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Investment Policy and Protection Aspects of Natural Resources (Foreign) Investment Strategies in Africa¹

André Thomashausen²

I. The PSNR and Foreign Direct Investment Regulation in Africa

Fifty years ago, the 1962 UN GA Resolution on the Permanent Sovereignty over Natural Resources (PSNR) proposed to lay down new legal foundations for the exploration and exploitation of natural resources. The Declaration was inspired by the great decolonisation and self-determination quest following the end of World War II. The terms of reference for the drafting Commission for the Declaration specifically instructed it to determine the extent of the PSNR principle within the notion of self-determination.³ It should thus not be a surprise that the PSNR remained firmly grounded on traditional and absolutist conceptions of equal state and territorial sovereignty. Art. 1 ruled that the permanent sovereignty over the resources of nations must be exercised in the interests of national development and the well-being of the people of the State concerned. The co-operative dimensions of resource exploration and exploration were not in the minds of the drafters and signatories, nor were the concerns of sustainable development and the environment addressed.

In the opinions of many contemporary authors, the Declaration did nevertheless not inhibit the subsequent rise of the principles of sustainable development and ecological and environmental responsibility.⁴ The reference in Art 1 to an exercise of PSNR in the interests of national development and the well-being of the people is today interpreted in a broader

¹ Paper presented at International Conference on Permanent Sovereignty over Natural Resources – Development of a Public International Law Principle and its Limits, Siegen, Germany 29th to 30th of January 2013.

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³ UNGA – Res. 1314 (XIII), Recommendations Concerning International Respect for the Rights of Peoples and Nations to Self-determination, Dec. 12, 1958, 13 UN-GAOR, Supp. No. 18, p. 27, UN Doc. A/4090; N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, Cambridge 2008, p. 59; B. Broms: “Natural Resources – Sovereignty over” in *Encyclopedia of Public International Law*, R. Bernhardt ed., Amsterdam 1997, (Volume III), p. 521.

⁴ E. Louka: *International Environmental Law – Fairness, Effectiveness, and World Order*, Cambridge 2006, p. 34; F. X. Perrez: “The relationship between “permanent sovereignty” and the obligation not to cause transboundary environmental damage”, *Environmental Law*, vol. 26, no. 4, 1996, p. 1194; N. Schrijver: *Sovereignty over Natural Resources – Balancing Rights and Duties*, p. 8.

sense, transcending the territorial boundaries of individual States. The proponents of an absolute sovereignty doctrine in regard to natural resources evidently focus in their reading of the Declaration, on the States' freedom to regulate foreign investments (Art. 2) as well as on the national prerogative to determine the conditions and procedures for compensation in cases of nationalisation (Art. 4).

It will be the proposition of this article, that in our contemporary context, considering state practice and the duty of States to exercise their PSNR in the interests of national development and for the well-being of its people, this in terms of Art. 1 of the Declaration on PSNR is of particular relevance and a key enabler for the more successful instances of resource exploration anywhere.

Another important argument in the contemporary State practice that underlies the application of the Declaration is the realisation that the Declaration did not define the concept of "natural resources". It was thus left open to interpretation whether fresh water, oceans, seas, air, forests, soils, genetic materials and other components of ecological systems can be included alongside with the more obviously profitable natural resources such as oil, gas, and minerals.

In Africa, the freedom to regulate foreign investments as stipulated in Art 2 of the Declaration⁵ encouraged the emerging post-colonial and underdeveloped States, almost without exception, to adopt foreign investment codes and legislation that introduced general prohibitions of foreign direct investments, subject to licensing and permit based exemptions. The inspiration for the FDI laws and codes in Africa came from the Algerian Investment Code of 1966.⁶ The key measures introduced by the Algerian model were:

- (i) private investments are permitted only subject to comprehensive approval and licensing procedures on the basis of extensive "feasibility studies" and binding performance projections, to be submitted by the foreign investor;
- (ii) the limitation of foreign investments to those sectors of the economy which are considered not to be vital to the national economy, unless the State specifically "invites" foreign or domestic private investment to participate in those sectors, which, as a rule, can only be done in joint venture with an existing state owned enterprise;

⁵ The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

⁶ See for an English translation of the 1966 Code: E de Brauw, Algeria, Amsterdam 1979 (International Bureau of Fiscal Documentation, Investment Codes of North Africa m 27). Also available at

<http://heinonline.org/HOL/LandingPage?collection=journals&handle=%20hein.journals/intlyr1&%20div=69&id=&page=>, accessed 10 Jan 2013.

- (iii) tight control and state monopolies regarding commercial operations of any foreign companies and all foreign trade, as well as foreign exchange;
- (iv) restrictions on ownership of immovable property by foreign companies or individuals;
- (v) mandatory local participation rules normally providing that foreign investors could only operate as minority (49%) equity partners of local (national) shareholders;
- (vi) severe penalties, which include confiscation, forfeiture and imprisonment, for any failure to comply with the administrative licensing conditions of any foreign investment or the laws governing any related activities;
- (vii) the discretionary granting of certain privileges, mainly customs and tax rebates and foreign exchange exemptions, to foreign investments approved by the authorities;
- (viii) the general rule that all general commercial, other statutory and common law will only apply subject to the special legislation regarding foreign investments and commercial activities of foreign companies;
- (ix) the existence of special legislation for mining, petroleum and gas explorations;⁷ and
- (x) compensation limited to the net value of assets in case of expropriation and only in so far as all licensing requirements are satisfied, such compensation being convertible into foreign exchange only up to the amounts of foreign capital actually and originally invested; and
- (xi) submission of all legal interpretation and disputes to the national law and forum only.

Typical for many of the Investments Codes during the first 3 decades of the PSNR Declaration was the prescription of detailed forms for the submission of minute investor information, feasibility data, economic performance projections and undertakings regarding labour. The Algerian Decree of 31 March 1967 prescribed the furnishing of every conceivable information in respect of the investor and his investment project, as well as 10 detailed forms or tables regarding: cost and financing of the foreign investment; number of jobs to be created within the first five years (including salaries); number of jobs to be created within the second five year period (including salaries); breakdown of the costs of all purchases to be made for the implementation of the project; costs and financing of the project as whole over the first five year period, including and excluding all taxes payable; and breakdown of the numbers of female and male, as well as foreign and Algerian staff, permanent and seasonal, and by levels of seniority, to be employed during the first five year period.⁸

⁷ See Ordinance 71-22 of 12-04-1971 in respect of hydrocarbons.

⁸ See de Brauw, *supra*, p 23 et seq.

The information requirements not only placed a particular planning burden on the applicant investor, but rather the information supplied by the foreign investor became part of the conditions for the investment authorisation and any deviation therefrom that had not been duly communicated to and approved by the competent authority could be used as a pretext to revoke the authorisation and declare part or the whole of the investment forfeited.

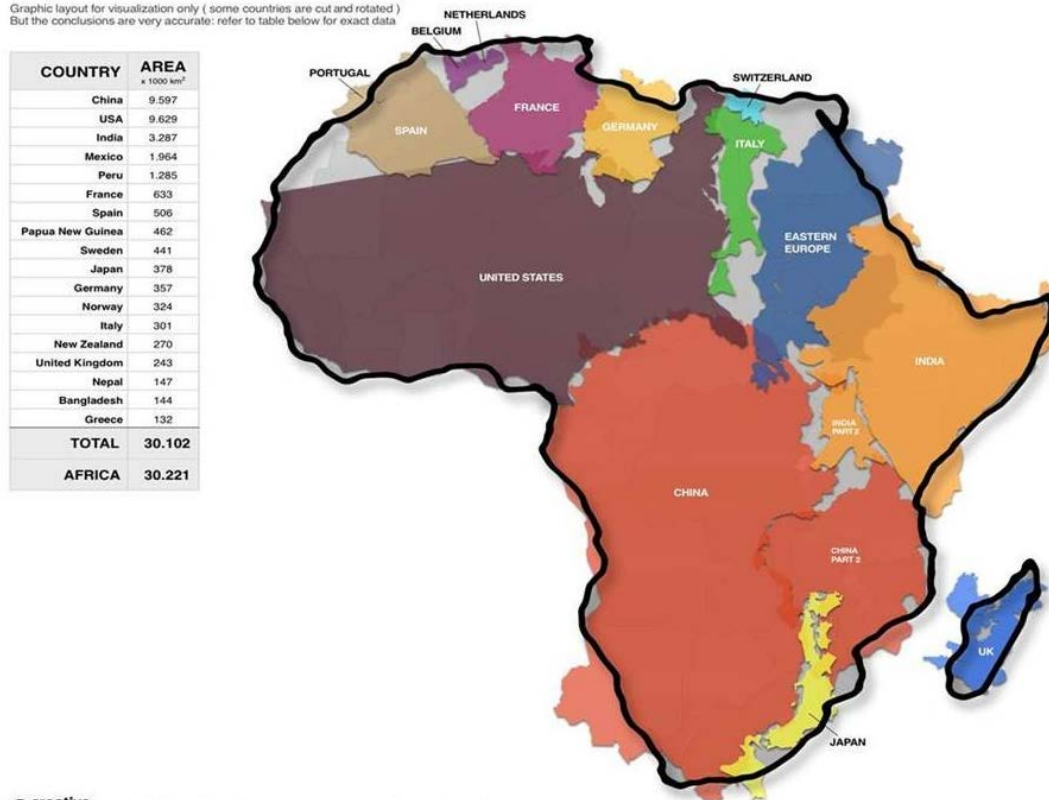
The early transformation of the principles of the PSNR Declaration into national laws thus became the main instruments for the institution of systemic corruption and maladministration in Africa. The other and even more detrimental effect was the misdirection of investments into areas selected for opportunistic political reasons and on the basis of unusually high and mostly hidden or indirect profits, rather than market conformity.

FDI statistics reflect this development. Whilst in 1970, Africa still attracted 10% of Global foreign direct investment flows, this percentage dropped by 1980 to below 1%, and by 1990 recovered only slightly to just over 1%. In 1999 the percentage of FDI flows to Africa as of global FDI still only stood at 1.3%, as against its share of 15% of World Population and 20% of the total World land area.

The True Size of Africa

A small contribution in the fight against rampant *Ignorance*, by Kai Krause

Graphic layout for visualization only (some countries are cut and rotated)
But the conclusions are very accurate: refer to table below for exact data

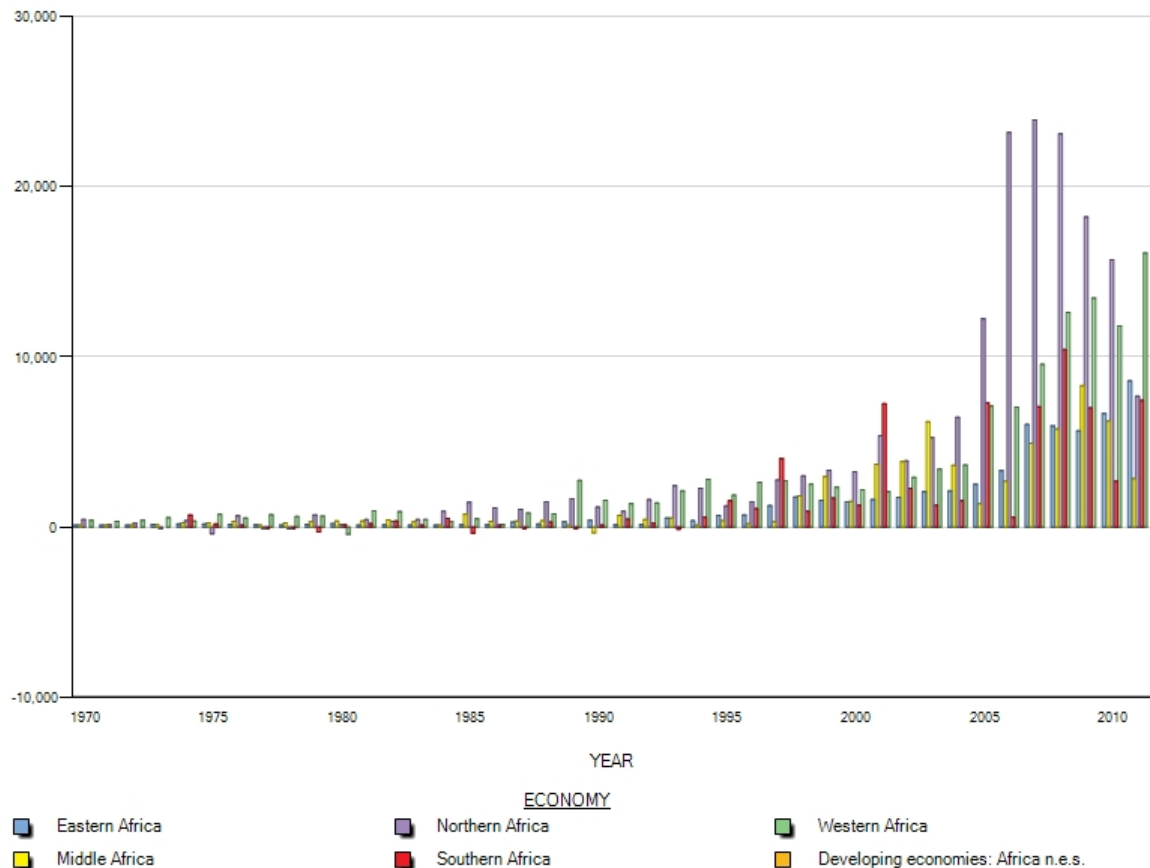


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Another indicator that has the greatest significance for the attraction of FDI is return on capital. Overall return on foreign investments in sub-Saharan Africa declined from 30.7% in the period 1961-73 to 13.1% in the period 1973-80, and 2.5% in the period 1980-87.

Real per capita GDP declined for the whole of Africa by -0.8% per year in the period 1987-92.⁹

With multiparty democracy and liberal legal reforms slowly gaining ground in Africa during the nineties, following the collapse of the Soviet Union, we can see a turn around. FDI as a percentage of World FDI increased to 2.75% in the decade from 2000 to 2010, with much of the increase going to North Africa. In real terms, this trend translated into an average 5.5% GDP growth 2000 to 2008.¹⁰



Inward FDI flows, annual, 1970-2011, Developing economies Africa and Africa n.e.s. ("not elsewhere specified")

UNCTAD International Trade Statistics: <http://unctadstat.unctad.org/TableViewer/chartView.aspx> and <http://unctadstat.unctad.org/TableViewer/tableView.aspx?ReportId=88>

⁹ L. Cockcroft / R.C. Riddell, Foreign Direct Investment in Sub-Saharan Africa, World Bank Working Paper International Economics Department, Washington D.C. 1991, at p 46, see also IMF, World Economic Outlook, May 1993, p 44.

¹⁰ These and the previous FDI data from Inward FDI flows, annual, 1970-2011, Developing economies Africa and Africa n.e.s. ("not elsewhere specified"), <http://unctadstat.unctad.org/TableViewer/tableView.aspx?ReportId=88>, last accessed 21 Jan 2013.

Foreign Investment in Africa



#ODMACT
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¹¹ UNCTAD, *Transnational Corporations and the Infrastructure Challenge*, World Investment Report 2008. New York and Geneva 2008; http://unctad.org/en/Docs/wir2008_en.pdf; see also summary at: <http://en.afrik.com/article14576.html>, accessed 21 Jan 2013.

The regional and conjectural differences are currently highlighted by the UNCTAD latest review of FDI performance in 2012, during which year a further increase of 5% for Africa has been recorded, but a decline of 43.6% for South Africa.¹²

II. The World Bank and the ACP / Lomé / Cotonou Conventions

The original **Algerian** interpretation of the PSNR Declaration in favour of an absolute concept of sovereignty in respect of natural resources has today been abandoned in the state practice of all States in Africa. The former FDI licensing commissariats have been transformed into FDI promotion and facilitation agencies. Approval procedures have been simplified with provision conceding automatic approval after the expiry of a relatively short notice period, typically 30 days. The advisory and support services of the World Bank's International Finance Corporation have successfully set standards and created what amounts to a global *jus commune* on the facilitation, regulation and protection of foreign direct investment,¹³ including in Algeria, in terms of the new Algerian Investment Code.¹⁴

The modern treatment of foreign investments in Africa is also the result of the first manifestation of an investment strategy in Africa. Driven by the industrialized free market economies of the Northern Hemisphere, the investment strategy towards Africa of the nineties found an overwhelming economic, legal and technical support from key World Bank institutions, the International Finance Corporation (IFC) since 1956, the International Centre for Settlement of Investment Dispute (ICSID) of 1966, the Multilateral Guarantee Agency (MIGA), established in 1985. Other key interventions can be attributed to UNCTAD, the OECD, the EU's ACP, Lomé and Cotonou Agreements, and since 1993 to the Japanese TICAD (Tokyo International Conference on African Development) initiative. The overall objective of this first coherent investment strategy has been to de-ideologize foreign investment, whilst linking it to clearly defined objectives of sustainable development and development assistance.¹⁵ The dimension of the nineties investment strategy towards Africa has been inherently multi-lateral and based on the principles of economic interdependence and friendly co-operation between States. It co-opted 43, that is to say

¹² http://unctad.org/en/PublicationsLibrary/webdiaeia2012d20_en.pdf, accessed 21 Jan 2013. See also the comprehensive study by Sanne van der Lugt, Victoria Hamblin, Meryl Burgess and Elizabeth Schickerling, "Assessing China's Role in Foreign Direct Investment in Southern Africa", *Centre for Chinese Studies at Stellenbosch University Report*, March 2011, 85 pp.

¹³ A comprehensive overview and documentation of national foreign investment and related legislation is found on the webpages of the World Bank's and IFC's "Doing Business" Initiative: <http://www.doingbusiness.org/>, accessed 21 Jan 2013.

¹⁴ Legislative Decree Number 93 of 12-10-1993.

¹⁵ See for instance: Investment Climate Advisory Services I World Bank Group Investment Law Reform. A Handbook for Development Practitioners. Washington June 2010. <https://www.wbginvestmentclimate.org/uploads/Investment-Law-Reform-Handbook.pdf>, accessed 21 Jan 2013; also: <http://www.oecd.org/daf/internationalinvestment/>, both accessed 21 Jan 2013.

all but 10 African States into becoming members of the ICSID investment dispute settlement mechanism,¹⁶ and established a very large number of bi-lateral investment protection agreements.

In hindsight, a strategic mistake can be attributed to the EU's Africa investment strategy. By denying accession to the newly liberated and re-constituted South African Nation to the trade cooperation facilities of the ACP-Lomé Convention at the ACP-EC Council of Ministers Meeting in Luxembourg on 24 April 1997, South Africa was challenged as a competitor for access to African resources and markets. The reasoning of the EU in the ACP context was that South Africa was economically much stronger than most other ACP Convention members and did not deserve to benefit from privileged access to the EU markets. In response, South Africa began defining its own expansion and investment strategy for Africa.

III. New Partnership for Africa's Development - NEPAD

South Africa's counter-strategy for investment in Africa was presented in Abuja, Nigeria in October 2001 by the then South African President Thabo Mbeki, together with his principal ally in Africa, Olusegun Obasanjo, with the launch of NEPAD, the New Partnership for Africa's Development.

NEPAD proposed to overcome Africa's endemic underdevelopment and mass poverty within a period of 15 years by rewarding good governance reforms and political peer review mechanisms with investments in essential transport, energy and communications infrastructure, totalling a proposed external funding of 64 Billion USD (equivalent to 12% of the GDP of Africa), per year, for 15 years. The funding and investments should be co-ordinated by a NEPAD Secretariat (conveniently located in Johannesburg, South Africa), and acting under a "Heads of State Forum", to bundle and coordinate most if not all European and bilateral development aid and investment into Africa, so as to maximize the FDI benefits.

Only six months after the launch of NEPAD, at the G8 meeting in Calgary, Canada, on 27 June 2002, the proposition of bundling most aid to Africa into a central co-ordination scheme was rejected. Individually, each G8 participant State and several other industrial nations promised to increase aid to Africa, so as to collectively arrive at an annual development aid increase of 6 Billion USD, or 10% of the projected and proposed NEPAD funding. The World had discovered other priorities, last but not least the War on Terror and the occupation of Iraq. In hindsight, we now know that the estimated total cost of the War on

Terror campaigns including the occupation of Iraq, from 2002 until 2012, amounts to at least 1.6 trillion USD, or 160 billion USD per year. In March 2004 the UK government appointed the “Blair Commission on Africa”. A year on, in March 2005 it produced a 399-page long report that contained about as many reasons why it would not be advisable to address Africa’s ills and needs in the manner in which NEPAD had proposed.¹⁷

Although a NEPAD secretariat still exists at the start of 2013 in Midrand, South Africa, it has reverted to a mostly advisory and facilitating role.¹⁸

IV. Forum on China-Africa Cooperation – FOCAC

Already in October 2000 and one year before the South African launch of NEPAD, the People’s Republic of China had secured the participation of 44 African States at the First Ministerial Conference of the Forum on China-Africa Cooperation (FOCAC).¹⁹



Mostly unnoticed or if at all, belittled, by the industrial nations of the Northern Hemisphere, the conference adopted the Beijing Declaration of the Forum on China–Africa Cooperation and the Programme for China–Africa Cooperation in Economic and Social Development.

¹⁷ <http://www.commissionforafrica.info/> accessed 21 Jan 2013.

¹⁸ <http://www.nepad.org/npca> accessed 21 Jan 2013.

¹⁹ <http://www.focac.org/eng/> accessed 21 Jan 2013.

The declaration and programme delineated a mostly bi-lateral network of development and investment strategies, to be coordinated by China, but implemented separately for each individual African State. It is a unique blend of entirely flexible and pragmatic approaches to international as well as trade and development relations. The core principles that have guided each of the tri-annual Ministerial Conferences have been the “Five Principles of Peaceful Coexistence”; friendly relations; liberation solidarity and mutual benefit, or as China often phrases it, a “win-win” common development policy. China insists that it is its respect for equal rights in international relations that will prevent it from in any way whatsoever impose political or economic policy conditionality, as had become the norm and characteristic of EU – ACP relations and many World Bank and IMF interventions.

The first 12 years of Chinese- African cooperation within the FOCAC framework have positioned China as the most relevant trading, development and investment partner in Africa.²⁰

Trade volumes between China and Africa expanded 20-fold from 10 Billion USD in 2000 to just over 200 Billion USD in 2012.²¹ Chinese FDI stock in Africa grew from under 50 Billion USD in 2000 to 13 Billion USD in 2010 and an estimated total of 55 Billion USD in 2012, showing an average growth rate of 60% per annum.

FDI figures regarding China present several methodological difficulties.²² Many of the preferential loans and credits granted by China for projects in Africa are actually foreign investments, as repayment is not truly expected. Three major Chinese State owned banks are entrusted with processing and granting “policy loans”, namely China Eximbank, China Development Bank, and China Agricultural Development Bank, often working in syndication with China’s largest banking institution, China Construction Bank. The total volume of loans and credit lines granted since 2002 stands at approximately 60 Billion USD. It is thus fair to adjust Chinese FDI stock values in Africa upward to at least 80 Billion USD.²³

For the past 4 years, China has become Africa’s largest trading partner, accounting for 20% of the total trade with Africa. China currently purchases three fifths of its crude oil

²⁰ See the overview by Daouda Cissé, “FOCAC: trade, investments and aid in China-Africa relations”, Centre for Chinese Studies Policy Briefing May 2012, 4 pp. A very good evaluation is also found in Katarina Kobylinski, “Chinese Investment in Africa: Checking the Facts and Figures”, Association for International Affairs Briefing Paper 7/2012, Czech Republic 2012.

²¹ For the latest 2012 figures see Ethel Hazelhurst, “Chinese exports to Africa still rising”, Business Report January 4 2013, <http://www.iol.co.za/business/business-news/chinese-exports-to-africa-still-rising-1.1447550>, accessed 21 Jan 2013.

²² Katarina Kobylinski, http://www.academia.edu/1798405/Chinese_Investment_in_Africa_Checking_the_Facts_and_Figures; accessed 21 Jan 2013; David E. Brown, “Hidden Dragon, Crouching Lion: How China’s Advance in Africa is Underestimated and Africa’s Potential Underappreciated”, p 17. Strategic Studies Institute Monograph, Carlisle

²³ See for statistical material and analysis in Mary-Françoise Renard, “China’s Trade and FDI in Africa”, Working Paper No. 126, May 2011.

imports from African producers, headed by Angola, as well as much of its coal, iron ore and heavy and precious metals. Naturally, China has a growing interest in improving its trade balance with Africa with rapidly increasing exports of machineries and manufactured goods. The recent proposals for Sino-African trade to be processed through a new inter-governmental accounting facility that would be Renminbi (RMB), rather than US Dollar-based, reflects the Chinese push to increase exports of products and manufactured goods into Africa.

The current state of affairs was openly criticised on 19 July 2012 by South African President Jacob Zuma in his address to the latest and fifth FOCAC Ministerial Conference held in Beijing:

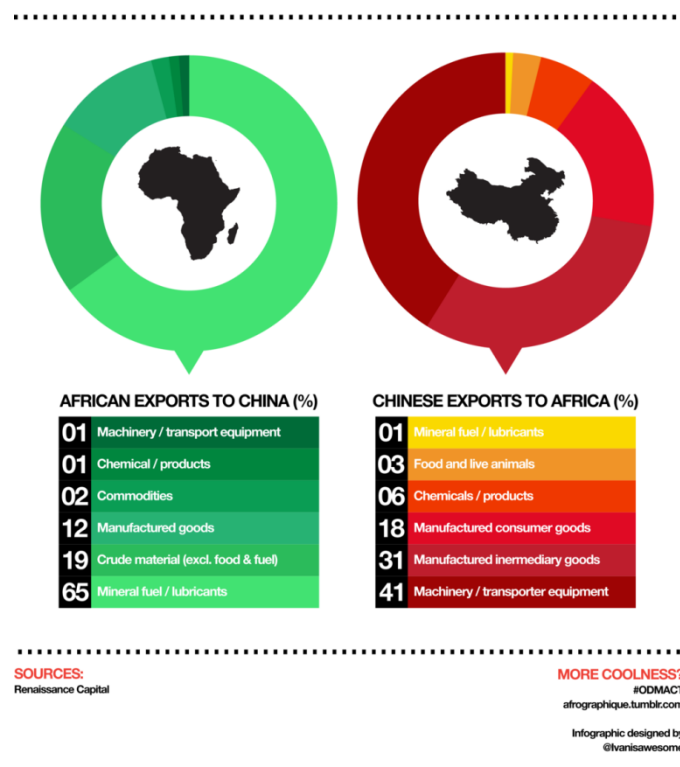
Africa's commitment to China's development has been demonstrated by the supply of raw materials, other products, and technology transfer.

As we all agree, Your Excellency, this trade pattern is unsustainable in the long term.

We certainly are convinced that China's intention is different to that of Europe, which to date continue to attempt to influence African countries for their sole benefit.²⁴

The concern voiced in 2012 by South Africa, as one of China's main trading and investment partners, is graphically demonstrated in the following figure:

Sino-African Trade

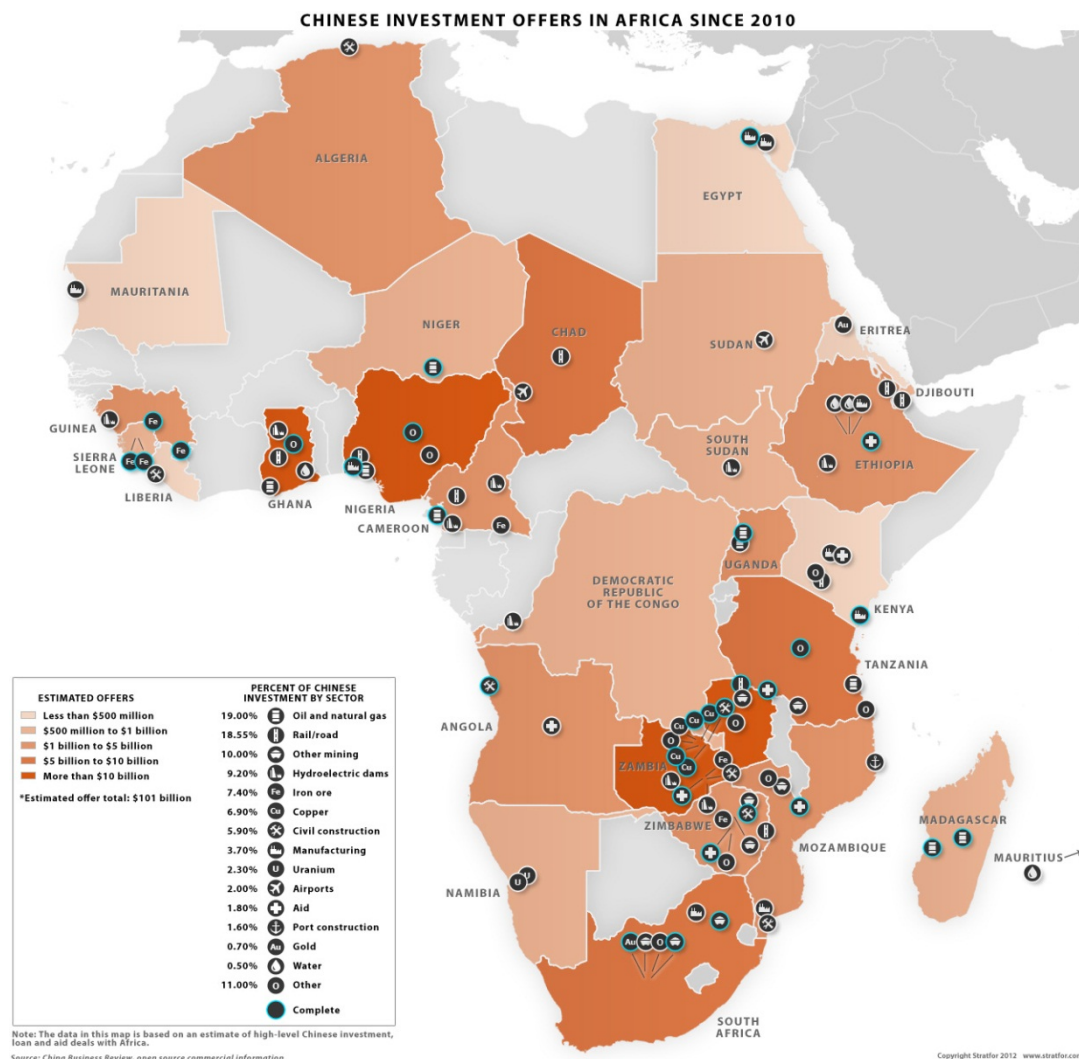


²⁴ <http://www.info.gov.za/speech/DynamicAction?pageid=461&tid=76792>; accessed 21 Jan 2013.

The aggressive exporting of manufactured goods and machinery has proved to be ruinous for many new and still fragile industries in Africa. An approximate total export to Africa of 7 Billion USD per year in textiles and garments has all but destroyed existing textile and shoe manufacturing industries in Africa and especially in South Africa.

South African ferrochrome steel makers are currently threatened by Chinese imports, manufactured with ferrochrome ore which China buys and mines in South Africa. Considerations by the South African government to impose an export tax on its ferrochrome ore are being vigorously opposed by China, invoking a web of currently 60 bilateral cooperation and consultation agreements concluded between China and South Africa since 1997.²⁵

The primary interest of China in securing direct access to natural resources that it can mine without local or non-Chinese intermediaries is shown further in the following relational map of Chinese FDI concentrations in Africa:



²⁵ A. Thomashausen, 48 "Export taxes as a means to protect South Africa's minerals beneficiation strategy", in: (2011) 23 *South African Mercantile Law Journal*, pp 407-419.

The main obstacles against stronger Chinese engagement in local manufacturing in Africa are the severe disparities in industry wage levels. The average skilled industry worker monthly wage in China equals approximately 300 Euros, whilst in South Africa it will four times higher, starting at the equivalent of 1.200 Euro per month with the recent mine worker strikes having set a new minimum wage level at the equivalent of 1.800 Euro per month.²⁶

It is clear that whilst globalisation and the WTO international trade regime have greatly enhanced the freedom of movements of goods and capital, they have not been able to achieve input cost parity between competing producer nations.

An essential characteristic of the China-Africa economic cooperation within the FOCAC network of cooperative engagements, institutionalized communication channels sub-committees and working groups, is China's integrated approach to development aid, foreign direct investment and long term, preferential and government guaranteed project finance.²⁷ A special role within the FOCAC is reserved for the China Portuguese-speaking Countries Ministerial Forum which was initiated in 2003 by the Chinese Special Region of Macau to strengthen cooperation with Angola, Cape Verde, Guinea Bissau, Mozambique and São Tomé, with Brazil and Portugal being carefully co-opted into the regular meetings and working committees.

Chinese development aid contributions in Africa are difficult to quantify as investments, developmental or commercial, and are characterized by secrecy. It is almost impossible for non-officials to gain access to actual agreements and reports.²⁸ Official figures show that at least 13 Billion USD was made available from 2006 to 2010 in preferential loans for aid projects. Each of the FOCAC summits of 2000, 2006 and 2009 also announced almost complete debt relief to all HIPC and LDC nations in Africa and granted complete tariff exemptions for 95% of their export products. The creation of the African Human Resources Development Fund successfully trained at least 40.000 personnel with a further cumulative 12.000 academic bursaries having been made available to students from Africa. Chinese Development Aid over the past 12 years also built several hundred hospitals and clinics in Africa, and trained at least 4.000 health workers. In many cases, the interven-

²⁶ A. Thomashausen, "Africa needs quality from friendship with China", *Business Report* 17 July 2012.

²⁷ Robert Schiere, "China and Africa: An Emerging Partnership for Development? – An overview of issues", African Development Group, Working Paper No. 125, May 2011.

²⁸ Paul Hubbard, "Aiding Transparency: What We Can Learn About China ExIm Bank's Concessional Loans", Center for Global Development, Working Paper Number 126 (September 2007), pp 7 et seq; Deborah Brautigam, "China, Africa and the International Aid Architecture", Working Papers Series N° 107, African Development Bank, April 2010, <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/WORKING%20107%20%20PDF%20E33.pdf>; also: "Is US FDI to Africa more transparent than China's?" <http://www.chinaafricarealstory.com/2013/01/is-us-fdi-to-africa-more-transparent.html>; both accessed 21 Jan 2013.

tions have a decisive strategic impact, with over 600 major infrastructure projects carried out in Africa thus far.²⁹

As a rule, direct development aid and developmental projects will strengthen essential government infrastructure and thereby secure access and influence for the Chinese Ministry of Foreign Affairs. Almost all capital cities in Africa have benefitted over the past decade from Chinese built and donated new buildings to house presidential and government administrations, parliaments and conferences. Quite naturally, this input has signalled that China takes African governments seriously and does not expect Ministries and Presidential Offices to function with unreliable power supply, in derelict buildings from the colonial past. China's approach further benefits from its "win-win" approach, based on the understanding Chinese development aid is given not by a rich, but itself developing nation, with GDP per capita ratios around 8.500 USD, meaning one quarter to a third of European nations, or one twelfth of, for instance Norway. It is a matter of the poor helping the even poorer, or as China will put it, of development solidarity. The most prominent example of China's success in addressing Africa's most pressing infrastructural needs, whilst at the same time respecting Africa's need for being respected equally, is the new and state of the art 200 million USD African Union headquarters building in Addis Ababa, donated entirely by China. The new headquarters were handed over in 2012.



\$200 million African Union headquarters building in Addis Ababa

<http://www.chinaafricarealstory.com/2012/01/africas-new-au-building-how-many.html>

²⁹ "White Paper on China-Africa Economic and Trade Cooperation," People's Republic of China (PRC) Information Office of the State Council, December 1, 2010. See for more details: Huang Meibo and Qi Xie, "Forum on China-Africa Cooperation: Development and Prospects", in: *China Monitor Special Edition Quo Vadis FOCAC*, July 2012, pp 11-20, 12, also Sven Grimm, "The Forum on China-Africa Cooperation (FOCAC) - Political rationale and functioning", *Centre for Chinese Studies Policy Briefing*, May 2012.

V. The FOCAC Business and Legal Models

Engagement between China and African participants of FOCAC will always commence with the discussion and proposal on government to government level of a Master Facility Agreement which is in most cases sponsored by either China Development Bank or China Eximbank, both falling under the both falling under the direct jurisdiction of the State Council thus ensuring political control of all decisions at the highest level of authority.

The Master Facility Agreement (MFA) will provide for a revolving credit line to be available to finance eligible projects. Projects will be proposed by a bi-national committee in which the recipient nation is normally represented by its Ministry of Finance. The bi-national committee is often referred to as the Project Management Office. The decision on project finance will lie with the Chinese financing institution, following a due diligence process conducted by the same Chinese financing institution who will engage with and obtain a wide range of Chinese governmental approvals, including from the State-Owned Assets Supervision and Administration Commission (SASAC) and the National Development Reform Commission (NDRC), as well as the State Administration of Foreign Exchange (SAFE) and in many cases the State Council. Once authorised, the Chinese financing institution will appoint on direction of the governmental authorities, the relevant qualifying Chinese industrial entities that will be contracted to implement the project. The project companies will be without exception state owned or public sector corporations. Local participation or content contributions from the benefitting African State is normally limited to below 30%.

With the exception of development aid finance, the Master Facility Agreements are serviced by guaranteed purchases of raw materials from the African partner State, mostly oil, ores and minerals, on the basis of guaranteed supply undertakings by the African resource State and guaranteed off take agreements by Chinese corporations. As a rule additional loans are granted as supply and take off volumes increase. In the case of Angola, the original loan amount of 2 Billion USD granted in 2004 grew to 14.5 Billion in 2011.³⁰

The usually followed procedure is summed up on the webpages of China Eximbank as follows:

In order to support and assist Chinese firms doing trade and business in Africa overcome the problem of insufficient funding, the Chinese government has already signed reduced

³⁰ A good account of the Chinese expansions into Angola, Uganda, Nigeria, and Zimbabwe is given in: Michelle Chan-Fishel and Roxanne Lawson, "Quid Pro Quo? China's Investment-for-Resource Swaps in Africa", 50(3), *Development*, 2007, pp 63–68. See also the detailed reports and evaluations covering Angola, DRC, Mozambique, Tanzania, Uganda, EAC and SADC in: Centre for Chinese Studies, *Evaluating China's FOCAC commitments to Africa and mapping the way ahead*, Stellenbosch 2010. On Sino-Angola relations specifically see: Claude Kabemba, "Chinese involvement in Angola", <http://www.osisa.org/books/regional/chinese-involvement-angola>, accessed 21 January 2013.

interest concessional loan framework agreements with 26 African countries, including Sudan, Kenya, Zambia, Tanzania, Gabon, Cameroon, Ghana and Mozambique. Chinese firms only need to find a suitable opportunity within these African countries in order to apply for one of these types of low interest concessional loans.

Chinese firms applying for an intergovernmental low interest concessional loan must meet the following basic conditions: the project must be located in a country with which China has signed a concessional loan framework agreement, at the beginning of the project, and during progress operations, the firm must inform the People's Republic of China, Ministry of Commerce Foreign Assistance Office whether or not the project operations are in accordance with the terms of the loan; the country in which the project is located must have a relatively stable political situation and favorable conditions for economic growth; the project must be in line with relevant policies of the Chinese government and the host government, and must obtain the consent of the host government; the lender and guarantor must have good credit and the capacity to repay; the investment project should be in manufacturing, with plentiful local resources, a vast market for goods, favorable economic prospects and capable of promoting the host country's economic development; the project should focus on infrastructure or the introduction of equipment, the government of the host country will need good credit and be capable of servicing the debt; the unit applying for and carrying out the project should have comparatively strong economic and technical strength and the capacity to manage foreign operations; the loan size should ordinarily be at least US \$1 million, and should purchase and import from China as much equipment, technology and services as possible; the project's supplementary funding, equipment etc; conditions must be implemented.

Application Procedure: 1) In accordance with the abovementioned conditions, the firm must submit an application to the Foreign Assistance Office in the Ministry of Commerce, along with supporting material. After the Ministry of Commerce has initially approved the project, it will submit a recommendation to the China Exim Bank. 2) After receiving the official letter of recommendation, the China Exim Bank will conduct a feasibility study of the project, using the official application and supporting material provided by the firm; the feasibility report; the credentials of the firm applying for the loan (comprising the firm's situation, licenses, company regulations etc.); a 3 year audit of the firm's certified financial report; the guarantor's situation and 3 year financial audit; a commercial contract with an African joint cooperative partner (if it is a joint venture, the joint venture rules and contract, and the partner's credit situation, etc. should be provided); an effective written document showing the African country's government approval or support for the project; and any other relevant documentation required by the China Exim Bank. The China Exim Bank will

*perform an evaluation, consider the feasibility of the project, and will then sign agreements with the borrower and the guarantor.*³¹

The Master Facility Agreement of 16 December 2011 between the Government of Ghana and China Development Bank is one of the few MFAs for which some detail has become known through the Ghanaian parliamentary approval process. Crucial to its implementation are a number of “subsidiary agreements”, forming conditions precedent for the MFA. These are:

- i. The Five Party Agreement - among Government of Ghana (GOG), Bank of Ghana (BoG), Ghana National

Petroleum Corporation (GNPC), CDB and UNIPPEC Asia (as the crude oil offtakers); this agreement sets out the structure of, and key contractual obligations of each party under, the transaction. In summary: GoG’s obligation to open and maintain the transaction accounts; BoG’s obligation to ensure timely and legal transfers of repayments to China Development Bank (CDB) accounts and to open and maintain standby letters of credit; GNPC’s obligation to supply and UNIPPEC’s obligation to purchase crude oil to support repayments as scheduled; and the Ministry of Finance and Economic Planning (MoFEP)’s obligation to oversee and manage the loan and the projects. Most importantly, under the Finance Documents, MoFEP is the party responsible for managing the facility on behalf of the Ghana. Although MoFEP is the borrower, and commercial agreements are executed between (Chinese) Project Sponsors and their (Chinese) project Contractors, the agreements impose the responsibilities on MoFEP to supervise and ensure that the projects are economically, financially and materially carried out according to best standards, meaning that the Chinese financing entity will normally not be responsible for delays, defects and defaults.

- ii. The Accounts Agreement - setting up the transaction accounts, namely: Collection Account, Debt Service Account, and Owner Contribution Account in CDB’s Hong Kong Branch for the operation and management of the loan;
- iii. The Charge over Accounts Agreement, giving CDB a charge (lien) over all the repayment accounts;
- iv. The Subsidiary Agreements: one each to be signed between GoG and CDB to cover the financing for each Eligible Project proposed for financing.
- v. Standby Letters of Credit that will be opened to support each loan repayment instalment: these are required to be open by BoG whenever a repayment is due. Although issued as 30 day L/Cs, it is understood that they will expire immediately whenever all GoG’s payment obligations for a repayment period are completed;

³¹ <http://www.people.com.cn/GB/paper53/13217/1185583.html>, accessed 21 Jan 2013, as translated in Paul Hubbard, “Aiding Transparency: What We Can Learn About China ExIm Bank’s Concessional Loans”, Centre for Global Development, Working Paper Number 126 (September 2007), pp 14-15.

- vi. Other Surety Documents; including a letter of Commitment from MoFEP certifying that the principal and interest of the outstanding loan will be included in each annual budget until paid off;
- viii. Offtaker Agreements between GNPC and UNIPEC Asia for the sale and purchase of crude oil to support repayment of the loan;
- ix. On-lending Agreements for MoFEP to on-lend the loans to the Project Sponsors entrusted with carrying out approved projects.

The duration of the Master Facility Agreement of 16 December 2011 is 15 years and 6 months, subject to such extensions beyond the repayment period of the loan as may be necessary to allow CDB to be fully reimbursed. The total credit amount is US\$ 3 Billion from China Development Bank available in two tranches:

Tranche A (US\$1.5,000,000,000) with 15 years repayment period with 5 years Grace period

Tranche B (US\$1.5,000,000,000) with 10 years repayment period with 3 years Grace period

Availability Period: 6 years from the signing date of the Master Facility Agreement

Repayment: Principal and interest in respect of the Facility shall be paid to CDB every 6 months at the end of each Interest Period. Interest Periods: 6 months. Interest Rate: 6 month LIBOR plus the applicable Margin.

Margin:

2.95% per annum – Tranche A loan

2.85% per annum – Tranche B loan

Upfront Fee of zero point two five per cent (0.25%) of the loan

Half (0.125%) will be due on or before twenty (20) days after signing of the MFA, and

Half will be paid as a Condition Precedent to the first Subsidiary Agreement.

Commitment Fee: one percent (1%) per annum on the undrawn and un-cancelled balance of the loan will become due no later than sixty (60) days after the signing of the MFA (i.e. by February 14th, 2012).

GoG 'Owner Contribution': 15% of each Subsidiary Agreement amount.

Debt Service Reserve Account cover: GoG is required to maintain a cover of 1.5 times each repayment in the account at all times.

Eligible Projects

Twelve (12) eligible projects, primarily infrastructure development projects under a variety

of MDAs, were identified and confirmed already for financing under the facility. They are:

1. Western Corridor Infrastructure Renewal Project – Takoradi-Kumasi; Dunkwa-Awaso Railway Line (Scenario 1 Retrofit);
2. Western Corridor Infrastructure Renewal Project - Takoradi Port Retrofit Phase 1;
3. Sekondi Free Zone Project – Shared Infrastructure and Utility Services;
4. Accra Plains Irrigation Project (Phase 1: 5000 ha);
5. Coastal Fishing Harbours and Landing Sites Re-development Project (Axim, Dixcove, Elmina, Winneba, Mumford, Senya-Beraku, Jamestown, Teshie, Tema, Ada, Keta);
6. Eastern Corridor Multi-modal Transportation Project – Upgrade of Volta Lake Ferries, Pontoons + Landing Sites (Kpandu-Amankwakrom; Kete Krachi-Kwadokrom; Yeji-Makongo; Tapa Aboatoase; Dzemini); Upgrade of Akosombo and Buipe Ports;
7. Western Corridor Gas Infrastructure Project: Offshore Gas Gathering Pipeline; Early Phase Gas Processing Plant; Onshore Gas Trunk Pipeline, including Pumpuni Dispatch Terminal; NGLs Processing Retrofit (Tema Oil Refinery); and Helicopter Surveillance Fleet;
8. Western Corridor ‘Petroleum Terminal’ Project;
9. Western Corridor ‘Oil Enclave’ Toll Road Project;
10. Accra Metropolitan Area ICT- Enhanced Traffic Management Project (including urgent road completion components);
11. Integrated National Security Communications Enhancement Project – Deployment of ICT Enhanced Surveillance Platform for Western Corridor “Oil Enclave”;
12. US\$ 100 million SME Projects Incubation Facility – Facility Management Contract(s) with local financial institution(s);

Subsidiary Agreements

Separate Subsidiary Agreements must be signed between MoFEP and CDB for each eligible project and will be submitted to CDB together with an Application for consent to the Subsidiary Agreement. The loans will be disbursed only following a successful due diligence by CDB on the eligible project. Once approved for disbursement, disbursements will be made upon submission to CDB by MoFEP of Utilisation Requests, of which no more than five (5) are permitted annually.

Loan disbursements will be made directly from CDB to the accounts of project contractors.

VI. FOCAC Success and Risk

The Master Facility Agreement structure offers African States an integrated approach where the offtake of raw materials is credited at market value to serve as finance for agreed project implementations where the contracting, project management, payments and cash flows do not pass to the authorities of the African resource State.

This may appear as a denial of sovereignty of the African resource State and a fundamental contradiction of the principles of the PSNR declaration. However, it addresses a fundamental reality that has caused many Western sponsored projects and loans to fail.

Current statehood in Africa is too weak to be able to successfully market and sell their natural resources by interacting with global corporations whose annual turnover exceeds by many times the annual budgets of African States, and often even the GDPs of entire States. Chronic lack in critical skills on a national level makes it difficult to diligently administer the proceeds of resource trading and apply them purposefully, without the resource contributing to what literature refers to as the “resource curse”, meaning large uncontrolled cash flows that undermine every attempt at safeguarding state administration and good governance. Moreover, African States are normally not able to obtain large commercial loans at reasonable rates and costs.

The Chinese approach puts Northern Hemisphere competitors at distinct disadvantages as their financial institutions and industries cannot operate in an integrated manner with the support and coordination of the State.

With the growing success and expansion of FOCAC to cover science, education and cultural exchange, including the teaching of Mandarin in many schools in almost every country in Africa, a new long term South-South alliance is forged. Already Africa has become home to probably close on 3 million Chinese nationals, if the informal or non-official migration is factored in. Angola for instance officially recorded 258.920 Chinese immigrants in April 2012.

The Chinese State control over all its State Owned Enterprises (SOE) through the State-Owned Assets Supervision and Administration Commission (SASAC) and the National Development Reform Commission (NDRC), all but eliminates the commercial risk for all the parties intervening in this process. China will praise this State control as the basis for the effectiveness of the FOCAC “win-win” formula.³² The downside of this approach however has been an overall disappointing return on capital from Chinese investments in Africa. Recent research suggests that over the entire past FOCAC decade from 2012, not a

³² Zezhong Zhang, “Promoting FOCAC more maturely in the next decade”, 15 (2011), Law, Democracy & Development, Faculty of Law, University of the Western Cape, pp 550-513.

single project sponsored and undertaken by China in Africa would have generated actual profits for the Chinese project companies and investors.³³

The benefits are at this stage still mostly political and strategic, and not economic. FOCAC helped rebuild essential administrative and transport infrastructure and strengthen the ability of governments to intervene and govern. For China it provided a welcome boost in actual orders and work for Chinese State Owned Enterprises that struggle, even within the confines of their own national markets, to compete with the far more innovative and quality conscious Chinese joint venture and private companies and industries. As FOCAC becomes integrated into the vision of a much broader alliance of developing nations, Brazil, Russia, India, China and South Africa, "BRICS", its FOCUS will adapt and economic consideration will become more important. In law, FOCAC and the BRICS are manifesting a state practice that has already changed the meaning of the Declaration on PSNR, and will further shape the emerging concepts of development cooperation.

³³ Michael Komesaroff, China's foreign mineral adventures"; SAFPI Policy Brief No 18", December 2012 http://us-cdn.creamermedia.co.za/assets/articles/attachments/42897_safpi_policy_brief_18_0.pdf, accessed 21 January 2013; Ian Taylor, "From Santa Claus to serious business: Where should FOCAC go next?", Centre for Chinese Studies, *Quo Vadis FOCAC? The fifth Ministerial Meeting of the Forum on China-Africa Cooperation*, July 2012, pp 31-38.

Das Forschungskolleg „Zukunft menschlich gestalten“ der Universität Siegen basiert auf einer gemeinsamen Initiative der Universität Siegen, dem Land Nordrhein-Westfalen und der Stiftung Zukunft der Sparkasse Siegen. Es ist das Ziel des Forschungskollegs, die interdisziplinäre und fächerübergreifende Forschung an der Universität Siegen zu Zukunftsfähigkeit und der Zukunftsgestaltung zu fördern und deren internationale Vernetzung voranzutreiben. Dabei basiert das Kolleg auf der Erkenntnis, dass die Gestaltung einer menschenwürdigen und nachhaltigen Zukunft es erfordert, die Grenzen der herkömmlichen Fachdisziplinen zu überschreiten.