The Non-Interference Policy in China's IP Related FTAs: Implications for African Development

By:

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The last two decades has seen Intellectual Property, (IP), increasingly regulated by bilateral and regional free trade agreements, (FTAs), rather than through multilateral forums like the WTO. This trend is evidenced in trade between China and African countries, which is dominated by bilateral trade agreements.

In 1989 and 2016, Ghana and Nigeria signed several Memorandums of Understanding, (MOUs), and bilateral trade agreements with the Peoples Republic of China. These MOUs and agreements are based on the principle of "non-interference" in other countries internal affairs adopted by China in trade agreements. Under this principle minimum regulation is made regarding the laws and policies governing IP protection.

Some researchers have hailed the non-interference approach as being more supportive of development in African countries than the more detailed directives contained in multilateral IP agreements like TRIPS, because of the greater policy space and flexibility it grants for developing countries to adapt IP regulation to suit their national public interest. This article doctrinally re-examines China-Africa FTAs to determine what implications they may have for African development.

Characteristics of China-Africa FTAs

Article 1.1(d) of the China-Nigeria bilateral investment treaty (BIT) describes the term "investment" to mean every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, including intellectual property rights, in particular copyrights, patents, trade-marks, trade names, technical process, know-how and good-will. By defining IP only in narrow economic terms, the provision focuses on protecting the rights of investors, (IP owners), but does not sufficiently protect the public interest objectives of users of IP.

The definition of IP as investments in China's BITs with Africa contrasts with Articles 7-8 of the TRIPS agreement that acknowledges the public interest nature of IP rights. The non-acknowledgment of the public interest purpose of IP leaves the China-Africa BITs vulnerable to be abused to the detriment of countries that are being invested in. For example, due to the lack of provision for labor rights in the China–Ghana BIT Chinese investors normally bring Chinese workers to work on the projects they undertake in Ghana without resorting to local labor which tends to affect the Ghanaian employment situation negatively. Consequently, in Chinese projects in Africa there is often little skills transfer to Africans.[1]

The objective of the China–Ghana BIT, as stated in its preamble, is to create "favourable conditions for investment by investors of one Contracting State in the territory of the other Contracting State based on the principles of mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic cooperation between both States." This provision does not set out development as a direct objective of the treaty, and does not explicitly acknowledge that the host country has any right to development.

The BITs do not take into account the fact that China, Ghana and Nigeria are at different levels of development and treated the parties as two independent countries at the same level of development who will reap equal benefits from this agreement. The lack of provision for special and differential treatment (SDT) would give Chinese businesses competitive advantage as greater owners of IPRs. Yet China continues to require SDT under its 2008 National IP policy. For example, in 2018 the possibility of a US-China trade war occurred when the U.S. Trade Representative proposed up to 25% tariffs on $50 billion worth of Chinese imports for harm caused by China's unreasonable technology transfer policies. These technology transfers arise from China's foreign-ownership restriction laws, which require foreign businesses to form joint ventures with domestic Chinese companies to sell their goods in China. The regulations also help protect China's infant industries from domination by multinational companies. African countries should also adopt such IP measures to protect its small and medium scale industries.

China's BITs with Ghana and Nigeria are silent on issues such as the objectives of IP protection, human rights, farmers' rights, prior informed consent and access and benefit sharing, the CBD, sustainable development and the environment that are important in ensuring that IPRs bring balanced benefits to both providers and users.

China's FTAs differ from multilateral IP treaties as they provide little substantive regulation of IP or public interest. China's FTAs represent an alternative template for IP protection than the approach contained in the WTO-TRIPS agreement. Non-regulation of IPRs is precarious because it provides room for overlooking the public interest objectives of IP protection. Yet the mandatory obligation that IP fulfill its public interest objectives in China's FTAs with the USA and other developed countries is recognized as an important tool used by China to build up its domestic technology.

China's BITs with Ghana and Nigeria do not mention protection of genetic resources and traditional knowledge. Yet, Articles 5-7 of the Nagoya Protocol to the CBD emphasizes that provisions in IP regulations for prior informed consent, access and benefit sharing relating to genetic resources, and traditional knowledge are important measures for harnessing IP laws to support

development in African states.

Based on the above considerations, it is not evident that China's BITs with Africa will generate more development than multilateral treaties like TRIPS. It is suggested that Africa's development interests will best be served under multilateral IP treaties that place public interest obligations on IPRs to advance the socio-economic development of user countries of IP.

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[1]Philip Ebow Bondzi-Simpson & Felix Awuah, "A Review of the China-Ghana Bilateral Investment Treaty, 1989" (2017) 12:3 *Frontiers of Law in China*, 372 at 381

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