CHINESE INVESTMENTS IN AFRICA: LEGAL 'MIS-ENGINEERING' AND UNEQUAL RETURNS ON INVESTMENTS.

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UNIVERSITY of the
WESTERN CAPE

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DATE SUBMITTED: MAY 2009

DECLARATION

I declare that **CHINESE INVESTMENTS IN AFRICA: LEGAL 'MIS-ENGINEERING' AND UNEQUAL RETURNS ON INVESTMENTS** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

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CERTIFICATION

I certify that I have read, and hereby recommend for acceptance by the University of the Western Cape, the thesis entitled "**CHINESE INVESTMENTS IN AFRICA: LEGAL 'MIS-ENGINEERING' AND UNEQUAL RETURNS ON INVESTMENTS**," submitted in partial fulfilment of the requirements of the LL.M. Degree in International Trade and Investment Law in Africa, of the University of the Western Cape.

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Dated on this .... day of May, 2009

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LIST OF ABBREVIATIONS

ABSS	African Bureaucratic Structure Survey
AGOA	African Growth and Opportunity Act
APEC	Africa Pacific Economic Cooperation
AU	African Union
BATNA	Best Alternative To a Negotiated Agreement
BITs	Bilateral Investment Treaties
BMC	Botswana Meat Commission
CCIA	COMESA Common Investment Area
CCIIP	China Council for International Investment Promotion
CEMAC	Central Africa Monetary Economic Community
CNOOC	China National Offshore Oil Corporation
CNPC	China National Petroleum Corporation
COMESA	Common Market for Eastern and Southern Africa
CPC	Communist Party of China
CPP	Convention People's Party
CSPIP	Civil Service Performance Improvement Programme
DFID	Department for International Development
EAC	East Africa Community
ECOWAS	Economic Community of West African States
ECT	Energy Charter treaty
EEC	European Economic Commission
EU	European Union
Ex-Im Bank	China Export-Import Bank
FDI	Foreign Direct Investments
FIAS	Investment Climate Advisory Service
FOCAC	Forum on China-Africa Cooperation
GATS	General Agreement on Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICSID	International Centre for Settlement of Investment Disputes

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IISD	International Institute for Sustainable Development
ILO	International Labour Organisation
IMF	International Monetary Fund
IPR	Intellectual Property Rights
IWOGDA	International Working Group on Doha Agenda
LDCs	Least Developed Countries
MAI	Multilateral Agreement on Investment
MDC	Millennium Development Corporation
MDG	Millennium Development Goal
MFA	Multi Fibre Arrangement
MFI	Multilateral Framework on Investment
MFN	Most-Favoured Nation
MNEs	Multinational enterprises
NAFTA	North American Free Trade Agreement
NEPAD	New Partnership for Africa's Development
NGOs	Non Governmental Organisations
NIRP	National Institutional Renewal Programme
ODA	Overseas Development Assistance
OECD	Organization for Economic Cooperation and Development
P.R.C.	People's Republic of China
RBPs	Restrictive Business Practices
SACU	South African Customs Union
Sinopec	China Petrochemical Corporation
TI	Transparency International
TRIMs	Trade Related Investment Measures
TRIPs	Trade Related Intellectual Property Agreement
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNICITRAL	International Nations Commission of International Trade Law
UNIDO	United Nations Industrial Development Organisation

US	United States
USD	United States Dollar
WAIPA	World Association of Investment Promotion Agencies
WGTI	Working Group on Trade and Investment
WTO	The World Trade Organization

DEDICATION

To my Lord Jesus Christ, through whom all things are possible. And, to my dad, Johnson Kago; to my mum, Joyce Kago,; to my fiancé, Wilfred Kashonga, and; to my siblings, Andrew Mwaura and Pamela Wangeci, for their prayers, love and support.

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KEYWORDS

Bargaining power

Bilateral Investment Treaties

China

Development goals

Foreign Direct Investment

International Investment Agreements

Multinational enterprises

Policy space

Sustainable economic growth

Weak institutions

CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION AND BACKGROUND TO THE RESEARCH

China has encouraged its companies and citizens to invest in Africa at a record pace. In Rwanda, Chinese companies have paved more than 80% of the main roads, while in Kenya and Sudan, they have built roads and bridges.[1] In Zambia, Chinese companies own one of its largest copper mines, and also run a handful of textile companies in Lesotho.[2] In more than a dozen African states, Chinese firms are searching for oil and building power plants and other infrastructure projects.[3]

On the premise of the foregoing, the Afro – China relationship has greatly increased, thus bringing about benefits as well as possible future legal and policy challenges to Africa.

Three challenges lend themselves for analysis in this mini thesis. First, states are driven by their national interest (survival, security, pursuit of wealth and economic growth and power). In this regard, the more powerful[4] a state is, the easier it is for it to impose its interests vis-à-vis weaker states. This is why in the Afro-Chinese investment relations the interests[5] of China seem to reign supreme over those of the African states. The study will, therefore, explore the relationship between Africa's weak bargaining power in negotiating agreements and the resultant unequal returns on investment.

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Secondly, the Bilateral Investment Treaties (BITs) negotiated between African States and China result in the former making concessions that they would otherwise not have made.[6]

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[1]Zhiqun Z. 'China's new diplomacy in Africa and its implications'. (2007).Available at: www.sloc.cafe24.com/upload/publication01/2007B06.pdf (accessed on 12/10/2008) at p 21.
[2]Elling N. 'China in Africa. Implications for Norwegian foreign and development policies'. (2006)15. Chr. Michelsen Institute. Available at: www.cmi.no/publications (accessed on 2/2/2009).
[3]Elling (2006) p 17.
[4]In this study power is defined as "…being able to get people to do things, to act as they might not otherwise have acted" (Paulson S. and Litschewski B. (1999) *Normative and norms:Critical perspective on Kelsenian themes*).
[5]That is, economic development and long term strategic interest aimed at increasing its international status, hence its international influence. See also Wenping H. 'The balancing act of China's Africa policy'. Available at: www.wsichina.org/cs7_2.pdf. (accessed on 2/2/2009) at pp 25 and 26.
[6]See definition of power in fn4 above.

This has led to a legal "mis-engineering"[7] of BITs as they are drafted without integrating the African development goals[8], thus denying host African states policy space. This study will, therefore, examine BITs entered into by China with Uganda, Djibouti and Germany. The intention here is to identify the specific elements of mis-engineering in the African states' BITs with China. Moreover, this thesis will examine how the legal mis-engineering has contributed to the unequal returns on investment.

Lastly, many African states are characterised by weak institutional frameworks. Corruptible and elite serving institutions result in the uncritical implementation of the BITs, hence hindering the realisation of the benefits of Foreign Direct Investments (FDI) from China.[9] This thesis will examine how mis-engineered BITs, operating in an environment of rigid and corrupt institutions result in unequal returns on investment

1.2 <u>HYPOTHESIS</u>

This thesis has a major and a minor hypothesis.

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Major hypothesis:	The unequal return on investments between China and Africa is a consequence of legal mis-engineering of BITs, and weak institutions existing in most African states.
Minor hypothesis:	The legal mis-engineering of BITs is a consequence of Africa's weak bargaining power.

[7]In this study, "mis-engineering" means drafting of BITs without giving due regard to the development goals of African states and their policy space.
The word "mis-engineering" shall henceforth be written without quotation marks.

[8]African development goals are underpinned by a number of strategic tenets: Poverty reduction, access to technology and global markets, creation and maintenance of social peace, the establishment of environmental standards, transparent bidding and institutions, promotion of governance and sound economic management, transparency in aid giving, the maximization of revenues for African governments and electorates, and maximizing the effect of local conflict resolution and peacekeeping. See The Brenthurst foundation. 'Africa-China-U.S. Trilateral dialogue'. (2007) summary report. Available at: http://www.thesullivanfoundation.org/gsp/documents/ChinaAfricaUSTrilateralDialogueSummaryReport.pdf (accessed on 6/2/09).

[9]Anonymous 'Competition or partnership? China, United States and Africa – An African view'. Available at: www.thesullivanfoundation.org/gsp/Trilateral%20Dialogue/documents/ChinaUSAfricaCompetitionorPartnershipCOMFNL.pdf (accessed on 6/2/09).

The theoretical framework that shall be used is the FDI dependency theory, which states that FDI is a conduit through which the centre (developed and industrialised countries) exploits the periphery (developing and least developed countries) and perpetuates the latter's state of underdevelopment and dependence.[10]

Three tenets of this theory will be used for analysis:

1. Excessive dependence on the centre weakens the periphery's bargaining power and restricts its range of options for internal policies in order to accommodate the needs and requests of the centre.[11]
2. With the vast increase in capital mobility[12] the economies of the periphery become perpetually dependent on foreign capital and finance (loans or aids) thus substantially reducing its scope for independent economic policies. [13]
3. Dependency leads to unequal returns on investment, hence underdevelopment of the periphery.[14]

1.3 OBJECTIVES OF THE RESEARCH

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The main objective of this thesis is to establish a robust causal relationship between the unequal returns on investment and the mis-engineered BITs between African states and China.[15]

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[10]Kebonang Z. 'NEPAD: Drawing lessons from theories of foreign direct investment'. (December 2006). Indian Journal of Economics and Business. Available at: http://findarticles.com/p/articles/mi_m1TSD/is_2_5/ai_n25012650/?tag=content;col1(accessed on 2/2/2009). See also Hyman and Michael R. 'Dependency theory and the effects of advertising by foreign-based multinational corporations'. (1994). Journal of Advertising .Available at: http://www.allbusiness.com/marketing-advertising/advertising/443838-1.html (accessed on 17/2/09).
[11]Crandall R. *et al.* (2005) *Mexico's democracy at work: Political and economic dynamics* at pp 134-137 See also Khan M. 'Foreign direct investment and growth: The role of the domestic financial sector'. Available at: http://www.pide.org.pk/pdf/Seminar/FDI-Presentation.pdf (accessed on 12/2/09).
[12]Capital mobility occurs when the centre repatriates profits and royalties and does not re-invest, causing a significant reduction in funds which would have been used for domestic investments. See also Rojas R. 'International capital: A threat to human dignity and life on planet earth'. (2001). Available at: http://209.85.229.132/search?q=cache:70JMCEJXVO0J:www.rrojasdatabank.org/Globalss.doc+Rojas+R.+(2001)+International+capital:+A+threat+to+human+dignity+and+life+on+planet+earth&cd=1&hl=en&ct=clnk&gl=za (accessed on 17/2/09).
[13]Rojas (2001).
[14]Kebonang (2006). See also Hyman (1994).
[15]Rojas (2001).

Specifically, the study undertakes to:

1) Explore the relationship between Africa's weak bargaining power in negotiating agreements and the resultant unequal returns on investment;

2) Identify the specific elements of mis-engineering in the BITs with China and examine how the legal mis-engineering has contributed to the unequal returns on investment;

3) Examine how rigid and corrupt institutions hinder the critical implementation of the BITs, hence unequal returns on investment.

1.4 SIGNIFICANCE OF THE RESEARCH

This study has both an academic and a policy justification. At the academic level, it is argued that the rapid economic growth in China has led to increased Chinese investments in Africa in natural resources, oil and the manufacturing sector.[16]The kind of policy, legal and institutional frameworks that exist in most African states hinder the Chinese investments from contributing positively to the host country's economic development, hence unequal returns on investment.[17]

The current literature existing with regards to Afro-Chinese investment focuses on *inter alia*: China as the new formidable competitor of the West and the lessons that Africa can learn from China;[18] FDI policies and challenges China is facing in Africa;[19] direct and indirect economic and development benefits to Africa;[20] China's sovereignty and non-interference policy with regards to its investment in Africa;[21] favourable aid and debt relief programmes;[22] China as an alternative to Africa, hence the need for Africa to act

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[16]Broadman H. and Gozde I. (2007) *Africa's silk road. China and India's new economic frontier*. See also Shinn D. 'An opportunistic ally. China's increasing involvement in Africa'. (2007).Harvard International Business Review, summer. Available at: http://www.allbusiness.com/government/government-bodies-offices-government/5504463-1.html (accessed on 20/10/2008).

[17]Kebonang (2006).

[18]Dollar D. 'Lessons from China for Africa'. (2008). World Bank Policy Research Paper ref. no. WPS4531.

[19]Anshan L. 'China and Africa. Policy and challenges'. (2007)3. China Security, World Security Institute at pp 69-93.

[20]Shinn (2007).Also see Goldstein A. *et al*. (2007) *The rise of China and India: What's in it for Africa*. Available at: http://www.oecd.org/dataoecd/54/62/36905545.pdf (accessed on 10/10/08).

[21]Meidan M. 'China's Africa policy: Business now politics later'. (2006)30. Asian perspective Availabe at: http://www.asianperspective.org/articles/v30n4-d.pdf (accessed on: 12/2/09) at pp 69-93.

[22]Goldstein (2007).

fast to reap the benefits;[23] and the environmental and labour issues surrounding Chinese investments in Africa.[24]

There is no literature examining whether the unequal return on investments between China and Africa is a consequence of legal mis-engineering of the BITs. This study is significant, therefore, for two reasons. One, it provides a textual analysis of BITs and argues that they are deliberately mis-engineered to benefit China. This kind of analysis is absent in literature on FDI. Two, it links the political and social economic dimensions of Afro-Chinese investment with the legal dimension with the aim of establishing how they interact to contribute to the mis-engineering of the BITs, and therefore unequal returns on investments.

At the policy level, it is argued that Chinese investments do not integrate Africa's and the host country's development goals and this results in unequal returns on investment. Thus Africa thus needs to come up with Afro-China policies. A number of policies have been suggested: for example, developing a monitoring mechanism by which all FDI coming to Africa can be screened, monitored is aligned to the development objectives of Africa.[25] This study is significant, at the policy level, for two reasons. One, it provides a framework for policy integration and possible re-engineering. Two, it discusses how weak institutions and the power factor[26] contribute to the uncritical implementation of the BITs and investment policies, hence resulting in unequal returns on investment.

1.5 SCOPE OF THE RESEARCH

The subject area under investigation is extensive; therefore a limited research scope is undertaken. The research will thus focus on Chinese investments in Africa as opposed to trade. The said investments will only be in the following areas: natural and mineral resources; oil; agriculture; manufacturing; and infrastructure. Further, this study will

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[23]Meidan (2006).
[24]Elling N. *et al*. 'China in Africa; Implications for Norwegian foreign and development policies'. (2006)15. CMI Report. Available at: www.cmi.no/publications (accessed on 9/10/08).
[25]Kebonang (2006).
[26]See definition of power at fn 4 above.

examine BITs entered into by China with Uganda, Djibouti and Germany only for purposes of identifying specific elements of mis-engineering.

1.6 OVERVIEW OF THE CHAPTERS

Chapter 1 gives a brief overview of the research, the objectives and scope of the research, as well as the Chapter outline.

In Chapter 2, four issues are discussed. First, a general overview of FDI regulation is given. This is followed by a discussion of how the lack of a multilateral agreement on investment has led to states regulating investments through host state regulations and BITs. Secondly, this Chapter discusses Chinese investments in Africa; its investment policies with regards to Africa; and the benefits and challenges facing Africa. Thirdly, an analysis of the Uganda, Djibouti and Germany BITs with China is undertaken to bring out the similarities. The specific elements of mis-engineering in the Uganda and Djibouti BITs with China will be identified. Finally, this chapter examines how the legal mis-engineering has contributed to the unequal returns on investment.

Chapter 3 examines the sources of China's strong bargaining power, the reasons for African states' weak bargaining power, and the contribution of this power asymmetry to the legal mis-engineering of China BITs with African states, and the resultant unequal returns on investment

Chapter 4 examines weak institutions characterizing most African states, and how they have contributed to the unequal returns on the Chinese investments.

Chapter 5 summarises the issues discussed, draws conclusions, and makes recommendations.

CHAPTER 2: THE LEGAL 'MIS-ENGINEERING' OF BITs: A TEXTUAL ANALYSIS.

2.1. INTRODUCTION

There is no global regulation of FDI[27] therefore it is regulated at national level largely through BITs. During BIT negotiations, African host states should ensure that due regard is given to there development goals through express provisions in the BITs. [28] This is because there is no doctrine of precedents in international investment arbitration.[29] Hence, despite the fact that issues regarding the extent of host state policy space in expropriation of the properties of foreign investors and investment protection have been clarified in recent Arbitral Tribunal decisions, future Tribunals are not bound by the decisions.[30]

The above notwithstanding, developed states continue to conclude BITs with African states that do not give the latter policy space and regulatory flexibility; therefore they are mis-engineered.

[27]The Multilateral Framework on Investment (MFI) negotiations at the World Trade Organisation (WTO) was removed from the WTO Doha negotiation agenda, for the time being, through the General Council decision of 1st August 2004. See discussion on failure of multilateralism at Chapter 2.2.3 hereinafter.

[28]Yu V. and Marshal F. 'Investors' obligations and host state policy space'. Paper presented at the second Annual Forum of Developing Country Investment Negotiators held in Morocco on the 3-4 November 2008, at p 23.

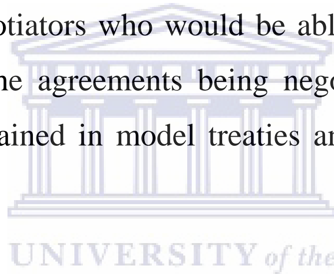
[29]Ibid.

[30]For example, with respect to investors' right to fair and equitable treatment, the Tribunal in *Parkerings-Compagniet AS –vs- Lithuania* (award on jurisdiction and merits, ICSID case No. ARB/05/08, award 14 August 2007) made it clear that investors' legitimate expectations must be interpreted in light of host states' right to legislate, and that investors cannot expect the legal environment to remain unchanged. Further, it established that Tribunals are entitled to take account of public policy considerations when determining whether a host state has discriminated between the investor and other similar operations. In the area of expropriation, the awards in *Methanex Corporation –vs- United States* (final award on jurisdiction and merits 3 August 2005) and *Saluka investments BV –vs- Czech Repubic (*partial award, PCA – UNICITRAL Arbitration rules, 17 March 2006) declared that a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process is not deemed expropriatory unless the host state has given specific commitments to the investor that it would refrain from such regulation.

2.2. LEGAL MIS-ENGINEERING AS POWER POLITICS

Five reasons demonstrate a deliberate mis-engineering of BITs between developed states and African states. First, states are driven by their national interest.[31] Consequently developed states approach BIT negotiations strategically, with the aim of securing a deal closer to their own preferences.[32] This is evidenced by the existence of model treaties and investment policies[33] wherein a country's preferences are encoded. Since developed countries are more economically powerful than African countries, they have leverage and control over the latter.[34] As a result of this power asymmetry, developed countries are generally in a much stronger position to impose their interests in BITs and so the preferences of developed countries usually prevail.[35]

Secondly, developed states know that African states lack financial capacity to contract qualified and experienced negotiators who would be able to analyse the practical, legal and policy consequences of the agreements being negotiated.[36] As a result, they can impose their preferences, contained in model treaties and in investment policies, upon African states.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Thirdly, the governments of most African states are known to be corrupt.[37] Government and the elite class attending BIT negotiations are usually willing to concede to the requests of developed states to ensure that Multinational enterprises (MNEs) invest in

[31]These are a country's goals and ambitions, whether economic, military or cultural; hence its security and survival.
[32]Peinhardt C. and Allee T. 'Delegating differences: Bilateral Investment Treaties and patterns of dispute resolution design'. Paper presented at the annual meeting of the International Studies Association held at Hilton Chicago in 2007. Available at:www.allacademic.com/meta/p179106_index.html (accessed on: 3.3.09).
[33]Such as the China-Africa investment policies.
[34]Parthapratim P. 'Surge in Indian outbound FDI to Africa: An emerging pattern in globalization?'. (2008). Paper presented at the Global Studies Conference at the University of Illinois, Chicago, US on May 16-18 2008. Available at: www.iimcal.ac.in/research/download/OFDI_Partha-pal.pdf (accessed on 3/3/09).
[35]Ibid.
[36]Peinhardt (2007).
[37]Harsch E. 'Africans taking action on corruption'. United Nations Department of Public Information. Available at: http://www.un.org/ecosocdev/geninfo/afrec/vol11no1/corrupt.htm (accessed on 23/4/09).

their states as they will exchange preferable policies for private benefits once the investors set up shop.[38]

Fourthly, FDI dependency weakens African states' bargaining power. Following the FDI dependency theory, excessive dependence on foreign investment markets, inputs, technology and products, weakens a country's bargaining position in the international arena and restricts the range of options for internal policies in order to accommodate the needs and requests of external actors .[39]

Lastly, many scholars argue that FDI leads to economic growth.[40] They state that FDI provides capital that may not be available in a host country's domestic market thereby helping the host country to attain economic growth.[41] Moreover, they posit that for those countries lacking capital resources and technologies, MNEs are "the only hope".[42] As a result of the above contentions, countries compete to attract FDI. This leads to 'subsidy games', whereby each country attempts to offer the investor the most favourable conditions as encoded in the model treaties being used at the negotiation table.[43]

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China is well aware of the above precarious position of African states.[44] Despite this knowledge, it has not attempted to conclude BITs specially designed for African states

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[38]Jung Y.' The impact of corruption on a country's FDI attractiveness: A panel data analysis, 1984-2004'. Paper prepared for presentation at the 2008 International Studies Association annual meeting held in San Francisco, CA on 26-29 March, 2008, at p 3. Referring to Tarzi S. 'Third world governments and multinational corporations: Dynamics of host's bargaining power'. (1991)10. International Relations ,at p 244, wherein it was stated that MNEs prefer countries "where individual leaders in host countries were known to accept private payments in exchange for their efforts to preserve the status quo".

[39] See the explanation of the dependency theory in Chapter 1.2 herein.

[40]Jung (2008) p 4. Referring to Indra D. and Oneal.J. 'Boon or bane? Re-assessing the productivity of Foreign Direct Investment'. (1999)64. American Sociological Review at pp 766-782, Firebaugh G. 'Growth effects of Foreign and Domestic Investment'. (1992)8.The American Journal of Sociology at pp 105-130 and Jensen M. 'Democratic governance and multinational corporations: Political regimes and inflows of Foreign Direct Investment'. (2003)57. International Organisation at pp 587-616.

[41]Ibid.

[42]Biersteker J. (1978) *Distortion or development?: Contending perspectives on the multinational corporation* at p 2. Referred to by Jung (2008) p 3.

[43]Pedro P. and Luis C. 'Competing for Foreign Direct Investment'. (2000)8. Review of International Economics at pp 360-371.

[44]See WTO submission of China, Cuba, India, Kenya, Pakistan, Zimbabwe on 19th November 2002 (WT/WGTI/W/152). It states, *inter alia*, *"The Working Group should …examine legally-binding measures aimed at ensuring corporate responsibility and accountability relating to foreign investors, including*

that balance the objectives of MNEs (i.e. profit maximization) and the development policy objectives of the host African states in order to ensure that African states obtain equal returns on investments. Instead, it has adopted the same BITs it signed with developed states notwithstanding the differences in the levels of development between developed and developing countries. Hence China's BITs with African states are deliberately mis-engineered in order for the former to obtain personal gains at the expense of the latter. This chapter will analyse the Uganda, Djibouti and Germany BITs with China. The aim is to show the similarity between China's BIT with Germany and that with Uganda and Djibouti; identify specific elements of mis-engineering; and, thereafter, discuss how they have contributed to the unequal returns on investment.

Before commencing this analysis, an overview of FDI regulation and Chinese investments in Africa will be undertaken.

2.3. AN OVERVIEW OF FDI AND FDI REGULATION.

2.3.1. FDI defined

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Most developing countries have relied on bilateral and multilateral donor assistance (Overseas Development Assistance – ODA) as a source of development finance.[45] The decade between 1990 and 2000 witnessed a drop of ODA by more than half, forcing developing countries to search for alternative, and sustainable, sources of capital to finance national development. Consequently, African countries considerably liberalized their existing investment regulations and entered into international investment arrangements to facilitate the flow of FDI into their economies. This saw the rise of FDI

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measures that clearly spell out investors' obligations and the obligations of their home governments." and *"…their objective of global profit maximization, there could be conflict of interests between their objectives and the development policy objectives of the host countries and they could indulge in restrictive business practices (RBPs), manipulation of transfer prices and other such practices. There is therefore a need to address the negative effects of the FDI activities by the MNEs that they may have on the host members, particularly the developing ones, while recognizing the positive role of the FDI".*

[45] Towards Earth Summit. 'Foreign Direct Investment: A lead driver for sustainable development?' (2002) Economic briefing series No.1. Available at: http://www.stakeholderforum.org/fileadmin/files/SF_Briefing_Papers/bp_FDI.pdf (accessed on 23/4/09).

inflows from USD 2.4 billion in 1985 to USD 36 billion in 2006.[46] FDI is now the largest source of foreign private capital reaching African countries.[47]

FDI is defined as capital invested by a resident entity in one economy (direct investor) in an entity resident in an economy other than that of the investor (direct investment enterprise) for the purpose of acquiring a lasting interest.[48]An inflow of private capital plays a part in the host country's development by helping to reduce the shortage of domestic savings and increasing the supply of foreign exchange.[49] In addition, it significantly contributes to human capital formation; technology spill-over; enterprise restructuring; better organisational and managerial skills through mergers and acquisitions; and increased competition.[50] FDI is thus viewed as a major stimulus to economic growth in developing countries, and as a powerful force for global integration.[51]

The benefits from foreign corporate presence do not accrue automatically.[52] To obtain maximum benefits the host state needs to manage its economy both efficiently and effectively. The presence of good infrastructure, an educated labour force, macro-economic stability, good investment framework, an efficient legal system, less corruption and political stability, are thus paramount.[53]

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[46]UNCTAD 'World Investment Directory 2008'.Available at: http://www.unctad.org/en/docs/iteiit20075_en.pdf (accessed on 25/2/09).
[47]Towards Earth Summit (2002).
[48]The "lasting interest" implies the existence of a long-term relationship between the direct investor and the direct investment enterprise as well as a significant degree of influence on the management of the latter. See OECD 'Survey of OECD work on international investment'. (1998). OECD working paper. Available at: http://www.oecd.org/dataoecd/0/59/2111393.pdf (accessed on 25/2/09) and OECD 'OECD benchmark definition of foreign direct investment'. (1996)3ed. Available at: http://www.oecd.org/dataoecd/10/16/2090148.pdf (accessed on 25/2/09).
[49]Ndulo M. 'Multilateral agencies and agreements and the regulation of trade and investment for developing countries'. (1991)17. Lesotho L.J at p 162.
[50]World Bank 'Foreign Direct Investment- benefits beyond insurance'. (1993). World Bank development Brief No. 14. Available at: http://www.worldbank.org/html/dec/Publications/Briefs/DB14.html (accessed on 25/2/09).
See also OECD 'Foreign Direct Investment for development: Maximising benefits, minimising costs'. (2002). Available at: http://www.oecd.org/dataoecd/47/51/1959815.pdf (accessed on 25/2/09).
[51] OECD (1998) fn 48.
[52] OECD (2002) fn 50.
[53]Asiedu E. 'Foreign direct investment in Africa: The role of government policy, institutions and political instability'. Available at: www.people.ku.edu/~asiedu (accessed on 22/1/09).

FDI is not without its downsides, especially for host states. For example, there are well founded fears of political interference in domestic politics by powerful investors.[54] Further, high dependence on multinational companies is a source of potential instability in the unlikely event that the host state loses its attractiveness as a base for multinational investment, hence entailing substantial adjustment costs.[55] Finally, repatriation of profits, and dividends, and failure to re-invest by the investors contribute to underdevelopment of the host state.[56]

2.3.2. FDI regulation: The history of BITs

Foreign investors invest to make profits and not for reasons of benevolence. Thus, if they make profits they expect to retain the same (subject to payment of appropriate taxes to the local authorities); and if they acquire property, they expect to be entitled to keep it.[57] This is why they demand legal security in the form of transparent and predictable rules.

In the period after World War II, the rights of foreign investors vis-a-vis those of the host state (state in which they invest) were protected by international law and the international political, and sometimes military, power[58] of the "home" state.[59]

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For example, under customary international law, the ability of a foreigner to undertake an investment in the host country was subject exclusively to the sovereignty of that country.[60] Therefore the host country had the right to control the movement of capital

[54]Ndulo. (1991).
[55]Ibid.
[56]Ajit S. 'FDI, globalization and economic development: Towards reforming national and international rules of the game'. ESRC centre for business research., University of Cambridge working paper No. 304. Available at: http://www.cbr.cam.ac.uk/pdf/WP304.pdf (accessed on 26/2/09). See also Kebonang (2006).
[57]Adeoye A. 'International protection of direct foreign investments in the third world'. (1987)37 . International and Comparative law quarterly.
[58]Host states feared reprisals of some form from the home state of investors and on account of this abstained from harassing them and treating them unfairly. See Jean Monnet Centre, 'Explaining the popularity of BITs'. (2004). NYU School of law. Available at: http://www.jeanmonnetprogram.org/papers/97/97-12-Contents.html (accessed on 25/2/09).
[59]Salacuse J. and Sullivan N. 'Do BITS really work? An evaluation of bilateral investment treaties and their grand bargain'. (2005)46. Harvard International Law Journal.
[60]Also referred to as sovereign rights of host states. See Salacuse J. 'BIT by BIT: The growth of bilateral investment treaties and their impact on foreign investment in developing countries'. (1990)24. The

into its territory, to regulate all matters pertaining to the acquisition and transfer of property within its national boundaries, to determine the conditions for the exercise of economic activity by natural and legal persons, and to control the entry and activity of aliens.[61] Similarly, expropriation of property owned by foreigners was permitted only for a public purpose and only if accompanied by prompt, adequate, and effective compensation (the Hull rule).[62]

Customary international law and other applicable international law failed to take account of contemporary investment practices and to address important issues of concern to foreign investors.[63] For example:-

a) Customary international law did not address the right of foreign investors to make monetary transfers from the host country.[64]
b) The existing principles were vague and subject to varying interpretations. For instance, there was no crystallised principle on how compensation under the Hull rule was to be calculated. [65]
c) The applicable international law prompted disagreement between industrialised countries and newly decolonised developing nations.[66] For example, foreign investors considered the sovereign rights as creating barriers to foreign capital and limiting their freedom to undertake investments.[67] On the other hand, the developing countries rejected the Hull rule claiming that it served only to

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International Lawyer. Available at: www.stephankinsella.com/texts/salacuse_bit_by_bit.pdf (accessed on 25/2/09).

[61]Salacuse (1990). See also Asante S. ‘ International law and foreign investment. A re-appraisal’. (1988)37. International and Comparative Law Quarterly at pp 589-590 where the same was referred to as ‘state responsibility’.

[62]The rule is named as such because Cordell Hull, while secretary of state for United States, declared that ‘no government is entitled to expropriate the private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore.’ See, Jean Monnet Centre (2004). See also Elkins *et al.* ‘Competing for capital: The diffusion of bilateral investment treaties, 1960-2000’. Paper presented at the annual meeting of the International Studies Association held at Le Centre Sheraton Hotel, Canada, on March 17, 2004. Available at: www.allacademic.com/meta/p73308_index.html. Accessed on 2/3/09

[63]Salacuse (2005).

[64]Ibid.

[65]Ibid.

[66]Salacuse (2005).

[67]Jean Monnet Centre (2004).

maintain their poverty and demanded that their particular needs and circumstances be taken into account. [68]

d) Existing international law offered foreign investors no effective enforcement mechanism to pursue their claims against host countries that had injured or seized their investments or refused to respect their contractual obligations.[69] As a result, investors had no assurance that investment contracts and arrangements made with host country governments would not be subject to unilateral change at some later time.[70]

Despite various efforts, no multilateral arrangements emerged to supplement the aforesaid uncertainties of customary international law and other applicable international law. Accordingly, from 1959[71], states started adopting BITs. These bilateral treaties established specific legal rules governing the investment and economic activities of nationals of western capital exporting states in the territories of other states. Developing countries willingly negotiated and ratified the same as a way to promote foreign investment in their territories.[72]

Up to the mid- 1980s the negotiation of BITs proceeded at a moderate pace, rarely exceeding 20 new treaties per year.[73] BITs have thus displaced customary international

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[68]The Hull rule came under attack between 1950 and 1960.Developing countries condemned the rule as an infringement on the sovereignty of the expropriating nation and called for a less exacting expropriation standard. They thus called into question the validity of the Hull rule as customary international law. The UN General Assembly then passed Resolution 3171 supporting a rule under which expropriation was permitted with less than full compensation. In the beginning of the 1970s, developing countries demanded for the establishment of a New International Economic Order. In 1974, the UN General Assembly declared a New International Economic Order in Resolution 3201. The said resolution considered unacceptable any form of sanction on a country that has expropriated the assets of an investor hence undermining the Hull Rule or the standard of "appropriate" compensation favoured by many developing countries. In 1974, the General Assembly adopted another resolution (Resolution 3281, the Charter of Economic Rights and Duties) that put host country government in full control and placed the investor at the mercy of that government hence further emphasizing the sovereignty of host states (See Jean Monnet Centre (2004) and Salacuse (1990).

[69]Salacuse (2005).

[70]Although the International Centre for Settlement of Investment Disputes ("ICSID") was formally established in 1965 as an affiliate of the World Bank to resolve disputes between host countries and foreign private investors, the Centre did not hear its first case until 1972. Injured foreign investors who were unable to negotiate a satisfactory settlement, secure an arbitration agreement with a host government, or find satisfaction in the local courts had few options other than to seek espousal of their claims by their source country governments, a process that by its very nature was more political than legal. See Salacuse (2005).

[71]The first BIT was adopted in 1959 and it was between Pakistan and Germany. See UNCTAD 'Bilateral Investment Treaties. 1959-1999'. (2000). Ref. UNCTAD/ITE/IIA/2.

[72]Salacuse (1990).

[73]Elkins (2004).

law as a source of applicable legal principles and are now the fundamental source of international law in the area of foreign investment.

2.3.3. Accelerated bilateralism: An effect of failure of multilateralism and growth of South-South co-operation

The explosion in signing of BITs began in the late 1980s. More than one hundred new treaties were signed yearly on average for the decade of the 1990s.[74] This can be attributed, partly, to the failure of multilateralism and the growth of South-South co-operation.

While bilateral deals continued to grow, multilateral efforts to regulate FDI were failing. Various efforts were made by organisations, regional trading groups and the World Trade Organisation (WTO) to regulate investments globally.

Major organisations came up with rules and guidelines for regulating investment multilaterally. In 1976 members of the Organisation for Economic Co-operation and Development (OECD) negotiated a voluntary set of rules, aimed at regulating investments among themselves; the UN efforts between 1976 and 1992 saw the establishment of The UN Code on Transnational Corporations; and the World Bank in 1992 adopted a set of non-binding guidelines for the treatment of foreign investment in the Asian-Pacific region. [75]

Similarly, in 1990 regional efforts to include investment provisions in regional trade arrangements began. Investment chapters were included in regional agreements like the North American Free Trade Agreement (NAFTA, 1994), Mercosur (Colonia Protocol) and the 1994 Energy Charter Treaty.

Efforts by the WTO have been through three multilateral agreements annexed to the 1994 Marrakesh Agreement (GATT 1994). For example; the Agreement on Trade Related Investment Measures (TRIMs) proscribes governmental mandating of certain

[74]Ibid

[75]Kumar N 'Investment on the WTO Agenda: A developing country perspective and the way forward for the Cancun ministerial conference'. (2003). Working paper by the Research and Information System for the non-aligned and other developing countries (RIS). Available at: www.ris.org.in/dp56_pap.pdf (2/3/09) at p6

performance requirements, for example, local content requirements and trade balancing requirements; the General Agreement on Services (GATS) binds governments to make some provisions for rights of establishment and national treatment standards for foreign controlled enterprises in specific industries; and the Trade Related Intellectual Property Agreement (TRIPs) binds signatories to certain standards on intellectual property.

Countries attempted to widen the scope of the multilateral regime on investments beyond what is covered in the TRIMs, GATS and TRIPs Agreements. One such attempt was the initiative to establish a Multilateral Agreement on Investment (MAI) under the aegis of OECD launched in 1995. The OECD negotiations on MAI failed in 1998 after a strong NGO campaign that criticised the draft agreement for the following reasons: it conflicted with environmental policies and laws; it failed to balance the new rights it would give foreign investors with social and environmental responsibilities in the host countries; it rigidly interpreted the non-discrimination (national treatment) principle, thus created a situation whereby foreign investors would be treated not only as favourable as, but better than, domestic investors; and because all stakeholders, in particular in developing countries, affected by foreign investment rules were not consulted and, therefore, their interests were not fully represented in the draft agreement.[76]

Following the failure of the MAI, the EU and Japan attempted to push the investment issue on to the WTO's agenda at the First Ministerial Conference of WTO in Singapore, by proposing to create a possible Multilateral Framework on Investment (MFI) under the auspices of WTO.[77] However, the WTO members did not reach a consensus on the comprehensive inclusion in the negotiations of matters related to investment. The Working Group on Trade and Investment (WGTI) was thus set up to study the relationship between trade and investment without a negotiating mandate[78]. Before the WGTI's study process could conclude its work and recommend the desirability, if any, of

[76]Mehra M. 'Update on the MAI'. (1998). Paper by the Oxfam GB. Available at: www.oxfam.org.uk/resources/policy/trade/downloads/Oxmai98.rtf (accessed on 25/4/09).
[77]Kumar (2003) p6
[78]See WTO Singapore ministerial declaration adopted on 18 December 1996. Ref. WT/MIN((96)/DEC. Available at:
http://www.wto.org/english/theWTO_e/minist_e/min96_e/wtodec_e.htm#investment_competition (accessed on 2/2/09). See also Kumar (2003) at p6.

a MFI within WTO's ambit, the EU with the support of other industrialised countries pushed the investment issue for negotiation at the Fourth Ministerial Conference of the WTO held in Doha in November 2001.[79] As a result, the Doha Declaration provided for the launch of negotiations on a multilateral framework after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.[80] This meant that actual negotiations on investments could not commence without the approval of every single WTO member state.

The Cancun Ministerial meeting of September 2003 (the Fifth Session of the Ministerial Conference) failed to mandate the WTO to negotiate a future multilateral investment agreement.[81] On 1 August 2004 the WTO General Council decided to remove the investment topic from the WTO negotiating agenda, at least for the period of the current Doha work program.[82]

In the absence of a multilateral agreement on investment, BITs have been used as an important instrument to protect foreign investors and attract FDI, hence the sudden proliferation of BITs.

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The accelerated growth of bilateralism could also be attributed to South-South co-operation. Initially, BITs were signed between developed countries and developing countries (North-South co-operation), the latter mainly being former colonies of the

[79]Kumar (2003) pp 6 and 7.
[80]WTO Doha ministerial declaration adopted on 14 November 2001. Ref. WT/MIN(01)/DEC/1. Available at:http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#relationship (accessed on 2/2/09).
[81]Tietje C. (2008) *International investment, protection and arbitration* at pp 66-73..
[82]The said decision stated, *inter alia*, that the "Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round." See WTO 'Text of the 'July package': The General Council's post-Cancun decision.' Ref. WT/L/579. Available at: http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm (accessed on 24/4/09).

former.[83] In the late 1990s many developing countries emerged as significant sources of foreign investment to other developing countries, and started signing BITs.[84] This is attributed to geographical proximity and the fact that developing countries possess similar push and pull structural, cyclical, as well as policy, factors.[85]

Over the last few years the number of BITs between developing countries has grown. For example, in 2005, 20 of the 70 new BITs were concluded between developing countries, bringing their total number to 644, whereas ten years before only 161 had existed.[86] Similarly, of the 44 new BITs signed in 2007, 13 were between developing countries, which now represent more than 26 percent of the total number of BITs.[87] China has been the most active: 60 percent of the BITs it concluded between 2002 and 2007 were with other developing countries, mainly in Africa.[88]

By 2007 a total of 2,608 BITs had been signed,[89] up from approximately 385 BITs signed by the end of 1989.[90]

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2.4. CHINA IN AFRICA

2.4.1 South-South co-operation

[83]A large number of developing countries signed their first BITs with their former colonial masters, for example, India signed its first BIT with the UK. See also Malik M 'Recent developments in regional and bilateral investment treaties' (2008) paper presented at the second annual forum of developing country investment negotiators by International Institute for Sustainable Development (IISD). Available at: http://www.iisd.org/pdf/2008/dci_recent_dev_bits.pdf (accessed on 3/3/09) at page 6.

[84]UNCTAD 'South-South co-operation in international investment arrangements' (2005) UNCTAD series. Available at: http://www.unctad.org/en/docs/iteiit20053_en.pdf (accessed on 2/3/09) at p25.

[85]Ibid

[86]Ibid

[87]Ibid

[88]UNCTAD 'Recent developments in international investment agreements (2007- June 2008)' (2008) ref. UNCTAD/WEB/DIAE/IA/2008/1. Available at: http://www.unctad.org/en/docs/webdiaeia20081_en.pdf (accessed on 2/3/09) at p4

[89]UNCTAD (2008) fn 88 p2

[90]UNCTAD (2000) fn 71. See also Malik (2008).

Investment between developing countries (South-South investment) has grown tremendously. For example, between 1997 and 2000, South-South FDI flows rose from USD 4.6 billion in 1994 to an average of USD 54.4 billion between 1997 and 2000, equivalent to 36 percent of total FDI inflows to developing economies in the latter period.[91]

The rapid increase in South-South investment has been linked to: first, liberalization of regulations and lowering of entry barriers in host countries, thereby encouraging foreign investment (market seeking investment); and secondly, the search for resources[92]to export back to home markets or to process in Africa and export to third markets [93](resource seeking investment).[94]

China is one of the major sources of South-South investment in Africa.[95] Between 1990 and 1997 Chinese investment in Africa amounted to about USD 20 million. From 1998 to 2002 it increased six-fold to USD 120 million.[96] By 2008, it was investing over USD 305 million a year.[97] This is attributed to the rapid economic growth in the past two decades leading to a sudden increase in income and high purchasing power of its middle class, hence an augmented demand in the manufacturing sector for oil, agricultural products, and natural resources.[98] Since African economies are linked to the world economy as commodity exporters of agricultural products, oil, and raw materials, because of their natural comparative advantage, they became an important investment destination for China.[99]

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[91]Gelb S. 'South-South investment: The case of Africa'. (2006). World Bank. Available at: www.rru.worldbank.org/FPDForum/documents/2006/background/gelb_fondad_background.pdf (accessed on 10/3/09) at p 200.
[92]Resources mean oil, gas, minerals, agriculture and labour.
[93]Third markets include the local host countries, regional and sub regional markets, and the global market with the US being an import third market particularly in the clothing and textile sector.
[94]Gelb (2006) p 201
[95]The other major sources being Taiwan, India and South Africa. See Gelb (2006)
[96]Gelb (2006) p 201
[97]Xinhua,'More Chinese enterprises eye investment in Africa'. (2008).China Daily. Available at: http://www.chinadaily.com.cn/china/2008-09/09/content_7009143.htm (accessed on 8/5/09)
[98]Broadman (2007).
[99]Goldstein (2007).

2.4.2 Chinese investments in Africa

Resource development and manufacturing account for a large percentage of China's investment in Africa.[100]

a) Resource development

Oil

For four decades since the 1950s, China managed to be self-sufficient, meeting all its internal consumer oil needs, as it discovered massive oil reserves at its major oil reservoir, the Daqing oil fields, in the far north of the country.[101] Due to its rapid economic growth, running at a rate of roughly nine percent per year, it was no longer able to meet its own consumption requirements through its domestic production of oil, and was forced to search for oil elsewhere.[102]

Nearly 60 percent of Chinese crude oil imports came from the Middle East in the early 1990s.[103] To avoid over-reliance on Persian Gulf oil, China (in the mid-1990s) began looking for new energy resources in Africa and other regions around the world.[104]It currently receives one-third of its oil imports from Africa, its biggest suppliers being Angola (13%), Sudan and Nigeria. Moreover, it is drilling for oil in Ethiopia, Mauritania, and off the Coast of Congo Brazzaville, while prospecting in Mali, Niger and Chad.[105]
China carries out its oil investments in Africa through three companies: the China Petrochemical Corporation (Sinopec), the China National Petroleum Corporation

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[100]World Bank 'Potential of Africa-Asia trade and investment: Potential for ownership and partnership' (2004) World Bank study on Africa-Asia trade and investment relations at p 74.
[101] Hurst C (2006) *China's oil rush in Africa.*
[102]In 2005 China consumed 6.59 million barrels per day while it only produced 3.75 million barrels per day. See Anonymous 'China increases security of supply with energy deals in Nigeria and Kenya' (2006) Global Insight. Available at: www.globalinsight.com/SDA/SDADetail5726.htm (accessed on 10/3/09) and Energy Information Administration. Available at: www.eia.doe.gov (accessed on 10/3/09).
[103]Hurst (2006).
[104]Kolas A 'China in African oil: Guilty as charged'. Available at: www.epsusa.org/publications/newsletter/june2007/kolas.htm (accessed on 10/3/09). See also Hurst (2006) p. 4.
[105]Hurst C (2006) at p 4. See also Li J 'China's rising demand for minerals and emerging global norms and practices in mining'. (2006). Paper prepared for the Foundation for Environmental Security and Sustainability (FESS). Available at: www.coleurope.eu/file/content/StudyProgrammes/eco/chair/toyota/200612_conference/Presentations/Li_ChinasRisingDemandForMinerals.pps+china+and+minerals+in+africaandhl=enandct=clnkandcd=43andgl=keandclient=firefox-a (accessed on 11/3/09)

(CNPC), and the China National Offshore Oil Corporation (CNOOC), which handles offshore exploration and production and accounts for over 10 percent of China's domestic crude production.[106]

Minerals

Industrialisation leads to an increase in income and mineral consumption hence China's interest in Africa's rich mineral resources. As at 2008, China was consuming approximately 30 percent of the globe's zinc, 25 percent of its lead, 27 percent of its iron and steel, 47 percent of its cement, 25 percent of its aluminium, and 22 percent of its copper.[107]China is currently the world's largest copper consumer having by passed the United States in 2004.[108]

The minerals sought by China affect every aspect of its economy. For example, titanium is needed for producing military aircraft, iron ore to fuel its export of consumer goods, copper for light manufacture, cement for infrastructure, and diamonds for the country's growing appetite for luxury items.[109] Consequently, to guarantee security of resource supply, manage emergencies, and ensure that there is a buffer to adjust to market fluctuations, China commenced plans, in 2006, to set up a Strategic Mineral Reserve to stockpile uranium, copper, aluminium, iron ore and other minerals.[110]

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China's main sources of minerals in Africa are, *inter alia*: The Democratic Republic of Congo for copper, timber and cobalt; Zambia for copper as well; South Africa for ferrochrome, aluminium, iron ore, platinum, gold and diamonds; and Zimbabwe for uranium.[111]

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[106]Hurst C (2006) p 5.
[107]Association for Asian Research (AFAR) 'Feeding the dragon: China's quest for Africa's minerals'. (2008). Available at: http://www.asianresearch.org/articles/3124.html (accessed on 5/5/09). See also Li (2006)
[108]ASAR (2008)
[109]Ibid
[110]Ibid
[111]Ibid. See also Li (2006).

Crop production and agro-processing[112]

For a long time Chinese investment in the agricultural sector in Africa was very limited, since it was self-reliant.[113] This changed in the mid-1990s when China's agricultural sector began facing growing problems. First, rapid economic growth led to better income, and which in turn led to a rising demand for protein, meat and processed foods.[114] Secondly, there was increased urbanisation due to rapid industrialisation, with loss of arable land, and soil erosion.[115] Thirdly, water shortages as a result of unequal distribution of rainfall, groundwater, and surface water, as well as the spreading of deserts by around 3,000 km² a year, made planting crops that need a lot of irrigation increasingly difficult.[116] Consequent to this, Chinese companies are presently buying and leasing land across Africa for crop production as well as investing in agro-processing.[117] These companies are specialising in growing rice, market garden produce, and industrial crops, such as, sisal and cotton. In addition, they are investing heavily in fishing and allied industries, as well as in fish farming (especially prawns), notably in Mozambique.[118]

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b) Manufacturing

Chinese investment related to manufacturing is mostly in light industries, construction and infrastructure.

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[112]Agro- processing is post-harvest activities that add value to the agricultural product prior to marketing. See Wilkinson J. 'The food processing industry, globalization and developing countries'. (2004)1. Electronic Journal of Agricultural and Development Economics (eJADE) at pp 184-201. Available at: www.fao.org/es/esa/eJADE (accessed on 20/3/09). See also Yoshino Y. 'Patterns of Africa-Asia trade and investment'.(2004). World Bank,wherein it was defined as to produce goods to be sold in China's food and farming industries.

[113]Dysck S. 'China's commodity hunger: From oil and copper to milk and grain'. A research by Deutsche Bank. Available at: www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD0000000000221119.pdf (accessed on 10/3/09).

[114]Ibid

[115]Ibid

[116]Ibid

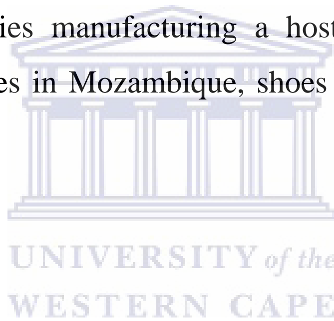
[117]Spencer R. 'China looks abroad to grow its own food'. (2008). The Telegraph. Available at: http://www.telegraph.co.uk/news/worldnews/asia/china/1942254/China-looks-abroad-to-grow-its-own-food.html (accessed on 20/3/09). See also Humphrey J. and Oetero A. 'Strategies for diversification and adding value to food exports: A value chain perspective'. (2000). UNCTAD, ref. UNCTAD/ITE/Misc.23

[118]Niquet V. 'China African strategy'. Available at: http://www.diplomatie.gouv.fr/fr/IMG/pdf/0805-Niquet-ANG.pdf (accessed on 20/3/09). See also Bezlova A. 'China: Buying farmland abroad and ensuring food security'. Available at : http://ipsnews.net/news.asp?idnews=42301 (accessed on 20/3/09).

Light industries

As regards light industries, textiles, clothing and furniture are the main targets of investment. Chinese textile manufacturing companies are associated with the import of textile materials (e.g., cotton fabrics) from China to African countries for their textile factories. These are used to produce apparel and/or garment products that are exported back home as well as to the United States and Europe.[119] For example, in Lesotho and Swaziland Chinese companies invested in the textile and clothing industry to take advantage of the African Growth and Opportunity Act (AGOA)[120] and to circumvent the Multi Fibre Arrangement (MFA)[121]. However, upon the MFA being phased out in 2004 a number of these companies relocated to China.[122] Currently, Chinese companies are investing in the lucrative textile industry of Egypt.[123]

In addition, China has factories manufacturing a host of other products across the continent, for example, batteries in Mozambique, shoes in Nigeria and ethyl alcohol in Benin.[124]



Infrastructure and construction

Chinese firms have become an increasingly important participant in the infrastructure and construction sectors in many African countries. Many of these firms are state owned, for example, the China Road and Bridge Corporation, and are particularly competitive in

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[119]World Bank (2004) fn 200 p 74.

[120]This agreement allows Sub-Saharan African states to export their apparels duty and quota free to the United States.

[121]The MFA imposed quotas for imports of textiles and clothing from more competitive developing countries like China and India into the USA, Canada , and the EU.

[122]Claassens H. 'The MFA's impact on clothing and textile manufacturers in South Africa'. Available at: http://www.tradersafrica.com/articles.asp?articleid={551E4B75-7032-4A8B-8CC2-575D2EBC1B84} (accessed on 24/4/09). See also Anonymous 'China winning resources and loyalties of Africa'. The Financial Times, 28th February 2006. Available at: http://www.yaleglobal.yale.edu/article.print?id=7051 (accessed on 24/4/09)

[123]Zou H. 'Chinese textile overseas invest into Egypt and the preferred'. (2009). Political facts and tips. Available at: http://facttips.com/Politics/234/chinese-textile-enterprises-overseas-investment-into-egypt-or-the-preferred.html (accessed on 24/4/09).

[124]Brautigam D. and Gaye A. 'Is Chinese investment good for Africa?'(2007.) Online discussion. Available at: www.cfr.org/publication/12622/is_chinese_investment_good_for_africa.html (accessed on 10/3/09).

large scale infrastructure and construction projects due primarily to their efficiency and low costs. [125]

The projects that they engage in are mainly those that no western donor or multilateral lending agency would touch, such as, stadiums and public buildings.[126] Examples of some of the works they have undertaken are: stadiums in West Africa, Presidential Palaces (e.g. in Kinshasa), dams (e.g. Sudan's Merowe Dam), hydro-electric plants (e.g. Zambia's Kafue Gorge), roads, railways, and government buildings (e.g. Supreme Court and the Police and Prison Training College in Windhoek, Namibia). [127]

2.4.3. China and Africa strategy

2.4.3.1 China-Africa Policy

Policy history

Inter-governmental relations between the People's Republic of China (P.R.C.) and African countries were inaugurated in 1956 when Egypt became the first African nation to establish diplomatic relations with the P.R.C.[128]

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Between 1956 and 1964, China's policy towards Africa was based on an ideological alliance.[129] During this period China supported the political struggles for African independence through the provision of weapons and human assistance to numerous independence movements.[130] After the attainment of national independence by most African countries, China sought Africa as an ally in its struggles against imperialism and hegemony through the provision of gratis economic aid regardless of the fact that its own

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[125] It should be noted that the number of Chinese private construction companies operating in Africa appears to be growing drastically. Burke C. and Corkin L. 'Constructive engagement: An overview of China's role in Africa's construction industries'. (2008). Available at: www.ccs.org.za/downloads/CCS_-_New_Impulses_from_the_South_-_May_08.pdf (accessed on 21/3/09). See also Gill B. and Reilly J. 'The tenuous hold of China Inc. in Africa'. (2007). Available at: www.twq.com/07summer/docs/07summer_gill_reilly.pdf (accessed on 21/3/09)

[126] Alden C. (2007) *China in Africa*.

[127] Burke (2008) See also Gill (2007).

[128] Anshan L 'China and Africa: Policy and challenges'. (2007)3. China Security (World Security Institute) at pp 69-93. Available at: http://www.wsichina.org/cs7_4.pdf (accessed on 23/3/09).

[129] Ibid

[130] Ibid

economic situation was precarious.[131] Further, it helped African countries build a number of landmark structures (e.g. stadiums, hospitals, conference centres) that were national symbols of independence embodying the spirit of cultural decolonization.[132] These projects cemented the Afro-Chinese relations, and by 1978 China had established diplomatic relations with 43 African countries.[133]

On China's realisation that aid alone was, unlikely to significantly transform the reality of African poverty, it changed its aid policy so as to help Africa help itself.[134] Thus in the 1980s its economic assistance began to include other forms of support, such as, preferential and discounted loans, co-operatives, and joint ventures for projects in Africa.[135] These reforms helped to bring new technology and management practices to projects in Africa as well as pressed African nations to use money effectively.[136]

In 1982 the 12th Communist Party of China (CPC) National Assembly decided to shift from a policy that emphasized "war and revolution" to one emphasizing "peace and development".[137] It thus established four principles to govern interstate political relationships, "Independence, Complete Equality, Mutual Respect, Non-interference in Others' Internal Affairs[138]", thereby leading to party to party relations between the CPC and many African governments.[139] Associations based on these principles convinced many Africans of China's sincerity in respecting African political choices and helped to promote economic and trade co-operation. Thus by 2002 the CPC had established relations with more than 60 political parties in 40 Sub-Saharan countries, which included both ruling and non-ruling parties.[140]

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[131]Ibid
[132]Ibid
[133]Ibid
[134]Ibid
[135]Anshan (2007).
[136]Ibid
[137]Ibid
[138]This principle emphasises sovereignty as the common denominator among all nations regardless of other factors, and fundamentally holds that all countries should be equal and no country has the right to dictate the sovereign affairs of others. See Anshan (2007).
[139]Anshan (2007)
[140]Ibid

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Current policy

China's rapid economic growth led to its need for further co-operation with Africa, both horizontally and vertically.[141] This led to increased trade and investment between China and Africa. As a result the western countries began media campaigns claiming that China is engaged in "neo-colonialism" in Africa. To counter the negative public discourse, Beijing modified its Africa policy significantly and showed a responsive attitude to most expectations that were advanced by the west.[142]The modified Africa policy is contained in China's White Paper on Africa released in January 2006.[143]

China did not change its aims of co-operating with Africa as well as the principles governing the relationship. In the White Paper China affirmed that its aims of co-operation with Africa are to develop friendly relations, co-operation, peace, stability and development, on the basis of the Five Principles[144] of Peaceful Coexistence. [145]

To ensure that it fulfils these aims, it undertook to adhere to the following principles for co-operation: sincerity; friendship; equality and mutual benefit; solidarity; reciprocity; and common development. With regard to sincerity, friendship and equality, it asserted that it would adhere to the Five Principles of Peaceful Coexistence, respect African countries' independent choice of the road of development, and support their efforts to grow stronger through unity. With regard to mutual benefit, reciprocity and common

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[141]This means increasing the interaction from being predominantly political to being also social and cultural as well as the expansion of the economic co-operation beyond traditional sectors to all areas of commerce industry and technology. See Wenping H. 'The balancing act of China's Africa policy'. Available at: www.wsichina.org/cs7_2.pdf (accessed on 2/2/09).

[142]Holslag J. 'Friendly giant? China's evolving Africa policy'. (2007)2. Asia paper. Available at: http://www.vub.ac.be/biccs/documents/Holslag,%20Jonathan%20(2007),%20Friendly%20Giant,%20Asia%20Paper,%20Asia%20Paper%202%20(5),%20BICCS,%20Brussels%5B1%5D.doc.pdf (accessed on 23/3/09).

[143]It is available at: www.english.peopledaily.com.cn/200601/12/eng20060112_234894.html (accessed on 21/3/09).

This document embodies a comprehensive and long term plan for enhanced co-operation in Sino-Africa relations. China presents therein its policy towards Africa, the objectives of the said policy, the measures to be taken to achieve them; its proposals for co-operation in various fields in the coming years with the view of promoting the steady growth of China-Africa relations in the long term hence bring the mutually-beneficial co-operation to a new stage. See Anshan (2007).

[144]The Five Principles of Peaceful Coexistence as promoted by China are: mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit and peaceful co-existence. See www//en.wikipedia.org/wiki/Five_Principles_of_Peaceful_Coexistence (accessed on 22/3/09).

prosperity, it claimed that it would support African countries' endeavour for economic development and nation building, so as to ensure the common prosperity of China and Africa.

China identified four fields of co-operation, in the White Paper, that it hoped would enhance all-round co-operation. They are:-

1. Political: The co-operation will involve high level visits and dialogue between Chinese and African leaders; exchanges between legislative bodies (inclusive of the African Union (AU) parliament), political parties, and local governments; institutionalised consultation through national bilateral committees or joint committees on trade, economics, science and technology; and solidarity with Africa through mutual support in the UN on issues connected with sovereignty, territorial integrity, national dignity and human rights. [146]

2. Economic: The co-operation will be in trade, investment, agriculture, infrastructure, resources, debt reduction and relief as well as economic assistance. It proposed that this would lead to more access for African commodities to Chinese markets; duty-free access for some goods from Least Developed Countries (LDCs) in Africa; establishment of trade and economic zones in Africa; support for co-operation of financial institutions; encouragement to establish China-Africa joint chambers of commerce and industry; encouragement for Chinese enterprises to participate and increase their engagement in building infrastructure in Africa; preferential loans for Chinese investors; co-operation of Chinese enterprises with African countries to rationally exploit African resources on a basis of mutual benefit; gradual increase of Chinese economic assistance to Africa; establishment of a special Afro-China agricultural co-operation program (including construction of ten agricultural technology demonstration centres); and

[146] The China White Paper containing the Afro-China policy is available at: www.english.peopledaily.com.cn/200601/12/eng20060112_234894.html (accessed on 21/3/09).

support for Africa in promoting its economic interests and development within multilateral trade systems.[147]

3. Education, science, culture, health and social aspects: The co-operation will involve granting education scholarships; exchange of students between China and Africa; sending Chinese teachers to teach Chinese and develop Africa's weak disciplines; construction of rural schools; enhancing scientific co-operation and technological exchange in bio-agriculture, solar energy, geological surveys, mining and new medicines; training for African professionals (African Human Resources Development Foundation); people to people exchanges (youth, women); sending Chinese volunteers to Africa; cultural exchanges (artists and athletes); exchange between media and sharing experiences on handling relations with domestic and foreign media; sending medical personnel and medicines; construction of hospitals ; help with improving facilities and medical personnel training; prevention and treatment of infectious diseases; protecting the environment by facilitating technological exchanges and co-operation in climate change, water resources conservation, anti-desertification, bio-diversity and other areas of environmental protection; actively carrying out personnel exchange, training and technological co-operation in the fields of disaster reduction and relief; and support exchanges and co-operation between the Red Cross Society of China and other Non-Governmental Organisations (NGOs), on the one hand and their African counterparts on the other.[148]

4. Peace and security: Co-operation will involve support for military building for African countries through high level military and technological exchanges; participation in UN peacekeeping operations; support for regional organisations to settle regional conflicts; increase of intelligence, judicial and police exchanges (e.g. about legal system building) and co-operation (e.g. extradition); and combating terrorism, organised crime and corruption.[149]

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[147]Ibid
[148]Ibid
[149]Ibid

In addition, China presented itself as a sister to African nations, with similar historical experiences (colonialism and struggle for national liberation), and being a developing country itself, as a political partner willing to speak in favour of African interests in the UN and other multilateral systems.[150] It thus requested mutual support in the UN on issues connected with sovereignty, territorial integrity, national dignity and human rights. This undoubtedly shows that China's interest with regard to Africa transcends the quest for resources and raw materials.[151] It is trying to garner the support and solidarity of African states on major international issues that divide developed and developing countries, and in the process gain a higher status and an influential position in international affairs.[152]

China used the White Paper to emphasise its stand on Taiwan by asserting the one China[153] principle as the political foundation for the establishment and development of China's relations with African countries and regional organisations; thus there will not be relations with any country co-operating with Taiwan.

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Lastly, it undertook to utilise the Forum on China-Africa Co-operation (FOCAC)[154] as a tool for strengthening political consultation and pragmatic co-operation between itself and Africa. In addition, it committed itself to try and find the best way for furthering co-operation between the forum and the AU's New Partnership for Africa's Development (NEPAD), and also pledged to provide the AU and Africa's sub-regional organisations with assistance to the best of its capacity.

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[150]Ibid
[151]Ibid
[152]Mingjiang L. 'China's domestic politics and its Africa policy". Available at: www.iss.co.za/dynamic/administration/file_manager/file_links/17NO1BOOKS.PDF?link_id=4057andslink_id=5824andlink_type=12andslink_type=13andtmpl_id=3(accessed on 21/3/09).
[153]The one China principle is the refusal to have official relations and contacts with Taiwan and support China's great cause of reunification.
[154]Hereinafter referred to as "the forum". It was launched in 2000 to act as an effective mechanism for the collective dialogue and multilateral co-operation between China and Africa as well as put in place a framework and platform for a new type of China-Africa partnership featuring long term stability, equality and mutual benefit. China is now using it as vehicle to explore and implement effective methods to realise the goals of the White Paper.

Criticisms

The White Paper has been criticised on three main grounds. First, that the "no political strings attached" policy does not support good governance, transparency and political reform in Africa as set out in the objectives of NEPAD. Therefore, there is the risk of strengthening repressive regimes/elites and weakening social and environmental standards. Furthermore, the said policy makes ownership to be totally focused on governments and thus, no mechanism exists to ensure that governments listen to other perspectives.[155]

Secondly, that the principle of non-interference in each others' internal affairs is not based on international law and human rights.[156] The non-interference principle holds that human rights should not be a reason for one country to interfere in another's internal affairs.[157] The West are opposed to this principle as they believes that human rights have historically arisen from a need to protect citizens from abuse by the state; therefore, all nations have a duty to intervene and protect people wherever they are.[158] On the other hand, the developing countries, including China and most African nations, argue that state sovereignty is supreme.[159]

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Thirdly, that the White Paper stresses on bilateral relations and avoids multilateralism. Further, it fails to take into account the development agenda of the continent as provided for by the AU and NEPAD. [160]

2.4.3.2 <u>Africa-China strategy</u>

Currently Africa does not have a China policy. In order to substantially benefit from China's presence, Africa needs to assert its own strategy for China. The AU and NEPAD

[155]Economy E and Monaghan K 'The perils of Beijing's Africa strategy' (2006) International Herald Tribune. Available at: www.iht.com/articles/2006/11/01/opinion/edecon.php (accessed on 23/3/09). See also Davies P 'China and the end of poverty in Africa:Towards mutual benefit?'. Available at: www.oefse.at/Downloads/veranstaltungen/1011/Vienna_Penny%20Davies.pdf (accessed on 23/3/09).
[156]Anshan (2007)
[157]Ibid
[158]Ibid
[159]Ibid
[160]Economy(2006)

should co-ordinate African strategies for China and ensure that African interests, needs and development goals take centre stage. In the meantime, individual African states can secure their interests through BITs by ensuring that they approach BIT negotiations strategically.

2.5 BENEFITS AND CHALLENGES OF AFRO-CHINA CO-OPERATION

There are significant direct and indirect economic and development benefits to Africa from China's growing presence on the continent. Examples of these benefits include: low prices of manufactured goods; increased FDI, especially in infrastructure, with potential for Africa FDI flows to China; more favourable foreign aid; market access, with increased exports of both primary and manufactured products as well as services, that have diversified Africa exports ; improved infrastructure ; unconditional loans ; increase in employment opportunities for host countries ; transfer of skills and technology; and learning from China on how to manage gradual economic and political transformations.[161]

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On the flip side, there are present and future challenges that arise as a result of Chinese trade with, and investment in, Africa. These include, *inter alia :*

2.5.1 Employment opportunities

Many African countries have high unemployment rate.[162] Notwithstanding this reality, Chinese firms continue to recruit skilled and non-skilled workers from China.[163] These firms claim that it is more efficient and convenient for them to recruit skilled workers and managers from China than to train local workers, as the former are often more familiar with the technologies ; non-skilled Chinese workers face fewer language and cultural obstacles in communicating with management, and are more compliant with demanding

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[161]Shinn (2007). See also Mwega F. 'China, India and Africa: Prospects and challenges'. Paper prepared for the AERC-AFDB International Conference on Accelerating Africa's Development Five Years into the Twenty-First Century held at Tunisia on 22-24 November 2006. Available at: www.afdb.org/pls/portal/url/ITEM/22FF6D2A4231DE42E040C00A0C3D37B0 (accessed on 23/3/09). Also see Goldstein (2007).

[162]Gong S. 'Chinese workers in Africa: Working conditions and potential conflicts'. (2007). UCLA African studies centre. Available at: http://international.ucla.edu/media/files/80.pdf (accessed on 24/4/09)

[163]Ibid

labour practices, for example, working longer hours, working during local holidays, and working overtime on weekends; and, employing African workers entangles them in local laws to a higher degree than employing Chinese nationals.[164]

As a consequence, Chinese enterprises in Africa have contributed little to employment in local economies. This has led to protests by citizens and labour unions in several African nations. Hence, Chinese workers are increasingly becoming targets for crime and terrorism. For example, in 2007 the Ethiopian separatist Ogaden rebels killed nine Chinese workers in a raid on an Ethiopian oilfield.[165] In the same year, sixteen Chinese workers were kidnapped in Nigeria in several separate incidents.[166] More recently, two Chinese labourers were killed in a labour protest in Equatorial Guinea in April 2008, leading to the withdrawal by China of more than 400 of its workers from that country.[167]

2.5.2 Injury to domestic industries

Chinese goods are normally cheaper than local products.[168]This is advantageous to African consumers but injurious to parallel domestic industries (especially textile industries). This conflict is evidenced by various incidents around the continent. In Dakar, there were two mass demonstrations, one in support of Chinese merchants, and the other in opposition.[169] In South Africa, there were similar protests which led to China imposing quotas upon its textile exports in order to allow the South African producers time to make their products competitive.[170] In Zambia, Chinese clothes undermined the clothing and electrical sectors.[171] In Ethiopia, although competition from Chinese shoes

[164]Anshan (2007)
[165]Maclean W.'African marvel, fret at China's hard workers'. Mail and Guardian. 21st August 2008. Available at: http://www.mg.co.za/article/2008-08-21-africans-marvel-fret-at-chinas-hard-workers (accessed on 24/4/09).
[166]Ibid
[167]Ibid
[168]Uffot E. 'The rush for Chinese products'. Newswatch. 27 October 2008. Available at: http://www.newswatchngr.com/index.php?option=com_contentandtask=viewandid=183andItemid=32 (accessed on 14/5/09).
[169]Anshan (2007)
[170]Ibid
[171]Kaplinsky R. *et al.* 'The impact of China on Sub-Saharan Africa'. (2007).Paper prepared for DFID. Available at:www.uneca.org/eca_programmes/acgd/Overview_Report.pdf (accessed on 23/3/09)

imports led to an upgrading of processes and design by many domestic firms, it simultaneously had a negative impact on employment and domestic output.[172]

2.5.3 Environment and Illegal exploitation of natural resources

China's domestic policies have prioritised economic growth over the protection of the environment, often with harrowing results.[173] Although the Chinese government has set in place laws, regulations and institutions to protect the environment, it has not succeeded.[174] Chinese companies have exported their domestic environmental track record to Africa. For example, Chinese run mining operations in Africa have had a detrimental impact on the environment, for instance, the copper mines in Zambia and Congo, and titanium sands projects in ecologically sensitive parts of Mozambique, Kenya, Tanzania, and Madagascar.[175] In Gabon, a Chinese company explored for oil in Loango National Park until the country's national park service ordered the exploration to stop as it was threatening rare plants and animals.[176] Moreover, the Environment Ministry had not approved the environmental impact study.[177]

In addition, China illegally exploits natural resources, for instance, it is a major importer of illegal timber from forests in Cameroon, Congo, and Equatorial Guinea. Up to 50% of all timber imported to China in 2004 were illegal, while in 2006 China was the world's leading importer of illegal timber. [178] Chinese businesses have also been implicated in ivory smuggling, notably in Sudan and Zimbabwe, as well as illegal fishing in Mozambique.[179] Moreover, they buy up to 75 % of Sudan's ivory.[180]

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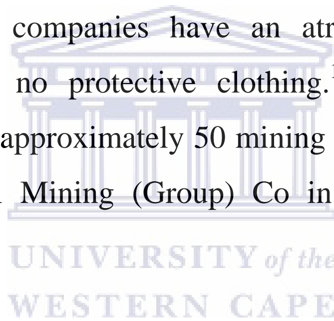
[172]Ibid
[173]Bosshard P.'China's environmental footprint in Africa'. (3rd April 2008). SA Institute of International Affairs (SAIIA) China in Africa policy briefing No. 3. Available at: http://internationalrivers.org/files/SAIIA%20policy%20briefing%20508.pdf (accessed on 25/4/09)
[174]Ibid
[175]Schiller B. 'The China Model' (20/12/2005). Open democracy. Available at: www.opendemocracy.net/democracy-china/china_development_3136.jsp (accessed on 23/3/09).
[176]Bosshard (2008)
[177]Ibid
[178]See www.globaltimber.org.uk
[179]See www.careforthewild.org/default.asp and Standing A. 'Corruption and industrial fishing in Africa.' (2008) Anti-corruption Resource Centre, Chr. Michelsen Institute (CMI). Available at: http://www.cmi.no/publications/file/?3188=corruption-and-industrial-fishing-in-africa (accessed on 21/4/09)

2.5.4 Violation of labour laws

The labour practices of Chinese enterprises in Africa are objectionable. They pay their employees exceptionally low wages compared to other foreign investors and make their workers work long hours with no breaks.[181] For example, in Zambia, workers in Chinese mines are getting paid as little as USD100 a month when the lowest paid miner at the Konkola Copper Mines, Zambia's largest producer, earns USD424 monthly.[182]
Furthermore, they lock employees in the factory during the night shift to ensure they do not leave work or steal merchandise. On 16 September 2002, 29 workers on night shift at the Chinese company, West African Rubber Products Company Limited, in Zambia, were burned to death because they were locked inside the factory without any outlet in case of emergency.[183]

In addition, Chinese mining companies have an atrocious reputation for sending employees underground with no protective clothing.[184] Such substandard working conditions caused the death of approximately 50 mining employees after an explosion at the China Non-Ferrous Metal Mining (Group) Co in Chambishi, Zambia, in April 2005.[185]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2.5.5 Immigrants

Migration of the Chinese to the continent has increased tremendously. Thousands of Chinese labourers and engineers were imported to build Ethiopia's $300m Takazee Dam. In Sudan, Chinese workers constructed an oil pipeline and, 74,000 Chinese still remained in country after the construction, 10,000 of them were employed by the China National

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[180]See www.careforthewild.org/default.asp
[181]Anonymous. 'China exportation of labour practices to Africa.' Available at: http://www.ihlo.org/CINTW/ArticleLabourPracticeExport.html (accessed on 23/3/09).
[182]Ibid referring to
Shacinda, S: 'Chinese labour policies mar African welcome'. Available at :www.today.reuters.com /misc (accessed on 23/3/09).
[183]McGreal, C ' Thanks China, now go home: Buy-up of Zambia revives old colonial fears' (2007/2/5) The Guardian, Lusaka, www.guardian.co.uk/china/stor/0,,2005902,00.html (accessed on 23/3/09)/
[184]'Zambians wary of 'exploitative' Chinese employers' IRIN, UN Office for the Coordination of Humanitarian Affairs www.irinnews.org/Report.aspx?ReportId=61640 (accessed 0n 23/3/09).
[185] Ibid

Petroleum Company (CNPC).[186] More than 3,000 Chinese live in Cameroon, 5,000 in Lesotho, 50,000 in Nigeria and 300,000 in South Africa.[187] This massive transfer of personnel is unlikely to have a positive impact on the African job markets, the building of local capacity and the transfer of technologies.[188] In addition, local retailers are faced with rapidly increasing business competition from expatriate Chinese traders.[189]

2.5.6 Support of oppressive regimes

China is known to support oppressive regimes, thereby complicating democratic consolidation and good governance.[190] For example, during the war between Ethiopia and Eritrea from 1998 to 2000, China bypassed a UN arms embargo and sold over USD 1 billion of weapons to both states.[191] Similarly, it sells weapons to Bashir of Sudan, Mugabe of Zimbabwe, and other buyers who then feed them into active conflicts.[192] Light weapons from China have flooded into the Great Lakes area, where millions have died as a result of civil conflict.[193] By supporting dictators, China validates corrupt regimes, hurting the continent in the long term.[194]

2.6. A TEXTUAL ANALYSIS OF THE UGANDA, DJIBOUTI AND GERMANY BITs WITH CHINA

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[186]Schiller (2005)
[187]Mwega (2006)
[188]Tull, Denis M. 'China's engagement in Africa: Scope, significance and consequences'. (2006)44. Journal of Modern African Affairs.
[189]Mwega (2006)
[190]Eisenman J. and Kurlantzick J. 'China Africa strategy'.
Available at: www.carnegieendowment.org/files/Africa.pdf (accessed on 23/3/09)
[191]When Ethiopia went to war with neighbouring Eritrea in the late 1990s, the United States evacuated its Peace Corps volunteers, scaled back military aid and issued a security warning to US citizens and companies. In contrast, China saw an opportunity to expand its influence. It dispatched even more diplomats, engineers, businesspeople and teachers to Ethiopia.
Eisenman J and Kurlantzick J 'China Africa strategy'.
Available at: www.carnegieendowment.org/files/Africa.pdf (accessed on 23/3/09)
[192]Oil explorations and export by Chinese investors in Sudan raised Sudan's total export earning. The oil revenue was being used to fund military build up by the Sudan government. Moreover, Chinese made tanks, fighter planes, bombers, helicopters, machine guns, and rocket propelled grenades have been used in Sudan's civil war. See 'China invests heavily in Sudan's oil industry," Sudan Tribune, December 23, 2004. See also Anonymous 'Of rogue multinationals and the mechanics of war' East African Alternatives for November/December 2000. See also Stephanie H. 'China's oil imports from Sudan draw controversy'. (2004). Available at: http://www.voanews.com/ (accessed on 29/3/09).
[193]Amosu A. 'China in Africa: It's (still) the governance stupid'. (2007/3/9). Foreign Policy in Focus (FPIF) discussion paper. Available at: http://www.fpif.org/fpiftxt/4068 (accessed on 23/3/09
[194]Zhiqun (2007) p 29

2.6.1 **Introduction**

As stated earlier, China is not driven by benevolent concerns with regard to its investments in Africa.[195] Its aim is to reap the maximum returns that can be secured with the barest of input and least possibility for technology and knowledge transfer.[196] This is why China is adopting the same BITs with African states as the ones it has concluded with developed states, notwithstanding the differences in levels of development between the former and the latter.

The above is buttressed by the fact that China's old generation BIT practice[197] was characterised by, first, a limited National Treatment[198] provision which reduced the obligation to accord National Treatment to "the extent possible", thereby watering down China's obligation to undertake goodwill efforts of adopting equal treatment of foreign investors; and secondly, limited the consent[199] to investor state dispute resolution..[200] Consequently, China was able to retain some policy space and as a result benefited from inward FDI.

In the late 1990's China entered into a new generation BIT practice that broke through the reservations with regard to National Treatment of foreign investors and limited consent to dispute resolution; hence according broad protection to investors.[201] The

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[195]Mosoti V. 'Non-discrimination and its dimensions in a possible WTO framework agreement on investment: Reflections on the scope and policy space for development of poor economies'. (2003) 4. The Journal of World Intellectual Property.
[196]Ibid
[197]At that time it was predominantly a capital importing state.
[198]See Article 3 (3) of the China-UK BIT (1986). It states: *"In addition to the provisions of paragraph (1) and (2) of this Article other Contracting Party shall to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations to the investments of nationals or companies of the other Contracting Party the same as that accorded to its own nationals and companies."*
[199]Their old generation BITs only allowed for investor-state disputes concerning the amount of compensation due in case of expropriation. See China –Sweden BIT (1982) and China-UK BIT (1986). Article 7(1) of the China-UK BIT states "*A dispute between a national or company of one Contracting Party and another Contracting Party concerning an amount of compensation which has not been amicably settled after a period of six months from written notification of the dispute shall be submitted to international arbitration."*
[200]Schill S. 'Tearing the great wall: The new generation investment treaties of the People's Republic of China'. (2007). Cardozo Journal of International and Comparative Law.
[201]Ibid

change in BIT practice was necessitated by the fact that at around this period, China became both a capital exporting state and a capital importing state, as opposed to being predominantly a capital importing state.[202]As a result, it was faced with the challenge of striking a balance between the mutual interest existing between itself and the developed countries[203] of protecting their investors abroad and upholding state sovereignty, and regulatory leeway as far as possible.[204]

Although China was aware of the development needs of African states, and that developed and developing countries are at different levels of development[205], it adopted the same new generation BITs for both categories of states. Hence, the new Chinese BITs with developing African states are deliberately mis-engineered. They curtail the policy space of developing African states and therefore they are unable to obtain equal returns on investments.

In light of the above, this section carries out a textual analysis of the Uganda, Djibouti and Germany BITs with China with the aim of demonstrating the similarities between the two developing countries' BITs (Uganda and Djibouti) with that of the developed country (Germany), and identifies specific elements of mis-engineering and how they have contributed to the unequal returns on investment.[206]

BITs signed by China follow the common typography of international investment agreements. They include, *inter alia*, the Preamble; definition of investment and investor; provisions designed to offer certain absolute standards of treatment (for example "fair

[202]Ibid. Similarly in 2008, China's stock of FDI was USD 758.9 billion (at home) and USD 139.3 billion (abroad). See CIA (2008)
[203]These developed countries are also both capital exporting and capital importing states. For example in 2008, Germany's stock of FDI was $ 924.7 billion (at home) and $ 1.36 trillion (abroad). See CIA fn 202 above.
[204]Schill (2007)
[205]Since China was a predominantly capital importing state before now, with limited provisions on dispute resolution and National Treatment in its old generation BITs. See also supra fn 44 - WTO submission of China, Cuba, India, Kenya, Pakistan, Zimbabwe of 19th November 2002 (WT/WGTI/W/152).
[206]This paper takes the position that FDI can be a positive force in the domestic economies and development planning of developing countries. This avoids the considerable debate on the effectiveness of FDI as an engine for promoting economic development.
Note:The Uganda BIT was signed in 2004 while the Djibouti one was signed in 2003

and equitable treatment"); relative standards of treatment (National Treatment or Most-Favoured Nation); protections against expropriation of foreign investments or nationalization; and recourse to dispute settlement (state to state and investor to state).

2.6.2 Preamble

The Preambles assert the goals of the BITs. The undertakings therein are not binding, but Preambles serve as useful aids in the interpretation of the BITs.[207] Where an operative provision is worded in an ambiguous manner or there is a lacuna in the text, reference may be made to the Preamble to set out the context in which the Treaty and the individual obligations are to be read.[208]

Arbitration Tribunals have interpreted BITs by referring to the Preambles and have adopted interpretations that ensure their effectiveness. For example, in **SGS Société Générale de Surveillance SA v Republic of the Philippines**[209], the Tribunal stated, *inter alia,* that:

> "The object and purpose of the BIT supports an effective interpretation of Article X (2) [the "umbrella clause" of the Philippines-Switzerland BIT]. The BIT is a treaty for the promotion and reciprocal protection of investments. According to the Preamble it is intended 'to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other'. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."

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[207]Dolzer R. and Stevens M.(1995) *Bilateral Investment Treaties*. International Centre for Settlement of Investment Disputes.
See also Vienna Convention on the Law of Treaties (1969) Article 31 states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in the context and in light of its object and purpose. The context shall comprise of the text, its Preamble and annexes.
[208]Dolzer (1995)
[209]*SGS Société Générale de Surveillance SA v Republic of the Philippines* (2004) 8 ICSID Reports 515 (paragraph 116 (C5/20)

Similarly, in **Ecuador v. Occidental**[210] the Court of Appeal stated, *inter alia*:

> "We accept Mr Greenwood's submission that the object and purpose of a BIT (including this BIT) is to provide effective protection for investors of one state (here OEPC) in the territory of another state (here Ecuador) and that an important feature of that protection is the availability of recourse to international arbitration as a safeguard for the investor. In these circumstances it is permissible to resolve uncertainties in its interpretation in favour of the investor: see e.g. the views of the arbitrators in para 116 of their award in *SGS Société Générale de Surveillance SA v Republic of the Philippines* (2004) 8 ICSID Reports 515."

All the three BITs state their purpose as strengthening economic co-operation and increasing economic development and prosperity of the parties by creating favourable conditions for investments and encouraging reciprocal protection of the same in order to stimulate business initiative of investors. The Djibouti and Uganda BITs contain an additional purpose, which is, to stimulate transfer of capital and technology. The Djibouti BIT goes further and avers that it aims to intensify the co-operation of both States on the basis of equality and mutual benefits.

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All three Preambles fail to mention issues, like: promotion of respect for internationally recognised worker rights; recognition of international law or principles of international law as a basis for economic co-operation; the need to balance the interests of the various stakeholders; promotion of sustainable development; and commitment to act in conformity with existing Human Rights and maintain health, safety and environmental measures. These issues are important for ensuring sustainable development of African states.

In light of the above, there is a deliberate mis-engineering of the Uganda and Djibouti Preambles as they do not make it clear that the objective of the investment promotion and protection must not be pursued at the expense of its public policy goals, such as, the

[210]*Ecuador v. Occidental* (No.2) [2007] 1 Lloyd's Rep 64 (paragraph 28 (B/4)

protection of health, safety, the environment, and the promotion of internationally recognised labour rights. The provisions of the BIT(s) will not be interpreted in light of the said public policy objectives. In effect, Chinese investors are not obliged to establish high levels of environmental, labour rights and human rights protection in host states and as such can compromise the relevant standard merely to satisfy political and economic interests.[211]

2.6.3 Definition of "investment"

The definition of "investment" is crucial for the establishment of the jurisdiction of Arbitral Tribunals. The term is usually interpreted in the context of each particular BIT in which it is used, that is, only the interests of investors falling within the scope of an "investment" as defined in the BIT can form the basis of a claim under the BIT.[212] It is also important for identifying the investment the host state wishes to attract.[213]

The Uganda BIT defines investment as every kind of property, such as, goods, rights and interests of whatever nature, while the Djibouti BIT defines it as every kind of asset invested by investors of the home state in the host state in accordance with the laws and regulations of the host state. The Germany BIT, on the other hand, defines investment as every kind of asset invested directly or indirectly by investors of one party in the territory of the other party. The three definitions cover not only capital that has crossed the borders but also all other kind of assets invested by the investor in the territory of the host country.[214]

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The three BITs complement the broad conceptualisation of "investment" by including a non-exhaustive list of covered assets within the definition. The list has five categories of

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[211] OECD 'International Investment Agreements: a survey of environmental, labour and anti corruption issues'. (2008). Available at: www.oecd.org/dataoecd/3/5/40471550.pdf (accessed on 23/3/09)

[212] When there is a definition of a term in the Treaty itself, that definition shall apply and the words used in the definition shall be interpreted in the light of the principle set out in Article 31(1) of the Treaty on the Law of Treaties. Vienna Convention on the Laws of Treaties (1969) Article 31(1) provides, as the main rule for treaty interpretation, that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[213] Only such investments described in the BIT may benefit from the protection and be eligible for a claim to dispute settlement. See OECD (2008). See also Malik (2008).

[214] UNCTAD 'Investor-State dispute settlement and impact on investment rulemaking'.(2007). Available at: http://www.unctad.org/en/docs/iteiia20073_en.pdf (accessed on 5/5/09) at p 22.

assets: first, movable and immovable property and any related property rights, such as, mortgages, liens or pledges; second, various types of interests in companies, such as shares, stock, bonds, debentures or any other form of participation in a company, business enterprise or joint venture; third, claims to money and claims under a contract having a financial value, and loans directly related to a specific investment; fourth, intellectual property rights; and fifth, business concessions, that is, rights conferred by law or under contracts. This list thus includes portfolio investment (which may be undertaken for short term gains or risk diversification purposes) and direct investment, as well as rights to realise economic or commercial activities based on a contract, i.e., the expectation to obtain future profits.

Many Arbitral Tribunals prefer to rely on the non-exhaustive list in the definition of investment, rather than on the broad phrase "every kind of asset". For example, in **Eureko B.V –vs- Poland,**[215] Eureko sought protection for its investments in Poland which allegedly consisted of a 20% shareholding in PZU and rights derived from the shares, such as, corporate governance rights and rights to acquire additional shares in the company upon meeting certain conditions. To establish whether the claimant had made an investment entitled to protection under the 1992 Netherlands-Poland BIT, the ad hoc Arbitral Tribunal noted that the term "investment" under Article 1 of the said BIT is broad and covered, *inter alia*, "…ii) rights derived from shares, bonds and other kind of interests in companies…".It therefore held that corporate governance rights derived from the 20% shareholding in PZU constituted an investment under the BIT.
Similarly, in **Petrobart –vs- Kyrgyz Republic,**[216] the Arbitral Tribunal had to decide whether a contract for the sale of gas condensate, which did not involve any transfer of money or property as capital in a business, qualified as an investment under the Energy Charter Treaty (ECT). The Tribunal found that a right conferred by contract to undertake an economic activity concerning the sale of gas, including a right to be paid for such a sale, is an investment under Article 1 (6) (c) which covers claims to money and claims to performance pursuant to a contract having economic value and associated with an

[215] *Eureko B.V –vs- Republic of Poland, partial award on liability*, 19 August 2005.
[216] *Petrobart –vs- Kyrgyz Republic*, Stockholm Chamber of Commerce case No. 126/2003, final award, 29 March 2005.

investment; and Article 1(6) (f) relating to any right conferred by law or contract permitted by law.

Some Tribunals, however, base their decision on the broad phrase "every kind of asset". For example, in **Fedax –vs- Venezuela**[217] the claimant argued that promissory notes acquired by way of endorsement from the respondent qualified as investments under the Netherlands- Venezuela BIT and the ICSID Convention. The Tribunal held that, according to the BIT, the phrase "every asset" justifies a broad interpretation, and that promissory notes are investments under the BIT and ICSID.

In light of the above, whatever aspect of the definition of investment the Tribunal decides to rely on, its interpretation will be broad. A broad based definition of investment is good for Germany and China, as it ensures that a wide variety of their investors' assets are protected in the capital importing state.[218] However, from the perspective of developing countries it is problematic, as it creates some uncertainty.[219] For example, it may commit developing host countries to permit, promote or protect forms of investment that they did not contemplate at the time they entered into the BIT, and would not have agreed to include within the scope of the BIT had the issue arisen explicitly.[220] In addition, it may commit them to provide treaty coverage to some investments that they may otherwise wish to restrict or control at the current time due to their development strategies, albeit that they plan to liberalise further in the future.[221] Moreover, the inclusion of short term investments (portfolio investments) in the definition has the potential of creating capital volatility in the event of economic turbulence as investors may withdraw investments.[222]

[217] *Fedax N.V –vs- Republic of Venezuela*, ICSID Case No. ARB/96/3, decision on objection to jurisdiction, 11 June 1997, 37 ILM 1378 (1998)
[218] Malik (2008)
[219] Ibid
[220] Consumer Unity and Trust Society (CUTS) international 'Multilateral Framework on Investment.' The International Working Group on Doha Agenda (IWOGDA). (2005). Available at: http://www.cuts-international.org/Scope_Definition.htm (accessed on 26/4/09).
[221] Ibid
[222] Ibid

In light of the above, the Uganda and Djibouti BITs are mis-engineered. The scope of their definition of "investment" should have been narrowed down, by use of exclusions and limitations, to the assets listed. The exclusions may include, *inter alia* : real estate or other property not acquired for the purpose of economic benefit or any other business purposes, for example, a vacation home: and, certain financial assets or transactions perceived as not entailing real acquisitions of interests by a foreign investor in the host country.[223]

For example, Article 9 of the Investment Agreement for the COMESA Common Investment Area (CCIA)[224] excludes from its definition of "investment,"

> "goodwill market share, whether or not it is based on foreign origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods and services to or from the territory of a Member State to the territory of another Member State, or a loan to a Member State or to a Member State enterprise; a bank letter of credit; or the extension of credit in connection with a commercial transaction, such as trade financing".

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The Canada model FIPA (2007) has a similar exclusion.

Limitations could be included in the coverage of assets, such as, portfolio investments and intellectual property rights (IPR). Despite the fact that portfolio investment has the capital volatility characteristic (i.e. may be withdrawn quickly), it can be an important source of capital and foreign exchange for Uganda and Djibouti, and, therefore, capable of providing a positive contribution to their development.[225] Hence, instead of excluding

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[223]UNCTAD 'Bilateral Investment Treaties 1995-2006: Trends in investment rulemaking'.(2007). Available at: http://www.unctad.org/en/docs/iteiia20065_en.pdf (accessed on 5/5/09).

[224]It was adopted at the twelfth Summit of COMESA Authority of Heads of State and Government, held in Nairobi, Kenya, on 22nd and 23rd May 2007. Available at: http://programmes.comesa.int/index.php?option=com_contentandview=articleandid=82andItemid=66andlang=en (accessed on 24/4/09).

[225]CUTS (2005)

it from the definition of "investment", its application could be limited only to investments that have been established for some minimum period of time. [226]

With regard to IPR, its coverage may be limited by requiring that it be associated with a business operating in the developing host state territory.[227] This ensures that simply holding an IPR in a foreign country does not trigger the rights or obligations of the BIT. As a result, the foreign investor must ensure that the investment has a significant operational presence in the host state, not just market share of some form or other.[228] IPR in the CCIA definition has this limitation.[229]

The Uganda and Germany BITs extend their application to all investments without any regard as to the time of establishment, while the Djibouti BIT extends its application only to investments made after its entry into force.[230] Although the Uganda BIT is not retroactive, it applies to all existing investments of investors from China in the territory of Uganda once it enters into force.[231] There is mis-engineering of the Uganda BIT as the 'old' investments which had not been subjected to the approval procedure of the BIT (or current domestic legislation) are included, hence amounting to preferential treatment.[232] China was in this case trying to seek as wide a protection as possible.

The Djibouti BIT includes a limitation to the scope of the investment by stating that the investment must be in accordance with its laws and regulations. This means that Djibouti retains full discretion and control over the admission of the investment into its territory and thus the BIT does not grant any right of establishment to Chinese investors.[233] Such discretion and control may entail formal requirements included in Djibouti's domestic

[226]Ibid
[227]Malik (2008) p 8.
[228]IISD Model International agreement on investment for sustainable development: Negotiators handbook (2005). Available at: http://www.corporateaccountability.org/eng/documents/2005/june_2005_iisd_model_international_agreement_on_investment_for_sustainable_development_negotiators_handbook_pdf_678_kb.pdf (accessed on 30/3/09)
[229]Malik (2008) p 8.
[230]See Article 11 of the Djibouti-China BIT and Article 12 of the Uganda-China BIT
[231]UNCTAD (2007) fn 223 p 6
[232]Dolzer (1995) p 44
[233]UNCTAD (2007) fn 223

legislation, compliance with which may be crucial for determining whether the agreement applies to a particular investment.[234] The purpose of the provision, as explained by the Tribunal in **Salini Costruttori S.p.A and Italstrade S.p.A v. Morocco**[235], is "*to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illega*l". Likewise, the provision emphasises that investment is covered only if it is consistent with the development policy, and other policies, as expressed in the domestic legislation of Djibouti.[236]In addition, it creates a "level playing field" for both foreign and domestic investors as they all have to observe the laws of the land.[237]

In **Fraport –vs-. the Philippines,**[238] the Tribunal declined to exercise its jurisdiction based on the BIT between Germany and the Philippines (1997). It held that, since Fraport was fully aware that it was in breach of domestic law, it had not made an investment "*in accordance with the laws of the Philippines*".

There is a legal mis-engineering of the Uganda BIT as it does not contain a similar emphasis. Uganda has not prevented the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal under its laws or are against its development policies.[239] A Chinese investor can, therefore, intentionally structure an investment in violation of Ugandan law and policies.[240]

Moreover, the three BITs do not contain an interpretative note stipulating that for an asset to be a covered "*investment*" it must have the *"characteristics of an investment"*, such as

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[234]Ibid

[235]*Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco*, decision on jurisdiction, Case No. ARB/00/4 (July 23, 2001), 42 I.L.M. 609 (2003), at para. 46.

[236]UNCTAD (2007) supra fn 223

[237]Ibid

[238]*Fraport AG Frankfurt Airport Services Worldwide – vs- Philippines*, ICSID Case No. ARB/03/25. Award 16 August 2007.

[239]See Tribunal decision in *Salini Costruttori S.p.A. and Italstrade S.p.A., v. Kingdom of Morocco*, (ICSID Case No. ARB00/4), decision on jurisdiction, 16 July 2001, (2003) 42 ILM 606. See also OECD 'Definition of investor and investment in international investment agreements'.(2008).Available at: www.oecd.org/dataoecd/3/5/40471550.pdf (accessed on 23/3/09) at pp 76

[240]See *Fraport AG Frankfurt Airport Services Worldwide* v. *The Republic of the Philippines*,
ICSID Case No. ARB/03/25, award, 16 August 2007, where the Tribunal held by majority that an investment intentionally structured in violation of Philippine Law in order for the investor to gain the prohibited management and control of a project did not qualify as an investment.

"the commitment of capital or other resources, be of a certain duration, the expectation of gain or profit, the assumption of risk, or the contribution to host state development", as stated in **Joy Mining Machinery Limited v. Egypt**.[241] The said provision can be found in Article 2 (2) of the Norwegian draft model BIT and Article 1 of the US-Rwanda BIT (2008).

The provision is important for the developing countries' BITs as it limits the coverage of investments to only those that contribute to host state economic development.

2.6.4 Definition of "investor"

The definition of "investor" is important for African states as it identifies the investors a country wishes to attract. Moreover, it is important in determining the jurisdiction of the Arbitral Tribunal, since being an investor from a state party to the Treaty is a necessary condition of eligibility to bring a claim. [242]

The Uganda and Djibouti BITs have a single definition of "investor" which applies to both parties. An "investor" is defined as either a natural person or a legal person.[243] The natural person needs to have the nationality of either contracting party in accordance with the laws of that contracting party.[244] The legal person must be an economic entity(including companies, corporations, associations, partnerships and other organisations) incorporated and constituted under the laws and regulations of either party, and having their seats (place of administration) within the territory of that party.[245]

The Germany BIT offers two definitions. One relates to Germany the other to China. In respect of Germany, an "investor" is defined as a German within the meaning of the Basic Law of German or a juridical person having its seat in Germany. China, on the

[241]See *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11, decision on jurisdiction, 6 August 2004, where the Tribunal held that even if the term asset is broadly defined, a bank guarantee cannot be termed as an investment. It claimed that it would turn the provision to be a meaningless one.
[242]OECD 'International Investment Law: Understanding concepts and tracking innovations: A companion volume to international investment perspective'. (2008).
[243]Article 1(a) and (b) of the China-Uganda BIT and the China-Djibouti BIT
[244]Article 1(a) of the China-Uganda BIT and the China-Djibouti BIT
[245]Article 1(b) of the China-Uganda BIT and the China-Djibouti BIT

other hand, defines an "investor" as a natural person with China's nationality, or economic entities incorporated and constituted under the laws of China with its seat in China.

All three BITs do not contain a denial of benefit clause providing that each party reserves the right to deny to any company the advantages of the BIT, if nationals of any third country control such company and, in the case of a company of the other party, that company has no substantial business activities in the territory of the other party, or is controlled by nationals of a third country with which the denying party does not maintain normal economic relations.[246] The clause is important to developing countries as it enables them to carve out from the definition of "investor" shell companies owned by nationals of a third country to which they did not intend to offer treaty protection.[247]

In the Austria – Libya BIT (2004) the denial of benefits clause states:-

> "A contracting party may deny the benefits of this Agreement to the investor of the other Contracting party and to its investments, if the investor of a Non-Contracting party own or control the first mentioned investor and that investor has no substantial business activity in the territory of the Contracting party under whose law it is constituted."

The denial of benefit clause, therefore, acts as a filter on the admissibility of claims. This was so stated by the Tribunal in **Generation Ukraine –vs- Ukraine.** In the said case, the claimant was a company registered in the United States (US) and had established a subsidiary in Ukraine. Ukraine invoked the denial of benefit clause (Article 1(2)) of the US – Ukraine BIT to deny the claimant the advantages of the BIT, because the claimant had no substantial business in the US and was in fact controlled by Canadians. The

[246]OECD 'Definition of investor and investment in international investment agreements'. (2008). Chapter 1 of the OECD publication 'Understanding concepts and tracking innovations'. Available at: www.oecd.org/dataoecd/3/5/40471550.pdf (accessed on 23/3/09) at p 32
[247]OECD (2008) fn 246 p 28

Tribunal, in its award, stated that the denial of benefit clause "…is a potential filter on the admissibility of claims which can be invoked by the respondent state".[248]

Similarly, in **Plama –vs- Bulgaria**[249] the ICSID Tribunal stated that the right to deny provision provided for in BITs serves as a filter of the admissibility of claims.

On the basis of the above, the Uganda and Djibouti BITs are mis-engineered, as they do not give them the authority to effectively carve out from the definition of "investor" shell companies owned by nationals of a third country to which they do not intend to offer treaty protection; for example, because they have a record of involvement in corruption activities, environment degradation, and human and labour rights violations. [250]

2.6.5 Investment promotion and protection

Investment promotion and protection provisions in BITs directly aim at encouraging outward or inward foreign investment through particular measures of the contracting parties.[251]

Article 2 of the three BITs state that each party shall (in accordance with its laws and regulations):

> "encourage investors of the other Party to make investments in its territory; accord fair and equitable treatment, constant protection and security of such investments in its territory; refrain from taking any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Party; and provide assistance in and facilities for obtaining visas and working permit to nationals of the other Party engaging in activities associated with investments made in the territory of that Party."

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[248]*Generation Ukraine Inc. –vs- Ukraine*, ICSID Case No. ARB/00/9, 16 September 2003 at paragraph 15.7

[249]*Plama Consortium Limited –vs- Republic of Bulgaria*, ICSID Case No. ARB/03/24, decision on jurisdiction 8 February 2005.

[250]OECD (2008) fn 246 p 76

[251]UNCTAD 'Investment promotion provision in international investment agreement'. (2008) at p 5

The Article is mis-engineered from the perspective of developing African states. It merely concentrates on protection of the investment of Chinese investors, and does not sufficiently address the issue of promotion of investment for purposes of attaining host state economic development. First, it does not provide for exchange of information on market requirements know-how and technology transfer through investment and joint ventures, as well as sharing of expertise on entrepreneurship and management.[252] Linkages between foreign affiliates and domestic firms are important channels through which assets, know-how and technology may be transferred from the former to the latter.[253] They contribute to the upgrading of domestic enterprises, integrating foreign affiliates more firmly into the host economies and promoting a constructive engagement between states.[254] Article 29 of the IISD Model International Agreement on Investment for Sustainable Development (IISD Model) is a good example of such a provision.

Secondly, it does not provide for promotion by the Chinese investors of technology transfer, as well as technical and managerial training of citizens of host African countries.[255] This can be achieved by expressly requiring Chinese investors: to refrain from imposing restrictive clauses in technology transfer contracts with their affiliates and licensees that prevent absorption and assimilation of technology transferred; and, to provide information on transferred technologies (especially data on availability of substitute technologies, information needed for technical, institutional and financial assessment of the technology transfer transactions).[256] Moreover, it could provide for the establishment of a technical assistance committee whose mandate would be to promote, facilitate and support, through technical assistance, the attainment of sustainable development. Article 37 of the IISD Model proposes the establishment of such a committee. The aforesaid express provision and the committee would ensure that the technology transferred is meaningful and appropriate to the host African state thereby supporting further innovation.[257]

[252]UNCTAD (2008) fn 251 pp 45-48.
[253]Ibid
[254]Ibid
[255]Yu (2008).
[256]Ibid
[257]Ibid

Thirdly, there is no mention of the establishment of an institutional framework between the parties to be employed to overlook the implementation of the agreement; monitor investment relations; forward proposals on how best to promote foreign investment between the parties; and organise workshops or fairs on investment opportunities with the participation of foreign investors.[258] Moreover, the institutional framework would be utilised to modify existing investment promotion activities and terminate those that prove to be ineffective.[259] Article 23(1) of the Norwegian draft model BIT establishes such an institution, known as the joint committee.[260]

Fourthly, it does not provide for granting host states a right to seek information from potential Chinese investors, or their home state, about its corporate government history and investor practices. This information is important for the state and the local communities, as it will enable them to make an informed decision about an investment.[261] Further, it heightens the role of the community as they are able to participate in pre-establishment decision making,[262] leading to community empowerment. [263]

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2.6.6 Treatment of investments

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[258]UNCTAD (2008) fn 251 pp 45-48.
[259]UNCTAD (2008) fn 251 p 79.
[260]It states, inter alia, that "*The Parties hereby establish a Joint Committee composed of representatives of the Parties... The Joint Committee shall: supervise the implementation of this Agreement;…where relevant, suggest to the Parties ways to enhance and promote investment action;…where relevant, discuss issues related to corporate social responsibility, the preservation of the environment, public health and safety, the goal of sustainable development, anticorruption, employment and human rights, …*"
[261]Article 28 (Commentary) IISD Model p 40.
[262]This means that when information gathered about an investor and investment is forwarded to the community, they are able to communicate their views. The host state can use these views in pre-establishment decision making.
[263]Article 28 (Commentary) IISD Model p 40.

A country's treatment of foreign investors and their investments is very important for purposes of attracting FDI.[264] Certain general standards are used in international practice to secure a particular level of treatment for FDI in host countries which would ensure that parties treat investments of investors of the other party in a manner that is equal and fair, not less favourable than that it accords to the investments and associated activities of its own investors (National Treatment), and not less favourable than that it accords to the investments and associated activities by the investors of any third State (Most Favoured Nation treatment).[265]

2.6.6.1 <u>Fair and equitable treatment</u>

Fair and equitable treatment is an absolute standard that grants protection to a foreign investor independently of the host state's treatment of its nationals or nationals of a third state.[266]

Articles 3(1) of the three BITs provide that *"investments of investors of each Contracting Party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party."*. The clause fails to define "fair and equitable treatment" as well as make reference to international law.

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The absence of a reference to international law leads to an interpretation that "fair and equitable treatment" envisages conduct "*which goes far beyond the minimum standard and afford[s] protection to a greater extent and according to a much more objective standard than any previously employed form of words*"[267]. Therefore, in ascertaining the content of the fair and equitable standard in a dispute, one would have to inquire, on a case by case assessment, whether "*in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable*". [268] In effect, this would amount to the application of the plain meaning of the words "fair and equitable" to each individual case,

[264]Dolzer (1995)
[265]Article 3 of the Uganda-China BIT and the Djibouti China BIT
[266]Schill (2007)
[267]UNCTAD 'Fair and equitable treatment' UNCTAD series on issues in International Investment Agreements (1999) referring to Mann F. (1990*) British treaties for the promotion and protection of investments* pp 234-251.
[268]Ibid

independently of other standards. This, in practice, would mean giving considerable discretion to the Tribunal entrusted with determining whether a breach of the standard has occurred, bearing in mind the subjectivity inherent in the notions of fairness and equity.[269] This has the potential of making numerous governmental regulatory actions inconsistent with the obligations of the BIT, regardless of whether those measures were adopted and implemented on a non-discriminatory basis.[270]

Conversely, when reference is made to international law, violation of fair and equitable treatment has been dealt with on a case by case basis by Arbitral Tribunals. For example:

a) In **United Mexican States –vs- Metalclad Corp.**[271] and **Emilio Augustin Maffezini –vs- The Kingdom of Spain,**[272] the Tribunals stated that violation of the fair and equitable standard would be established if government conduct was unjust due to: lack of transparency and predictable laws that protect investors against a reversal of decisions; inconsistent actions by different government organs; and, arbitrary changes of the law.

b) The Arbitral Tribunal in **Waste Management Inc. –vs- United Mexican States**[273] affirmed that violation of the said standard would arise if the government conduct was arbitrary; grossly unfair; unjust or idiosyncratic; and, discriminatory (e.g. exposes the investor to sectional and racial prejudice).

c) In **Pope and Talbolt –vs- Canada**[274] the Tribunal avowed that if the government wilfully disregards the due process of the law and lacks procedural propriety, the host state would be in violation of the standard.

d) The Tribunal in **Mondev International limited –vs- United States**[275] averred that unfair and inequitable treatment of foreign investors will be established where government conduct was improper and discreditable.

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[269]Ibid

[270]UNCTAD (2007) fn 223 pp 31 and 32

[271]*United Mexican States –vs- Metalclad Corp*., Judgment, Supreme Court of British Columbia, 2 May 2001, 5 ICSID Reports 236. See also Schreuer C. 'Fair and equitable treatment in Arbitral practice' (June 2005)6. Journal of world investment and trade. Available at: http://www.univie.ac.at/intlaw/pdf/77.pdf (accessed on 1/5/09).

[272]*Emilio Augustin Maffezini –vs- The Kingdom of Spain*, award, 13 November 2000, 5 ICSID Reports 419. See also Schreuer(2005)

[273]*Waste Management Inc. –vs- United Mexican States*, award, 30 April 2004.See also Schreuer (2005)

[274]*Pope and Talbolt –vs- Canada*, award in respect of damages, 31 May 2002. See also Schreuer (2005)

e) In **Tecmed –vs- Mexico**[276] and **Pope and Talbot –vs- Canada** the Tribunal asserted that unfair and inequitable treatment of investors means hostile treatment, harassment, and coercion by government authorities.

From the above arbitral jurisprudence, it follows that fair and equitable treatment under international law includes: the requirement of stability and predictability of the legal framework and consistency in the host state's decision making; the principle of legality; the protection of investor confidence or legitimate expectations; procedural due process and denial of justice; protection against discrimination and arbitrariness; the requirement of transparency; and, the concept of reasonableness and proportionality.[277] Violation of these government obligations would be found in fewer cases than if fair and equitable treatment were accorded its plain meaning. Therefore, the aforesaid mis-engineering of failure to clarify the meaning of "fair and equitable treatment", and limiting its meaning to the minimum standard of treatment, give a very wide ambit to the duty of treatment of host states as there is no clear limit to its applicability. This significantly impairs the flexibility and discretion of the Djibouti and Uganda governments to regulate, and to pursue, their public policy objectives.[278]

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2.6.6.2 National Treatment

National Treatment in a BIT context means *"the obligation of contracting parties to grant investors of the other contracting party treatment no less favourable than the treatment they grant to investments of their own investors"*.[279] The effect of this is to create a level playing field between foreign and domestic investors in the relevant market.[280] This is disadvantageous for host countries as it distorts the growth of its domestic and infant industries.[281]

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[275] *Mondev International limited –vs- United States*, ICSID Case No. Arb (AF)/99/2, award of 11 October 2002. See also Schreuer (2005)

[276] *Tecmed –vs- Mexico*, ICSID Case No. Arb (AF)/00/02, award of 29 May 2003. See also Schreuer (2005)

[277] Schill(2007)

[278] UNCTAD (2007) fn 223 pp 31 and 32

[279] UNCTAD (2007) fn 223 p 33

[280] Ibid

[281] UNCTAD (1999) 'National Treatment'. UNCTAD series on issues in International Investment Agreements. UNCTAD/ITE/IIT/II (Vol. IV) at p 47

National Treatment contains two different concepts: "pre-admission" National Treatment and "post-admission" National Treatment.[282] "Pre-admission" National Treatment refers to any requirements placed upon the incoming investment or investor as a prerequisite for admission into the host state. Some examples of this type of regulation include restrictions or prohibitions on investing in certain sectors of the economy, local inputs requirements, export requirements, use of local labour, or local ownership requirements.[283] "Post-admission" National Treatment refers to any regulations, including taxation, licensing, and health and safety laws, imposed on the investment (or its associated activities) after it has already been established.[284] The three BITs refer to post-admission National Treatment. This is good for the developing African states as it allows them to put into place policies on market access (i.e. who can have access to their internal investment environment) and to impose any conditions they may consider necessary.[285] This helps them to preserve national development goals, security and protection of public morals.[286]

For policy space purposes, the Uganda and Djibouti BITs are mis-engineered as, first, they do not provide for exceptions to National Treatment.[287] There are stark inequalities in economic power, technical capabilities and financial strength between China on the one hand, and Djibouti and Uganda, on the other. Certain differentiation between national and non-national firms is thus necessary to bring about a degree of operative equality.[288] The exceptions would therefore enable Uganda and Djibouti to exclude certain types of

[282]Reading M. 'The bilateral investment treaty in ASEAN: A comparative analysis'. (1992)42. Duke Law Journal pp. 679-705. Available at: http://www.jstor.org/stable/1372842.pdf (accessed on 27/03/2009) at pp 699
[283]Ibid
[284]Ibid
[285]Countries have the sovereign right under public international law to place checks on the entry of aliens into their countries be they natural or artificial persons. See Mosoti (2003) p 1022 and 1029
[286]Mosoti (2003) p 1022 and 1029.
[287]Article 3 (2) of the China-Djibouti BIT and the China-Uganda BIT state "*Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favourable than that accorded to the investments and associated activities by its own investors*."
[288]UNCTAD (1999) fn 281 p 3

enterprises, industries or activities from the operation of National Treatment thereby allowing policy flexibility while maintaining National Treatment.[289]

The most relevant type of exception would be the industry specific exception, whereby a contracting party reserves the right to treat domestic and foreign investors in certain types of activities or industries differently under its laws and regulations for reasons of national economic and social policy.[290] The most common method of doing so is to "opt out" of the general National Treatment obligation, typically by way of an annex of reserved industries and activities which fall outside the scope of the National Treatment obligation, and in which differential treatment is possible.[291] The Norwegian draft model BIT uses this approach. Article 3 (2) states: "*National treatment shall not apply to the reservations set out in Annex [A].*"

This approach may, however, curtail the ability of a host country to distinguish between domestic and foreign investments as it may be difficult to identify with precision all the industries and activities to which national treatment should not apply.[292]

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Article 18 (4) of the CCIA investment Agreement addressed the said problem by allowing for review of the reserved industries list. Article 18 of the said Agreement states:

> "This Agreement shall not apply to the Temporary Exclusion List and/or Sensitive List which a Member State may submit provided the Temporary Exclusion List and/or Sensitive List is submitted to the CCIA Committee within six months after the date of ratification and accession to this Agreement…The Sensitive and Temporary Exclusion Lists shall be reviewed every two years and at such subsequent periodic intervals as may be decided by the CCIA Committee."

[289]UNCTAD (1999) fn 281 p 12
[290]UNCTAD (1999) fn 281 p 46
[291]Ibid
[292]UNCTAD (1999) fn 281 p 64

Another method is using The General Agreement on Trade in Services (GATS) "opt-in" hybrid model (also known as the "progressive liberalisation" model) whereby the obligation of National Treatment will not be a general obligation applicable to investments in all industries and sectors and by all parties, but a specific commitment applying only in industries and sectors inscribed in a party's schedule.[293] The application is to be gradually extended to other sectors through successive rounds of negotiations. Furthermore, if a state decides to include a sector in its schedule, it retains the possibility of deciding the level of National Treatment it proposes to grant in that sector by listing specific limitations it wishes to maintain.[294] Those limitations could actually be specific discriminatory measures that are inconsistent with the national treatment standard. Hence, by scheduling them, a party maintains the legal right to continue to apply them.

These approaches enable a government to "*sequence the level of support that it gives to domestic investors while shrewdly anticipating to grant some scale-back support to both local and foreign investors or to completely eliminate such support at a certain point in future*".[295] The power and economic asymmetries are thus recognised, hence helping the struggling domestic industry to be able to compete with external or foreign investment bringing about a degree of operative equality.[296]

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Secondly, the BITs do not specify, in their National Treatment provisions, that the treatment concerned will be that which the host country accords to its own investments "in like circumstances". The qualification "like circumstances" refers to broad objective characteristics of a business, for example, its economic sector, the size of the business or its geographical location.[297] In **S.D Myers –vs- Canada,**[298] the Tribunal interpreted the term "like circumstances" by referring to the economic sector. It stated, *inter alia*, that:

[293]UNCTAD (1999) fn 281 p 12
[294]Ibid
[295]Mosoti (2003) p 1020
[296]Mosoti (2003) p 1021
[297]Wandrag R. 'SACU – US FTA: Investment issues' (2006) South African Institute of International Affairs (SAIIA) at pp 16 and 17.
[298]*SD Myers –vs- Canada*, UNICITRAL award of 12 November 2000. Available at: http://www.naftaclaims.com/Disputes/Canada/SDMyers/SDMyersMeritsAward.pdf (accessed on 4/5/09)

> "…. The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is in the same "sector" as the national investor. The Tribunal takes the view that the word "sector" has a wide connotation that includes the concepts of "economic sector" and "business sector… From the business perspective, it is clear that SDMI and Myers Canada were in "like circumstances" with Canadian operators such as Chem-Security and Cintec. They all were engaged in providing PCB waste remediation services. SDMI was in a position to attract customers that might otherwise have gone to the Canadian operators because it could offer more favourable prices and because it had extensive experience and credibility..."

The qualification ("like circumstances") infers that National Treatment is a comparative standard that should only be applied in comparative circumstances.[299] This, therefore, allows preferential treatment of domestic investors (and, therefore, "less favourable" treatment of foreign investors) on the basis of their actual economic conditions, such as, "infant industries" or "minority industries" or economic/business sector.[300] This gives African governments policy space to pursue national policies through preferential rules and regulations.[301] For example, preferential regimes for small and medium businesses would not have to be extended to include large multi national corporations, as they would not compete in "like circumstances".[302]

Lastly, the two developing countries' BITs do not include a development clause in their National Treatment provision; hence they are mis-engineered. This means that Uganda and Djibouti are obliged to grant the same privileges, benefits and incentives (for example, special policies and programmes that they grant to domestic industries to stimulate their growth and competitiveness) to Chinese investors thereby further

[299]Wandrag (2006) pp 16 and 17.
[300]Wandrag (2006) p 17
[301]UNCTAD (1999) fn 281 p 26. See also Wandrag (2006) at p. 17.
[302]Wandrag (2006) p 17.

strengthening the foreign investor's competitiveness.[303] The development clause allows preferential treatment in relation to legally specified development measures (for example investment incentives for domestic investors for purposes of economic development of the host state) provided they do not substantially impair investments by foreign investors.[304]

The Netherlands- Jamaica BIT contains such a clause. Its Article 3 (6) states:

> "*Special incentives granted by one Contracting Party only to its nationals in order to stimulate the creation of local industries are considered compatible with this Article, provided they do not significantly affect the investments and activities of nationals of the other Contracting Party in connection with an investment*."[305]

2.6.6.3 Most Favoured Nation (MFN) treatment

The MFN treatment standard means that investments or investors of one contracting party are entitled to treatment by the other contracting party that is no less favourable than the treatment the latter grants to investments or investors of any other third country.[306] The MFN standard seeks to prevent discrimination against investors from foreign countries on grounds of their nationality, and therefore establishes, at least in principle, a level playing field between all foreign investors protected by a BIT. [307] MFN treatment may be based upon a treaty; another agreement; a unilateral, legislative or other act; or mere practice.[308]

The MFN standard, therefore, ensures that investments or investors of contracting parties to a BIT receive the best treatment that each of them has granted to the investments or

[303]UNCTAD (1999) fn 281
[304]UNCTAD (1999) fn 281
[305]The Government of the Kingdom of the Netherlands and the Government of Jamaica BIT is available at: http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_jamaica.pdf (accessed on 5/5/09)
[306]UNCTAD (2007) fn 223 p 38
[307]UNCTAD (1999) 'Most-Favoured-Nation Treatment.' UNCTAD series on issues in International Investment Agreements. UNCTAD/ITE/IIT/10 (Vol. III).
[308]OECD (2005) 'Most Favoured Nation Treatment'. OECD series on International Investment Law: A changing landscape.

investors of any other third country.[309] At the same time, the MFN standard sets certain limits upon host countries with regard to their present and future investment policies, by prohibiting them from favouring investors of one particular foreign nation over those of another foreign country.[310]

However, not all treatment given by a host country to foreign investors falls under the scope of the MFN provision. In order to be covered by the MFN clause, the treatment has to be the general treatment usually provided to investors from a given foreign country.[311] Therefore, if a host country granted special privileges or incentives to an individual investor in an investment contract between it and the host country (so-called “one-off” deals), there would be no obligation under the MFN clause to treat other foreign investors equally. The reason is that a host country cannot be obliged to enter into an individual investment contract.[312] Freedom of contract prevails over the MFN standard. Only if this individual behaviour became general practice in the host country, for example, if an incentive is granted under a general subsidy programme, would the MFN provision apply. It may be difficult to decide at what point an individual practice, which has been repeated in several cases, becomes general treatment. The relevance of MFN in this particular instance is that all foreign investors should be treated equally for purposes of being potential candidates for the special privilege or incentive which, in practice, could only be granted to one individual investor.[313]

Article 3 (3) of the three BITs are identical. For policy space purposes, there is mis-engineering of the Djibouti and Uganda BITs with China, as the MFN clause, first, does not contain a statement averring that MFN applies only to investments that are “in like situations”. This impedes Djibouti and Uganda from treating different categories of investment differently, or from differentiating between enterprises of different sizes, as long as fairly objective and defensible criteria are used in making such distinctions.[314]

[309]UNCTAD (2007) fn 223 p 38
[310]UNCTAD (1999) fn 307
[311]Ibid
[312]Ibid
[313]Ibid
[314]Mosoti (2003) p 1025. See also UNCTAD (1999) fn 307 p 7

Secondly, the BITs do not provide for general exceptions to MFN and National Treatment. The BITs should allow contracting parties to derogate from the non-discrimination standard, for purposes of maintenance of public order, public health or public morality; and for national security reasons.[315] For example, Article 24 of the Norwegian draft Model BIT (2007) permits the host state to adopt measures that discriminate between investors or between investments. It states that:

> " i)to protect public morals or to maintain public order;[316]ii)to protect human, animal or plant life or health; iii) to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; iv) for the protection of national treasures of artistic, historic or archaeological value; or v) for the protection of the environment."

Article 22 (1) of the CCIA Investment Agreement contains a similar provision.

Thirdly, the BITs do not provide for country specific negotiable exceptions that provide leeway to countries to make MFN exceptions with regard to any measure or sector.[317] These exceptions are normally set out by the parties to a BIT in its Schedule.[318] They include those measures maintained or intended, and discriminatory policies that may not be consistent with its MFN treatment.[319] For purposes of development, inclusion of the said exceptions would enable Djibouti and Uganda to steer foreign investors into those activities they consider particularly important for their economic development and thereby contribute to acceleration and deepening of the process of industrial development.[320]

[315]UNCTAD (1999) fn 307 p 15
[316]The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society
[317]Mosoti (2003) p 1025
[318]Mosoti (2003) pp 1027 and 1028
[319]Ibid
[320]That is, those activities they can reasonably expect to acquire a comparative advantage hence promote production in such areas. See UNCTAD (1999) fn 307 p 38

2.6.7 Expropriation

Expropriation is the involuntary forced divestment of FDI.[321] Expropriation can take different forms. First, it can be *direct,* where an investment is nationalised or otherwise directly expropriated[322]through formal transfer of title or outright physical seizure.[323] Secondly, it can be *indirect,* [324]where the state interferes with the use of that property, or with the enjoyment of the benefits accruing there from, even where the property is not seized and the legal title to the property is not affected.[325]

A state has a right to nationalise foreign owned property for: legitimate public welfare measures (e.g., health, environment or safety regulations); public interest measures; and legitimate measures necessary to protect public morals, public order, human, animal or plant life or health, safety, national treasures of artistic, historic, or archaeological value, or for the conservation of exhaustible natural resources.[326] Further, exercise of the right should not be discriminatory and compensation should be provided.[327]

Not all state measures interfering with property amount to expropriation. It has been stated that:

> "State measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of

[321]Kobrin S. 'Expropriation as an attempt to control foreign firms in LDCs: Trends from 1960 to 1979'. (1984)28. International Studies Quarterly, pp. 329-348. Available at: http://www.jstor.org/stable/2600634 (accessed: 30/03/2009).

[322]'Expropriation applies to individual measures taken for a public purpose while nationalisation involves large-scale takings on the basis of an executive or legislative act for the purpose of transferring property or interests into the public domain ' See OECD 'Indirect expropriation and the right to regulate in international investment law'. (2005) at p 45

[323]International law is clear that a seizure of legal title of property constitutes a compensable expropriation. See OECD (2005) fn 322 p 46

[324]Also referred to as "de facto", "disguised", "constructive" or "creeping" expropriation. See Kobrin (1984)

[325]OECD (2005) fn 322 p 45

[326]This is now generally accepted. See Sornarajah M. (1994) *The International Law on Foreign Investment* at Chapter 6

[327]Property of aliens cannot be taken, whether for public purposes or not, without adequate compensation .This is a well recognized rule of public international law. See OECD (2005) fn 322 and Sornarajah (1994) Chapter 6.

devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation".[328]

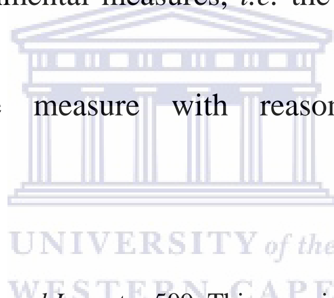
In addition, non-discriminatory measures related to application of competition law to an investment, consumer protection, securities, environmental protection and land planning are non-compensable takings as they are regarded essential to the efficient functioning of the state.[329]

There is a thin line between the concept of indirect expropriation and non-compensable regulatory governmental measures.[330] Hence, Tribunals have established some criteria to distinguish these concepts and these are:

i) the degree of interference with the property right[331],

ii) the character of the governmental measures, *i.e.* the purpose and the context of the governmental measure,[332] and

*iii)*the interference of the measure with reasonable and investment-backed expectations[333]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[328]Brownlie I. (2003) *Public International Law* at p 509. This was similarly quoted in OECD (2005) fn 322 p 47

[329]OECD (2005) fn 322 p 47 referring to Sornarajah (1994) p 283.

[330]OECD (2005) fn 322 p 71

[331]Several BIT Tribunals have recently retained the criterion of the severity of the impact (substantial deprivation) to qualify an act by a state as an expropriation. For example, in *CME (Netherlands)* v. *Czech Republic* (Partial Award) (13 September 2001). Available at: http://www.biicl.org/files/3919_2003_cme_v_czech_republic.pdf (accessed on 30/3/09), the Tribunal found that an expropriation had occurred because the Media Council caused the destruction of the operation of the company in question to the extent that it became a company "*with assets, but without business*". It stated also that although "*regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the host state*" the administrative measures taken by the host country did not fall under such a category.

[332]Governments have the right to protect, through non-discriminatory actions without compensation hence a governmental measure taken for purposes of promoting generally recognised considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no 'taking'. For example, in *Lauder* v. *The Czech Republic* (Final Award) (3 September 2002), the Tribunal commented on the interference with property rights by stating that: "… Parties to [the Bilateral] Treaty are not liable for economic injury, that is, the consequence of *bona fide* regulation within the accepted police powers of the State". This was so quoted in OECD (2005) fn 322 p 68

[333]Investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of economic and political system and even revolution. If any of these risks materialises it does not necessarily mean that property rights affected by such events can be deemed to have been taken. This was so stated in *Starret Housing Corp.* v. *Iran, 4 Iran-United States* Cl. Trib. Rep. 122, 154 (1983) as quoted in OECD (2005) fn 322 p 69

Article 4 of the three BITs allows a host state to expropriate the investments of Chinese investors, or take any other measures having the effect of dispossession, provided it is for the public benefit and compensation is paid.

For developmental purposes, the Uganda and Djibouti BITs are mis-engineered as they neither explain “other similar measures”[334] or “any other measures having the effect of dispossession” [335]nor establish any criteria to identify such measures. The words are broad enough to suggest that every measure substantially impairing the value of an investment could be challenged as an indirect expropriation. A broad concept of indirect expropriation could have the effect of converting a country's routine regulatory acts into a potential indirect taking, and, consequently, entailing compensation in favour of the affected foreign investor.[336]

Recent Arbitral Tribunals have identified the above problem, and have opted to give “expropriation” a more restrictive interpretation, despite the presence of the words “other similar measures” or “any other measures having the effect of dispossession”.[337] For example, in **Saluka Investments BV (The Netherlands) –vs- The Czech Republic**[338] the Tribunal ruled that bona fide regulations, adopted in a non-discriminatory manner, aimed at the general welfare, would not be regarded as expropriation.

Similarly, in **Methanex Corporation –vs- United States**[339] the Tribunal held that non-discriminatory regulations for a public purpose, if enacted with due process, will not amount to expropriation if it affects, amongst others, a foreign investor or investment, unless specific commitments have been given by the regulating government to the then

[334]Article 4(I) of the China-Djibouti BIT
[335]Article 4(I) of the China-Uganda BIT
[336]UNCTAD fn 223 p 44
[337]Wandrag (2006) p 17.
[338]*Saluka Investments BV (The Netherlands) –vs- The Czech Republic* Partial Award, March 17, 2006 http://www.investmentclaims.com/decisions/Saluka-CzechRep-Partial_Award.pdf . The summary of the case was extracted from Wandrag (2006) p 20.
[339]*Methanex Corporation v United States*, Final Award, 9 August 2005. The summary of the case was extracted from Wandrag (2006) at p 20.

putative foreign investors contemplating investment that the government would refrain from such regulation.

The above two cases demonstrate that Arbitral Tribunals are in support of the need of governments' policy space.[340] Despite this recognition, African states need to negotiate for "similar measures" or "any other measures having the effect of dispossession" to be expressly defined in the BITs. This is because there is no doctrine of precedents in international investment arbitration.[341]

More recent investment agreements are defining the said terms. For example, the United States- Rwanda BIT (2008) offers the following definition of "measures equivalent to expropriation":

> "*The second situation addressed by Article 6(1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.*
>
> *(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by case, fact-based inquiry that considers, among other factors:*
>
> *(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;*
>
> *(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and*
>
> *(iii) the character of the government action.*
>
> *(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare*

[340]Wandrag (2006) p 17.
[341]Yu (2008)

objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[342]

Further, Article 4 (2) of both the Uganda and Djibouti BITs state that prompt compensation should be equivalent to the real value of the investment before the expropriation is taken or the impending expropriation becomes public knowledge, whichever is earlier. It however fails to provide for a valuation criteria to determine the said real value as well as incidences when compensation may be adjusted. Hence, an Arbitral Tribunal may decide to award "full compensation" which may include all future profits lost thus neutralising the economic and developmental objective behind the expropriation.[343]

In light of the above, there is a need to balance the foreign investor's desire to be fully compensated for its loss and the policy reasons behind the host state's lawful expropriation, when determining the value of compensation.[344] Most Tribunals have found the "going concern" (fair market value) approach as the best valuation method to strike such a balance.[345] This method takes into account not only the net book value of the assets (both tangible and intangible) of the expropriated concern but also the goodwill, and future prospects and the ability to earn revenue[346]. It thus emphasises the real commercial prospects of the expropriated undertakings as the basis of calculating compensation.[347] Therefore, where these prospects are shown to be poor the amount of compensation awarded is considerably discounted.[348] This thus means that loss of future profits, per se, is not recoverable in the case of lawful compensation and the right to full restitution is not guaranteed in all circumstances.[349]

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[342]United States-Rwanda BIT (2008) at in Annex B paragraph 4
[343]Muchlinski P. 2ed(2007). *Multinational Enterprises and the Law* at pp 587-620
[344]Ibid
[345]Ibid
[346]Mouri A. (1994) The international law of expropriation as reflected in the work of the Iran-U.S. claims tribunal at pp 420-430
[347]Ibid
[348]Ibid
[349]Mouri (1994). See also Muchlinski (2007)

For example, in **Amoco International Finance Corp. –vs- Iran**[350] the Tribunal rejected the net book value method of valuation proposed by Iran and instead adopted the going concern method that is based on the concept of legitimate expectations. This was also the position of the Tribunal in **American International group –vs- Iran**[351].

Moreover, the amount of compensation awarded can further be reduced by the amount of any direct state investment, state subsidy or aggravating conduct of the investor.

The going concern valuation method and the adjustments to compensation have been adopted by recent International Investment Agreements. For example, Article 8(b) of the IISD Model Agreement states, *inter alia*, that:-

> "Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value. Compensation may be adjusted to reflect aggravating conduct by an investor or conduct that does not seek to mitigate damages."

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In addition to the above, the BITs do not allow for burdensome compensation to be paid in instalments[352] where interest will be at the rate established by agreement between the parties or by a competent Tribunal, as provided for in Article 20 (5) of the CCIA investment Agreement. The said Article states that:

> "On payment, compensation shall be freely transferable. Awards that are significantly burdensome on a host state may be paid yearly over a period agreed by the Parties, subject to interest at the rate established by agreement of the disputants or by a Tribunal."

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[350] *Amaco International Finance Corp. –vs- Iran*, 15 Iran-US CTR 189 (1987 II). Extracted from Muchlinski (2007)

[351] *American International Group –vs- Iran*, 4 Iran-US CTR 96 (1985). Extracted from Muchlinski (2007)

[352] For example, the IISD Model provides that burdensome compensation can be paid over a period of at least three years, or such other periods the parties may agree upon.

This clause is important because Uganda and Djibouti are both LDC's[353] and as such, in certain situations, may not be able to pay compensation promptly because of financial difficulties.

2.6.8 Transfers

Investors invest in foreign countries to make profits and repatriate them to the home state.[354] Therefore, they require a guarantee that they shall not be prevented by the host state from doing so.

Article 6 of the China-Djibouti BIT and China – Germany BIT as well as Article 7 of the China-Uganda BIT guarantee Chinese investors (and vice-versa) that they will be able to transfer their investments and returns to their home states.[355] The China-Djibouti BIT further subjects the said guarantee to its laws and regulations.

Unlike the Djibouti BIT, the Uganda BIT has a Balance of Payment (BoP) exception which provides that the right of repatriation of profits may be temporarily restricted in:

> "...serious balance of payments difficulties and external financial difficulties or the threat thereof… provided that this restriction: i) shall be promptly notified to the other party; ii) shall be consistent with the articles of agreement with the International Monetary Fund; iii) shall be within an agreed period; iv) would be imposed in an equitable, non discriminatory and in good faith basis"[356]

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The "BoP exception" is important for situations in which the host country is experiencing extremely low levels of foreign currency reserves and thus finds it exceptionally difficult to convert and transfer funds related to investments.[357] The provision therefore allows the

[353] UNCTAD 'UNCTAD list of LDC's. Available at: http://www.unctad.org/Templates/Page.asp?intItemID=3641andlang=1 (accessed on 30/3/09)
[354] Sornarajah (1994) Chapter 6
[355] The provision does not prevent the host state from the imposition of taxes or other normal government fees. This fact is further buttressed in Article 7 (4) of the China-Uganda BIT
[356] Article 7 (4) of the China-Uganda BIT
[357] Negotiators hand book of the IISD Model investment Agreement. Available at:

Ugandan government to manage all currency flows in the event of a BoP crisis without being in breach of the BIT. The omission of the provision in the Djibouti BIT is a mis-engineering.

Both BITs provide that the transfer shall be made in a *"freely convertible currency and at the prevailing market rate of exchange applicable within the parties accepting the investments and on the date of transfer"*.[358] The said provision does not permit the parties to either use the currency in which the investment was originally made or agree on the convertible currency to use, hence, it is mis-engineered. The importance of framing the provision as such is that it provides the host state with some flexibility, since it is given the opportunity to agree with the investor on the currency to be used.[359] In the absence of an agreement, transfers are effected in the currency in which the capital was originally invested.[360] Moreover, the host state would not have to use its foreign exchange reserves to comply with the obligation if the capital was originally invested in domestic currency.[361]

The transfer provision should not prevent parties from ensuring compliance with other measures relating to matters such as bankruptcy, trading in securities, criminal acts or compliance with resolutions of Tribunals.[362] Both BITs do not provide for such specific exceptions to the transfer Article and are thus mis-engineered.

Article 10(c) of the IISD Model Agreement is a good illustration of the specific exception provision for transfers. It provides that:

> "Notwithstanding Paragraphs (A) and (B), a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:
>
> i) bankruptcy, insolvency or the protection of the rights of creditors;

http://www.corporateaccountability.org/eng/documents/2005/june_2005_iisd_model_international_agreement_on_investment_for_sustainable_development_negotiators_handbook_pdf_678_kb.pdf (accessed on 30/3/09)

[358]Article 6 (3) of the China-Djibouti BIT and Article 7(3) of the China Uganda BIT

[359]UNCTAD (2007) fn 223 p 60

[360]Ibid

[361]Ibid

[362]Negotiators handbook – IISD Model Agreement. See also UNCTAD (2007) fn 223 p 62

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ii) issuing, trading or dealing in securities;

iii) criminal or penal offences;

iv) reports of transfers of currency or other monetary instruments; or

v) ensuring the satisfaction of judgments in adjudicatory proceedings."

Both BITs do not address the issue of speculative capital inflows as they do not have a provision requiring all capital inflows to remain in the country for at least one year. This provision is important as it preserves the flexibility of host states to appropriately administer financial and monetary policies.[363]

2.6.9 Performance requirement

Generally FDI flows are expected to facilitate industrialisation and development of host countries by enabling them to tap the resources of MNEs, such as, production technology, organisational and managerial skills, marketing know-how, and marketing networks. Host countries also expect to benefit from knowledge spill-over and other favourable externalities from FDI.[364] However, there is considerable variation in the 'quality' of FDI inflows and not all of them benefit host countries equally.[365] Therefore, governments use performance requirements to improve the overall quality of FDI inflows.[366] For example, they impose local content requirements on MNEs and/or their affiliates to intensify generation of local linkages; or impose export obligations in order to expand the contribution of FDI to the expansion of manufactured exports of the host state.[367]

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Developed countries extensively employed performance requirements in their process of development especially when they were net importers of capital. For example, in the 19th century, the US was a capital importing country and had restrictions on foreigners'

[363]UNCTAD (2007) fn 223 p 62.

[364]Kumar N. 'Performance requirements as tools of development policy: Lessons from experiences of developed and developing countries for the WTO agenda on trade and investment'(2003)RIS discussion paper No. 52. Available at: http://www.ris.org.in/dp56_pap.pdf (accessed on 31/3/09)

[365]Ibid

[366]Ibid

[367]Ibid

ownership in agricultural land, mining, and logging.[368] Furthermore, it discriminated against foreign firms in banking and insurance, prohibited foreign investment in coastal shipping, reserved the directorships of national banks for American citizens, deprived the foreign shareholders of voting rights in the case of federally-chartered banks, and prohibited the employment of foreign workers by foreign firms.[369] Similarly, in the post-World War II period Australia imposed 50 percent domestic ownership requirement in natural resource projects, and also employed offsets policy under which larger government contracts required new domestic activity of 30 percent of their import content.[370]

The form of these performance requirements employed by developed countries in the 1990s changed in favour of trade policy measures that achieve the same objectives but are consistent with the provisions of TRIMs. These include rules of origin[371] to increase domestic value addition, voluntary export restraints and anti-dumping.

Both BITs do not contain a performance requirement provision therefore the parties are free to use performance requirements measures as far as they are imposed as a condition for the establishment of the investment or applied afterwards on a non-discriminatory basis.[372] However, because such measures are often applied on a case by case basis, conflicts with other rules, such as the National Treatment or MFN obligations, may occur.[373] To avoid this situation, such measures should be expressly allowed in the BITs and exempted from being found in breach of the agreement through a provision deeming them to be in compliance.[374] In effect, pre-establishment performance requirement

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[368]Ibid
[369]Ibid
[370]Kumar ibid
[371]Rules of origin determine the extent of domestic content a product must have to qualify as an internal product in a preferential trading agreement hence, they have the same effect as the local content requirements
[372]UNCTAD (2007) f 223 p 65
[373]Article 26 of the IISD Model Agreement
[374]Commentary on Article 26 of the IISD Model Agreement contained in the negotiators handbook.

measures[375] would be acceptable. Afterward, any performance requirement measure would be fully subject to the agreement.[376]

Below is a sample performance requirement Article that should have been incorporated in both BITs.

> "(A) The Parties recognize their obligations regarding Trade Related Investment Measures established in other international agreements to which they are a Party.
>
> (B) Subject to Paragraph (A), host states may impose performance requirements to promote domestic development benefits from investments. Measures adopted prior to the completion of the host state measures prescribing the formalities for establishing an investment shall be deemed to be in compliance with this Agreement. If such measures are taken after the completion of the host state measures prescribing the formalities for establishing an investment, they shall be subject to the provisions of this Agreement.
>
> (C) Measures covered by this Article include requirements:
>
> i) to export a given level or percentage of goods or services;
>
> ii) to achieve a given level or percentage of domestic content;
>
> iii) to purchase, use or accord a preference to goods produced or services provided in its territory;
>
> iv) to purchase goods or services from persons in its territory;
>
> v) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange flows associated with such investment;

[375]They are performance requirement measures taken before all the formalities or requirements to establish an investment have been completed

[376]The distinction between pre-establishment and post-establishment is important for fairness (for the investor) and policy space (for the host state) purposes. An investor needs to know all conditions before making the decision to invest. Performance requirements can impact, in a significant way, the economics of an investment. Therefore, to alter it after the fact would be to alter the decision underlying an investment, a decision usually taken in consultation with the host state. Hence, the subsequent shift in the economics of an investment towards other actors in the host state merits coverage by the Agreement in fairness to the investor and to balance the provision.

vi) to restrict sales of goods or services in its territory that such investment produces by relating such sales to the volume or value of its exports or foreign exchange earnings; and

vii) similar measures intended to promote domestic development."[377]

2.6.10 Umbrella clause

This is provided for in Article 11 of the China-Uganda BIT and Article 10(2) of the Germany and Djibouti BITs. The Articles impose a requirement on each contracting party to observe all investment obligations entered into with investors from the other contracting state. This broad language enables the international arbitration Tribunal constituted under the BIT to exercise jurisdiction over claims concerning breaches of contract, agreement, license, permit etc, by a host state notwithstanding the fact that there is an exclusive forum selection clause in the contract.[378]

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It is inappropriate to grant to an international Dispute Settlement Body full jurisdiction to hear any type of complaint for breach of contract, or breach of a permit, etc. as a direct breach of an international agreement through the umbrella clause.[379]International arbitration is expensive for developing countries. Moreover, they have few lawyers trained in international arbitration and would thus be forced to hire lawyers from developed countries whose legal fees are extremely high. This makes total international arbitration costs beyond reach of many developing countries, especially LDC's.

The old generation Chinese BITs ,for example the UK-China BIT (1986), did not contain an umbrella clause since China, at that time, was reluctant to include it as it was essentially a capital importing state.[380] Hence, the inclusion of this clause is a deliberate mis-engineering of the Uganda and Djibouti BIT by China.

[377]Article 26 of the IISD Model Agreement
[378]Negotiators handbook: IISD Model Agreement
[379]Ibid
[380]Schill (2007)

2.6.11 Minimum standard for environmental, labour and human rights protection

An Article setting the minimum standards for environmental[381], labour and human rights is missing in the three BITs. It is important to commit parties to the maintenance of the environment and other standards for example labour, public health and safety, and to prohibit them from reducing the said standards for purposes of attracting and maintaining investments.

Such a provision is important for developing countries as it acts as a clear and strong prohibition against lowering standards, weakening or reducing domestic law on labour, environment and human rights in order to encourage investments; and protects African states from Chinese investors who might choose to waive or derogate from the said laws. As a result, a level playing field is maintained for states. It also prevents a potential "race to the bottom" in environmental or other standards.

The provision, therefore, demands high level of domestic law in the said areas and also sets the minimum standards, through reference to international instruments such as the ILO (International Labour Organisation) declaration on Fundamental Principles and Rights of Work, 1990, and international human rights agreements.[382]

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This provision is common in recent US BITs. For example, Article 12 and 13 of the US-Rwanda BIT contains such a provision.

2.7.12 Anti-corruption

Corruption is a major obstacle for economic growth. It hinders economic development by reducing domestic investment, discouraging FDI, encouraging overspending in government, and distorting the composition of government spending away from

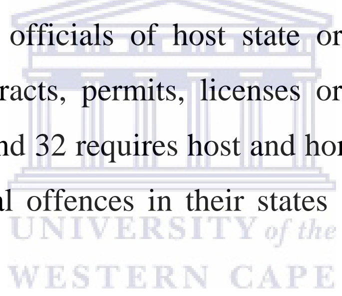
[381]There is also a notable absence of environmental issues in the China Africa policy discussed earlier. This shows that China is not committed to sustainable use of the environment. African states hence must insist for environment provisions to be included in BITs

[382]An Article similar to Article 22 and 32 of the IISD Model Agreement

education, health, and the maintenance of infrastructure, towards less efficient public projects that have more scope for manipulation and bribe-taking opportunities.[383]

The BITs do not contain an anti-corruption Article prohibiting the parties from offering, soliciting or promising gifts of any pecuniary or other nature, whether directly or through intermediaries, to any public official of the other party and making such acts (including incitement, aiding and abetting, conspiracy to commit such acts) criminal offences subject to appropriate criminal enforcement and sanctions under domestic law.[384]
Such a clause is important for the two developing African states as it would ensure that parties to the BIT do not engage in corrupt activities, as such activities hinder economic growth and sustainable development.

The IISD model BIT contains appropriate anti-corruption Articles. Article 13 prohibits investors from bribing public officials of host state or engaging in other corruption activities in order obtain contracts, permits, licenses or other rights in relation to an investment. While Article 22 and 32 requires host and home states, respectively, to make bribery and corruption criminal offences in their states subject to appropriate criminal enforcement sanctions.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2.7.13 <u>Top managerial personnel</u>
Host countries may use compulsory legislation to ensure the participation of their nationals in the management or control of foreign investments.[385] This is justified on national security grounds and for purposes of ensuring that their nationals receive technical training and managerial experience from foreign investments.[386]

Host states should thus be allowed to require that a majority of the board of directors, or any committee of an investment, be of a particular nationality, or be resident in the territory of the host country (as opposed to requiring that an investment appoint to senior

[383]Wei S. 'Corruption in economic development: Beneficial grease, minor annoyance or major obstacle?' (1998). World Bank development research group Available at: http://www.worldbank.org/wbi/governance/pdf/wei.pdf (accessed on 31/3/09) at pp 24
[384]Negotiators handbook: IISD Model Agreement
[385]UNCTAD (2007) fn 223 p 72
[386]Ibid

management positions individuals of any particular nationality), provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.[387]

Article 9 (1) and (2) of the US-Rwanda (2008) BIT contains such a provision. It states:

> "1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.
>
> 2. A Party may require that a majority of the board of directors or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment."

Such a provision is lacking in the three BITs. The inclusion of the said provision is important as it assures investors that they will be able to have the management officers they wish to manage the investment, with an exception. The exception allows host states to ensure a minimal level of representation on the Board for purposes of national security and obtaining technical training and managerial experience.[388] This contributes to sustainable development of the host developing states through transfer of managerial skills.

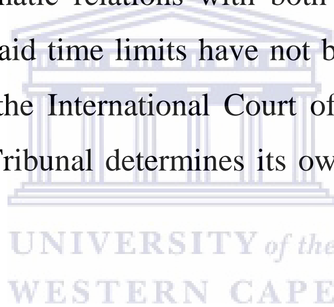
2.7.14 Dispute resolution

Disputes are an inevitable occurrence in many international commercial transactions as the contracting parties have different commercial and legal expectations, cultural approaches and political ramification.[389] When they arise and cannot be resolved through diplomatic channels and negotiations, they will need to be resolved in accordance with a legal process. This process should have the confidence of the parties or at least be in a

[387]See Article 9 of the IISD Model Agreement
[388]See commentaries on Article 9 of the Negotiators handbook-IISD Model Agreement
[389]Mistelis L. ' International arbitration: Trends and challenges'. (2007). Available at: www.adrmeda.org/romeconference07/materials/Arbitration%20-%20Trends%20and%20Challenges.pdf (accessed on 31/3/09)

forum that is acceptable to the parties. In such circumstances, parties to a BIT frequently prefer to use arbitration as a private, independent and neutral system.

In Article 9 (Settlement of dispute between contracting parties) of the China-Uganda BIT, the parties agreed to first resolve the dispute through diplomatic channels. If they fail to settle the dispute within three months, the dispute may be submitted to an ad hoc joint committee consisting of the representatives of the two parties or to ad hoc arbitration.[390]In the event that the joint committee also fails to settle the matter within six months, the parties may refer the dispute to an ad hoc arbitration Tribunal. In such a situation, one party informs the other of its intention to refer the dispute to arbitration. Each party then appoints an arbitrator within two months from the date of the said notification. Within two months of appointment, the two arbitrators must select a national of a third State having diplomatic relations with both parties to be Chairman of the Arbitral Tribunal. If the aforesaid time limits have not been complied with, either party may request the President of the International Court of Justice to make the necessary appointment(s). The Arbitral Tribunal determines its own rules and its decision is final and binding on the parties.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Article 8 of the China –Djibouti BIT and the China- Germany BIT are similar to the above Article of the Uganda BIT except that the dispute is referred straight to the ad hoc Tribunal, if parties fail to settle the dispute within six months through diplomatic channels, as opposed to submitting it first to a joint committee.

Article 8 (Settlement of disputes between an investor and a contracting party) of the China-Uganda BIT provides that any dispute arising between an investor of one contracting party and the other contracting party shall as far as possible be settled amicably through negotiations. If it is not settled within six months, it shall be submitted, by the choice of the investor, to either the competent court of the other contracting party or to ICSID. However, the contracting party to the dispute may require the investor to go through domestic administrative review procedure specified by the laws and regulations

[390]The joint committee is set up by the parties and comprises of relevant experts. The procedures of the committee are decided by both parties.

of that contracting party before submission of the dispute to ICSID. The choice that the investor takes shall be deemed final. The arbitration award shall be based on the law of the contracting party to the dispute including its rules on the conflict of law. The award shall be final and binding. Both parties shall commit themselves to its enforcement and shall each bear its costs for its appointed arbitrator and legal representation. However, the cost of appointment of Chairman and the Tribunal shall be shared equally between the parties.

The above Article is similar to Article 9 of the China-Djibouti BIT and the China-Germany BIT except that the investor in the Djibouti and Germany BIT has a choice between ICSID and an ad hoc Arbitral Tribunal as opposed to ICSID and the courts of the contacting party to the dispute.

For sustainable development purposes, the Uganda and Djibouti BITs are mis-engineered as they relieve the investor of the obligation to exhaust local remedies, as a condition for submitting a dispute to international arbitration. The Article should require parties to first attempt to settle the dispute locally. Only if a resolution has not been reached within a certain period of time should the claim be allowed to be submitted to international arbitration. This is important for host states as it reduces the cost of dispute resolution substantially.[391]

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The BITs do not address a number of issues such as the procedures to apply when submitting a notice of intent for arbitration, how to prevent the same dispute from being simultaneously taken up in more than one legal forum, specification of the place of arbitration, measures for interim injunctive relief and preliminary objections.[392] This is important for purposes of increasing predictability and control over the execution of arbitration procedures.[393]Article 28 of the US-Rwanda BIT and Annex A Article 7 of the CCIA contain such a provision.

[391]See Article 12 of the Belgium–Luxembourg and Botswana BIT of 2003
[392]UNCTAD (2007) fn 223 p 120
[393]UNCTAD (2007) fn 223 p 120

Moreover, the BITs do not contain a control mechanism as they do not provide for the possibility for specialised authorities of the contracting parties to interpret certain matters or provisions of the agreement, which shall be binding for the arbitral Tribunal. For example, Article 21 of the BIT between the United States and Rwanda (2008) provides:

> " […]
> 3. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B [investor-State dispute settlement] only if:
> (a) the claimant has first referred to the competent tax authorities of both Parties in writing the issue of whether that taxation measure involves an expropriation; and
> (b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation." [394]

This provision allows the competent tax authorities of both contracting parties to decide whether a particular taxation measure is in fact an expropriation. If the authorities agree that this is not the case, the investor is prevented from submitting a claim under the investor–State dispute settlement provisions. This mechanism aims at ensuring that technical matters or provisions of the BIT are interpreted by specialised authorities of the host state. Thus, such decisions are not primarily left to the Arbitral Tribunals hence promoting fairness.[395]

A slightly similar provision is found in Annex A Article 10 of the CCIA which states:

> "A Tribunal, at the request of a disputing party or on its own initiative, may appoint one or more experts to report to it in writing on any factual

[394] Text in brackets added
[395] UNCTAD (2007) fn 223 p 120

> issue concerning environmental, health, safety or other matters raised in a proceeding. The Tribunal shall consider any terms or conditions relating to such appointments that the disputing parties may suggest."

The BITs do not contain a procedure to avoid frivolous claims in investment related disputes, i.e. claims that evidently lack a sound legal basis.[396] Such a procedure entails an Arbitration Tribunal addressing and deciding, as a preliminary question, any objection by the other party that, as a matter of law, the claim is not one for which an award in favour of the claimant may be made. Inclusion of such a procedure is important to prevent Chinese investors from abusing the system[397]consequently wasting time, effort, fees and other costs, not only for the defendant contracting party, but also for the Arbitral Tribunal.[398] Article 28 of the US-Rwanda (2008) BIT contains such a provision.

The BITs also fail to provide for transparency in Arbitral proceedings. Such a provision allows open hearings, availability of Arbitral documents (for example the notice of intention to arbitrate, the settlement of any dispute, the intention of a panel or appeal, the pleadings, evidence and the decisions) to the public and *amicus curiae* submissions . The inclusion of such provisions helps to open disputes under the BIT to public review thereby safeguarding public interest. Moreover, it helps African states know the consequences of certain domestic policies to the terms of the BITs and as such they are able to amend their policies appropriately to avoid costly claims by foreign investors. This provision is common in recent BITs for example Article 19 of the Norwegian draft model BIT, Annex A Article 9 of the CCIA, and Article 29 of the US-Rwanda BIT.

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Finally, both BITs do not provide for the consolidation of claims. That is, providing for the "joinder" of claims having a common question of law or fact in, and/or arising out of the same events or circumstances. This helps foster judicial economy and avoids

[396]UNCTAD (2007) fn 223 p 121
[397]The system is abused when Chinese investors think that the greater the number of claims, the better the chance of having the Arbitral Tribunal adjudicating at least one in their favour. See UNCTAD (2007) fn 223 p 121
[398]UNCTAD (2007) fn 223 p 121

inconsistent results.[399] Annex A Article 11 of the CCIA and Article 33 of the US-Rwanda BIT are examples of such a provision.

2.7 CONCLUSION

The above analysis of the Uganda, Djibouti and Germany BITs with China has shown that their provisions are similar. Moreover, it has demonstrated, first, that the Germany-China BIT is balanced as it protects German foreign investors in China while at the same time protecting Chinese investors in Germany. Secondly, that the Djibouti and Uganda BITs with China are mis-engineered as they broadly protect Chinese investors without adequately addressing the development goals of Uganda and Djibouti.

Moreover, the analysis of the BITs has identified several elements of mis-engineering. These elements have obliterated the sovereign ability of both Uganda and Djibouti to formulate investment policies that are in tandem with their development needs hence leading to unequal returns to investment. These unequal returns include, *inter alia*, insufficient transfer of technology, technical and managerial skills; violation of human and labour rights; unsustainable use of the environment; over exploitation of natural resources; and condoning and promotion of corrupt activities leading to diversion of benefits of FDI from the state etc.

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Although BITs cannot promote investment in and of themselves, it is imperative that they are well drafted. This is because they can help to create a favourable legal environment that reduces the level of real and perceived risks for the investors, while at the same time give developing countries sufficient policy space. It is impossible to come up with a perfect BIT that will adequately cover the concerns of both host and home states. However a balance can be struck, through negotiations and compromise, which will ensure both parties substantially benefit. African states thus need to approach BIT negotiations strategically with a model that is consistent with the goals and requirements of economic development. Unfortunately, African states have weak bargaining power in negotiating BITs and therefore the possibility of reaching such a balance is unfeasible.

[399] UNCTAD (2007) fn 223 p 123

The next chapter examines how Africa's weak bargaining power in negotiating BITs has contributed to the mis-engineering of the BITs and the resultant unequal returns to investments.

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CHAPTER 3: THE POWER FACTOR: OF WEAK BARGAINING POWER

3.1 INTRODUCTION

A state's power is a reflection of its aggregate resources.[400] Therefore, national power is determined by a state's capabilities, which in turn determine the position of a state in relation to other states in international relations.[401] It thus follows that in bilateral negotiations states with more aggregate resources will prevail as they can use their superior resources[402] to coax weaker states into making more concessions through threats and promises.[403]The effect is that outcomes of bilateral negotiations are likely to represent the interests of the more powerful state, and are therefore predetermined. This is buttressed by the existence of model bilateral treaties that leave room for only minor changes on a case by case basis.[404]

In light of the above, this chapter will examine the sources of China's strong bargaining power, the reasons for African states' weak bargaining power and the contribution of this power asymmetry in the legal mis-engineering of China BITs with African states hence the resultant unequal returns on investment.

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3.2 BARGAINING POWER[405]DISPARITY

The dependency theory[406] predicts that developing host states are in a permanently weaker bargaining position in relation to BITs because of the unequal conditions of trade and investments in the international economy, and because of the willingness of the local

[400]Resources in this context mean economic strength, military capabilities, technological development, stability of the political system and administrative capacity. See Tallberg J. 'Bargaining power in the European Council'. (2007). Swedish Institute of European Policy Study (SIEPS). Available at: www.statsvet.su.se/publikationer/tallberg/tallberg_sieps_final_2007.pdf (accessed on 5/4/09)

[401]Tallberg (2007) p 16

[402]These resources have to be issue specific resource. Therefore, in this case it will be market power, skills, technology and Gross Domestic Product (GDP)

[403]Tallberg (2007).

[404]Jean Monnet (2004) See also Albin C. (2001) *Justice and fairness in international negotiation*.

[405]Bargaining power is the ability of negotiators to exert influence over each other, win accommodations from the other and to influence an outcome of a negotiation. See Hicks B. *et al.* (1997) *Cooperative strategies: Asian Pacific perspectives*.

[406]Kebonang (2006).

ruling elites to submit to the interests of foreign capital.[407] Hence, even though African states have the power to control access to their home markets and natural resources, [408] it is usually surpassed by the superior advantage[409] of China (i.e. the ability to offer foreign capital; managerial and technological know-how and; opportunities for commercialization and industrial development) arising from variation of the said resources.[410]

For example, Moran[411] undertook a study of the US copper companies and the Chilean state and found that since Chile needed technology and investments for new mining venture in the copper industries, the bargaining power of the US copper companies increased.[412] Moreover, he established that after nationalisation the Chilean copper industry remained vulnerable to pressure from US by means of an embargo on spares and technology.[413] Consequently, he concluded that host states are usually in a weaker bargaining position in situations whereby their economies and industries are not mature and as such require new technologies and investments from foreign investors.[414]

Similarly, in the 1970's, the UK government was constrained in its bargaining with Chrysler Corporation over the latter's investment in the Linwood car manufacturing plant in Scotland, because it wanted to attract employment opportunities as the region had a high unemployment rate.[415]

[407]Muchlinski (2007) p 117-118

[408]The access includes investment opportunities, internal markets, labour supplies, raw materials and other sources that China desires. See Jeffry F. and David L (2000) 4th Ed. *International political economy: perspectives on global power and wealth* at pp 156

[409]Which is China's ability to provide FDI to African States.

[410]Jeffry(2000). See also Bennett C. and Sharpe E. 'Agenda setting and bargaining power: The Mexican state versus transnational automobile corporations'. (Oct., 1979)32. World Politics pp 57-89 .Available at: http://www.jstor.org/stable/2010082 (accessed: 05/04/2009)

[411]Muchlinski (2007) pp 104-107 cross referencing Moran T. (1974) *Multinational Corporations and the politics of dependence: Copper in Chile*

[412]Ibid

[413]Ibid

[414]Ibid

[415]Muchlinski (2007) pp 61-80 cross referencing Hood N. and Young S. (1982) *Multinationals in retreat: the Scotish experience*.

Consequently, China is able to negotiate BITs that meet its national interests without necessarily meeting the development needs of the African states and thus gaining disproportionately. This explains why even though Djibouti and Uganda have the ability to control access to their markets and resources, they desperately need China's investments for transfer of technology and managerial skills, industrialization and commercial development. Therefore, they concede to unfavourable provisions during BIT negotiations. For instance, there are no exceptions to National Treatment standard contained in Article 3(2) of the Djibouti and Uganda BITs with China such as the right to treat domestic and Chinese investors differently so that struggling domestic industries are able to compete with external and foreign investors and so bringing about a degree of operative equality.[416] Similarly, Article 4 of the said BITs defines expropriation broadly. As a result, every measure substantially impairing the value of an investment could be challenged as an expropriation even though it is a routine regulatory act or an act undertaken for public welfare.[417]This gives Chinese investors broad protection at the expense of the policy space of African states.

Host states are usually aware of the effects of certain provisions in a BIT on its policy space but they nevertheless concede to their inclusion because of their weaker bargaining position.[418]Therefore, depending on its extent and exercise, bargaining power undermines the voluntary nature of transactions and thereby affects the capacity of the weaker party to act on objective judgment of utility.[419]

The discussion above identifies six sources of China's strong bargaining power in bilateral investment negotiations.

3.2.1 Advanced Technology and technology transfer capabilities

Technology includes knowledge and methods that are necessary to carry on or to improve the existing production and distribution of goods and services as well as entrepreneurial

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[416]See Chapter 2.5.4 and UNCTAD (1999) fn 281

[417]See Chapter 2.5.6

[418]Muchlinski (2007) pp 117-118

[419]Drahos P. 'When the weak bargain with the strong: Negotiations in the WTO'. (2003)8. International Negotiation at pp 34. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=418480 (accessed on 5/4/09)

expertise and professional know-how.[420] Technology transfer, on the other hand, is the process through which commercial technology is disseminated.[421] It involves the successful learning of information by one party from another party, and the effective application of that information in generating marketable products and services.[422] Once technology is transferred, it raises awareness of its existence, thereby creating a 'demonstration effect' and possible 'spill-over' to local firms in the course of time.[423] Technology is therefore a powerful tool for combating poverty through its contribution to sustained economic growth, enhanced market efficiency, and creation of employment opportunities.[424]

The emergence and the development of the Chilean salmon industry and Chinese economic success are good examples of the important role of technology transfer in industrial development. Technology transfer enabled Chile to build a globally competitive and innovative salmon industry within two decades, hence making it the second largest salmon producer in the world.[425] Moreover, the industry is Chile's main export sector thus contributes significantly to regional development. [426]

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Between 1974[427] and the early 1980s, Chile's salmon industry exported mainly frozen tailless and beheaded salmon that were easier to process, store and transport.[428] FDI played a marginal role in the early development phases of the industry. However, the

[420]Santikarn M. (1981) *Technology Transfer* at pp 3-6.
UNCTAD distinguishes between hard technology i.e. equipment, industrial processes and soft technology i.e. knowledge, information, expertise, organizational skills, management, marketing and technical know-how. See UNCTAD World Investment Report 2004 at p 132.
[421]Muchlinski (2007) p 430.
[422]UNCTAD 'Report of the expert meeting on international arrangements for transfer of technology: Best practices for access to and measures to encourage transfer of technology with a view to capacity-building in developing countries, especially in least developed countries'. (2001). Ref: TD/B/COM.2/EM.9/3. Available at: http://unctad.org/en/docs/c2em9d3.en.pdf .
[423]Muchlinski (2007) p 430.
[424]UNCTAD 'The role of science and technology in the achievement of the MDGs'. (2004). Ref: TD(XI)/BP/4.
[425]UNCTAD 'Transfer of technology for successful integration into the global economy: A case study of the salmon industry in Chile' (2006).Available at: http://www.unctad.org/en/docs/iteiit200512_en.pdf (accessed on 25/4/09) at pp 21-26.
[426]Ibid
[427]This is when the first major firm to farm salmon, Domsea Farms Chile, owned by the US firm Union Carbide, started operation.
[428]UNCTAD (2006) fn 425 pp 21-26

good performance and success of the industry attracted many foreign firms seeking to expand salmon production or provide inputs and support services.[429] Thus, in the mid 1980s, mergers with foreign firms and joint ventures commenced. The entry of large firms into the Chilean salmon industry facilitated the introduction of new technologies and practices, such as, automated feeding and fish-counting systems. Moreover, it facilitated expansion of production and export of value-added products as the industry acquired and developed technologies for processing and packaging various fish products. This led to vertical integration and the increase of the average size of firms. This led to a rise in employment opportunities. Total employment by the sector increased almost threefold between 1992 (10,200 workers) and 2002 (40,500 workers). In 2004, the number rose to 45,000 workers.[430]

China, on the other hand, has been the largest host country of FDI as a developing economy since 1993. Major firms like Microsoft, Intel, General Motors (GM), Honda and Motorola, Siemens, Nortel and Volkswagen established their production bases in China in order to take advantage of the differences in production, communication and labour costs, as well as personnel pool and large domestic market size.[431] These firms generated technology spill-over effects when developing and producing new products through the provision of technical assistance to supporting enterprises for meeting new technology requirements; staff training ;and provision of a manufacturing base to domestic firms for developing new products. [432]As a result, by the end of 1990, Chinese private enterprises (e.g. Huawei, ZTE, TCL etc) developed and became leading technology providers. In addition, because of joint ventures, its automobile industry grew tremendously, leading to transfer of technology, managerial, and technical expertise. This enabled some domestic private enterprises to eventually come up with new car models without establishing joint

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[429]Ibid
[430]Ibid
[431]China has sophisticated technological infrastructure as well as cheap labour and well educated workers especially in engineering and science thus has been very attractive to developed country's MNEs. See Muchlinski (2007) at p 435 and Theodore M. *et al.* (2005) *Does Foreign Direct Investment Promote Development?* at pp 327-331
[432]Ibid

ventures with foreign firms.[433] Thus, China utilised FDI inflow to transform its traditional industries through advanced and applicable technology.[434]

The industrial, mining, transport and agricultural sector of many African countries are hampered by poor infrastructure, obsolete technology and a lack of technological capacity to innovate.[435] Hence, in the current knowledge-based global economy, transfer of technology and technological capability building is critical for purposes of economic growth, as demonstrated above.[436]

For example, the Namibia's marine resources are among the richest in the world as its nutrient rich Benguela source currently produces numerous commercially important species of fish and shellfish.[437] Many opportunities thus exist in value addition activities, mariculture and freshwater (aquaculture) fisheries. However, Mara Zaire, manager of Namibia Investment Centre, stated that they are at present unable to effectively and efficiently utilise the marine resource since they do not have the know-how and market.[438] Consequently, they desperately need the Chinese to avail to them the same.[439]

China is aware that African states easily absorb technology imported from technologically advanced developing countries more easily than technology imported from developed countries; hence China is very attractive to African States.[440] This has thus tremendously increased its bargaining power in bilateral investment negotiations.

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[433]Ibid

[434]Deng Z. *et al.* 'Swapping market access for technology? An assessment of China's preferential foreign direct investment policies'. Available at: http://www.nottingham.ac.uk/cpi/News_and_Events/event_reports/IFCCS_Conference_Nov_08/abstracts/Ziliang_Deng.pdf (accessed on 7/4/09). See also Theodore M. *et al.* (2005) *Does Foreign Direct Investment Promote Development?* at pp 327-331

[435]Muchlinski P (2007)

[436]UNCTAD (2001) fn 422 p 6.

[437]Namibia Investment Centre. Speech of the Manager, Mara Zaire (8/9/2008). Available at: http://www.chinafair.org.cn/English/News/230570.html (accessed on 5/5/09).

[438]Ibid

[439]Ibid

[440]Muchlinski (2007)

3.2.2 Investment as a resource

Investment as a resource, in this context, means the ability of China to provide African states with export market access, foreign capital, technical and managerial skills.

3.2.2.1 Market access

Accelerating the growth of exports has become a priority for the governments of many African countries.[441] This drive for export promotion is triggered, firstly, by the debt crisis that has led to the pressure to increase exports in order to finance imports and interest payments on external debt.[442] Secondly, the realisation that exports can help gain some measure of growth in the face of stagnant domestic demand.[443] Lastly, the successful experience of countries that followed an export-oriented growth policy.[444]

These governments thus see FDI from China through MNEs as a way of doing this. The MNEs would bring the necessary technology to produce products of export quality; the skills and attitude to ensure delivery, quality and dependability necessary for export marketing; and knowledge of and direct access to the world's largest markets.[445]

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Moreover, China has a huge domestic market. This is attributed to the rapid economic growth that it has experienced in the last two decades.[446] For example, in 2007, its economy grew by 13% up from 9.2% in 2003.[447]Such growth needs resources to fuel it. Since China does not have sufficient resources domestically, it buys from around the

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[441]UNCTAD 'Formulation and implementation of foreign investment policies: Selected key issues' (1992) Available at: http://unctc.unctad.org/data/e92iia21a.pdf (accessed on 5/5/09) at p 24.
[442]Ibid
[443]Ibid
[444]For example, China was able to increase its export performance from USD 18 billion in 1980 to USD 593 billion in 2004. This was as a result of substantial rise in FDI inflows from almost zero to USD 61 billion in the same period, with the accumulated FDI being as much as USD 560 billion by the end of 2004.See Zang K. 'How does FDI affect a host country's export performance? The case of China' Available at: http://faculty.washington.edu/karyiu/confer/xian05/papers/zhang.pdf (accessed on 6/4/09).
[445]UNCTAD (1992) fn 441p 24
[446]Hurst (2006) *China's oil rush in Africa*.
[447]China's growth slowed down in 2008 because of the global financial crises. See Keliher M. 'Replacing US in Asian export market' (2004) Asian Times Online of 11/2/04. Available at: http://www.atimes.com/atimes/china/FB11Ad01.html (accessed on 7/5/09). See also Bristow M. 'China's economic growth' (2009) BBC News of 22/1/09. Available at: http://news.bbc.co.uk/2/hi/business/7843947.stm (accessed on 7/5/09).

globe.[448] For instance, 38% of China's imports are resource goods which include agricultural products, chemicals, minerals, metals and textiles, which African states are endowed with.[449]African States are eager to gain access to this market in order to increase their exports. For example Rajesh Jeeta, Mauritius Minister of Industry, Small and Medium Industries, Commerce and Cooperatives stated in an interview that "*Mauritius has strong economic ties with China. China remains one of our major trading partners.....with robust growth being registered and rising standard of living, the Chinese market is expanding and becoming more sophisticated. While Mauritius obviously cannot match the clout of China, it can certainly raise and diversify its exports to this growing market. I hope that this event will also provide some insight into ways and means to increase exports to China...*"[450]

In light of the above, China has high bargaining power in bilateral negotiations because of the said eagerness of African states to access the world market, and the Chinese market, in particular.

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3.2.2.2 Foreign capital

An undeveloped financial sector as well as the history of macroeconomic instability and high inflation characterizing a number of African States has contributed to a savings gap, with domestic savings lower than domestic investments.[451] The Harrod-Domar growth model postulates that there is a direct relationship between a country's saving rate and its rate of economic growth.[452] Hence, countries should strive to fill the saving-investment gap so as to achieve economic growth.[453]

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[448]Keliher (2004)
[449]Ibid
[450]Xinhua 'More Chinese enterprises eye investment in Africa'. (2008) China Daily. Available at: http://www.chinadaily.com.cn/china/2008-09/09/content_7009143.htm (accessed on 8/5/09).
[451] Krkoska L. 'Foreign direct investment financing of capital formation in central and eastern Europe'. (2001). European Bank for Reconstruction and Development working paper No. 67.Available at: http://www.ebrd.com/pubs/econo/wp0067.pdf (accessed on 5/4/09) at pp 2-5.
[452]Sen H. 'Different arguments for and against the role and impact of foreign investment on the development potentials of developing countries: An overview' (1998)13 Journal of Economics and Administrative Sciences Dokuz Eylul University at pp 181-190. Available at: www.geocities.com/ceteris_paribus_tr2/h_sen12.pdf (accessed on 5/4/09).
[453]Ibid

FDI is an important source of capital financing that would contribute to filling the aforesaid gap.[454] In Singapore, for instance, FDI made important contributions in filling the gap between domestic savings and investment. In 1960 the share of gross domestic savings was equal to -3 % of GDP.[455]It increased to 20 % of GDP in 1970 and 33% of GDP in 1981. With the contribution of FDI, the share of investment reached 42 % of GDP in 1981 which was the highest rate in the world at that time.[456]

Moreover, privatisation related FDI inflows would help to finance the fiscal deficit where the need for large infrastructural spending and generous welfare programmes are inconsistent with budget revenue constraints, including inefficient tax administration.[457] Further, it would cover the often large current account deficits caused by the inflow of consumer and investment goods which are not produced domestically.[458] Although FDI is not the only source of financing for either the fiscal deficit or the current account deficit, its nature of being a stable long term capital inflow makes it preferable to short term flows or debt financing so as to avoid an increase in macroeconomic instability.[459]

China is one of the major sources of Africa's foreign capital.[460] In 2008, China's outbound FDI was USD 139.3 billion, a substantial amount of which was invested mainly in Africa and Asia. For instance, between January and June 2008, it invested an estimated USD 305 million in Africa.[461] China's ability to provide foreign capital to African states gives it bargaining leverage in bilateral negotiations. African states would be willing to compromise in order to ensure a BIT that will pave the way for the needed foreign capital is concluded.

[454]Ibid
[455]Ibid
[456]Ibid
[457]Krkoska (2001)
[458]Ibid
[459]Ibid
[460]The other major sources being Taiwan, India and South Africa. See Gelb (2006) p 201
[461]Xinhua (2008) fn 450

3.2.2.3 Employment and human resource development

Africa is experiencing massive unemployment and underemployment.[462] For example, in 2006, North Africa had the highest unemployment rate in the world while Sub-Saharan Africa's was second.[463] Most urban unemployment in African countries takes the form of underemployment.[464] It arises when people undertake any available economic activity, however poorly paid and unproductive, because of lack of social-safety nets as well as alternatives in the form of unemployment insurance or job training for formal sector work.[465] In sub-Saharan Africa, for instance, the urban informal sector[466] is estimated to employ more than 60 per cent of the urban labour force at extremely low incomes.[467]

Since urbanisation is irreversible, urban 'decent employment'[468] is the key to solving the problems faced by cities,[469] hence promoting economic growth.[470] Prerequisites for creating decent employment include structurally transforming the economies of African countries through labour intensive technologies.[471] This can be achieved through foreign investment, in the private sector, by MNEs that use labour intensive technologies, particularly those that require unskilled labour. This would increase employment both directly and indirectly.[472]

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[462]ILO 'Global employment trends 2007'. (2007)Available at: www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_081866/index.htm (accessed on 5/4/09)
[463]12.2% and 9.8% respectively. See ILO (2007) fn 462
[464]Ibid
[465]Ibid
[466]The urban informal sector includes such activities as small-scale peddling, petty services or work in unregistered factories.
[467]Ibid
[468]Decent employment is an integrative concept that refers to both quality and quantity of labour. Decent employment should be productive and secure work, ensure respect of labour rights, provide an adequate income, offer social protection and include social dialogue, union freedom, collective bargaining and participation.
[469]The problems faced by cities include overcrowding, hunger, disease, crime and malnutrition.
[470]As pointed out by Mr. Samir Radwan, a senior economist of the ILO. See ILO 'Unemployment threatens world cities'. (1996). Available at: http://www.uneca.org/ERA2005/full.pdf (accessed on 4/4/09)
[471]Economic Commission for Africa 'Economic report on Africa (2005): Meeting the challenges of unemployment and poverty in Africa'. Available at : www.uneca.org/era2005/overview.pdf (accessed on 4/4/09) at p 78
[472]Ibid

Moreover, MNEs would assist human resource development by introducing new technology and training of its employees in the requisite skills. This would raise the number of skilled labourers who can be employed in the formal sector and MNEs that use capital intensive technologies. Similarly, if the MNEs enter into joint ventures with local firms, managerial skills would be transferred to the locals.[473]

China is home to many MNEs that can bring FDI into Africa, thus providing African states with access to its domestic market, the export market, the much needed foreign capital as well as employment opportunities, technical and managerial skills. This therefore raises China's bargaining position in bilateral negotiations and it is thus able to impose its interests on African States.

3.2.3 China's commercial intelligence network

Commercial intelligence networks are networks that gather, distribute and analyse information relating to a state's trade, investments, economic and business performance as well as those of other states.[474] Included in the network are state's investment promotion agencies, centres and bureaus, its business organisations (for example, a national chamber of commerce), as well as individual corporations.[475] The more integrated the network, in terms of information sharing and analysis, the more effective a country is likely to be in bilateral investment negotiations.[476]

China has developed sophisticated networks over time. For example, it currently has the China Council for International Investment Promotion (CCIIP) whose major task is to ensure that China's economic strategies are adequately addressed in its investment relations with other states.[477]CCIIP is at the apex of an elaborate consultative structure that involves more than twenty investment promotion centres, bureaus, and agencies around the country; foreign investment consulting companies and; several members from

[473]Employment is increased indirectly by providing backward and forward linkages and by influencing employment in competing firms. See Sen (1998).
[474]Drahos (2003) p 7.
[475]Ibid
[476]Drahos (2003)
[477]CCIIP website. http://www.cciip.org.cn/english/index.htm (accessed on 5/4/09)

the private sector.[478] Moreover, it liaises with international organizations such as the World Bank, World Association of Investment Promotion Agencies (WAIPA), United Nations Conference on Trade and Development (UNCTAD), United Nations Industrial Development Organisation (UNIDO), Investment Climate Advisory Service (FIAS) and the Africa Pacific Economic Cooperation (APEC).[479]

CCIIP facilitates Chinese enterprises investing overseas by cooperating with relevant chambers of commerce, trade associations, investment promotion agencies and economic societies, at home and abroad, thereby serving as a platform for information exchanges on trade and investment.[480]

The information obtained from CCIP can be used by the government during bilateral investment negotiations to enable its negotiators enter into informed and persuasive dialogue with African states' negotiators.[481]

3.2.4 Best Alternative To a Negotiated Agreement (BATNA)

With regard to international negotiations, BATNA is the superlative, real and actionable option that can be undertaken by a state party to a negotiation if the current negotiations fail and an agreement cannot be reached.[482]Hence, BATNAs define the minimum conditions for an agreement as well as enhance the ability to "walk away".[483] They give states bargaining power, since, the better a state's BATNA appears both to it and to the other state, the more credible their threat to walk away.[484] Moreover, its negotiators can adopt a more firm and forceful stance when proposing ideas and interests as the basis for an agreement; they are unlikely to be subjected to internal pressure to make an agreement for the mere reason that they are unaware of what would happen should the negotiation

[478]Ibid
[479]Ibid
[480]Ibid
[481]Information has been established to be one of the key assets for a BIT negotiation team. See Sunshine R. (1990) *Negotiating for international development: a practitioner's handbook* at p 93.
[482]Venter D. 'BATNA explained'. Negotiation skills training academy news letter. Available at: http://www.negotiationtraining.com.au/articles/next-best-option/ (accessed on 5/5/09).
[483]Sebenius J. and Lax D. 'The art of getting the best deal'. Financial Times , 28/9/2008. Available at: http://www.people.hbs.edu/jsebenius/FT/The_Art_of_Getting-Part_1.html (accessed on 5/5/09).
[484]Fisher R. and Ury W. (1983). *Getting to yes: Negotiating without giving in at* p 111.

fail; and they are not committed to reach an agreement because they are uninformed of alternatives outside the negotiation.[485]

It is important for state negotiators to be familiar with the other party's BATNA in order to know whether they are desperate for an agreement. This will enable them make a decision between demanding for more and making additional concessions, as they will be aware of up to what point the other party will stay at the bargaining table.[486]

Chinese international negotiators are well trained and aware of both their BATNA as well as that of the other party.[487] Furthermore, they put in a lot of time to research their options in order to ensure good decision making and negotiation outcome.[488] African negotiators, on the other hand, arrive at the bargaining table ill prepared.[489] This therefore gives China a bargaining leverage.

3.1.5 Unconditional aid

Aid is referred to as official development assistance (ODA)[490] in the international arena. ODA originated from the success of the Marshall Plan, the largest and most successful aid package in history, in which USD 13 billion was spent after World War II by the US for the reconstruction of the infrastructure, policies and governance processes of a

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[485]Ibid. See also Spangler B. 'Best Alternative To a Negotiated Agreement (BATNA)'. (2003). Beyond Intractability Organisation. Available at: http://www.beyondintractability.org/essay/batna/ (accessed on 5/4/09)
[486]Ibid
[487]See discussion on Chinese commercial intelligence network above.
[488]Ibid
[489]This under-preparation is attributed to the fact that negotiators of African countries are over-extended and as such have inadequate time to prepare. See Sunshine (1990) chapter 3 p 95
[490]*"According to the Development Assistance Committee (DAC) of the OECD, official aid or ODA refers to "… grants and loans to developing countries and territories which are: (i) undertaken by the official sector of the donor country; (ii) with the promotion of economic development and welfare in the recipient country as the main objective; and (iii) at concessional financial terms (i.e. if a loan has a grant element of at least 25 per cent)". This generally accepted definition excludes concessional flows of private voluntary organizations and official flows with little or no concessionality. Grants, soft loans and credits for military purposes are also excluded. However, there are difficulties with this definition, and some analysts include non-concessional loans from the World Bank in ODA, while others include IMF loans whether concessional or not. Most analysts, however, often ignore the fine distinctions between the various forms of financial flow to developing countries."* UNCTAD 'Doubling aid: Making the big push work'.(2006) at pp 14. Available at: http://www.unctad.org/en/docs/gdsafrica20061_en.pdf (accessed on 10/4/09).

devastated Europe.[491] It was accompanied by conditionalities.[492] Every country benefiting from US assistance had to sign a bilateral agreement binding it to balance budgets; restore financial stability and stabilise exchange rates at realistic levels; and set aside counterpart funds from government budgets and put them at the disposal of the US administrators to underwrite further investment. [493]

Aid is a highly effective tool in raising economic growth in good macroeconomic policy environments, provided it is "*for an extended period, rather than as an exceptional financing item"*.[494] In African states, it is used to fill budget deficits, finance infrastructural projects and as a source of capital financing that would contribute to filling the savings-investment gap.[495] In 2007, net ODA to Africa from developed countries amounted to USD 38.7 billion. Developed countries still attach conditionalities to ODA in the form of (unlike in the Marshall plan) democratic reforms; market opening; and human rights and environmental protection.[496]

Even though Africa is a major recipient of ODA[497], it has criticised the use of conditionalities on the premise that it undermines the domestic democratic processes by supplanting public policymaking, thereby transferring sovereignty.[498] Hence, the policies imposed are not formulated and decided upon ("owned") by the Africans. Thus,

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[491]Rich R. 'Applying conditionality to development assistance'. (2004)11. Agenda at pp 321-334 quoting Sanjana J. 'The Marshall plan and its implications for development assistance today'. (2000). Hemispheres, The Tufts University Journal of International Affairs.
[492]Conditionality is defined as "*a mutual arrangement by which a government takes, or promises to take, certain policy actions, in support of which an international financial institution or other agency will provide specified amounts of financial assistance*" Killick T. 'Aid and the political economy of policy change'. (1998). Overseas Development Institute, London at pp 6.
[493]Rich (2004) quoting Hogan M. 'American Marshall planners and the search for a European neo-capitalism'. (1985) 90. The American Historical Review at pp 44–72.
[494]Lum T *et al.* 'Comparing global influence: China's and U.S. diplomacy, foreign aid, trade, and investment in the developing world'. (2008). Paper prepared by the Congressional Research Service (CRS) for the members and committees of Congress. Available at: http://www.fas.org/sgp/crs/row/RL34620.pdf (accessed on 10/4/09) at p 40.
[495]Sen (1998).
[496]Rich (2004).
[497]In 2007, net ODA to Africa amounted to USD 38.7 billion, representing 37% of total aid. See OECD 'Aid targets slipping out of reach?'(2007) at p 3. Available at: http://www.oecd.org/dataoecd/47/25/41724314.pdf (accessed on 10/4/09)
[498]Santiso C. and Paul H. 'World Bank and good governance: Good governance and aid effectiveness'. (2001)7. The Georgetown Public Policy Review.

governments may agree to start the proposed reforms simply to obtain conditional resources, and then later abandon them.[499]

China has recently become economically strong enough to significantly increase its presence as a donor of ODA to Africa.[500] Its ODA takes a different form to that of developed countries as it consists of interest-free or concessional[501] loans (of up to 41%) rather than grants (which constitute only 3%); infrastructure financing mainly of challenging trade and investment projects that aid donors from developed countries have avoided because of technical difficulties or hardships; and debt forgiveness. [502] The most important characteristic of China's ODA to African states is that it is unconditional, except for the one China policy.[503]

More than 35 African countries are engaging with China on infrastructure finance deals mainly in hydropower generation and railways.[504] The finance is channelled primarily through the China Export-Import (Ex-Im) Bank on terms that are marginally concessional.[505] In some cases, infrastructure finance is packaged with natural resource development.[506] That is, repayment of the loan for infrastructure development is made in terms of natural resources (for example, oil). This arrangement is mainly used by the

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[499]Harsch E. 'Making Aid more effective' Available at: www.un.org/ecosocdev/geninfo/afrec/vo113no2/28_29eca.htm (accessed o 10/4/09)
[500]Lonnqvist L. 'China's aid in Africa: implications for civil society'. (2008).International NGO Training and Research Centre(INTRAC) policy briefing paper 17.
[501]Concessional loans are loans provided to developing countries with lower interest rates and longer repayment periods than typical or standard market or multilateral loans, i.e. less than market interest rates and extended grace period (also known as a soft loan). Grants have no repayment obligations but are tied to projects. Concessional loans are better than grants (provided they are given in good policy environments) as they can provide more funds. See http://www.brettonwoodsproject.org/glossary/item.shtml?x=344934 (accessed on 10/4/09) and Koeda J. 'Grants or concessional loans? Aid to low income countries with a participation constraint'. (2004). University of California, Los Angeles (UNCLA) job market paper. Available at: http://www.e.u-tokyo.ac.jp/cirje/research/workshops/macro/macropaper04/koeda_revised.pdf (accessed on 11/4/09)
[502]Lum (2008).
[503]China's policy of "non-interference in other countries' domestic affairs" has won Africa's support because it is regarded as respectful of their countries' sovereignty. See Lum (2008) and Chapter 2 of this thesis.
[504]Foster V et al 'Building bridges: China's growing role as infrastructure financier for Sub-Saharan Africa'. (2008). World Bank publication. Available at: http://siteresources.worldbank.org/INTAFRICA/Resources/BB_Final_Exec_summary_English_July08_Wo-Embg.pdf (accessed on 6/5/09) at p 3
[505]Foster (2008) p 7
[506]This is usually referred to as "Angola mode" or "resources for infrastructure".

China Ex-Im Bank for countries that cannot provide adequate financial guarantees to back their loan commitments. For example, in 2004, China Ex-Im Bank agreed to give Angola a very substantial line of concessional credit to enable the government to repair infrastructure damaged in the country's 27-year civil war.[507] So far, the government of Angola has drawn three instalments totalling USD 4 billion from this credit line.[508] The first instalment, for USD 2 billion, is known to have been backed by 10,000 barrels per day of oil exports.[509]

China's engagement in Ethiopia amounts to a total of USD 1.6 billion.[510] The main focus has been on the ICT sector, particularly the Ethiopia Millennium Project to create a fiber-optic transmission backbone across the country and roll out the expansion of the GSM network.[511] Most of these were financed under export seller's credit arrangements with the Chinese telecommunications operator ZTE, for the supply of equipment to the Ethiopian national telecommunications incumbent.[512]

In Sudan, China has financed close to USD 1.3 billion of infrastructure projects, including the development of more than 2,200 MW of thermal generating capacity, the 1,250-MW Merowe hydropower scheme, and a number of other significant investments in the rail, road, and water sectors.[513]

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In light of the above, Chinese finance is, on a scale, large enough to make a material contribution toward a state's infrastructure needs. This gives it a bargaining niche in bilateral negotiations. Moreover, in bilateral negotiations, China is known to offer infrastructure finance projects as part of a package to win much larger commercial projects from a host country, which typically involve large-size acquisition of natural resources related assets by Chinese enterprises.[514]

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[507]Foster (2008) p 4
[508]Ibid
[509]Ibid
[510]Foster (2008) p 5
[511]Ibid
[512]Ibid
[513]Ibid
[514]OECD 'China's outward direct investment'. (2008). OECD investment policy review. Available at: http://www.oecd.org/dataoecd/25/11/41792683.pdf (accessed on 6/5/09) at p 91.

3.2.6 Competition: A race to the bottom

China receives a substantial amount of inward FDI from developed countries. For example, its stock of inward FDI in 2007 was USD 758 billion.[515] As a result its industrial structure has been moving up the value chain, while its exports have shifted toward more high-tech products.[516] For this reason, China has been forced to shift low-tech and labour-intensive manufacturing to secondary locations in western inland provinces and foreign countries.[517] Its MNEs have therefore been investing in developing countries to replicate their low tech and labour intensive production model that produces low value added goods. The MNEs select countries where their said model fits in well with the endowment pattern as well as the stage of economic development, in order to be relatively easy to transplant.[518] For example, Chinese companies are currently investing in the lucrative textile industry of Egypt, the foot wear industry in Nigeria, batteries in Mozambique and ethyl alcohol in Benin.[519]

Although the said Chinese MNEs employ labour intensive technology, it is slightly more advanced than for the host developing state. In addition, their international marketing system is better and their managerial skills more sophisticated than for the host developing states.[520]

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In light of the above, China provides African states with capital, technology and management skills to tap.[521] In addition, their technology is easily adaptable and more suited for developing countries. As a result, African states compete amongst themselves to get a pie of market share and foreign capital from China.[522] Increased competition for investments cause African countries to lower (or retain poor) human rights, labour and environmental standards as well as relax their policies and regulations in order to attract

[515]Ibid
[516]Ibid
[517]Ibid
[518]Ibid
[519]Zou (2009) and Brautigam (2007).
[520]OECD (2008) fn 514
[521]Parthapratim (2008)
[522]Ibid.

foreign capital.[523] This creates a real risk of 'racing to the bottom'.[524] Moreover, it causes African countries not to demand for changes in core provisions of the model BITs. Consequently, China gets an opportunity to impose terms that are more favourable to them.[525] For example, the Djibouti and Uganda BITs with China give the Chinese investors broad protection and thereby limits the policy space of African countries considerably.

From the above analysis it is readily understandable why China has strong bargaining power and African states comparatively weak bargaining power in bilateral negotiations and therefore contributing to the legal mis-engineering of the BITs and the resultant unequal returns on investment.

3.3 IMPROVING BARGAINING POSITION

African states can improve their bargaining position through adequate preparation by the negotiators, diversification from export of primary commodities, value addition and grouping.

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3.3.1 Preparation

A BIT negotiating team's asset is information.[526] That is, being clear about what the goals and purpose of the negotiation is; having an excellent grasp of technical issues; having a strategic plan and a BATNA; and having details about the other party's negotiating culture and the likely effect when the two cultures interact at the bargaining table, their

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[523]World Bank 'Is globalization causing a "race to the bottom" in environmental standards?' (2001). Available at: www.worldbank.org/economicpolicy/globalization/documents/AssessingGlobalizationP4.pdf (accessed on 9/4/09. See also Ikiara M. 'Foreign Direct Investment (FDI), technology transfer and poverty alleviation: Africa's hopes and dilemma'. (2003). Special series No. 16. African Technology Policy Studies Network (ATPS) paper. Available at: http://www.atpsnet.org/pubs/specialpaper/SPS%2016.pdf (accessed on 11/4/09).

[524]"Race to the bottom" arises when states compete with each other as each tries to underbid the others by lowering taxes, spending, regulation etc so as to make itself more attractive to outside financial interests or unattractive to unwanted outsiders. See Schram F. (2000) *After welfare: The culture of post-industrial social policy* at p. 91.

[525]Elkins (2004)

[526]Sunshine (1990) p 93

goals and their BATNAs. This information can be acquired through carrying out adequate research and consultations with experts, technical advisors and/or specialists.[527]

The major component of preparation that is highly underestimated by African country negotiators is the impact of cultural diversity.[528] Cultural values[529] generate a cultural perspective[530] which in turn helps shape a negotiating style.[531] Our society's customs are conveyed to us at childhood by family and teachers until we internalise them and make them our own.[532] As a result, habits for doing things and assumptions about how things ought to be done are formed. Our perceptions then become selective, as over time, we filter out sensory data inconsistent with our cultural perspectives hence, giving rise to preconceptions and pre-dispositions.[533]

People from the same country tend to develop and share a distinctive negotiation approach and style because of their national cultural perspective. This style affects decision making behaviour, including goal-setting and strategising during negotiation preparations. Knowing the other party's cultural tendencies in advance gives international development negotiators distinct and tactical advantages, as they are able to establish possible areas of complementarities and synergies and therefore can capitalise on them.[534]

With regard to strategic planning, it is important for negotiators to formulate a negotiating plan, that is, what the country wants to achieve from the bilateral negotiations. Coming up with a model BIT is a good way of doing this. The International Institute for Sustainable Development (IISD) came up with a model BIT as well as a

[527]Ibid
[528]Ibid
[529]Cultural value is the society's basic beliefs, norms, standard of conduct and customs. See Sunshine (1990)
[530]Cultural perspective is the viewpoint or lens for looking at and interacting with the world. See Sunshine (1990)
[531]Sunshine (1990) p 27
[532]Sunshine (1990) pp 29-30
[533]Sunshine (1990) pp 29 -30
[534]Berton P *et al.* (1999) *International negotiation: Actors, structure/process, values* at p 29

negotiators handbook that African country bilateral investment negotiators could use to guide them in coming up with their strategic plans.[535]

The risks of negotiating with inadequate information are grave. At a minimum, they include being taken by surprise by an unanticipated question or assertion of the other party, missing a window of opportunity or falling for unfounded threats and promises hence making ill-considered concession.[536]

Preparation is often the weakest component of negotiation performance for African country negotiators, relative to their industrialised country counterparts.[537] Frequently, African country negotiators arrive at the bargaining table ill-prepared and therefore curtail their ability to make reasoned persuasion.[538] In light of the above, African countries need to take negotiation preparations very seriously in order to improve their bargaining power.

3.3.2 <u>Diversification and value addition</u>

Many African countries are highly dependent on primary commodities such as agriculture (coffee, tea, cocoa, fisheries), natural resource extraction (diamonds, copper, iron, steel, aluminium), oil, natural gas and coal for export earnings.[539] For example, diamonds is Botswana's main export commodity. Botswana became a significant diamond producer after 1982 when a major mine was opened. Income from diamond mining, both in the form of taxes and dividends, accounts for about half of government revenues.[540] Similarly, Nigeria is predominantly dependent on petroleum and cocoa; 95%

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[535]They are both available at the IISD website : http://www.iisd.org
[536]Sunshine (1990) at p 95
[537]Ibid
[538]Ibid
[539]South Centre 'Dependency of developing countries on non-agricultural commodities: Characteristic and challenges' (2005) ref: SC/TADP/AN/COM/2 at p 4. Also see UNCTAD 'Diversification of production and exports in commodity dependent countries, including single commodity exporters for industrialisation and development taking into account the special needs of LDCs'. (2002). Ref: TD/B/COM 1/EM.18/2. at p 3.
[540]UNCTAD (2002) fn 539 p 7

of Ugandan exports consist of coffee; and 95% of Zambian exports consist of copper and zinc.[541]

The world prices of primary commodities are highly volatile; consequently, dependency on primary commodities makes African countries vulnerable to booms and crashes in the world market prices resulting in severe microeconomic and macroeconomic shocks.[542] Heavy dependence on the export of very few primary commodities due to lack of diversification, makes them even more vulnerable.[543] This constrains their ability to attain a path of stable and sustained growth and employment creation that could benefit all segments of their population.[544] For example, Burundi is dependent on the export of coffee and tea to an extent of 87%.[545] Between 1986 and 1987, the prices of coffee and tea fell by 37% and 20% respectively.[546] As a result Burundi's annual exports fell from USD 154 millions to only USD 90 millions - a decline of almost 40%.[547] In 1988, with a marginal improvement of 7% in coffee prices, coupled with an increased volume of exports, total exports rebounded to USD 132 million.[548] However, they contracted drastically again in 1989 to USD 78 million only due to a 20% fall in coffee prices.[549] In 2003, after a passage of more than 15 years, Burundi's total exports were only USD 37 million.[550] The surge in export prices had a double effect on investment, through increased financial resources due to export receipts and improved access to international capital markets.[551] However, when export prices collapsed, no positive structural change

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[541] Parimal J. 'Rethinking policy options for export earnings'. (2006). South Centre research paper No. 5 at p 11. Available at:
www.southcentre.org/index.php?option=com_docmanandtask=doc_downloadandgid=125andItemid=
(accessed on 11/4/09)
[542] Collier P. 'Primary commodity dependence and Africa's future'. (2002). World Bank at p 2. Available at: http://siteresources.worldbank.org/INTABCDEWASHINGTON2002/Resources/Collier-full.pdf
(accessed on 11/4/09). See also Parimal (2006) p 19
[543] Parimal (2006) p 13
[544] Collier (2002).
[545] Parimal (2006) p 7
[546] Ibid
[547] Ibid
[548] bid
[549] Ibid
[550] Ibid
[551] Berthelemy J. and Soderling L. 'The role of capital accumulation, adjustment and structural change for economic take-off: Empirical evidence from African growth episodes'. OECD (1999) working paper 150 at p 27. Available at: http://www.oecd.org/dataoecd/17/63/1921696.pdf (accessed on 11/4/09.

had taken place to cushion the economy hence leading to deterioration of export gains.[552] This state of affairs is common with most African states.[553] The inability to seize the opportunity to grow could be partly because booms tend to lure African governments into unsustainable increases in expenditures and they therefore find themselves locked into them when revenue falls again.[554] Furthermore, African governments have less technical economic expertise to deal with such situations for the benefit of the economy.[555]

Since unstable markets cannot provide a reliable indication of the relative profitability of investments in primary commodities sectors because of high volatility, risk-averse investors become hesitant to invest.[556]Chinese investors are however known to undertake investments in countries with macroeconomic instability; political instability; weak institutions; high rate of reversibility of policies and; high risk of expropriation by state.[557] For example, there is a civil and religious war in Sudan between the government and its own people in the south of the country.[558] Notwithstanding, China is still investing heavily in the oil industry through its main state owned company, China National Petroleum Corporation (CNPC).[559] Similarly, it has invested in the mineral rich DR Congo despite its current unstable economy.[560]

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In the event that China decides to invest in an African country that has unstable market due to dependency on export of primary commodities, their bargaining niche in bilateral negotiations rises. Consequently, for African states to improve their bargaining position, they need to diversify by commencing trade in services, tourism, low skill manufacturing, and production of new types of commodities such as “off-season” and “specialty fresh

[552]Berthelemy (1999) p 27 and 28
[553]South Africa and possibly Tunisia are probably the only African countries not affected by export booms and crashes. See Berthelemy (1999) p 28
[554]Collier (2002) p3
[555]Collier (2002) p 5
[556]Parimal (2006) p 19
[557]Lonnqvist (2008) p 6.
N.B Africa was ranked the riskiest continent by the institution investor risk rating. See Berthelemy (1999) p 27.
[558]‘Petrochina,CNPC and Sudan: Perpetuating genocide’, (2008). Report prepared by the Sudan Divestment Task Force.
[559]Ibid
[560]Vandaele J. ‘Development: China outdoes Europeans in Congo’. (2008). IPS News. Available at: http://ipsnews.net/news.asp?idnews=41125 (accessed on 5/5/09).

vegetables" or cut flowers. Moreover, diversification can be achieved through value addition to export commodities in the agricultural, mineral, oil and natural gas sectors through resource based manufacturing and commodity processing.[561] All the above is possible through effectively and efficiently utilising financial resources obtained from windfall gains as a consequence of export booms, domestic savings and ODA. This can be achieved through investing as well as addressing domestic constraints to export development, for example, government policy constraints,[562] financial market constraints,[563]poor infrastructure and administrative constraints,[564]and limited trading knowledge[565].

This has been successful in some countries, for example Mauritius and Kenya. In the past three decades, Mauritius was dependent on export of sugar but has recently managed to develop a thriving export oriented manufacturing sector.[566] Furthermore, it is investing in Madagascar's clothing sector. Kenya on the other hand diversified away from traditional commodities (i.e. tea and coffee) to processed products (such as preserved fruit and fish products) and the production of new types of niche products (such as "off-season" and "Specialty fresh vegetables" or cut flowers).[567] It is now the largest African cut-flower grower and one of the biggest exporters of fresh horticultural produce.[568] Diversification helped the two countries reduce risks associated with price swings and develop new areas of competitive advantage hence improving their bargaining power in bilateral negotiations.[569]

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[561]Bonaglia F. and Fukasaku K. 'Export diversification in low-income countries: An international challenge after Doha'. OECD (2003). Working paper No. 209 at p 16. Available at: http://www.oecd.org/dataoecd/13/28/8322001.PDF (accessed on 12/4/09)
[562]For example, the anti-export bias due to exchange rate misalignment and taxes on international trade. See Bonaglia (2003) p 20
[563]For example, limited provision of export credit and insurance. See Bonaglia (2003) p 20
[564]For example, high transport costs. See Bonaglia (2003) p 20
[565]For example, lack of information on foreign market structure, contact making and marketing. See Bonaglia (2003) p 20
[566]Bonaglia (2003) p 16
[567]Bonaglia (2003) p 21
[568]Ibid
[569]Bonaglia (2003) p 16

3.3.3 Negotiating as an economic bloc

During the struggle for political independence, many African countries acknowledged continental unity and regional co-operation as a strategy for combating foreign dependence and underdevelopment.[570] In post colonial Africa, states participated in regional economic groups for political, economic and social interests.[571] Most African countries are members of at least one of the existing regional integration arrangements on the continent.

The major regional integration arrangements in Africa are Central Africa Monetary and Economic Community (CEMAC), East Africa Community (EAC), South African Customs Union (SACU), Economic Community of West African States (ECOWAS) and Common Market for Eastern and Southern Africa (COMESA).

The EAC is the regional intergovernmental organisation of the Republics of Kenya, Uganda, Tanzania, Burundi and Rwanda.[572] There is currently a fully operational customs union which incorporates important elements of integration stages, such as, working cross-border movement instruments like the East African passport, harmonized macroeconomic policies, convertible currencies and a working capital market with cross-listing of stocks among others.[573]. The members jointly decided to form a common market before 2010 to further their political, economic, social and cultural integration.[574] When fully formed, the EAC common market will be a regional integration bloc with a combined population of approximately 90 million people and a total GDP of more than USD 30 billion.[575] This deeper integration through creation of a single market and investment area means a larger domestic market; hence economies of scale, large investment area as a result of enlarged market, more attractive investment location for

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[570]Adetula V. 'Regional integration in Africa: Prospect for closer co-operation between West, East and Southern Africa'. (2004). Paper presented at the meeting of IDASA/FREDSKORPSET Research Exchange Programme-Governance and Democracy at Johannesburg, South Africa on 2/5/2004.
[571]Ibid
[572]See the EAC website. http://www.eac.int/ (accessed on 14/4/09)
[573]M.A consulting group. ' Study of the establishment of an East African Community common market.' Available at: http://www.eac.int/ (accessed on 14/4/09)
[574]Ibid
[575]Anonymous 'The benefits of the East Africa Federation to the youth'. Available at: http://www.africanexecutive.com/modules/magazine/articles.php?article=751 (accessed on 14/4/09)

both domestic and foreign investors, increased competitiveness, and a market more amenable to effective participation in the global economy and diversification. This therefore increases their bargaining power in bilateral investment negotiations. Moreover, the members will be able to negotiate as a trade bloc and would thus achieve a degree of bargaining power in bilateral and multilateral forums.

In light of the foregoing, there is need for African states to deepen regional integration in order to improve their bargaining power in bilateral negotiations.

3.4 CONCLUSION

The Afro-Chinese BITs are mis-engineered because of bargaining power disparity. African states have weak bargaining power and are therefore not able to negotiate BITs that meet their development needs. As a result, Africa ends up getting unequal returns on the Chinese investments.

Africa needs to improve its bargaining power through proper preparation for the negotiations, diversification from export of primary commodities, value addition to its products of export and deepening regional integration. This will ensure that the parties ratify a balanced BIT; they equally benefit from the relationship; and that Africa fully taps the benefits of South-South co-operation hence achieve increased economic growth.

However, even with a balanced BIT, equal return on investment is not guaranteed. This is because of the corruptible and elite serving institutions characterising many African states.

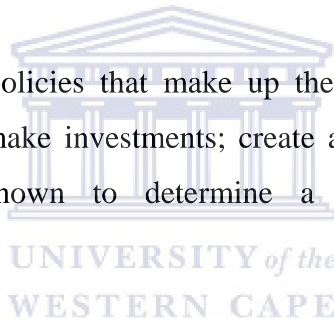
Chapter four discusses how BITs operating in an environment of rigid and corrupt institutions contributes to the unequal returns on investment.

CHAPTER 4: UNEQUAL RETURNS ON INVESTMENT IN THE CONTEXT OF WEAK STATE INSTITUTIONS AND INSTABILITY IN HOST STATES

"I would suggest that the rate at which countries grow is substantially determined by three things: their ability to integrate with the global economy through trade and investment; their capacity to maintain sustainable government finances and sound money; and their ability to put in place an institutional environment in which contracts can be enforced and property rights can be established. I would challenge anyone to identify a country that has done all three of these things and has not grown at a substantial rate." Larry Summers (2003)[576]

4.1 INTRODUCTION

Institutions and government policies that make up the economic environment within which individuals and firms make investments; create and transfer ideas; and produce goods and services, are known to determine a country's long-run economic performance.[577]



North defines institutions as a set of formal rules and informal conventions that provide the framework for human interaction and shape the incentives of members of society.[578] The World Bank, on the other hand, defines institutions as formal (constitution, laws, regulations, contracts, internal procedures of specific organizations) or informal (trust, values, customs and norms) rules that shape the behaviour of organizations and individuals in a society, including the rule of law.[579]

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[576]Summer L. 'Globalisation and American interests'. (2003). Available at: http://www.hno.harvard.edu/gazette/2003/04.10/17-godkin.html (accessed on 16/4/09). Delivered during a public lecture on April 7th 2003. Professor Larry Summer is former president of Harvard University, former Secretary of the Treasury under the Clinton Administration, former Chief Economist of the World Bank, and currently lectures Economics, public policy and international affairs

[577]Hall R. and Jones C. "Why do some countries produce so much more output per worker than others?" (1999)114. The Quarterly Journal of Economics pp. 83–116. Available at: http://elsa.berkeley.edu/~chad/pon400.pdf (accessed on 16/4/09).

[578]North D (1990) *Institutions, institutional change, and economic performance* at p 3.

[579]Burki S. and Perry G. 'Beyond the Washington consensus: Institutions matter'. (1998). The World Bank. Available at:

From North's perspective, "good" institutions are viewed as establishing an incentive structure that reduces uncertainty and promotes efficiency hence contributing to stronger sustainable economic performance.[580] This is so because they ensure two desirable outcomes: that there is relatively equal access to economic opportunity (a "level playing field"), and that those who provide labour and capital are appropriately rewarded and their property rights are protected.[581] Institutional quality is therefore important for a state to obtain equal returns on FDI.

This chapter will examine weak institutions characterising most African states and state instability and how they have contributed to the unequal returns on the Chinese investments.

4.2 AFRICA'S WEAK INSTITUTIONS

A weak institution is one that, inter *alia,* does not: observe the rule of law; secure property rights; enforce contracts; have an even handed and transparent government; and have quality regulations.[582] This adversely impacts on a country's ability to engage in mutually beneficial trade and investments.[583]

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For example, institutional weaknesses in Ghana caused severe economic instability to the country despite the fact that it is endowed with natural resources (gold and timber) and good agricultural land (plants cocoa).[584] Ghana was the first British colony in Africa to become independent in 1957 and at that time it had the same level of GDP per capita as

www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1998/11/17/000178830_98111703552694/Rendered/PDF/multi_page.pdf (accessed on 6/5/09) at pp 11 and 12

[580] North (1990) pp 3 and 4

[581] World Economic Outlook, 'Growth and institutions'. (2003). Available at : http://www.imf.org/external/pubs/ft/weo/2003/01/pdf/chapter3.pdf (accessed on 16/4/09) at chapter 3 pp 96 and 97

[582] Tiffin A. 'Ukraine: The cost of weak institutions'. (2006). IMF working paper ref: WP/06/167 at pp 5 and 6. Available at: http://ssrn.com/abstract=920259 (accessed on 16/4/09).

[583] Tiffin (2006) p 6

[584] Acemoglu D. *et al.* 'Institutional causes, macroeconomic symptoms: Volatility, crises and growth.' (2003)50 Journal of monetary economics at pp 49-123. Available at: http://www.people.fas.harvard.edu/~jrobins/researchpapers/publishedpapers/jr_JMEpublishedversion.pdf (accessed on 16/4/09).

South Korea.[585] However, in 1998 its GDP per capita had just about recovered to where it was at independence.[586]

This was because the first post-independent government of Ghana headed by Kwame Nkurumah introduced a range of distortionary policies.[587] For instance, it used the state's cocoa marketing board and exchange rate policy to systematically expropriate the cocoa farmers who dominated the economy and exports.[588] The rents obtained were redistributed to the urban and ethnic interests which supported the then ruling party (the Convention People's Party (CPP)). Moreover, the role of the state was reduced to that of dispenser of patronage hence leading to the construction of a non efficient bureaucratic government.[589] These distortionary policies did not stop when Nkrumah was ousted in 1966.[590]

The effects of these policies were severe for the Ghanaian economy more so because the institutions did not place constraints over the behaviour of the political elites.[591] As a result, Nkrumah and the then ruling party were able to build a one-party state, use the bureaucracy and economic policies for patronage and engage in mass corruption.[592] The high political stakes that resulted made it very attractive to be in power and induced intense political instability, as evidenced by the very frequent coups the country experienced.[593] Political instability translated into economic instability. Moreover, economic relations could not be sustained and therefore investors preferred to invest in sectors or activities where they could withdraw their capital more quickly, thus affecting the country's ability to engage in mutually beneficial investments.[594]

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[585]Acemoglu (2003) p 62
[586]It's GDP per capita was USD 390 in 1998 compared to that of South Korea which was USD 8600. See Johnson S. *et a.l* 'An African success story: Botswana'. (2001). Massachusets Institute of Technology, department of economics working paper 01-37 at p 41 table 2
[587]Acemoglu (2003) p 62
[588]Acemoglu (2003) 64 and 64
[589]Johnson (2001) pp 31 and 32
[590]Acemoglu (2003) p 66
[591]Acemoglu (2003) p 63 and 64. See also Johnson(2001) pp 31 and 32
[592]Acemoglu (2003) p 63 and 64
[593]Ghana experienced military coups in 1966, 1972, 1978, 1979 and 1982 and re-democratisations in 1969, 1979 and 1996. Ibid p 62
[594]Acemoglu (2003) p 64

In 1981, Lt. Jerry Rawlings took over power, after several coups, and ruled till the year 2000. During his regime, the government co-ordinated with the World Bank and launched a stringent economic recovery program aimed at re-opening infrastructural bottlenecks and reviving productive sectors such as agriculture, mining, and timber.[595] During the reforms, capacity building efforts for management of aid and other development matters was concentrated on producing a few trained persons without much regard for strong government institutions leading to stagnation on globalisation.[596] On realising the effect of this move on investments and the economy, a civil service reform programme was launched in 1987 by the Provisional National Defence Council as a component of the Structural Adjustment Programme.[597] However, the programme had serious shortcomings, for example, it was crafted as a technical instrument by 'consultants' and mission experts and imposed top-down with little local participation and ownership; the office of the head of the civil service was the main focus of the reform enterprise rather than the civil service as a whole; the programme lacked an effective machinery to ensure evaluation and follow-up actions; and donor deadlines, time tables and funding arrangements created imbalances.[598]

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The Civil Service Performance Improvement Programme (CSPIP) was therefore introduced to address the above deficiencies.[599] It got technical and financial assistance from the World Bank and the United Kingdom Department for International Development (DFID).[600] Moreover, the government introduced a National Institutional

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[595] This program is what is usually referred to as the Structural Adjustment Program. See Carlsson J. et al. (1997) *Foreign aid in Africa: learning from country experiences*. See also Hustaedt E. and Chau Q. 'Public service human resource development in international cooperation: A general perspective'. (2007). Conference paper for the PSC International Human Resource conference of 19-20th April 2007. Available at: www.ipma-hr.org/pdf/sa/20GTZ-OPSCconferencepaperdonorsupport.doc (accessed on 5/5/09).

[596] Ibid

[597] Adei S. and Danquah Y. 'The civil service performance improvement programme (CSPIP) in Ghana: Lessons of experience'. (2002). Paper presented at the 24th AAPAM annual roundtable conference on the African public service in the 21st century-New initiatives in performance management held in Lesotho. Available at: http://unpan1.un.org/intradoc/groups/public/documents/AAPAM/UNPAN031852.pdf (accessed on 5/5/09).

[598] Ibid

[599] Ibid

[600] Analoui K. and Agyekum D. 'Public sector reform in Sub-Saharan Africa: What can be learnt from the Civil Service Performance Improvement Programme in Ghana?' (2008). Public Administration and Development. Available at: http://www3.interscience.wiley.com/cgi-bin/fulltext/121422256/PDFSTART (accessed on 7/5/09).

Renewal Programme (NIRP)[601] to undertake thorough, deep-seated institutional renewal and capacity building throughout the public sector in order to meet its vision 2020.[602]

In addition to the above institutional reform efforts, the government of Ghana, in May 2004, volunteered to be the first country to face scrutiny under the NEPAD Peer Review Mechanism.[603] Furthermore, it enacted the freedom of information bill and the whistle blowers bill. Despite all the above, substantial governance problems remain and corruption still exists.[604]

As a result of a combination of : institutional reforms, improved economic policy environment based on sound fiscal management, aid and rising private investments, Ghana's economy begun to advance.[605] Since the 1990s, it has managed to sustain real GDP growth of above 4 percent and per capita growth of approximately 2 percent.[606] Economic growth averaged over 5 percent since 2001 and reached 6 percent in 2005-06.[607] In 2008, its GDP per capita was USD 1500 up from USD 390 in 1998.[608]

Despite the said economic performance, reports have indicated that Ghana could have achieved more accelerated economic growth as a result of the institutional reforms programmes.[609]It did not because the CSPIP was donor driven hence not fully home grown. Moreover, it was directly executed by the head of the civil service with a few officials.[610] Consequently, the public were not adequately sensitised on their rights and on what to expect from the civil service as a result of the perceived changes.[611] Similarly, a number of the junior workers in the civil service were unaware of the programme hence

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[601]CSPIP is a component of the NIRP targeted at the core Civil Service.
[602]Ghana government 'Meeting the challenges of Ghana's economic growth'. (2009). Available at : http://www.ghana.gov.gh/ghana/meeting_challenges_ghanas_economic_growth.jsp (accessed on 5/5/09).
[603]OECD 'African Economic Outlook' (2006). Available at: http://www.oecd.org/dataoecd/34/10/36740417.pdf (accessed on 5/5/09
[604]Ibid
[605]Ibid
[606]Ibid
[607]Ibid
[608]CIA (2008)
[609] Adei (2002).
[610]Ibid
[611]Ibid

continued with their old corrupt practices.[612] As a result, the CSPIP failed to fully transform the Ghanaian civil service.

The aforesaid shows that the government of Ghana recognises the importance of good institutions for economic growth and has therefore made concerted efforts to improve its public sector. John Atta Mills, the current president of Ghana, during his presidential campaigns, continuously affirmed the importance of strong institutions to investments, trade and economic growth and thus pledged to strengthen them by having an open and transparent government.[613] Because of political will, Ghana's institutions might eventually strengthen thus lead to mutually equal returns on foreign investments hence more accelerated economic growth.

Another example is DR Congo. It is rich in copper, cobalt, diamonds, gold, petroleum, wood, palm oil, rubber, cotton and cocoa but its economy is wanting because of weak institutions.[614] Just like Ghana, its institutional problems originated from the immediate post-independence leadership. DR Congo gained independence in 1960 from Belgium. Parliamentary elections were held the same year and Joseph Kasavubu was elected president while Patrice Lumumba was elected as prime minister.[615] In 1964, the president was removed from power by the committee of army commanders and Mobutu Sese Seko was pronounced head of state.[616] Mobutu ruled DR Congo (which name he later changed to Zaire) from November 1964 to May 1997 when Laurent Kabila (the father of Joseph Kabila) assumed command after his army defeated the national army.[617]

Mobutu had full control of the economy and politics. His government was characterised by abuse of the rule of law; inefficiency; corruption and institutionalised theft; and

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[612]Ibid
[613]Speech by John Evans Atta Mills at the launch of his party's (National Democratic Congress (NDC) campaign on Wednesday, May 7, 2008, held at the national theatre, Ghana. Available at: http://www.mills-mahama-ghana.com/news_list/Speech+By+Prof.+John+Evans+Atta+Mills,+At+National+Theater-t-NEWS2.htm (accessed on 22/4/09).
[614]Gran G. and Hull G. (1979) *Zaire, the political economy of underdevelopment*.
[615]Ibid
[616]Ibid
[617]Omozuanvbo J. and Mbaku J. (2003) *Political liberalization and democratization in Africa: lessons from country experiences*.

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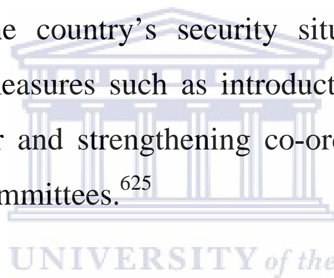
overstaffing. He replaced European personnel and managers running the parastatals and government ministries with Zairians who did not have expertise.[618] Instead of the rule of law, Mobutu installed a system of patronage which had at its pinnacle him and his family, thus replacing the Zairian judicial system as the true arbiter of disputes.[619] In addition, he took from foreigners their farms, ranches, plantations, concessions, private businesses, real estate agencies and other properties for the benefit of the dominant class,[620] who bought them from the state at a meagre fee.[621] The dominant class did not invest resources into the businesses they acquired for fear that Mobutu would likewise expropriate them. Moreover, they used their privileged positions to enhance their status and wealth.[622] Because of all the foregoing, Zaire was unable to benefit from its natural resources and investments and as a result the economy of Zaire collapsed.[623]Joseph Kabila, the current president, is attempting to recover the economy by setting up proper institutions and improving the country's security situation.[624] His government has adopted institutional reform measures such as introduction of an action plan to tackle corruption in the public sector and strengthening co-ordination of government actions through the inter-ministerial committees.[625]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Unlike Ghana, DR Congo and most African countries, Botswana has been able to sustain economic growth since independence because it possesses strong institutions and has good economic policies.[626]

Botswana's post-independence government maintained the public service that it inherited from the British in 1966 and developed it into a relatively non-corrupt, meritocratic and

[618]Nzongola G. (2003) *The Congo from Leopold to Kabila: A people's history*.
[619]Ibid
[620]The dominant class consisted of state officials, parastatal heads, army leaders, political party leaders and other bureaucratic bourgeoisie
[621]Omozuanvbo (2003). See also Nzongola (2003) and San Jose State University, department of economics 'The Congo as a Nation'. Available at: http://www.applet-magic.com/congo.htm (accessed on 23/4/09).
[622]Ibid
[623]Ibid
[624]CIA (2008). See also Naidoo S. 'DRC: A country re-awakening'. (2002). Africa Business Journal. Available at: http://www.tradersafrica.com/articles.asp?articleid={69EE9EDC-E1E0-4F20-8905-0C7CF9399B52} (accessed on 5/5/09).
[625] Ibid
[626] Johnson (2001) p 33

efficient bureaucracy.[627] It was able to do this because it did not "indigenise"[628]the bureaucracy (like many post-independence African governments) until suitable qualified Batswana were available hence they kept expatriate workers and freely used international advisers and consultants. [629]

Moreover, Botswana had pre-colonial tribal institutions that encouraged broad based participation and placed constraints on political elites. [630]British colonisation had limited effect on the aforesaid institutions. The tribal institutions ensured that the political elites kept their political powers by pursuing good policies. Moreover, it placed restrictions on infighting over political rewards.[631] As a result, good strategies were adopted by the post- colonial government, for example, it : negotiated a Customs Union with South Africa in 1969 and thereby securing a greater share of the revenue; encouraged mining companies to explore the country and as a result diamond, copper, nickel and coal were discovered; renegotiated the investment agreement with DeBeers[632] and consequently started receiving 50 per cent share of diamond profits; implemented a consistent series of development plans emphasising investments in infrastructure, health and education; did not indigenise its public service therefore its bureaucracy to date maintains probity, relative autonomy and competence; and formed the Botswana Meat Commission (BMC) which purchased cattle from ranchers, set prices and sold the beef to regional and world markets as well as negotiated access to the European Economic Commission (EEC) at favourable terms. [633]

As a result of the said strong institutions and the good government decisions, the basic system of law and contract worked well; state and private predation were limited; its large diamond resource did not induce domestic political instability or conflict for control

[627]Johnson (2001) p 2
[628]That is, to localise the public service. See Johnson (2001) p 18
[629]At independence (in 1966), Botswana was very poor with few assets and infrastructure. It had only two secondary schools with 80 Batswana in the final year unlike Zambia that had ten times as many secondary school graduates at independence and Uganda seventy times. It hence had very few local qualified individuals to efficiently and effectively work in the public service. See Ibid Johnson (2001) p 18
[630]Johnson (2001) p 32
[631]Johnson (2001) p 24 and 32
[632]It is the largest diamond mining company in Botswana. See Johnson (2001) p 17
[633]Johnson (2001) p 17

of the revenue[634]; the government invested heavily in infrastructure, education and health; its fiscal policy was prudent ; the exchange rate was closely tied to fundamentals; and the government had a marketing board[635] that was not used to extract resources from the rural sector.[636] Consequently, the property rights of actual and potential investors were protected; there was political stability; and the political elites were constrained by the political system and the society from rent seeking.[637] Botswana thus was (and still is) able to obtain sustainable equal returns on trade and investments in and/or out of its territory, since independence. This is evidenced by the fact that in 2008 it was able to obtain a GDP per capita of USD 13,300 (up from USD 3070 in 1998) compared to that of Ghana which was at only USD 1500(up from USD 390 in 1998). [638] Similarly its investments were at 23.9% of GDP, Agriculture was 1.6% of GDP, industry 16.6% of GDP, mining 36% of GDP and services 45.8% of GDP.[639] Moreover, investment in human capital was (and still is) significant, its balance of payment in surplus and its domestic reserve large.[640]

From the three country cases, it is clear that high institutional quality and good policies can assist African states obtain immense returns from Chinese trade and investments in the continent. Three distinct characteristics of high institutional quality can be identified from the three cases discussed above that African countries should ensure they possess in order to obtain equal returns on Chinese investments:

[634]The diamond revenues generated enough rewards for the main political actors hence increasing the opportunity cost of (and discouraging) further rent seeking (i.e. pursuit of unearned wealth). See Ibid p 2
[635]It is an institution employed by the urban interests to exploit farmers e.g. the cocoa marketing board of Ghana earlier discussed.
[636]Johnson (2001) pp 1 and 2
[637]Johnson (2001) p 2
[638]Johnson (2001) p 41 table 2 for the 1998 figures. See also CIA (2008)
[639]CIA (2008)
[640]Johnson (2001) p 19

4.2.1 **Observance of the rule of law**

The rule of law requires that the government be bound by the law; there is equality before the law; there is law and order; there is predictable and efficient justice and; that the state does not violate human rights. [641]

4.2.1.1 **Government bound by the law**

The government should exercise its powers in accordance with well established and adequately publicised rules, regulations and legal principles.[642] This is only possible if the independence of the judiciary is guaranteed.[643]

Therefore, the judiciary should be free from extraneous pressures, organised, have self confidence and be autonomous of all authority, save that of the law, in order to be able to curtail government power. [644] Moreover, it should have powers to review administrative actions hence ensure that government officials do not use force, personal will or power.[645] Consequently, the host state would be in compliance with the provisions of the BITs with regard to the obligation to protect the investments of the investor and expropriation. This therefore means that property rights will be protected and contracts enforced.[646]

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BITs generally adequately protect the investor by prohibiting the host state from expropriating foreign investments, either directly or indirectly, through taxation or regulatory measures ; setting a standard of compensation in the event of expropriation; and providing detailed terms for capital repatriation, National Treatment requirements for

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[641]Belton R. 'Competing definitions of the rule of law: Implications for practitioners'. (2005) No. 55. Carnegie endowment for international peace publication at pp 1-19. Available at: http://www.carnegieendowment.org/files/CP55.Belton.FINAL.pdf (accessed on 20/4/09).
[642]Belton (2005) p 9.
[643]Belton (2005). See also Culver K (1999) *Readings in the philosophy of law* at p 18.
[644]Ibid
[645]Culver (1999) p 18
[646]Compliance means compliance with the standing substantive rules embodied in treaties. That is the degree to which a host state's treatment of foreign investments is in conformity with the substantive provisions of such treaties. See Freeman N. 'The determinants of investor-state disputes: Institutional capacity and compliance with Bilateral Investment Treaties'. (2009). Paper presented at the annual meeting of the Southern Political Science Association held at Hotel Intercontinental, New Orleans, LA on Jan 07, 2009 at p 14.Available at : http://www.allacademic.com/meta/p276486_index.html (accessed on 22/4/09).

investors once inside the market and MFN type requirements. The effects of non-compliance[647] are felt immediately by investors.[648] As a result, they use their financial and legal resources to publicise acts of non-compliance and pursue legal remedies through arbitral claims against the host state. Such claims are costly for host African states[649] and they thus need to ensure that they comply with the provisions of the BITs in order to avoid numerous arbitral claims being brought against them.[650]

When the host state exercises its powers in accordance with well established and adequately publicised rules, regulations and legal principles as well as complies with the provisions of the BITs, foreign investors are encouraged to deploy more capital or invest in long term projects. As a result, African states gain from sufficient transfer of technology, knowledge and technical skills as well as increased government revenue and employment opportunities.[651]

If a government is bound by the law, it means that its judiciary is independent.[652] Therefore, foreign investors will have an independent judicial forum, whose rulings they will have confidence will be enforced by the state, to which they can either appeal arbitrary, capricious or self-serving rulings by the state or forward any investor state dispute arising. [653] If foreign investors have confidence in the judiciary, they will not turn to external sources of dispute resolution provided for in the BITs as alternatives to the domestic courts. This is good for the host state as its judiciary will not loose business to international competitors such as arbitral bodies; it is cheaper for the state if a dispute between it and the investor is handled domestically; and the local courts and private

[647]The non-compliance effects include loss of property or decreased profitability.
[648]Ibid p 16.
[649]Paying for legal fees as well as paying compensation awarded to the investor.
[650]Freeman (2009) pp 5 and 16.
[651]Henisz J. and Zelner B. 'The institutional environment for telecommunications investment'. (2001)10. Journal of economics and management strategy at pp 123-147.
[652]Belton (2005) and Culver (1999).
[653]Henisz J. 'The institutional environment for international business'. (2000)16. Journal of law, economics and organization. Available at : http://www-management.wharton.upenn.edu/henisz/papers/wiib.pdf (accessed on 20/4/09) at pp 13-14.

lawyers would generate precedents through judgments and complaints respectively.[654] This prevents the legal systems from relying solely on public servants to create the law hence avoid suboptimal quality of lawsuits and suboptimal development of precedents thereby improving the quality of the judicial system of the host state in question.[655]

4.2.1.2 Equality before the law

All people in a state are equal hence political elites and the wealthy persons should be tried under the same law and in the same courts as ordinary citizens and foreign investors.[656] The observance of this rule ensures that no government is above the law, and no public official acts arbitrarily or unilaterally outside the law. As a result, property rights will be respected and contracts enforced. This therefore ensures that only valid expropriation occurs as provided for under the BIT and there is National Treatment of foreign investors.

Real equality before the law requires courts that are strong and independent hence there should be no corruption and bribery in the judiciary to escape justice.[657] Moreover, the courts should be easily accessible, that is, no long delays or excessive costs. [658] This increases the probability that disputes between foreign and domestic partners or the state arising from contracts and agreements will be adjudicated fairly under the domestic law of the host state. Foreign investors will thereby be encouraged to utilise domestic courts instead of turning to international arbitration.

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[654]Judgments have *stare decisis* effects. Complaints as contained in the statement of claim can state facts that contribute to the creation of precedent (judicial opinions reflect inputs from complaints and other pleadings), formulate new common law causes of action and clarify statutes. See Kobayashi H. and Ribstein E. 'Class action lawyers as lawmakers'. (February 2004). George Mason law and economics research paper No. 04-08. Available at: http://ssrn.com/abstract=501548(accessed on 22/4/09)
[655]Kobayashi (2004)
[656]Belton (2005) p 9
[657]Belton (2005) p 10
[658]Culver (1999) p 18

4.2.1.3 Law and order

It means protection from one's fellow citizens.[659] It is essential in protecting the lives and property of investors and citizens since natural rights of freedom and property rights are constantly exposed to the invasion by others.[660] Law and order is reliant on a good government system whereby the judiciary is not corrupt; the politicians do not give security to enterprises of criminals; the police is reformed and thus do not abuse human rights or engage in corruption thereby quell crime; the prisons reform prisoners and prevents them from perpetrating crimes from inside, court clerks do not "loose files" and law enforcement agencies do not delay investigations for bribes.[661] Uncontrolled crime like theft and smuggling hurts businesses by increasing the cost of security hence reducing the total output. This discourages investors from investing in more technology and equipment.[662]As a result, there will be fewer jobs for the locals, less transfer of technology and skills and less monetary returns accruing to the host state.

4.2.1.4 Predictable and efficient justice

Laws should be adequately publicised and relatively stable so that they are known by everyone and settled. This enables courts to rule with predictability.[663] Laws and government policies should not be changed too often for purposes of long term planning and decision making of foreign investors. Knowledge of the general outlines and sometimes even of the details of government policies and state laws are often important for business strategic planning.[664]

The judiciary should be efficient and provide impartial justice. The substance of a country's laws matter little if the institutions set up to interpret and enforce those laws are

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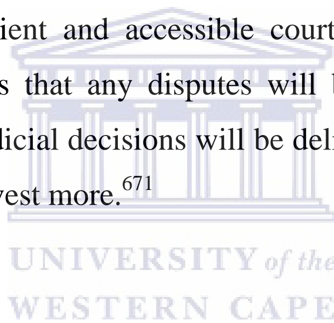
[659]Beer C. 'Judicial performance and the rule of law in Mexican States'. (2006)48. Latin American politics and society .Available at : http://muse.jhu.edu/journals/latin_american_politics_and_society/v048/48.3beer.html(accessed on 20/4/09)
[660]Belton (2005) pp 10-13
[661]Ibid
[662]Beer (2006)
[663]Belton (2005) p 12
[664]Culver (1999) p 16

inefficient, arbitrary or corrupt.[665] An efficient justice system discourages delaying of cases arising out of contravention of host state domestic law, breach of the terms of the BIT or any other cases brought before it. Delays in the judicial system create opportunities for corruption as litigants may be tempted to "buy" a speedier resolution to a case or to subvert justice[666] thereby undermining the integrity of both the decision at hand and the court system.[667] Excessive delays, corruption, and incompetence in court systems increase risks and costs for business as well as freeze up resources.[668] This prevents growth and thus serves as a disincentive to the investor to make efficient adjustments to changes in technology or to production processes (i.e. capital investments) that maximise long run profits thereby contributing to economic growth of the host state.[669].

Further, an independent, efficient and accessible court system provides the essential guarantees to foreign investors that any disputes will be resolved through a fair and predictable process and that judicial decisions will be delivered quickly.[670] This increases the investor's willingness to invest more.[671]



4.2.1.5 Uphold human rights

The principles of natural law and justice should be observed by the government for a state to obtain equal returns on its investments. Under the natural law theory, the government should not enforce any written law unless it conforms to certain unwritten,

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[665] Sabatini et al. 'Rule of law, economic growth and prosperity'. (2007). Report of the rule of law working group sponsored by the Americas Society and Council of the Americas. Available at: http://www.as-coa.org/files/PDF/pub_562_363.pdf (accessed on 20/4/09) at p 2.

[666] For example in situations where delay favours one party therefore acts as a penalty to another party before even judgment is announced. See Belton (2005) at p 12

[667] Belton (2005) p 12

[668] Ibid

[669] Beer (2006). See also Sabatini (2007) p 36 as well as Keefer P and Knack S. 'Why don't poor countries catch up? A cross-national test of an institutional explanation' (1997)35 Economic inquiry at pp 590-602. Available at: http://www3.interscience.wiley.com/cgi-bin/fulltext/119152657/PDFSTART (accessed on 20/4/09) at p 591.

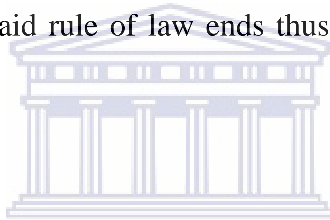
[670] Sabatini (2007) p 17. See also Belton (2005) p 12.

[671] Dam K. 'The judiciary and economic development'. (2006)2ed. 2 John M. Olin law and economics working paper No. 287, the law school, University of Chicago. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=892030 (accessed on 20/4/09).

universal principles of fairness, morality, and justice that transcend human legal systems.[672]

In light of all the above, the rule of law captures the extent to which fair and predictable rules form the basis for economic and social interactions and the extent to which property rights are protected, contracts are enforced and investors are protected. [673] Hence failure of a host state to respect the rule of law weakens its domestic property rights regime and as a result, arbitral claims against it increase.[674] Moreover, it affects foreign investors' incentive to make capital investments.[675]

African states should thus ensure that their policies and various government bodies ,for example, the judiciary, the police force, legal education, the prisons, and others, are reformed to achieve the aforesaid rule of law ends thus reap mutually equal returns on Chinese investments.[676]



4.2.2 <u>Corruption</u>

The World Bank defines corruption as "the abuse of public office for private gains".[677] Some common types of government corruption include: bribery, extortion, fraud, nepotism, embezzlement, patronage systems and similar activities.[678]

Bribery is government corruption whereby one party offers something of value to a government official in exchange for some favour or immunity from laws or ethics.[679] In this context, extortion is the use of one's political position to obtain something of

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[672]Tiffin (2006) p 11.
[673]Ibid
[674]Freeman (2009) p 5.
[675]Keefer (1997) p 591
[676]Beer (2006)
[677]World Bank 'Helping countries combat corruption: The role of the World Bank' (1997) The World Bank: Washington DC.
[678]Center for Democracy (1999) *A handbook on fighting corruption*. Available at: http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnace070.pdf (accessed on 22/4/09).
[679]Mbaku J.(2007) *Corruption in Africa: Causes, consequences, and cleanups* at p 2.

value.[680] Government corruption that involves fraud can include any act that is intended to deceive another party (including the public) in order to achieve personal gain.[681] Nepotism is government corruption whereby family and close kin are favoured in some political dealing.[682] Embezzlement, in this context, is government corruption involving taking or using government money for personal use.[683] Patronage systems consist of the granting of favours, contracts, or appointments to positions by a local public office holder or candidate for a political office in return for political support.[684]

Corruption thrives where a state fails to control its own bureaucrats, to protect property and contract rights, and to provide the institutions that underpin an effective rule of law.[685]A society may also be more vulnerable to government corruption when there is little transparency in government transactions, power is relegated to the hands of a few decision makers who are not held accountable to the masses, and when there are no checks and balances on the political system.[686] The majority of African states exist under such conditions and this is why corruption is so pervasive in the continent.

Corruption in Africa is a direct consequence of poorly developed and inappropriate institutional arrangements.[687] Most of the continent's immediate independent leaders did not take time to engage the public in state reconstruction through democratic constitution making so as to compact, by themselves, their own institutional arrangements.[688] Instead, institution making was top-down, elite driven, opportunistic and reluctant. Hence, the outcome was laws and institutions that were not locally focused and did not reflect the values of people to be governed by them. The institutions adopted did not promote

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[680]World Bank 'Introduction to corruption'. Available at: http://info.worldbank.org/etools/docs/library/35970/mod03.pdf (accessed on 22/4/09)
[681]Ibid
[682]Ibid
[683]Ibid
[684]Ibid
[685]Ndiva K. 'Change or the illusion of change: The war against official corruption in Africa'. (2006). George Washington International Review. See also Hellman *et al.* 'Measuring governance and state capture: The role of bureaucrats and firms in shaping the business environment'. (2000). European Bank for Reconstruction and Development working paper No. 51. Available at: http://www.ebrd.com/pubs/econo/wp0051.pdf (accessed on 21/4/09) at p 1.
[686]Ibid
[687]Mbaku (2007) p 2
[688]Ibid

indigenous entrepreneurship nor did they enhance peaceful co-existence of each country's numerous population groups.[689] Instead, they provided incentives, which encouraged people to invest in rent seeking, corruption and other forms of opportunism.[690]

Ghana and DR Congo are good examples of African states where the institutions adopted after independence were not people driven but political elite driven hence encouraging corruption.[691] This stunted wealth creation in the two countries and significantly damaged economic growth and development.

The growth of international trade and business has created many situations where the payment of bribes (often euphemistically called "commissions") may be highly beneficial to the companies that pay them. For example:

a) When obtaining general licenses, approvals, and other requirements for establishing a firm, including general investment approval, approvals for incentives, tax registration, company formation, expatriate work permits, business licenses, etc.[692]
b) When obtaining specialised approvals required for certain sectors or activities, such as are typically required for sectors involving resource utilisation, tourism, financial services, transportation, etc.[693]
c) When securing land, improving it, getting utilities services, and constructing buildings. [694]

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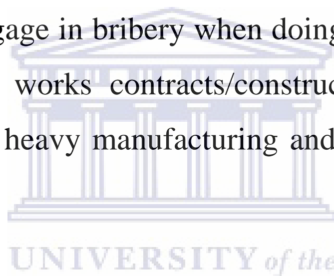
[689]Ibid
[690]Ibid
[691]Acemoglu D. *et al.* 'Institutional causes, macroeconomic symptoms: Volatility, crises and growth'. (2003)50. Journal of Monetary Economics at pp 49-123. Available at: http://www.people.fas.harvard.edu/~jrobins/researchpapers/publishedpapers/jr_JMEpublishedversion.pdf (accessed on 16/4/09)
[692]Emery J. 'Governance, transparency and private investment in Africa'. Paper presented on 17-18 November 2003 at the OECD Global Forum on International Investment held in Johannesburg, South Africa. Available at: http://www.oecd.org/dataoecd/33/50/19499957.pdf (accessed on 21/4/09) at p 4.
[693]Ibid
[694]Ibid

d) Operational requirements, which firms encounter once they begin operations. These are the result of regulations governing labour, foreign exchange, international trade, standards, etc. [695]

e) While tendering for government contracts.[696]

By paying bribes, the foreign companies obtain: reduction to taxes owed to the host state; exceptions from compliance with certain regulations and statutes; reduction in paperwork legally required of all investors and; exemptions from payment of certain taxes. [697] As a result, public revenue is reduced thus contributing to larger fiscal deficits.[698] In such a situation, the investor becomes the sole beneficiary in the investment arrangement.

The 2008 Transparency International (TI) bribe payers index ranked Chinese companies the second highest likely to engage in bribery when doing business abroad.[699] They bribe public officials in the public works contracts/construction; real estate and property development; oil and gas; and heavy manufacturing and mining sectors, in order to get high end contracts. [700]



Examples of Chinese companies' corrupt activities in Africa are numerous. For example, in Gabon, it is estimated that taxes are not paid on 60 percent of the areas allocated to Chinese Companies as forest concessions.[701] Further, the companies neglect production ceilings imposed. In addition, they do not live up to the obligation to process a part of their exports in the country of origin thus 80 percent of Gabonese forest products arrive

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[695]Ibid

[696]Tanzi V. 'Corruption around the world: Causes, consequences, scope and cures'. (1998). International Monetary Fund working paper No. WP/98/63. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=882334andrec=1andsrcabs=882994 (accessed on 15/4/09) at p 7.

[697]Ibid

[698]Tanzi (1998) p 26.

[699]Transparency International (TI) 2008 bribe payers index. Available at: http://www.transparency.org/news_room/in_focus/2008/bpi_2008 (accessed on 21/4/09) at p 5.

[700]TI (2008) p 10.

[701]Allan T. 'Chinese involvement in African illegal logging and timber trade' (2005) paper prepared by the Environmental Investigation Agency for the US house of representatives committee on international relations. Available at: http://www.eia-global.org/PDF/testimony--ChinaAfricahearing--forests--jul05.pdf (accessed on 21/4/09) at pp 4 and 5.

in China as round woods.[702] By exporting raw logs and timber, China is stripping Gabon's natural resources at the absolute lowest cost. Gabon is not benefiting from jobs and higher prices that can be achieved from value-added processing.[703] Chinese companies are able to carry out these illegal activities by bribing government officials, from the lowest administrative level to the highest echelon of cabinet ministers.[704]

Similarly, in Equatorial Guinea, Rimbunan Hijau's subsidiary Shimmer International[705] (a Chinese company), the dominant player in the logging sector, has 'close ties' with the Minister of Forests.[706] Hence, maximum allowable cut and concession sizes are largely ignored. Moreover, it is estimated that up to 90 percent of the total harvest going to China is illegal.[707]

In Mozambique, Chinese companies are engaged in illegal fishing. They are able to do this by bribing inspectors and observers.[708] Furthermore, the likelihood of a successful prosecution of a Chinese company is thought to be extremely low as senior Mozambique officials are often complicit in these crimes.[709]

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The public servants are normally tempted to receive the bribes because of personal financial needs, health and other personal or family needs.[710] Alternatively, it may be the pressure of loosing one's job for failure to co-operate with a *"clique"* that has so perpetuated corruption in the system. [711]

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[702]Allan (2005) p 5.
[703]Ibid
[704]Ibid
[705]Including its many subsidiaries and associated companies.
[706]Allan (2005)
[707]Ibid
[708]Standing (2008)
[709]Ibid
[710]Gbadamosi G. 'Ethics, corruption and economic prosperity in Africa: Botswana experiences'. Available at: www.clas.ufl.edu/users/aspring/All%20courses/UF%20courses/corruption.doc (accessed on 21/4/09)
[711] Ibid

Professor Lambsdorff,[712] in his study on the causes and consequences of corruption, found that corruption lowers a country's attractiveness to international and domestic investors. This reduces capital accumulation and lowers capital inflows. Also the productivity of capital suffers from corruption. Moreover he found out that corruption distorts government expenditure and reduces the quality of a wide variety of government services, such as, public investment, health care, tax revenue, and environmental control.

In light of the above, in order for African states to obtain equal returns on the Chinese investments, they need to tackle corruption so as to avoid loosing income due to the host state and deterring foreign investors from investing. Attempts to reduce corruption will need action on at least four fronts:

> *"(1) honest and visible commitment by the leadership to the fight against corruption. The leadership must show zero tolerance for it;*
>
> *(2) policy changes that reduce the demand for corruption by scaling down regulations and other policies such as tax incentives, and by making those that are retained as transparent and as non-discretionary as possible. Discretion must be kept to the minimum;*
>
> *(3) reducing the supply of corruption by increasing public sector wages, by increasing incentives toward honest behaviour, and by instituting effective controls and penalties on the public servants; and*
>
> *(4) somehow solving the problem of the financing of political parties."*[713]

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Some of these actions require major reforms in economic policies, institutions and incentives, aimed at reducing the role of government in economic activities (to limit authority), strengthening transparency, oversight, and sanctions (to improve accountability) and redesigning terms of employment in public service (to improve

[712]Lambsdorff G. 'Consequences and causes of corruption: Who do we know from a cross-section of countries?' University of Passau. Available at: http://www.wiwi.uni-passau.de/fileadmin/dokumente/lehrstuehle/lambsdorff/downloads/Corr_Review.pdf (accessed on 22/4/09)

[713]Tanzi (1998) p 34. For further reading, see Gray C. and Kaufmann D. 'Corruption and development'. (1998).Available at: http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/gray.pdf (accessed on 21/4/09) at pp 2-4.

incentives).[714] As a complement to these broader reforms, the careful and transparent implementation of enforcement measures, such as prosecuting some prominent corrupt figures, can also have an impact.[715]

4.2.3 Bureaucratic quality (Quality of governance)

Governance has to do with the manner in which responsibility is discharged. Such a responsibility may be acquired through election; appointment or delegation in the public domain or in the area of commerce, corporate governance.[716] Therefore, good governance in a state means a condition whereby the government discharges its responsibilities in an effective, transparent, and accountable manner. Bad governance, on the other hand, is associated with maladministration in the discharge of responsibility.[717] Good governance entails the existence of efficient and accountable institutions (political, judicial, administrative, economic, corporate) and entrenched rules that promote development, protects human rights, respects the rule of law, and ensures that people are free to participate in, and be heard on, decisions that affect their lives.[718]

The African Bureaucratic Structure Survey (ABSS), in a survey of twenty African countries, established that the efficiency of public service provision was poor in Kenya, Nigeria and Malawi while Mauritius, Eritrea, Botswana, Namibia and Tunisia had an efficient public service.[719] While, the bureaucratic structure of Botswana, Namibia, Mauritius and Tunisia was found to be performing consistently well.[720] From this survey, it is evident that the countries with an inefficient public services, low reliability of

[714]Center for Democracy (1999) p 15
[715]Gray (1998) p 4
[716]Kempe H. 'The UNECA and good governance in Africa'. Paper presented on 4-5 April 2003 at Harvard International Development Conference on Governance and Development in a Dynamic Global Environment on behalf of Amoako K. Available at: www.uneca.org/dpmd/Hope_Harvard.doc (accessed on 21/4/09) at p 2
[717]Kempe (2003) pp 2-3
[718]Kempe (2003) p 3
[719]Court et al. 'Bureaucratic structure and performance: First Africa survey results'. (1999). United Nations University. Available at: http://www.unu.edu/hq/academic/pg_area4/pdf/unu-research.pdf (accessed on 21/4/09)
[720]Ibid

services and, in general, low bureaucratic quality have low investments and economic growth unlike those with high bureaucratic performance.[721]

Bureaucratic performance can be improved through having first, certain entry requirements to public service jobs and paying reasonable wages thereby attracting a pool of talented officials in the bureaucracy.[722] Secondly, internal promotion hence encouraging career stability and good performance.[723] Thirdly, autonomy from political pressure. This ensures that laws, policies and regulations are not frequently changed for political gain.[724] Fourthly, consultations with the private sector before implementation of policies. [725]The private sector plays a major role in economic growth of a country, thus the need for a co-operative relationship between the public and private sector. Bureaucrats should discuss major policy changes with the private sector before implementation so as to get a clear picture of the effect of the policy on the economy of the country.[726]

By improving bureaucratic quality, investors are guaranteed that public services, for example, business licences, approvals and other domestic requirements for establishing and running a business in the host state; policies and taxation; as well as public utilities like water, electricity, telecommunication services etc. will not be administered and provided in a preferential and discretionary manner.[727] Moreover, they will not be required to bribe the public servants. This increases the investors' ability to profit by decreasing transaction costs hence encouraging them to make efficient adjustments to changes in technology or to production processes (i.e. capital investments) which will be beneficial to the host state.[728]Furthermore, there will be efficient collection of revenue from the investments and therefore a substantial reduction of loss of government income.

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[721]Ibid
[722]Rauch J. and Evans P. 'Bureaucratic structure and bureaucratic performance in Least Developed Countries'. (2000). Journal of public economics at pp 49-71. Available at: http://www.sciencedirect.com (accessed on 21/4/09)
[723]Ibid
[724]Court (1999)
[725]Ibid
[726]Ibid
[727]Keefer (1997) p 591
[728]Ibid

4.3 INSTABILITY IN THE HOST STATE

Instability may include mass violence, civil wars, border wars, ethnic clashes, riots, election violence, high propensity of a change of government, strikes, political disorder, assassinations, anti governmental demonstrations, revolutions, coup d'etat and attempted coup d'etat. [729]

Riots, strikes and demonstrations can have direct effects on productivity (e.g. cause breaks or disruptions in the production process) and therefore the profits of the investors. As a result, they may decide to postpone projects or invest elsewhere (capital flight).[730]Anti governmental demonstrations, on the other hand, threaten government stability thus tempting it to use corruption to insure the loyalty of the bodies that might help it to remain in power like the police, the army and the administration.[731] Corruption has a negative effect on return on investments as discussed earlier.

Conversely, occurrence of attempted or successful coups and revolutions indicates a propensity of government to abandon the rule of law and therefore a threat to established property rights as the probability that returns on investment are expropriated increases.[732] As a result of the aforesaid risk, less investment is undertaken in the host state hence minimal transfer of skills and technology; and reduced export markets, employment opportunities and government revenue.[733]

Moreover, a high tendency of a change of government is associated with uncertainty about the new policies of a potential new government.[734] Foreign investors prefer a stable political environment, with less policy uncertainty and less uncertainty about property

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[729]Alesina A. and Perotti R. 'Income distribution, political instability and investment' (1993) National Bureau of Economic Research (NBEC) working paper No. 4486.
[730]Alesina (1993) pp 4,7 and 8
[731]Berthelemy J. *et al.* 'Political instability, political regimes and economic performance in African countries'. (2002). Paper prepared for the OECD at p 6. Available at: http://www.csae.ox.ac.uk/conferences/2002-UPaGiSSA/papers/Kauffmann-csae2002.pdf (accessed on 27/4/09)
[732]Berhelemy (2002). See also Alesina (1993) p 8.
[733]Ibid
[734]Alesina A. et al. 'Political instability and economic growth'. (1992). National Bureau of Economic Research (NBEC) working paper No. 4173 at p 4

rights, thus in their absence, risk-averse foreign investors may hesitate to take economic initiatives or may "exit" the economy, by investing elsewhere.[735]

In addition, civil wars, border wars and ethnic clashes cause the governments to make concessions they would otherwise not have made in order to finance the wars. For example, Sudan is an oil rich state with proven reserves of more than 563 million barrels.[736] Because of its large debt, it relies heavily on FDI to sustain government expenditures.[737]

China's main state owned company, China National Petroleum Corporation (CNPC) is the biggest stakeholder in the Muglad oil-development project, China's largest overseas oil project that consists of a 940 mile pipeline that stretches from Heglid in Southern Sudan to Port Sudan on the Read Sea.[738] The project produces up to 10 million tons of oil a year with an estimated $450 million of the oil revenue being received by the Khartoum-based Sudan government from its 5% stake in the project annually.[739]Unfortunately, the government redirects the overwhelming majority of this FDI to finance the civil and religious war against its own people in the predominantly Christian south. [740]

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Under ordinary circumstances, the oil project would have helped Sudan gain a bargaining leverage in the international investment negotiations hence an opportunity for it to obtain excellent return on investments thereby increasing economic development.

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[735]Ibid
[736]China signed a BIT with Sudan on the 18th of May 1997 which came into force on the 1st of July, 1998. See 'Of Rogue multinationals and the mechanics of war.' (2000) The East African Alternatives. Paper prepared by the East African Alternatives team.
[737]Sudan Divestment Task Force. 'Petrochina,CNPC and Sudan: Perpetuating genocide' (2008).
[738]East African Alternatives team 'Of Rogue multinationals and the mechanics of war' (2000) The East African Alternatives.
[739]Ibid
[740]Sudan Divestment Task Force (2008)

4.4 INSTITUTIONAL REFORM

Institutional quality is important for a state to obtain equal returns on investment hence policy makers should emphasise on reforming their institutions.[741]

A study by the International Monetary Fund (IMF) identified three catalysts of institutional reform.[742] They include, first, greater liberalisation. Liberalisation creates a bigger role for the export sectors to have good institutional qualities in order to be able to comply with international standards and codes[743] and therefore easily integrate into the global economy.[744]

Secondly, maintenance of high level of press freedom in order to increase political accountability. Greater accountability of political institutions is associated with policies and institutional reforms that are beneficial for the broader economy, with the political leadership answerable to a broad cross-section of the population. This ensures that it favourably aligns the incentives of the leadership with that of the whole economy.[745]

Thirdly, external anchors. They include organisations and arrangements such as the WTO, the America's Growth and Opportunity Act (AGOA) and the Millennium Development Corporation (MDC).[746] They may contribute to institutional quality through imposing a criterion for membership or accession. For example, in return for enhanced market access, WTO accession may include a conditionality of local institutional quality.[747] Similarly, AGOA and MDC may link the benefit of trade and investments to having good institutions.[748]

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[741]North (1990)
[742]World Bank. 'Building institutions.' (2005) Available at: http://www.imf.org/external/pubs/ft/weo/2005/02/pdf/chapter3.pdf (accessed on 5/5/09).
[742]Ibid
[743]Including corporate governance, monetary and fiscal transparency, money laundering, banking supervision etc
[744]World Bank (2005) fn 742
[745]Ibid
[746]Ibid
[747]Ibid
[748]Ibid

4.5 CONCLUSION

Factor accumulation and foreign investments acquired through signing balanced BITs are not sufficient to obtain equal returns on the Chinese investments. African countries need to reform their institutions so that they protect private property rights; enforce contracts and; ensure efficiency in public service provision, low levels of corruption and political stability. This will decrease uncertainty thereby reduces both transaction costs and product costs for the foreign investors. As a result, they make profits and are hence encouraged to make more capital investments. Conversely, the host state benefits from transfer of technology and technical skills; a larger export market, employment opportunities, increased opportunities for diversification and; reduced arbitral claims. Moreover, strong institutions curtail corruption by Chinese MNEs that cause the host state to loose a substantial amount of revenue

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CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

China's FDI is a great opportunity for African states to achieve sustainable economic growth. This is because, first, China is heavily investing in Africa's infrastructure rejuvenation which would help to open up the domestic market thereby contributing to economic growth.[749] Secondly, it offers African states infrastructure finance and ODA without conditionalities.[750] This non-interference with the internal affairs of the African states enables the latter to "own" their reforms.[751] Thirdly, the technology from its MNEs is more easily absorbed by many African states than technology imported from developed countries.[752] Fourthly, it takes a long-term perspective in its relationships with African states and its projects are more cost-effective and executed faster than those of the developed countries.[753] Lastly it offers African states the latitude to learn useful concrete lessons (rather than mechanically incorporate the entire alternative 'models') from its development policies that contributed to its economic growth.[754]

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Despite all the above, it is unlikely that the African countries having BITs with China are getting equal returns on investments. This is because the BITs are mis-engineered and thus do not offer any flexibility to African governments and policy makers to channel foreign investment in a manner that corresponds to their development needs. Furthermore, African states often have weak institutions.

In the analysis of China's BITs with Uganda, Djibouti and Germany, it was established that the provisions of the three BITs are almost similar,[755] despite the difference in level of development existing between the two African states and the one developed state. It also demonstrated that, first, the Germany-China BIT is balanced as it protects German

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[749] Foster V (2008)

[750] bid

[751] Oya C. 'Greater Africa-China economic co-operation: Will this widen the policy space?' (2008)4. Development Viewpoint Centre for Development Policy and Research. Available at: http://www.esrftz.org/policy/linkdocs/AfricaChinaCooperation.pdf (accessed on 5/5/09)

[752] Muchlinski (2007)

[753] Oya C (2008)

[754] Ibid

[755] The subtle difference is as a result of certain nuances and semantics.

foreign investors in China, while at the same time protecting Chinese investors in Germany.

Secondly, that the Djibouti and Uganda BITs with China broadly protect Chinese investors at the expense of the policy space of the two African states. For example, despite the importance of the Preamble in the interpretation of the provisions of the BITs, it nevertheless fails to make it clear that the objective of the investment promotion and protection must not be pursued at the expense of the public policy goals of the two developing states such as the protection of health, safety, the environment and the promotion of internationally recognized labour rights. Chinese investors may therefore compromise the said standards to satisfy political and economic interests without fear of breaching the provisions of the BITs.[756]

Moreover, the BITs do not contain reservations, exceptions, temporary derogations and limitations that help to indirectly address development and policy space concerns in BITs. Hence, provisions such as definition of investor, investment and indirect expropriation; fair and equitable treatment; MFN; and National treatment are interpreted and applied broadly thereby substantially limiting the policy and regulatory flexibility of the two developing states.

In addition, there are no obligations on the investors requiring them to ensure that their investments are in tandem with host members' interests, development policies and objectives and further that they *"…strictly abide by all domestic laws and regulations in each and every aspect of the economic and social life of the host members in their investment and operational activities…"*[757] Similarly there are no home state obligations requiring the Chinese government to *"…ensure that the investors' behaviour and practices are in line with and contribute to the interests, development policies and*

[756]OECD 'International Investment Agreements: A survey of environmental, labour and anti corruption issues'. (2008).Chapter 3 of the OECD publication 'Understanding concepts and tracking innovations'. Available at: www.oecd.org/dataoecd/3/5/40471550.pdf (accessed on 23/3/09)

[757]Proposal submitted by China, Cuba, India, Kenya, Pakistan and Zimbabwe, in November 2002 to the WTO's now-moribund Working Group on Trade and Investment (WGTI)

objectives of the host member."[758] As a result Chinese investors are under no obligation not to engage in corrupt activities or to pay due regard to labour law, human rights and the environment when carrying out their activities.

The analysis of the BITs, therefore, has evidently confirmed that it is unlikely for Uganda and Djibouti to get equal returns on the Chinese investments.

The reason why Uganda and Djibouti concluded mis-engineered BITs with China can be explained from the bargaining power disparity. It was established that because of Africa's weak bargaining power, they are unable to negotiate BITs that meet their development needs hence end up getting unequal returns on the Chinese investments. Several measures that African states could take to increase their bargaining leverage were thereafter proposed. They included proper preparations for the negotiations, diversification from export of primary commodities, value addition to products of export and deepening regional integration.

In the event that the African states manage to negotiate or renegotiate balanced BITs, it is unlikely for them to obtain equal returns on investment if their institutions are weak. The thesis therefore recognised that the unequal return on the Chinese investments is not attributed only to mis-engineered BITs. Weak state institutions and instability in host African states play a major role as well. The thesis identified three distinct characteristics of high institutional quality that African States should try and adopt to ensure they obtain equal returns on the Chinese investments and these included observance of the rule of law, eradication of corruption and maintaining good governance. Moreover, the thesis emphasised the need for political stability in order to obtain equal returns on the Chinese investments.

This thesis has therefore highlighted that for African states to obtain equal returns on the Chinese investments, they need to address the issue of mis-engineered BITs, power disparity and weak state institutions.

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[758]Ibid

5.2 RECOMMENDATIONS

In light of the above, it is recommended, first, that those African states that have concluded BITs with China should evaluate the possibility of renegotiating the BITs in order to include reservations, exceptions, temporary derogations and limitations. For example:-

1. The preamble should be amended to include more objectives of the BIT, in particular, objectives relating to the promotion of respect for internationally recognised workers' rights; the recognition of international law or principles of international law as a basis for economic co-operation; the need to balance the interests of the various stakeholders; the promotion of sustainable development; and a commitment to act in conformity with existing Human Rights and maintain health, safety and environmental measures. This will help elucidate to the Chinese investor that the investments must not be pursued at the expense of public policy goals of the host state such as the protection of health, safety, the environment and the promotion of internationally recognised labour rights.

2. The definition of investment should be amended in the BITs to exclude real estate or other property that are not acquired for business purposes and/or economic benefit; certain financial assets or transactions that do not entail real acquisitions of interests by a Chinese investor in the host country; a bank letter of credit; the extension of credit in connection with a commercial transaction, such as trade financing; claims to money originating exclusively from commercial contracts for the sale of goods and services; loans between the parties to the BIT or to the MNE of one of the parties to the BIT and; goodwill market share.

3. The BITs should be amended to limit the application of portfolio investment to only investments that have been established for a minimum period of time, such as two years, as a way of controlling capital volatility.

4. The coverage of Intellectual Property Rights (IPR) should be limited by requiring that it be associated with a business operating in the African host state territory. This ensures

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that the investment has a significant operational presence in the host African state, not simply market share, in order to trigger the rights and obligations of the BIT.

5. The BITs should be amended to give African states full discretion and control over the admission of Chinese investments. This can be done by limiting the scope of the definition of investment by including a statement stating that the investment must be in accordance with host states' laws and regulations.

6. The BITs should be amended to limit the investments that can be covered under the BIT to only those that contribute to the economic development of the host state by stating that a covered asset should have the characteristics of an investment, such as the commitment of capital or other resources; of a certain duration; an expectation of gain or profit; the assumption of risk; or the contribution to host state development.[759]

7. The definition of the investor should be limited by including a denial of benefit clause. This removes from the definition of investment shell companies owned by nationals of a third country, whom the host states do not intend to protect under the BIT.

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8. The BITs should be amended to expressly provide for the promotion of investments through joint ventures; the avoidance of restrictive trade practices such as imposing restrictive clauses in technology transfer contracts by Chinese investors; and requiring China to refrain from imposing policies and measures that restrict their MNEs to transfer or diffuse technologies to their partners in the host countries. This ensures that the host African state immensely gains though transfer of technology as well as managerial and technical skills thereby contributing to equal returns on investment.

9. The BITs should be amended to provide for the establishment of an institutional framework between the parties to be employed to overlook the implementation of the agreement, monitor investment relations, forward proposals on how best to promote foreign investment between the parties, and organise workshops or fairs on investment opportunities with the participation of foreign investors. This would aid in ensuring that

[759]See Chapter 2.6.2 discussing case laws that established the said characteristics of an investment.

the host African state is benefiting from the Chinese investments through abandoning unsuccessful practices and adopting proposed new ones.

10. The BITs should be amended to limit fair and equitable treatment to the minimum standard under international law. This ensures that numerous governmental regulatory actions are not made inconsistent with the obligations of the BIT, regardless of whether they were adopted and implemented on a non-discriminatory basis.

11. The BITs should be amended to include the GATS-type exceptions to National Treatment and MFN, where the two standards will only be applicable to industries and sectors inscribed in a party's schedule of commitments. Countries can also use the "opt-out"[760] method of exception to the two standards whereby, African states reserve the industries which fall out the scope of the two standards by way of an annex to the BIT. With regard to National Treatment, the said exceptions would enable the domestic industries of the host state to compete with external and foreign investments. With regard to MFN, it would enable the host state to steer foreign investors into those activities they consider of priority for them to realise sustainable economic development and industrial development.

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12. The BITs should be amended to limit the scope of National Treatment to like circumstances.[761] This gives African governments' policy space to pursue national policies through preferential rules and regulations.

13. The BITs should also be amended to define the concept of indirect expropriation and allow for exceptions in respect of the same, with regard to acts undertaken to protect public morals; human, animal or plant life; health and safety; the environment; and national treasures. This limits the application of indirect expropriation and thereby avoids a situation whereby host states' routine regulatory acts as well acts undertaken for

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[760]As discussed in Chapter 2.5.5 of the thesis

[761]As per the definition in *SD Myers-vs-Canada* where the tribunal stated, *inter alia*, that "like circumstances" means same business and economic sector. That is the two companies engage in the same business and attract the same customers thus a customer may decide to go to one and not the other because of favourable prices and experience.

legitimate public interest, are converted into indirect takings that requires compensation to be paid.

14. The BITs should be amended to allow for burdensome compensations for expropriations to be paid in instalments as some African states may be unable to pay compensation promptly because of financial difficulties. This would reduce the financial strain on governments as they would be able to schedule payment according to their ability.

15. The provision on repatriation of profits should be amended to include a Balance of Payments (BoP) exception. Such an exception would allow host states to manage all currency flows in the event of a BoP crisis without being in breach of the BIT.

16. The BITs broadly protect the Chinese investors without giving them any obligations to the host sate. Therefore, the BITs should be amended to include obligations of the investor and the home state. Such obligations would be with regard to the maintenance of the environment and other standards for example labour, public health and safety. Similarly, investors should be obliged to refrain from engaging in corrupt activities. This would prevent MNEs unsustainable practices such as exploitation of natural resources and pollution of the environment.

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17. The BITs should be amended to allow for *amicus curiae* submissions, as well as transparency in arbitral proceedings, to enable involvement of the public, who shall act as a check and balance to the conduct of the arbitral proceedings.

In addition to the above proposed amendments, African states should look into the possibility of coming up with an African Model Investment Agreement to be formulated under the auspices of the AU and NEPAD. Most African states' development goals are identical and in line with the aims and objectives of the AU and NEPAD which include, *inter alia,* promotion of sustainable economic growth, eradication of poverty, helping Africa to fully integrate into the global economy and promotion of democracy, good

political, economic and corporate governance.[762] This is logical from both an economic perspective as well as a human resource perspective.[763]

Similarly, African states should come up with a China policy which will assert Africa's expectations from the Afro-China relationship as well as their strategy for obtaining equal returns from the Chinese investments. The AU and NEPAD can be used to co-ordinate the establishment of the said China policy and ensure that Africa's interests are adequately emphasised upon.

Secondly, to increase their bargaining power in BIT negotiations, African states should prepare strategically for the negotiations. Their preparation should entail having a negotiation plan. This can be achieved through coming up with a model BIT that adequately allows for policy space and flexibilities. The IISD Model Investment Agreement and handbook for practitioners and the CCIA are good guides and reference points.

Moreover, they can increase their bargaining power through diversification from export of primary commodities to trade in services, tourism, low skill manufacturing and production of new types of commodities such as bio-fuels, cut flowers etc. This would reduce their dependency on primary commodities[764] thus increasing their bargaining power.

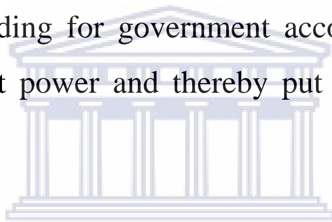
The bargaining power of African states can be further improved by deeper integration through development of a single market and investment area in regional arrangements like the EAC and SADC. This would therefore mean a larger domestic market and therefore, economies of scale, large investment area as a result of enlarged market, more attractive investment location for both domestic and foreign investors and increased

[762]See http://www.nepad.org/2005/files/inbrief.php (accessed on 5/5/09).
[763]The AU has the capacity to engage qualified trade and investment experts to come up with the model investment treaty. Similarly, from an economic perspective, the states can share the costs of engaging the experts as opposed to each individual country engaging trade experts.
[764]Examples of these are agricultural products (e.g. coffee, tea, cocoa, fisheries), natural resources extraction, oil, gas, coal and timber.

competitiveness. This would make them more amenable to effective participation in the global economy and the process of diversification.

Thirdly, African states should reform their institutions through greater liberalisation, maintaining a high level of press freedom and external anchors, as suggested by the IMF.[765] In addition, they should commit to the NEPAD peer review mechanism.[766] The peer review mechanism would help identify institutional weaknesses and give recommendations on how to improve the institutions. Through peer pressure and public scrutiny, African states with weak institutions may effect change by adopting corrective actions.

Furthermore, the civil society and private sector of African states should play an active role in advocating and demanding for government accountability. This would help to check and balance government power and thereby put pressure on the government to improve the state institutions.



In light of all the above, African states need to strategically prepare for BIT negotiations so as to ensure they negotiate for inclusion of exceptions, limitations and reservations in the BITs, as recommended herein. This will guarantee that the BITs give them policy space to pursue their development goals. This would enable them to reap commensurate

[765]See discussion on institutional reform in chapter 4

[766]The NEPAD peer review mechanism is voluntary hence African members of the AU have to accede to it by signing the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance. By signing, it means that the state undertakes to submit to and facilitate periodic peer reviews and generally be guided by agreed parameters for good governance at both political and economic levels. The NEPAD peer review entails the systematic examination and assessment of the performance of member states by the other states (peer) through a review panel consisting of prominent Africans nominated and appointed by their respective member state's head of state. The function of the panel is to promote policies, standards and practices in favour of political stability, economic growth, sustainable development, human rights and regional integration, amongst the member states. The ultimate goal is to help the reviewed state improve its policy-making, adopt best practices and comply with established standards, principles, codes, and other agreed commitments. The review is conducted in a non-adversarial manner and it relies heavily on mutual trust, understanding between the state being reviewed and the reviewers, as well as their shared confidence in the process. See Cilliers J. 'NEPAD's peer review mechanism'. (2002). Institute for Security Studies occasional paper No. 64. Available at: http://www.iss.co.za/index.php?link_id=29&slink_id=982&link_type=12&slink_type=12&tmpl_id=3 (accessed on 24/4/09).

returns on the Chinese investments. Moreover, they should reform their institutions so that the BITs are critically implemented for the economic benefit of the host state.

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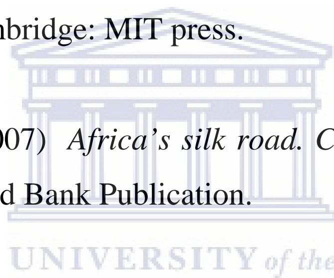

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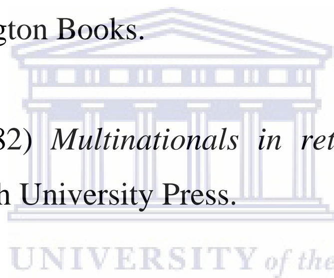

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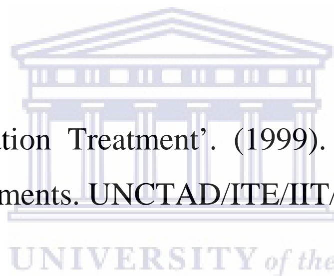
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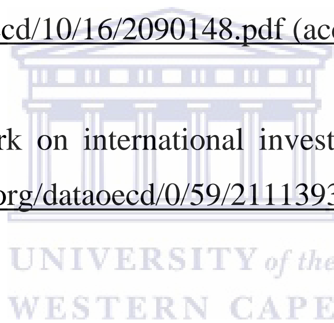

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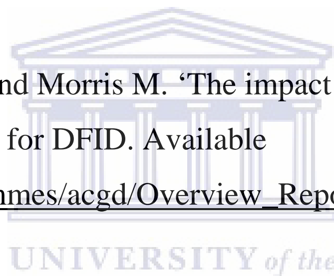
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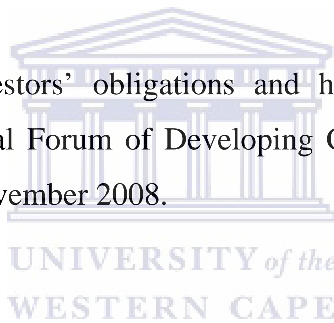

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APPENDIX A

AGREEMENT BETWEEN THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA AND THE GOVERNMENT OF THE REPUBLIC OF UGANDA ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the People's Republic of China and the Government of the Republic of Uganda hereinafter referred to as the Contracting Parties, Desiring to strengthen their economic cooperation by creating favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party; Recognising that the encouragement and reciprocal protection of such investments will be conducive to the stimulation of business initiative and will increase prosperity of both Contracting States; Convinced that the promotion and protection of these investments would succeed in stimulating transfers of capital and technology between the two Contracting States in the interest of their economic development, Have agreed as follows:

Article 1

Definitions For the purpose of this Agreement:
1. The term "investment" means every kind of property, such as goods, rights and interests of whatever nature, and in particularly though not exclusively, includes:
(a) tangible, intangible, movable and immovable properly as well as any other right in rem such as mortgages, liens, usufructs, pledges and similar rights;
(b) shares, debentures, stock and any other kind of participation in companies;
(c) claims to money or to any other performance having an economic value associated with an investment; (d) intellectual and industrial property rights such as copyrights, patents, trademarks, industrial models and mockups, technical processes, know-how, trade names and goodwill, and any other similar rights;
(e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources, Any change in the form in which properties are invested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the Contracting Party in whose territory the investment has been made.
2. The term "investor" means
(a) natural persons who have nationality of either Contracting Party in accordance with the laws of that Contracting Party;
(b) legal entities, including company, association, partnership and other organization, incorporated or constituted under the laws and regulations of either Contracting Party and have their headquarters in that Contracting Party.
3. The term "return" means the amounts yielded from investments, including profits, dividends, interests, capital gains, royalties, fees and other legitimate income.
4. For the purposes of this Agreement, the term "territory" means respectively: -for the People's Republic of China, the territory of the People's Republic of China, including the territorial sea and air space above it, as well as any area beyond its territorial sea within which the People's Republic of China has sovereign rights of exploration for and exploitation of resources of the seabed and its sub-soil and superjacent water resources in

accordance with Chinese Law and international law; -for Uganda, the Republic of Uganda.

Article 2

Promotion and protection of investments

1. Each Contracting Party shall encourage and promote investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and regulations.
2. The investments made by investors of one contracting party shall enjoy full and complete protection and safety in the territory of the other Contracting Party.
3. Without prejudice to its laws and regulations, neither Contracting Party shall take any discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.
4. Subject to its laws and regulations, one Contracting Party shall provide assistance in and facilities for obtaining visas and working permit to nationals of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party.

Article 3

Treatment of Investment

1. Investments of investors of each Contracting Party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party.
2. Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors.
3. Neither Contracting Party shall subject investments and activities associated with such investments by the investors of the other Contracting Party to treatment less favorable than that accorded to the investments and associated activities by the investors of any third Sate.
4. This treatment shall not include the privileges granted by one Contracting Party to nationals or companies of a third Sate by virtue of its participation or association in a free trade zone, customs union, common market or any other form of regional economic organization.
5. The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party. Such matters shall be governed by the Double Taxation Treaty between the two Contracting Parties and the domestic laws of each Contracting Party.

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Article 4

Expropriation

1. Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect, of investors of the other Contracting Party of their investments in territory, except for the public interest, without discrimination and against compensation.

2. Any measures of dispossession which might be taken shall give rise to prompt compensation, the amount of which shall be equivalent to the real value of the investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge, whichever is earlier.
3. The said compensation shall be set not later than the date of dispossession. The compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment. The compensation shall also be made without delay, be effectively realizable and freely transferable.

Article 5

Indemnification Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war, a state of national emergency, insurrection, riot or other similar events in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation and other settlements, which is no less favorable than that granted to its own nationals or companies or to those of the most favored nation.

Article 6

Subrogation

If one Contracting Party or its designated agency makes a payment to its investors under a guarantee or a contract of insurance against non-commercial risks it has accorded in respect of an investment made in the territory of the other Contracting Party, the latter Contracting Party shall recognize:

(a) the assignment, whether under the law or pursuant to a legal transaction in the former Contracting Party, of any rights or claims by the investors to the former Contracting Party or to its designated agency, as well as,

(b) that the former Contracting Party or to its designated agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of that investor and assume the obligations related to the investment to the same extent as the investor.

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Article 7

Transfers

1. Each Contracting Party shall guarantee to the investors of the other Contracting Party the transfer of their investments and returns held in its territory, including:

(a) profits, dividends, interests and other legitimate income;

(b) proceeds obtained from the total or partial sale or liquidation of investments;

(c) payments pursuant to a loan agreement in connection with investments;

(d) royalties in relation to the matters in Paragraph 1 (d) of Article 1;

(e) payments of technical assistance or technical service fee, management fee;

(f) payments in connection with contracting projects;

(g) earnings of nationals of the other Contracting Party who work in connection with an investment in its territory.

2. Nothing in Paragraph 1 of this Article shall affect the free transfer of compensation paid under Article 4 and 5 of this Agreement.
3. The transfer mentioned above shall be made in a freely convertible currency and at the prevailing market rate of exchange applicable within the Contracting Party accepting the investments and on the date of transfer.

4. In case of a serious balance of payments difficulties and external financial difficulties or the threat thereof, each contracting party may temporarily restrict transfers, provided that this restriction: i) shall be promptly notified to the other party; ii) shall be consistent with the articles of agreement with the International Monetary Fund; iii) shall be within an agreed period; iv) would be imposed in an equitable, non discriminatory and in good faith basis.
5. A Contracting Party may require that, prior to the transfer of payments, formalities arising from the relevant laws and regulations are fulfilled by the investors, provided that those shall not be used to frustrate the purpose of paragraph 1 of this article.

Article 8
Settlement of disputes between an investor and a Contracting Party
1. Any legal dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
2. If the dispute cannot be settled through negotiations within six months from the date it has been raised by either party to the dispute, it shall be submitted by the choice of the investor:
(a) to the competent court of the Contracting Party that is a party to the dispute;
(b) to International Center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965, provided that the Contracting Party involved in the dispute may require the investor concerned to gothrough the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before the submission to the ICSID. Once the investor has submitted the dispute to the competent court of the Contracting Party concerned or to the ICSID, the choice of one of the two procedures shall be final.
3. The arbitration award shall be based on the law of the Contracting Party to the dispute including its rules on the conflict of laws the provisions of this Agreement as well as the universally accepted principles of international law.
4. The arbitration award shall be final and binding upon both parties to the dispute. Both Contracting Parties shall commit themselves to the enforcement of the award. Each party to the dispute shall bear the costs of its appointed arbitrator and of its representation in arbitral proceedings. The relevant costs of the Chairman and tribunal shall be borne in equal parts by the parties to the dispute. The tribunal may in its award direct that a higher proportion of the costs be borne by one of the parties to the dispute.

Article 9
Settlement of disputes between Contracting Parties
1. Any dispute relating to the interpretation or application of this Agreement shall be settled as far as possible through diplomatic channels within three months.
2. In case of failure of a settlement through diplomatic channels within three months, the dispute may be submitted to an ad hoc joint committee consisting of the representatives of the two Parties or to ad hoc arbitration.

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3. The Contracting Parties may set up such joint committee comprising relevant experts to resolve the dispute. The procedures of the joint committee shall be decided by both parties to the dispute.
4. If the joint committee cannot settle the dispute within six months, the party to the dispute is entitled to submit the dispute to an ad hoc arbitration tribunal. The arbitration tribunal shall be set up as follows for each individual case: Each Contracting Party shall appoint one arbitrator within a period of two months from the date on which one Contracting Party has informed the other Party of its intention to submit the dispute to arbitration. Those two arbitrators shall, within further two months, together select a national of a third State having diplomatic relations with both Contracting Parties as Chairman of the arbitral tribunal. If these time limits have not been complied with either Contracting Party shall request the President of the International Court of Justice to make the necessary appointment(s). If the President of the International Court of Justice is a national of either Contracting Party or of a State with which one of the Contracting Parties has no diplomatic relations or if, for any other reason, he cannot exercise this function, the Vice-President of the International Court of Justice shall be requested to make the appointment(s).
5. The court thus constituted shall determine its own rules of procedure. Its decisions shall be taken by a majority of the votes; they shall be final and binding on the Contracting Parties.
6. Each Contracting Party shall bear the costs resulting from the appointment of its arbitrator. The expenses in connection with the appointment of the third arbitrator and the administrative costs of the court shall be borne equally by the Contracting Parties.

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Article 10

Other obligations

If the legislation of either Contracting Party or international obligations existing at present or established hereafter between the Contracting Parties result in a position entitling investments by investors of the other Contracting Party to a treatment more favorable than is provided for by the Agreement, such position shall not be affected by this Agreement.

Article 11

Special Agreements

1. Investments made pursuant to a specific agreement concluded between one Contracting Party and investors of the other Party shall be covered by the provisions of this Agreement and by those of the specific agreement.
2. Each Contracting Party undertakes to ensure at all times that the commitments it has entered into vis-à-vis investors of the other Contracting Party shall be observed.

Article 12

Application

This Agreement shall apply to investment, which are made prior to or after its entry into force by investors of one either Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the other Contracting Party

concerned in the territory of the latter, but shall not apply to the dispute that arose before the entry into force of this Agreement.

Article 13
Governing law
All investments shall, subject to this Agreement, be governed by law in force in the territory of the Contracting Party in which such investments are made.

Article 14
Consultations
1. The representatives of the Contracting Parties shall hold meetings from time to time for the purpose of: (a) reviewing the implementation of this Agreement;
(b) exchanging legal information and investment opportunities;
(c) resolving disputes arising out of investments;
(d) forwarding proposals on promotion of investment;
(e) studying other issues in connection with investment.
2. Where either Contracting Party requests consultation on any matter of Paragraph 1 of this Article, the other Contracting Party shall give prompt response and the consultation be held alternatively in Beijing and Kampala.

Article 15
Amendments
The terms of this Agreement may be amended by mutual agreement of both Contracting Parties and such amendments shall be effected by exchange of notes between them through diplomatic channels.

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Article 16
Entry into force and duration
1. This Agreement shall enter into force on the first day of the following month after the date on which both Contracting Parties have notified each other in writing that their respective internal legal procedures necessary therefore have been fulfilled and remain in force for a period of ten years.
2. This Agreement shall continue to be in force unless if either Contracting Party has fails to given a written notice to the other Contracting Party to terminate this Agreement one year before the expiration of the initial ten year period specified in Paragraph 1 of this Article or at any time thereafter.
3. With respect to investments made prior to the date of termination of this Agreement, the provisions of Article 1 to 15 shall continue to be effective for a further period of ten years from such date of termination.

In Witness Whereof the undersigned, duly authorized thereto by respective Governments, have signed this Agreement. Done in duplicate in Beijing on May 27, 2004, in the Chinese and English languages, both texts being equally authentic.

For the Government of Uganda
For the Government of the People's Republic of China Republic

APPENDIX B

AGREEMENT BETWEEN
THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA
AND THE GOVERNMENT OF THE REPUBLIC OF DJIBOUTI
ON THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the People's Republic of China and the Government of the Republic of Djibouti,
Intending to create favorable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party;
Recognizing that the reciprocal encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of the investors, flow of capital and technology, and will increase prosperity and economic development and that fair and equitable treatment of investments is desirable in both States;
Desiring to intensify the cooperation of both States on the basis of equality and mutual benefits;

Have agreed as follows:

ARTICLE 1
DEFINITIONS
For the purpose of this Agreement,
1, The term "investment" means 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, and in particularly, though not exclusively, includes:
(a) movable and immovable property and other property rights such as mortgages and pledges;
(b) shares, debentures, stock and any other kind of participation in companies;
(c) claims to money or to any other performance having an economic value associated with an investment;
(d) intellectual property rights, in particularly copyrights, patents, trade-marks, trade-names, technical process, know-how and good-will;
(e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.
Any change in the form in which assets are invested does not affect their character as investments.
2, The term "investor" means,
(a) natural persons who have nationality of either Contracting Party in accordance with the laws of that Contracting Party;
(b) economic entities, including companies, corporations, associations, partnerships and other organizations, incorporated and constituted under the laws and regulations of either Contracting Party and have their seats in that Contracting Party.
3, The term "return" means the amounts yielded from investments, including profits, dividends, interests, capital gains, royalties and other legitimate income.

ARTICLE 2

PROMOTION AND PROTECTION OF INVESTMENT

1, Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and regulations.

2, Investments of the investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy the constant protection and security in the territory of the other Contracting Party.

3, Without prejudice to its laws and regulations, neither Contracting Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.

4, Subject to its laws and regulations, one Contracting Party shall provide assistance in and facilities for obtaining visas and working permit to nationals of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party.

ARTICLE 3

TREATMENT OF INVESTMENT

1, Investments of investors of each Contracting Party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party.

2, Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors.

3, Neither Contracting Party shall subject investments and activities associated with such investments by the investors of the other Contracting Party to treatment less favorable than that accorded to the investments and associated activities by the investors of any third State.

4, The provisions of Paragraphs 1 to 3 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of:

(a) any customs union, free trade zone, economic union and any international agreement resulting in such customs union, free trade zone, economic union;

(b) any international agreement or arrangement relating wholly or mainly to taxation;

(c) any international agreement or arrangement facilitating frontier trade.

ARTICLE 4

EXPROPRIATION

1, Neither Contracting Party shall expropriate, nationalize or take other similar measures (hereinafter referred to as "expropriation") against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met:

(a) for the public interests;

(b) under domestic legal procedure;

(c) without discrimination;

(d) against compensation.

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2, The compensation mentioned in Paragraph 1 of this Article shall be equivalent to the value of the expropriated investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge, which is earlier. The value shall be determined in accordance with generally recognized principles of valuation. The compensation shall include interest from the date of expropriation until the date of payment. The compensation shall also be made without delay, be effectively realizable and freely transferable.

ARTICLE 5

COMPENSATION FOR DAMAGES AND LOSSES

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war, a state of national emergency, insurrection, riot or other similar events in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, if it takes relevant measures, treatment, as regards restitution, indemnification, compensation and other settlements no less favorable than that accorded to the investors of its own or any third State.

ARTICLE 6

REPATRIATION OF INVESTMENTS AND RETURNS

1, Each Contracting Party shall, subject to its laws and regulations, guarantee to the investors of the other Contracting Party the transfer of their investments and returns held in its territory, including:

(a) profits, dividends, interests and other legitimate income;

(b) proceeds obtained from the total or partial sale or liquidation of investments;

(c) payments pursuant to a loan agreement in connection with investments;

(d) royalties in relation to the matters in Paragraph 1 (d) of Article 1;

(e) payments of technical assistance or technical service fee, management fee;

(f) payments in connection with contracting projects;

(g) earnings of nationals of the other Contracting Party who work in connection with an investment in its territory.

2, Nothing in Paragraph 1 of this Article shall affect the free transfer of compensation paid under Article 4 of this Agreement.

3, The transfer mentioned above shall be made in a freely convertible currency and at the prevailing market rate of exchange applicable within the Contracting Party accepting the investments and on the date of transfer.

ARTICLE 7

SUBROGATION

If one contracting Party or its designated agency makes a payment to its investor under an indemnity given in respect of an investment made in the territory of the other Contracting Party, the latter Contracting Party shall recognize the assignment of all the rights and claims of the indemnified investor to the former Contracting Party or its designated agency, by law or by legal transactions, and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right to same extent as the investor.

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ARTICLE 8

SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

1, Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled with consultation through diplomatic channel.

2, If a dispute cannot thus be settled within six months, it shall, upon the request of either Contracting Party, be submitted to an ad hoc arbitral tribunal.

3, Such tribunal comprises of three arbitrators. Within two months of the receipt of the written notice requesting arbitration, each Contracting Party shall appoint one arbitrator. Those two arbitrators shall, within further two months, together select a national of a third State having diplomatic relations with both Contracting Parties as Chairman of the arbitral tribunal.

4, If the arbitral tribunal has not been constituted within four months from the receipt of the written notice requesting arbitration, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or is otherwise prevented from discharging the said functions, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party or is not otherwise prevented from discharging the said functions shall be invited to make such necessary appointments.

5, The arbitral tribunal shall determine its own procedure. The arbitral tribunal shall reach its award in accordance the provisions of this Agreement and the principles of international law recognized by both Contracting Parties.

6, The arbitral tribunal shall reach its award by a majority of votes. Such award shall be final and binding upon both Contracting Parties. The arbitral tribunal shall, upon the request of either Contracting Party, explain the reasons of its award.

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7, Each Contracting Party shall bear the costs of its appointed arbitrator and of its representation in arbitral proceedings. The relevant costs of the Chairman and tribunal shall be borne in equal parts by the Contracting Parties.

ARTICLE 9

SETTLEMENT OF DISPUTES BETWEEN INVESTORS AND ONE CONTRCTING PARTY

1, Any legal dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

2, If the dispute cannot be settled through negotiations within six months, the investor of one Contracting Party may submit the dispute to the competent court of the other Contracting Party.

3, Any dispute, if unable to be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, shall be submitted at the request of either party to

(a) International center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18,1965; or

(b) an ad hoc arbitral tribunal

provided that the Contracting Party involved in the dispute may require the investor concerned to exhaust the domestic administrative review procedure specified by the laws and regulations of that Contracting Party before submission of the dispute the aforementioned arbitration procedure.
However, if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article, the provisions of this Paragraph shall not apply.
4, Without prejudice to Paragraph 3 of this Article, the ad hoc arbitral tribunal referred to in Paragraph 3 (b) shall be constituted for each individual case in the following way: each party to the dispute shall appoint one arbitrator, and these two shall select a national of a third State which has diplomatic relations with both Contracting Parties as the Chairman. The first two arbitrators shall be appointed within two months of the written notice requesting for arbitration by either party to the dispute to the other and the Chairman shall be selected within four months. If, within the period specified above, the tribunal has not been constituted, either party to the dispute may invite the Secretary General of the International Center for Settlement of Investment Disputes to make the necessary appointments.
5, The ad hoc arbitral tribunal shall determine its own procedure. However, the tribunal may, in the course of determination of procedure, take as guidance the Arbitration Rules of the International Center for Settlement of Investment Disputes.
6, The tribunal referred to in Paragraph 3 (a) and (b) of this Article shall reach its award by a majority of votes. Such award shall be final and binding upon both parties to the dispute. Both Contracting Parties shall commit themselves to the enforcement of the award.
7, The tribunal referred to in Paragraph 3 (a) and (b) of this Article shall adjudicate in accordance with the law of the Contracting Party to the dispute accepting the investment including its rules on the conflict of laws, the provisions of this Agreement as well as the applicable principles of international law.
8, Each party to the dispute shall bear the costs of its appointed arbitrator and of its representation in arbitral proceedings. The relevant costs of the Chairman and tribunal shall be borne in equal parts by the parties to the dispute. The tribunal may in its award direct that a higher proportion of the costs be borne by one of the parties to the dispute.

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ARTICLE 10

OTHER OBLIGATIONS

1, If the legislation of either Contracting Party or international obligations existing at present or established hereafter between the Contracting Parties result in a position entitling investments by investors of the other Contracting Party to a treatment more favorable than is provided for by the Agreement, such position shall not be affected by this Agreement.
2, Each Contracting Party shall observe any commitments it may have entered into with the investors of the other Contracting Party as regards to their investments.

ARTICLE 11

APPLICATION

This Agreement shall apply to investment, which are made after its entry into force by investors of either Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter.

ARTICLE 12

CONSULTATIONS

1, The representatives of the Contracting Parties shall hold meetings from time to time for the purpose of:

(a) reviewing the implementation of this Agreement;

(b) exchanging legal information and investment opportunities;

(c) resolving disputes arising out of investments;

(d) forwarding proposals on promotion of investment;

(e) studying other issues in connection with investment.

2, Where either Contracting Party requests consultation on any matter of Paragraph 1 of this Article, the other Contracting Party shall give prompt response and the consultation be held alternatively in Beijing and Djibouti.

ARTICLE 13

ENTRY INTO FORCE, DURATION AND TERMINATION

1, This Agreement shall enter into force on the first day of the following month after the date on which both Contracting Parties have notified each other in writing that their respective internal legal procedures necessary therefore have been fulfilled and remain in force for a period of ten years.

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2, This Agreement shall continue on force if either Contracting Party fails to give a written notice to the other Contracting Party to terminate this Agreement one year before the expiration of the period specified in Paragraph 1 of this Article.

3, After the expiration of initial ten years period, either Contracting Party may at any time thereafter terminate this Agreement by giving at least one year's written notice to the other Contracting Party.

4, With respect to investments made prior to the date of termination of this Agreement, the provisions of Article 1 to 12 shall continue to be effective for a further period of ten years from such date of termination.

IN WITNESS WHEREOF the undersigned, duly authorized thereto by respective Governments, have signed this Agreement.

Done in duplicate at Beijing, on august 18, 2003, in the Chinese and English languages, both texts being equally authentic. In case of divergent interpretation, the English text shall prevail.

For the Government of the Republic of Djibouti

For the Government of the People's Republic of China

APPENDIX C

AGREEMENT BETWEEN THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA AND THE FEDERAL REPUBLIC OF GERMANY ON THE ENCOURAGEMENT OF RECIPROCAL PROTECTION OF INVESTMENTS

The People's Republic of China and the Federal Republic of Germany (hereinafter referred to as the "Contracting Parties"), Intending to create favourable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party, Recognizing that the encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of the investors and will increase prosperity in both States, Desiring to intensify the economic cooperation of both States,
Have agreed as follows:

Article 1
Definitions
For the purpose of this Agreement
1. the term "investment" means every kind of asset invested directly or indirectly by investors of one Contracting Party in the territory of the other Contracting Party, and in particular, though not exclusively, includes:
(a) movable and immovable property and other property rights such as mortgages and pledges;
(b) shares, debentures, stock and any other kind of interest in companies;
(c) claims to money or to any other performance having an economic value associated with an investment;
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(d) intellectual property rights, in particular copyrights, patents and industrial de-signs, trade-marks, trade-names, technical processes, trade and business secrets, know-how and good-will;
(e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources;
any change in the form in which assets are invested does not affect their character as investments;
2. the term "investor" means
(a) in respect of the Federal Republic of Germany:
Germans within the meaning of the Basic Law for the Federal Republic of Germany, any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit;
(b) in respect of the People's Republic of China:
natural persons who have nationality of the People's Republic of China in accordance with its laws, economic entities, including companies, corporations, associations, partnerships and other organizations, incorporated and constituted under the laws and regulations of and with their seats in the People's Republic of China**,** irrespective of whether or not for profit and whether their liabilities are limited or not;

3. the term "return" means the amounts yielded from investments, including profits, dividends, interests, capital gains, royalties, fees and other legitimate income.

Article 2

Promotion and Protection of Investment

(1) Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and regulations.

(2) Investments of the investors of either Contracting Party shall enjoy constant protection and security in the territory of the other Contracting Party.

(3) Neither Contracting Party shall take any arbitrary or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.

(4) Subject to its laws and regulations, either Contracting Party shall give sympathetic consideration to applications for obtaining visas and working permits to nationals of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party.

Article 3

Treatment of Investment

(1) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.

(2) Each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less fa-vourable than that accorded to the investments and associated activities by its own in-vestors.

(3) Neither Contracting Party shall subject investments and activities associated with such investments by the investors of the other Contracting Party to treatment less favourable than that accorded to the investments and associated activities by the inves-tors of any third State.

(4) The provisions of Paragraphs 1 to 3 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of

(a) any membership or association with any existing or future customs union, free trade zone, economic union, common market;

(b) any double taxation agreement or other agreement regarding matters of taxation.

Article 4

Expropriation and Compensation

(1) Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.

(2) Investments by investors of either Contracting Party shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party (hereinafter referred to as expropriation) except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the investment immediately before the expropriation is taken or the threatening expropriation has

become publicly known, whichever is earlier. The compensation shall be paid without delay and shall carry interest at the prevailing commercial rate until the time of payment; it shall be effectively realizable and freely transferable. Precautions shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and payment of such compensation. At the request of the investor the legality of any such expropriation and the amount of compensation shall be subject to review by national courts, notwithstanding the provisions of Article 9.
(3) Investors of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in this Article.

<u>Article 5</u>
Compensation for Damages and Losses
Investors of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency or revolt, shall be accorded treatment by such other Contracting Party not less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State as regards restitution, indemnification, compensation or other valuable consideration.

<u>Article 6</u>
Repatriation of Investments and Returns
(1) Each Contracting Party shall guarantee to the investors of the other Contracting Party the transfer of their investments and returns held in its territory, including:
(a) the principal and additional amounts to maintain or increase the investment;
(b) returns;
(c) proceeds obtained from the total or partial sale or liquidation of investments or amounts obtained from the reduction of investment capital;
(d) payments pursuant to a loan agreement in connection with investments;
(e) payments in connection with contracting projects;
(f) earnings of nationals of the other Contracting Party who work in connection with an investment in its territory.
(2) Each Contracting Party shall guarantee to the investors of the other Contracting Party the free transfer of compensation and other payments under Article 4 and 5.
(3) The transfer mentioned above shall be made without delay in a freely convertible currency and at the prevailing market rate of exchange applicable within the Contract-ing Party accepting the investments and on the date of transfer. In the event that the market rate of exchange does not exist, the rate of exchange shall correspond to the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights.

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<u>Article 7</u>
Subrogation
If one Contracting Party or its designated agency makes a payment to its investor under a guarantee given in respect of an investment made in the territory of the other Contracting

Party, the latter Contracting Party shall recognize the assignment of all the rights and claims of the indemnified investor to the former Contracting Party or its designated agency, by law or by legal transactions, and the right of the former Con-tracting Party or its designated agency to exercise by virtue of subrogation any such right to same extent as the investor. As regards the transfer of payments made by virtue of such assigned claims, Article 6 shall apply mutatis mutandis.

Article 8

Settlement of Disputes between Contracting Parties

(1) Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled with consultation through diplomatic channel.

(2) If a dispute cannot thus be settled within six months, it shall, upon the request of either Contracting Party, be submitted to an ad hoc arbitral tribunal.

(3) Such tribunal comprises of three arbitrators. Within two months of the receipt of the written notice requesting arbitration, each Contracting Party shall appoint one arbitrator. Those two arbitrators shall, within further two months, together select a national of a third State having diplomatic relations with both Contracting Parties as Chairman of the arbitral tribunal.

(4) If the arbitral tribunal has not been constituted within four months from the receipt of the written notice requesting arbitration, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or is otherwise prevented from discharging the said functions, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party or is not otherwise prevented from discharging the said functions shall be invited to make such necessary appointments.

(5) The arbitral tribunal shall determine its own procedure. The arbitral tribunal shall reach its award in accordance with the provisions of this Agreement and the principles of international law recognized by both Contracting Parties.

(6) The arbitral tribunal shall reach its award by a majority of votes. Such award shall be final and binding upon both Contracting Parties. The arbitral tribunal shall, upon the request of either Contracting Party, explain the reasons of its award.

(7) Each Contracting Party shall bear the costs of its appointed arbitrator and of its representation in arbitral proceedings. The relevant costs of the Chairman and tribunal shall be borne in equal parts by the Contracting Parties.

Article 9

Settlement of Disputes between Investors
and one Contracting Party

(1) Any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.

(2) If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration.

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(3) The dispute shall be submitted for arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), unless the parties in dispute agree on an ad-hoc arbitral tribunal to be established under the Arbitration Rules of the United Nations Commission on the International Trade Law (UNCITRAL) or other arbitration rules.
(4) Any award by an ad-hoc tribunal shall be final and binding. Any award under the procedures of the said Convention shall be binding and subject only to those appeals or remedies provided for in this Convention. The awards shall be enforced in accordance with domestic law.

Article 10
Other Obligations
(1) If the legislation of either Contracting Parties or obligations under international law existing at present or established hereafter between the Contracting Parties in ad-dition to this Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable prevail over this Agreement.
(2) Each Contracting Party shall observe any other obligation it has entered into with regard to investments in its territory by investors of the other Contracting Party.

Article 11
Application
This Agreement shall apply to investment, which are made prior to or after its entry into force by investors of either Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter.

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Article 12
Relations between Contracting Parties
The provisions of the present Agreement shall apply irrespective of the existence of diplomatic or consular relations between the Contracting Parties.

Article 13
Consultations
Either Contracting Party may propose to the other Contracting Party that consultations be held on any matter concerning interpretation, application and implementation of the Agreement. The other Contracting Party shall accord sympathetic consideration to the proposal and shall afford adequate opportunity for such consultations.

Article 14
Protocol
The attached protocol shall form an integral part of this Agreement.

Article 15
Entry into Force, Duration and Termination

(1) This Agreement shall enter into force one month from the date on which both Contracting Parties have notified each other in writing that the national requirements for such entry into force have been fulfilled. The relevant date shall be the day on which the last notification is received.
(2) This Agreement shall remain in force for a period of ten years and shall be ex-tended thereafter for an unlimited period unless denounced in writing through diplomatic channels by either Contracting Party twelve months before its expiration.
(3) After the expiration of the initial ten years period, either Contracting Party may at any time thereafter terminate this Agreement by giving at least twelve month's written notice through diplomatic channels to the other Contracting Party.
(4) With respect to investments made prior to the date of termination of this Agreement, the provisions of Article 1 to 14 shall continue to be effective for a further period of twenty years from such date of termination.

Article 16
Transition
(1) Upon entry into force of this Agreement the Agreement of 7 October 1983 between the Federal Republic of Germany and the People's Republic of China on the Encouragement and Reciprocal Protection of Investments shall terminate.
(2) The present Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the entry into force of this Agreement, but shall not apply to any dispute or any claim concerning an investment which was already under judicial or arbitral process before its entry into force. Such disputes and claims shall continue to be settled ac-cording to the provisions of the Agreement of 7 October 1983 mentioned in paragraph 1 of this Article.

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Done at Beijing on 1st December, 2003 in duplicate in the German, Chinese and English languages, all texts being authentic. In case of divergent interpretation of the German and the Chinese text, the English text shall prevail.

For the Federal Republic of Germany

For the People's Republic of China

PROTOCOL TO THE AGREEMENT BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND THE FEDERAL REPUBLIC OF GERMANY ON THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS

On signing the Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, the plenipotentiaries, being duly authorized, have, in addition, agreed on the following provisions, which shall be regarded as an integral part of the said Agreement:

1. **Ad Article 1**
(a) For the avoidance of doubt, the Contracting Parties agree that investments as defined in Article 1 are those made for the purpose of establishing lasting economic relations in connection with an enterprise, especially those which allow to exercise effective influence in its management.
(b) "Invested indirectly" means invested by an investor of one Contracting Party through a company which is fully or partially owned by the investor and having its seat in the territory of the other Contracting Party.
(c) Returns from the investment and from reinvestments shall enjoy the same protection as the investment.

2. **Ad Article 2**
The Agreement shall apply to the territory of each Contracting Party including the territorial sea as well as to the areas of the exclusive economic zone and the continental shelf insofar as international law permits the Contracting Party concerned to exercise sovereign rights or jurisdiction in these areas.

3. **Ad Article 2 and 3**
With regard to the People's Republic of China paragraph 3 of Article 2 and paragraph 2 of Article 3 do not apply to
(a) any existing non-conforming measures maintained within its territory;
(b) the continuation of any such non-conforming measure;
(c) any amendment to any such non-conforming measure to the extent that the amendment does not increase the non-conformity of these measures.
The People's Republic of China will take all appropriate steps in order to progressively remove the non-conforming measures.

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4. **Ad Article 3**
(a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of Article 3 (2): the management, maintenance, use, enjoy-ment and disposal of an investment. The following shall, in particular, be deemed "treatment less favourable" within the meaning of Article 3: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of Article 3.
(b) The provisions of Article 3 do not oblige a Contracting Party to extend to investors resident in the territory of the other Contracting Party tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to investors resident in its territory.

5. Ad Article 6
(a) With regard to the People's Republic of China:
- Article 6, paragraph 1 (c) will apply provided that the transfer shall comply with the relevant formalities stipulated by the present Chinese laws and regulations relating to exchange control.

- Article 6, paragraph 1 (d) will apply provided that a loan-agreement has been registered with the relevant foreign exchange administration authority.

To the extent that the formalities mentioned above are no longer required according to the relevant provisions of Chinese law, Article 6 shall apply without restrictions.

(b) A transfer shall be deemed to have been made "without delay" within the meaning of Article 6 (3) if effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted to the relevant foreign exchange administration with full and authentic documentation and information and may on no account exceed two months.

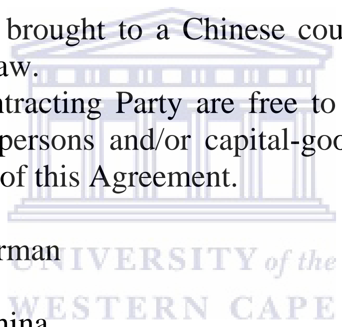
6. **<u>To Article 9</u>**

With respect to investments in the People's Republic of China an investor of the Federal Republic of Germany may submit a dispute for arbitration under the following conditions only:

(a) the investor has referred the issue to an administrative review procedure according to Chinese law,

(b) the dispute still exists three months after he has brought the issue to the review procedure, and

(c) in case the issue has been brought to a Chinese court, it can be withdrawn by the investor according to Chinese law.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7. The investors of either Contracting Party are free to choose international means of transport for the transport of persons and/or capital-goods directly connected with an investment within the meaning of this Agreement.

For the Federal Republic of German

For the People's Republic of China