁰⁸. In relation to enterprise being an investor, the BIT defines ownership by prescribing an equity interest more than fifty percent as the qualification. Similarly, the BIT defines control of an enterprise when the investor in question enjoys the power to constitute the majority of the directors or direct their actions. The BIT also interestingly makes reference to the definitions of certain terms as defined by relevant regimes governing international organization like IMF and WTO⁸⁰⁹.

⁸⁰⁸ See Article 1 (a) (vi) of Mozambique-Japan BIT 2013.

⁸⁰⁹ For example, the term ‘freely usable currency’ is indicated to mean the same as defined by the IMF Agreement.

In terms of treatment standards, the 2013 Mozambique-Japan BIT obliges the state parties to provide four typical treatment guarantees namely national, MFN, fair and equitable treatment, and equal treatment in access to justice. However, some interesting elements could be found in individual treatment standards. For example, in national treatment the BIT provides a categorical exclusion of any measures prescribing special formalities to foreign investors subject to the condition that such measures do not cause any substantial impairment of rights of such investors. However, the BIT stands out in providing a very extensive set of rules prohibiting various types of performance requirements. Even, in comparison to the reminiscent provisions of the WTO TRIMS Agreement in this regard, the BITs the rules prohibiting performance measures are much wider in scope. It is also highly pertinent to note that such a prohibition is not limited measures targeted towards the investments/investors from a contracting state, but also extended to those from non-contracting states as well. While imposition of eleven distinct performance measures are prohibited outrightly, the BIT also bars the state parties from making the grant of any advantage to the investments/investors subjected to the condition of compliance of certain prescribed performance measures⁸¹⁰.

⁸¹⁰ Some of the prohibited investment performance measures include mandatory export requirements, local content requirements, export prohibitions, technology or knowledge transfer requirements, nationality requirement for certain key appointments, foreign exchange earning requirements for imports, achievement requirement in R&D, and mandatory supply of goods or services requirements to certain regions or markets. See Article 6(1) (a-k) of Mozambique-Japan BIT 2013. Five distinct performance requirements are prescribed by the BIT, the compliance of which should not be made as a condition for the investments/investors to receive any relevant advantages. See Article 6 (2) (a-e). However, for both the above sets of performance measures, there are some exceptions recognized. See Article 6 (3) (a-c). Furthermore, it is relevant to note that the BIT recognizes the possibility of maintaining some existing non-conforming measures notified by the state parties in Annex I and

Reflecting the modern standards, the Mozambique-Japan BIT 2013 also contain extensive prescription of a range of transparency requirements that would benefit covered investments. In addition, the BIT unequivocally mandates the state parties to carry out public consultation on any amendments or repealing of relevant regulations affecting matters addressed by the BIT. Further more, a key requirement that stands out from the BIT pertains to mandate to take efforts and introduce measures aimed at prevention and combatting of corruption affecting matters addressed by the BIT. On the protection against expropriation, the BIT follows some standard provisions albeit some distinct caveats visible. For example, for determination of the fair market value of any investment subjected to expropriation, the BIT dictates that the valuation should not be affected by any change in value caused by the public disclosure of any impending expropriation. The provisions governing protection against consequences of strife, rights of transfer of investors and the right of subrogation of the contracting states or their agencies under the BIT follow typical standards as seen in some of the other BITs discussed earlier in this paper⁸¹¹.

With regard to the settlement of disputes between contracting states, again the common path of consultation followed by arbitration is prescribed. For the settlement of investor-state investment disputes, the BIT firstly upholds the right of the investors from seeking administrative or judicial redressal. Beyond that, the BIT recognizes the importance of consultation, and in the event of its failure, the right to seek arbitration under ICSID or its additional facility or under the UNCITRAL arbitration

II of the BIT from being governed by the prohibition of both performance requirements as well as the application of national and MFN treatment requirements. See Article 7 of the Mozambique-Japan BIT 2013.

⁸¹¹ See Mozambique-Japan BIT 2013, Articles 13, 15 and 14 respectively.

rules or any other arbitration governed by arbitration rules mutually agreed between the parties.

The BIT interestingly recognizes the right of the contracting state that is not party to an investment dispute, to make submissions to the arbitration tribunal on questions of interpretation of the BIT⁸¹². Equally interesting are the provisions that prescribe a preference to hold the investment arbitration in a jurisdiction that is a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958⁸¹³. It also reiterates the need to enforce resulting investment awards with reference to applicable laws and regulations as well as international enforcement standards emanating from relevant obligations under the ICSID and New York Conventions. In addition to some standard security and general exceptions, the BIT recognizes the possibility to impose safeguard measures on a temporary basis to address serious macro economic challenges faced by a state party like balance of payment situations. However, distinct from other BITs studied, prudential measures are permitted under the current BIT, whereby contracting states could impose measures aimed at ensuring the integrity and stability of their financial systems or protecting certain interests like deposit or policy holders as well as others served by relevant financial services⁸¹⁴. The BIT also contains a denial of benefits clause⁸¹⁵ and some typical provisions prohibiting the promotion of investment flows be-

⁸¹² See Article 17(10) of the Mozambique-Japan BIT 2013.

⁸¹³ See sub-section 13, *ibid*.

⁸¹⁴ See Article 20 of Mozambique-Japan BIT 2013. In addition to the prudential measures, the BIT also addresses the issue of taxation related measures and measures aimed at protecting intellectual property rights, both containing standard provisions seen in other BITs.

⁸¹⁵ For the details of the denial of benefit clause. see Article 25 of the 2013 BIT.

tween the contracting states at the cost of compromising any labour standards or measures governing health, safety, and environment.

The next BIT of Mozambique with a third state that is relevant for our analysis is the investment accord concluded with Angola. The Mozambique-Angola BIT 2015 is a relatively brief instrument and it would suffice to refer to some of its distinct features here. The Mozambique-Angola BIT 2015, in its preamble, enshrines values that are mostly seen in BITs examined so far including the importance of reciprocal promotion of favourable investment climate for achieving economic prosperity, the significance of the need to balance investment promotion and protection objectives with other priorities like health, safety and environment, and the indispensable nature of fair and equitable treatment to covered investments. Interestingly, unlike other BITs discussed so far, the Mozambique-Angola BIT 2015 refrains from defining any specific investment related terms and instead chooses to rely on the definitions provided by the national legislation of the relevant contracting state in question. Similarly, on various issues relating to promotion and admission of the foreign investments that may fall within the purview of the BIT, reference is primarily made to relevant national legislation⁸¹⁶.

On the question protection and treatment of investments, the BIT mandates typical treatment standards including MFN, national treatment, fair and equitable treatment, guarantees of protection and security of investments and access to justice. Relevant exceptions are also recognized in

816 For example, national legislation is the fundamental source driving promotion and acceptance of foreign investments and permissible restrictions for administering areas of economic reserves to enhance national security purposes, see Articles 3(1) and (2) of Mozambique-Angola BIT 2015.

this regard including on matters arising out of other economic accords like customs or economic union, and the field of taxation. A general prohibition of expropriation with the classic exception of recognition of public interest purposes, as well as the obligation to pay fair, adequate and effective compensation for any such expropriation arising out of the exceptions are prescribed in similar lines of other BIT examined earlier. In relation to the obligation to compensate for loss or damages suffered by the investments, instead of the typical cause of strife recognized in other BITs discussed earlier, the Mozambique-Angola BIT 2015 provides a very general rule obliging payment of compensation for any loss or damage caused by illegal intervention by authorities of the contracting state in question⁸¹⁷.

Mozambique-Angola BIT 2015 recognizes the investors' right to transfer on different heads including compensation paid as well as all income and proceeds arising from the investments subsequent to taxation and subjected to relevant exchange rate rules. At the same time, the BIT also recognizes the freedom of the contracting parties to impose safeguard measures to address balance of payment situations and macro-economic challenges including those pertaining to monetary and exchange rate policies⁸¹⁸. Moreover, the BIT interestingly permits the contracting states to impose prudential measures aimed at ensuring smooth financial services as a possible precautionary measure. The preponderance to the indispensable values of health, safety, environment and labour standards is maintained by the Mozambique-Angola BIT 2015 although reference to other related agenda are also found⁸¹⁹.

⁸¹⁷ See Article 6 (1) of the Mozambique-Angola BIT 2015.

⁸¹⁸ See Article 8 of the Mozambique-Angola BIT 2015.

⁸¹⁹ For example, reference is also made to other related aspects pertaining to commercial

The right of subrogation and the obligation to protect and enforce intellectual property rights are specifically mandated under the BIT. In incorporating a denial of benefits clause, the Mozambique-Angola BIT 2015, in addition to the typical grounds, recognizes the right to deny the benefits of the BIT on certain contemporary grounds like investments violating national or international laws combatting money laundering and terrorist financing. The Mozambique-Angola BIT 2015 also recognizes the importance of keeping up the relevance of the BIT to meet any changing needs by mandating periodical discussion and review of the enforcement and operations of the BIT provisions, and holding of joint consultation with other relevant stake holders. Finally, regarding dispute settlement, the Mozambique-Angola BIT 2015 also deviates from other BITs discussed earlier especially on the question of resolution of investor-state disputes. Unlike others, the Mozambique-Angola BIT 2015 simply prescribes that any investor state disputes arising under the BIT shall be resolved in accordance with the means provided by the relevant national legislation⁸²⁰. However, for any potential inter-state disputes relating to the BIT, the contracting parties are mandated to use diplomatic resolution, failing which resort to an international arbitration is prescribed.

The Mozambique-Turkey BIT 2017 (2017 BIT) is one of the more recent investment accords concluded by Mozambique and its closer review will demonstrate whether it has any unique characteristics distinct from other BITs examined. In particular, its comparative review in the light of features of the China-Turkey BIT 2015 will also provide useful insights

or industrial standards, sustainable development, use of environmentally friendly technologies, and workforce recruitment and training. See Article 10 (1-3) of Mozambique-Angola BIT 2015.

⁸²⁰ See Article 15 (3) of Mozambique-Angola BIT 2015.

regarding how an investment accord concluded with a same third state by China and Mozambique are distinct. At the very outset, in addition to the reference to the typical investment promotion and developmental goals, the preamble of the 2017 BIT shows a distinct reference to the specific values of fair and equitable treatment of investments as well as achieving of investment promotion goals without compromising essential measures governing health, safety, environment and labour rights⁸²¹. The definition of investment in the two BITs differ on two aspects. Firstly, the definition of investment in the 2017 BIT has added a distinct emphasis to the characteristic of investment acquisitions made with an aim to establish lasting economic relations in the host state as well as other investment characteristics, which do not form part of the definition investment under the China-Turkey BIT 2015.

Secondly, the explicit inclusion of rights arising in various specific contracts within the definition of the term investment under the latter BIT is distinct from the former, which does not expressly enlist such rights within the definition. A more striking difference can be found in the definition of the term ‘investor’ where the inclusion of legal persons incorporated or constituted in a third state but owned or controlled by the nationals or legal persons of the contracting states under the 2015 China-Turkey BIT, is absent in the 2017 BIT. With regard to the general clause prescribing promotion and protection of investments, the explicit reference to access to justice and non-discrimination as part of fair and equitable treatment and provision of necessary police measures as part of obligation to provide full protection and security to investments under the 2015 China-Turkey BIT is also absent in the 2017 BIT. Some subtle differences can be noticed in

⁸²¹ In comparison, the preamble of the China-Turkey BIT 2015 does not refer to these two sets of values.

the general clause governing treatment of investments, where, although the 2015 China-Turkey BIT seem to have a more detailed set of prescriptions, it does not reveal any substantial difference while comparing with the treatment of investment clause under the 2017 BIT.

In contrast, the 2017 BIT has a more detailed set of prescriptions governing general exceptions, whereby specific measures that could form part of actions taken by a contracting state to protect its essential security interests that will not be bound by the provisions of the BIT are enumerated. On the issue of expropriation and compensation, the prescription of list of factors to be considered whether any measure introduced by a contracting state could constitute indirect expropriation under the 2015 China-Turkey BIT is not present in the 2017 BIT. Except for that absence, the major provisions governing expropriation and compensation as well as compensatory measures for losses faced by investors due to certain acts of strife in the two BITs are similar. On the provisions addressing the right of repatriation and transfer, as discussed earlier in this chapter, the 2015 China-Turkey BIT recognizes the prerogative of the state parties to impose a ban or restrictions on the right in a range of circumstances including circumstances warranting compliance with national laws relating to certain matters like bankruptcy or trade in securities and derivatives or suspicion of offences as well as macro economic situations like balance of payment crisis. In contrast, the 2017 BIT has a conspicuous absence of recognition of above mentioned situations involving compliance with national laws, but provides a more extended and exclusive set of provisions recognizing safeguard measures that could be imposed by state parties in response to balance of payment situations⁸²².

⁸²² See Articles 8 and 9 of Mozambique-Turkey BIT 2017. While Article 8 recognizes the right of the contracting states to impose restrictions for safeguarding balance of payments

On the matter of settlement of investor-state investment disputes, although both the BITs recognize similar dispute settlement avenues, some tangible differences exist. For example, the 2017 BIT recognizes the possibility of settling investment disputes using any arbitration institution or rules by virtue of mutual agreement between the disputing parties, but the China-Turkey BIT 2015 does not provide the option. Secondly, as identified earlier in this chapter the China-Turkey BIT 2015 contains a range of provisions addressing the investor state dispute settlement process extensively that are absent in the 2017 BIT⁸²³. However, on the issue of settlement of disputes between contracting states, both BITs have more or less similar provisions governing the avenues and process of resolution. Finally, the 2017 BIT has an exclusive denial of benefit clause included within its framework, which is absent in the China-Turkey BIT 2015.

5. Concluding Remarks

The detailed enquiry on the provisions of the China-Mozambique BIT of 2001 and the preliminary assessment of certain distinct features in more recent legal instruments in the two states reveals some major shift in the scope and nature of the legal standards governing foreign investments. In the light of these comparative findings, it is arguable that there is a clear set of *prima facie* evidence that calls for the need to revamp the bilateral investment accord between China and Mozambique. Any counter argu-

or abiding with the instructions of the IMF, Article 9 provides a detailed set of provisions enumerating the requirements relating to adoption of safeguard measures to address balance of payment situations.

⁸²³ Compare Article 11 (1-7) of Mozambique-Turkey BIT 2017 with Article 9 (1-9) China-Turkey BIT 2015.

ment that may propagate reliance or utility of the recent domestic legal instruments in both China and Mozambique is not persuasive given the inherent limitations national laws governing foreign investments in general will suffer. Although, both China and Mozambique have enacted revamped their major national legislation governing foreign investments in 2020 and 2023 respectively, reliance on those instruments cannot be equated to the utilitarian of a well-conceived bilateral investment protection accord court serve.

On the contrary, the recent update of the national legislation by both countries should serve as a stark reminder for the need to revisit and review the ageing investment accord between the two countries. China's new Foreign Investment Law of 2020 and Mozambique's more recent Investment Law of 2023 reveal a range of modern and expanded set of legal standards governing foreign investments. However, one of the striking differences between the two legislative measures pertains to the range of investments covered. While the former exclusive governs foreign investments, the latter covers investments that are domestic as well as foreign in origin. A close review of both these domestic legal instruments in the light of the detailed exposition of the China-Mozambique BIT carried out earlier shows categorical differences that need to be taken cognizance in determining the need to revamp the 2001 BIT. Moreover, in the light of the progressive path pursued by the two states in their modern BITs concluded with the third states, the risks of redundancy of the more than two decades old investment accord between China and Mozambique is very high, which should be averted at any cost to sustain a healthy investment flow between the two investment markets.