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Foreign Investment in Sub-Saharan Africa: How Changing Attitudes have Affected the Legal Environment in the Post Cold War Era

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by

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INTRODUCTION

Sub-saharan Africa, like so many third world and former soviet bloc countries, have made economic growth as their top priority goal and therefore, are seeking different and sometimes creative ways to attract investment, trade, technology and jobs to their own economies. This pursuit of trade and investment is dictated by the universal need to raise the standards of living for the peoples in these countries. In many Sub-saharan economies, economic development policies revolve around the basic needs of feeding, housing and clothing the populations of their respective countries.[1]

The movement towards attracting foreign investment has been paralleled by democratic political reforms and economic liberalization of previously very autocratic and restrictive

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[1]See Marguerite Michaels, *Retreat From Africa (U.S-Africa relations),* 72 FOREIGN AFFAIRS p.93(16) Winter, 1993. The author states" The litany of statistics that marks the continent's declining living standard is staggering. Africa's economic growth rate is 1.5 percent - the world's lowest - and it claims 32 of the bottom 40 countries on the U.N. annual development index, a measure of comparative economic and political progress. Food production is 20 percent lower than it was in 1970, when the population was half the size. Only 37 percent Sub-Saharan Africans have clean drinking water; there is one doctor for every 24,500 people; illiteracy rates are as high as 80 percent in some countries. Population, meanwhile, continues to grow at a rate of 3.2 percent annually versus 2.1 percent for Latin America and 1.8 percent for Asia . The average life expectancy is 51 years, 12 fewer than for indians and chinese."

systems. To most outside observers, Africa is synonymous with war, political instability, famine and disease. According to the 1993 World Bank report, Sub-Saharan Africa "is the only region in the world likely to experience an increase in absolute poverty over the next decade."[2]

In the past decade, many African countries instituted major economic reforms, mostly at the insistence of the world Bank and the International Monetary Fund, in order to deal with the severe foreign debt situation and improve their opportunities for attracting foreign investment.These reforms also known as "structural adjustment", mainly consisted of measures to trim budget deficits, devalue the currencies, remove subsidies, free prices, liberalize trade and sell off state-owned enterprises. The original expectations were that these measures properly implemented, would be able to spur growth and significantly reduce the debt burden. Four years into this decade, many observers have concluded that "structural adjustment" programs in Africa have been, with a few exceptions, a disappointing flop.

In the meantime, in order to accomplish the goals of economic reform, many African countries enacted a host of new investment laws designed to attract and protect foreign investment.[3] In General, these investment laws were crafted to minimize or eliminate bureaucratic hurdles,establish

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[2] See World Bank, *World Development Report,* 1993, New York: Oxford University Press.

[3] *see* ICSID. INVESTMENT LAWS OF THE WORLD, Vol.1, For a summary see, ECOSOC, FOREIGN DIRECT INVESTMENT IN AFRICA AND STRATEGIES TO ENCOURAGE TRANSNATIONAL CORPORATIONS TO RESPOND POSITIVELY TO THE IMPROVED INVESTMENT CLIMATE: Report Of the Secretary-General, U.N. Doc. E/C.10/1990/9, Mar.13, 1990, at 13-18.

guarantees against expropriation and provide incentives to potential foreign investors.[4]

SCOPE OF THESIS

This paper is to examine the relationship between foreign investors and African host countries, in a historical context.The issue presented here is whether there is a historical explanation for economic problems many African countries are currently facing. There will be then a discussion of the current investment laws in selected Sub-Saharan countries. There have been scattered literature involving analysis of individual country investment laws.[5] These have mainly focused on the technical provisions of the investment regulations and the jurisprudential issues raised by these laws.[6] The objective of this paper will be to utilize a multi-disciplinary approach to examine the fundamental policy issues that are involved in these laws. This method will hopefully add more perspective to the understanding of the successes and failure of these laws.

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[4] ICSID. id

[5] e.g Chris Maina Peter, *Promotion and Protection of Foreign Investments in Tanzania,* 6(1)ICSID REVIEW 42; *Also See*, Shiferaw W. Michael, *The New Ethiopian Joint Venture Law,* 5(1)ICSID REVIEW 80; and Bertrand P. Marchais, *The 1989 Investment Code Of Madagascar*, 5(1)ICSID REVIEW 73

[6] *See for example*, Stephen C. Vasciannie, T*he Namibian Foreign Investments Act: Balancing Interests in the New Concessionary Era*, 7(1) ICSID REVIEW 114, at page 116 says " The Purpose of this article is to outline the main provisions of the Namibian Act and to examine briefly the ways in such provisions reconcile the interests of foreign capital and the state, in the light of current perspectives on foreign investment law and policy."

This paper is going to examine the critical relationship between the issues of control and protection from the perspective of both the foreign investor and the host nation.It will be contended that most problems and obstacles faced by sub-saharan countries,looking for foreign investment, will center around this dichotomous relationship and that successful foreign investment policies will require to strike a balance between these needs, in order to find an optimal relationship.

In general attitudes towards foreign investment has changed in most african countries, but so have the patterns of foreign investment. There are now different sources of capital, different recipients and different risk considerations.These changes have been initiated and precipitated by events, sometimes, beyond control of African countries and therefore, not anticipated. It is therefore, no longer enough to have a good attitude towards foreign investment, but african countries are going to have to employ innovative and competitive strategies, not only to attract but also encourage investment in their local communities.This Paper will discuss the impact of events like the debt crisis, the establishment of a Single European Market, the ending of the cold war, and the ending of apartheid in South Africa, on the attitude towards and the patterns of foreign investment.

When one reads literature emanating from foreign capitals on the economic situation in Sub-saharan africa, one easily gets a perception of a situation so grim and hopeless, that it is almost beyond arrest.[7] This author is going to argue that critics of the slow pace and lack of progress in African development have been too quick to write off the sub-continent and apportion blame. It will be suggested that new and more realistic models of development will be needed to address significant flaws that have led to failure in previous development efforts; hence the search for alternative solutions and ideas. This will essentially involve an examination of how law reform is affecting African development with particular reference to foreign investment regulation and investment capital development in general. Issues that need to be tackled are whether assumptions and beliefs about the role of foreign investment in african development need to be modified;[8] and what are the other alternative choices available for capital accumulation.

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[7]. One only needs to read such articles like *The white man's burden.(financial aid to Africa)*,328 ECONOMIST p.49(2) Sept. 25, 1993 and Marguerite Michaels, *Retreat From Africa (U.S.A-Africa relations)* 72 FOREIGN AFFAIRS p.93(16) Winter, 1993, to get such a depressing impression.

[8] For the general discussion on the role of foreign direct investment in economic growth and development see *C.FRED BERGSTEN ET. AL.., AMERICAN MULTINATIONALS AND AMERICAN INTERESTS 354 (1978); see also GRANT L. REUBER, PRIVATE FOREIGN INVESTMENT IN DEVELOPMENT 1973*

CHAPTER I

HISTORICAL PERSPECTIVE

A) THE COLONIAL ERA

During the colonial period capital formation was derived from five principal sources; foreign (imperial) governments, colonial governments borrowing from abroad, foreign private investors (both portfolio and direct), colonial government taxation and private savings.[9]
The principal purposes of capital investment, especially in the early stages of development, was to develop and establish trade, communication, administrative and military infrastructure.[10] Subsequently territories endowed with extensive mineral and other natural resources tended to attract a higher level of investment capital investment than those territories that were lacking in vital resources. This is one of the reasons that the proponents of the theory dependency have maintained the view that colonial economies were developed as peripheral extensions of the metropolitan and internationalist capitalist economy. According to this theory, a state of dependency based on a master-servant relationship,between the less developed former colonies and the developed metropolitan countries,which existed in the

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[9]D.K FIELDHOUSE, BLACK AFRICA 1945-1980,p.37(1986)

[10]*See*, Alan Pim, *Capital Investment in Sub-Saharan Africa* in AN ECONOMIC HISTORY OF TROPICAL AFRICA (VOL. 2)227, 228-230(Z.A and J.M Konczacki eds. , 1977) [10] [10]

colonial era will continue to subsist until the former are able to stand on their own in all aspects.[11]

i) The Colonial Companies

The primary pioneers in foreign flow of capital to colonial Africa were the colonial charter companies which were formed by the metropolitan imperial states for the specific purpose of exploiting their colonial overseas possessions.

Among the most notable were the British East Africa company, The United Africa Company, Deutsche-Ostafrikanische Gesellschaft (The Germany East Africa Company),Lever Brothers of Liverpool (later became Unilever) and so on... Referring to the British East India Company, the following quotation reflects the nature and scope of a colonial charter company:

> The merchants of [the British East India Company] received the entire rights over all India they could bring under their sway.... As its director, Sir Josiah Child, once boasted, the India Company was "a sovereign state in itself."It declared war on the Mogul Empire, it had a fleet, an army, and fortified settlements, it could coin money and make laws. Businessmen administered India in their

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[11]The "dependency theory" has been defined as "A set of interrelated propositions that identify the process of unequal exchange in economic and social relations between the third world and the industrialized countries, in which the economic performance and social structures of dependent countries are dominated by those of the richer countries." See J.P DICKESON & Et Al., A GEOGRAPHY OF THE THIRD WORLD p.173(1983), Methuen.

> own fashion, and a very lively it was for a long time.[12]

The colonial company was bestowed with political powers and sometimes reinforced with military force.It had power over the indigenous society. These companies had the initial responsibility of administering and developing the colonial economies for the purpose of supplying raw materials to the mother country's industries. Because colonies were considered an appendix to the metropolitan country's economy, economic development was very much restricted to products considered vital for the mother country or for re-export; duplication or development of competing products was rigorously discouraged.[13]

ii)Legal Controls

The advent of colonialism brought with it the influence of imperial European laws to the colonies. Imperial companies operating in the colonies enjoyed the full protection of their mother country laws. These laws also operated to protect these companies against competition from other European countries. Trade and investment in the colonies was regulated by strict laws directed at centralizing exports and imports of each colony upon the imperial country.

iii)Tariffs and Non-Tariff Barriers

Tariffs were maximized in order to prevent trade being diverted to other areas.[14] The primary aim of the imperial

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[12]P.T ELLSWORTH, THE INTERNATIONAL ECONOMY (New York:The Macmillan Company, 1964), P.33

[13]ENDEL-JACOB KOLDE, ENVIRONMENT OF INTERNATIONAL BUSINESS (1982) Wadsworth, p.173-4

[14]Id..at p.173

European states was to regulate commerce in such a way as to maximize their share of trade in both directions and also the profits from it.The English navigation acts, dating back from the 1650's were applied to regulate colonial trade and commerce.[15] According to these acts, all goods imported to the colonies had to be either the product of Britain or had to be transshipped and pay duties there. All colonial trade had to be carried in British-owned and registered vessels. Furthermore, colonies were prohibited or restricted from manufacturing to trade in a certain range of products. These controls together with a system of preferential tariffs, helped British shipowners, merchants and manufacturers maintain a virtual monopoly over colonial trade and enabled the government to maximize its revenues from the taxes of the colonial trade.[16]

iv)Local Traders:

Although colonial legal system protected colonial companies doing business in the colonies, the colonial authorities did not provide the same protection to the local merchants.The few local traders that managed to advance into produce marketing as buyers and middlemen were easily displaceable with well financed foreign competitors. The governments viewed the role of the local people as producers of cash crops like cocoa, coffee, rubber for export purposes

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[15]D.K FIELDHOUSE, COLONIALISM 1870-1945, p.54(New York: St. Martin's Press-1981)

[16]Id. *Also see*, ROBERTS, HISTORY OF FRENCH COLONIAL POLICY for the discussion of French colonial tariff policy. The French colonial tariff system was different from the British in that it discriminated between territories known as "assimilated colonies" and non-assimilated colonies. Their policies, however, had a similar objective of restricting and in some ways close the colonies from the rest of the world.

and did not encourage them to engage in commercial and industrial activities. The colonial merchants and foreign investors, on the other hand, enjoyed government support, especially, in obtaining exclusive access to financial and credit facilities usually also owned by colonial companies.

B) AFTER INDEPENDENCE:

After world war 11, there was a rush of decolonization in Asia, followed by a succession of Black African countries gaining independence in the early 1960's.There was no single reason for the rapid decolonization but a combination of factors. Chief among these were, the increasing nationalist demands for independence from the colonized people and pressure from external forces. These external influences were mainly exerted by anti-imperialist movements from communist countries and pressure from the USA which had long been shut out of colonial market.[17]

Because of and due to the varied colonial experiences of the new independent states, the post colonial African governments opted for different routes towards economic development. Newly independent states attitudes toward foreign investment largely depended on the degree of emphasis on the market-driven economy as the vehicle for the economic development strategy.

The English speaking sub-saharan countries opted for four (4) different types of development strategies:[18]

i) States oriented towards public ownership-Ghana, Tanzania and Zambia;

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[17]J.P DICKENSON Et Al , *supra* at 36-37

[18]YUSUFU BANGURA, BRITAIN AND THE COMMONWEALTH AFRICA, (Manchester University Press-1983),p.188

ii) States pursuing a policy of indigenisation of Africanization- Nigeria, Kenya and Uganda;
iii) States within the residual pound sterling bloc- Sierra Leone, Gambia and Malawi;
iv) States dependent on the Republic of South Africa- Botswana, Lesotho and Swaziland.[19]

i) Public Ownership:

These states followed policies that favored increasing state involvement in the direction and management of the economy. Although these countries did not 'adopt Marxist and /or socialist models of government', they, nevertheless, believed that strong government involvement and leadership in the economy was imperative in order to deal with the acute problems facing their societies.[20]

They embarked on the program of nationalization and restricted the expansion of foreign private investment.Most of the property expropriated belonged to the local subsidiaries of the MNC,s.[21] The governments became heavily involved in the micro-management of the economy. For example,in Zambia after the "Mulungushi Declarations" of the late 1960s, the government asked companies to 'invite' it to

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[19]Id..at p.189-198; The author warns 'not to put too much weight' on this typology as these groups are not mutually exclusive.

[20]Peter Kenneth Kiplagat, *Legal Aspects of Political & Economic Reform in E. Europe & Africa*, 4 AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 927, 928(1992). This political Ideology was referred to as 'AFRICAN SOCIALISM'. These governments were characterized by one party state structures and tended to focus heavily on public (State) rights as against individual and human rights.

[21]Oserheimen A, Osunbor, *Nigeria's Investment laws and the State's Control of Multinationals*, 3(1) ICSID REVIEW 38, 39

participate in 51% share-ownership arrangements in a variety of economic areas.[22]

Post independence legislation passed reflected the nationalists needs to gain control over their economic and social destiny. Exchange control legislation was enacted to restrict the transfer of funds out of the country.For example, in Nigeria, the Exchange Control act of 1962 placed all foreign exchange transactions under the supervision of the Federal Ministry of Finance and the Central Bank.[23] The immigration act introduced controls and restrictions to the employment of aliens in local businesses, including a requirement for work permit before an alien could take up employment or engage in business activities.[24] In Zambia, Foreign investors were excluded from all retail trade; which was restricted to Zambians, state companies and co-operatives.Tanzania nationalized all banks, food processing companies and insurance companies under the policy of 'self-reliance and socialism' established by the 1967 Arusha Declaration.[25]

These policies led to a general decline in foreign investment.In Tanzania, between 1968 and 1971, British private investment declined from 10.9 million Pound Sterling.[26] In most of these countries, other aspects of economic and social development were also negatively

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[22]*See generally*, BEVERAGE AND OBERRSCHALL, AMERICAN BUSINESSMEN AND DEVELOPMENT IN ZAMBIA (1976);CHILESHE, THIRD WORLD COUNTRIES AND DEVELOPMENT OPTIONS:ZAMBIA (1986)

[23]*See*, Osunbor, *supra* note 13, at p.46

[24]Id.

[25]See Bangura, *supra* note 10, at p. 192-194

[26]Id

impacted.Economic performance measured in terms of per capita GDP, replacement investment, real exports, national debt, inflation and unemployment was discouragingly poor. Social policies regarding population growth, education and health services were likewise disappointing.[27]

ii) Indigenization or Africanization:

The purpose of this policy was to exclude foreign participation in some selected economic sectors and their restriction to various sets of limits in others.[28] This policy was different from nationalization, in that the government was still committed to private enterprise and wanted the private sector, including the private foreign investor, to provide impetus for development. Here too, the state was instrumental in controlling and regulating foreign investment, but mainly for the benefit of the local entrepreneurs.

The policy of indigenization consisted of four (4) principal components:

a) indigenization of ownership or capital;

b) indigenization of the board of directors or control;

c) indigenization of manpower or personnel;

d) indigenization of technology- the selection and absorption of technology.[29]

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[27]Thomas Allen, *The law relating to Foreign investment in Manufacturing in Bostwana, Zambia and Zimbabwe* 4 AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, (RADIC)(1992)44, 46

[28]*See,* Osunbor, *supra* note 13, at p.40. Note that the author the term 'Africanization' in a generic sense and points out that each country applied the policy in preference to its own citizens.

[29]Id.

Legislation was passed to reflect the policies of these governments. As in cases of nationalizations, exchange control measures were introduced to reduce the outflow of capital.New immigration laws were introduced to restrict employment of foreigners to areas with critical shortage of qualified citizens.

The companies Acts were revised to move away from the British Model Companies Act of 1908. In Nigeria, the new Companies act of 1968 required the registration of foreign companies, significantly increased disclosure requirements by requiring publication of consolidated accounts statements, profit and loss statements and the disclosure of nationality of directors and members of boards.[30] Likewise, custom duties and tariffs were raised to protect domestic industries.

Indigenization per se, did not negatively impact flow of foreign investment like nationalization did. There was some outflow of capital in some countries prompted by lack of appropriate provision for "prompt, fair and adequate" compensation and by fears about the political uncertainty.[31]

iii) Residual Pound Sterling Bloc:

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[30]Id at p.41; Section 369, Part x of the 1968 Nigerian Companies Act provided that every "foreign company" which had an established place of business in Nigeria on October 1, 1968 would be "deemed to have been incorporated in Nigeria".This provision made foreign companies subject to Nigerian law since, technically, in some matters such as existence and capacity, companies are governed by the laws of their incorporation.

[31]See Bangura, *Supra* note 10 at p.197. Kenya and Nigeria experienced substantially less negative impact on their foreign investment status. In fact both countries had a marked increase in the flow investment. Uganda, on the other hand, suffered massive exodus of foreign capital; mainly due to its erratic and unpredictable political environment.

The countries in this group were those that continued, even after independence, to peg their currencies to the British pound sterling. Their close links with the sterling provided a free payments system with Britain, a situation which was advantageous to foreign investors in general, and British investors in particular.[32] Like the indigenisation states, the 'residual sterling bloc' believed in private enterprise and indigenisation. But because of their limited natural and capital resources, and fragile economic base; they placed foreign investment ahead of indigenisation in terms of their development priorities.

These countries also maintained a low key approach to international politics and tended to avoid contentious stances on foreign affair issues or political ideologies.[33] They also opted for an open door policy towards foreign investment. Malawi had detailed programs for attracting foreign investors, such as industrial licensing, incentives, tax rebates and financial drawbacks.[34]

These policies had a positive effect on the flow of foreign investment towards these countries. In general, there was a steady cooperation between the state, citizens and foreign investors in banking, insurance, commerce and transport. However, these countries suffered from limited natural resources and fragile economic bases. This tended to

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[32]Id at p. 198

[33]Id at p. 199. President Kamuzu Banda rejected the socialist policies adopted by the neigbhouring countries as "disastrous for foreign investment" and he also maintained close relations with then white ruled Rhodesia and South Africa- Malawi's principal sources of foreign investment and trading partners.

[34]*Industrial Development* in Malawi: A GUIDE FOR PROSPECTIVE INVESTORS, 1970 p.3 and pp.20-23

minimize their opportunities for attracting foreign investment.

iv) Dependants of the Republic Of South Africa

These are the countries which share common borders with and whose economies were characterized by the dominant presence of the Republic of South Africa.[35] Most of the Foreign investment came from South Africa and shared the 'Rand' as their common currency.[36]

In summary, when many sub-saharan countries gained independence and nationhood, they soon discovered that this was mostly in name and lacked real substance. They found that they had very limited human and physical infrastructure. They had inherited colonial institutions, many of which had at best, a mystical relevance to their values and aspirations. Unfortunately, for the post independence governments of Africa, they, like their colonial predecessors which had no electorate to account for, governed by expediency, backed by military force to enforce their policies. The public distrust of the government created during the colonial era continued even after independence.

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[35]Bangura, *Supra* note 13, pp.200-202. During the colonial period the British government had assumed that the three countries would be absorbed into the Union of South Africa and had therefore, not interfered with the natural processes of South African economic penetration.

[36]Id. Botswana withdrew from the common currency in 1974.

CHAPTER II

A) THE DEBT CRISIS

The African debt crisis began as part of the international debt crisis that threatened the economies of both the world's richest and poorest with financial collapse. Several explanations have been offered for the crisis but no single reason has been blamed as the major cause.The important point is that the debt crisis marked an extraordinary event in African development.

i) Causes of the debt crisis:

The causes for debt crisis can be grouped into two categories; External and internal causes.
The external reasons were a combination of international events which directly or indirectly impacted economic and social processes on African continent.

The debt problems began with enormous rise in the oil prices of the early 1970's. [37] The oil exporting countries placed a lot of their proceeds on deposit in international banks; which in turn needed borrowers to recycle the money profitably. Meanwhile, the rise of the oil prices had a negative impact on economic activity in developed countries and this drove down interest rates.[38]

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[37] *Debtor's Prison (A survey of Third World Finance),* 328 ECONOMIST, p.T7(4), sept.25, 1993

[38] Id.

The international banks competing for the growing market offered loans to developing countries on increasingly more generous terms. They offered longer loan maturities, longer grace periods and narrower spreads over their own cost of funds.[39] Under these circumstances, the external debts of developing countries jumped from under $100 billion in 1972 to more than $ 600 billion in 1981.[40]

Meanwhile, as industrial economies were slowing down, commodity exports from developing countries were fetching higher prices on the world market.The developing country borrowers were able to increase their output so as to exceed the real interest rate on their debt. This meant that developing countries could maintain attractive debt-to-exports ratios and increase their external borrowing without increasing the burden of debt in relation to the size of their economies.[41]

These external events were compounded with region specific factors which further complicated the Sub-saharan debt situation.The first major cause for the debt burden was the slow pace of development widely attributed to inherited economic problems at the time of independence.[42] All Sub-Saharan African countries gained independence at a very stage of their development with very limited human, economic

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[39]Id.

[40]Id.- Most of the debt consisted of syndicated commercial loans.

[41]Id.

[42]CAROL LANCASTER, AFRICAN ECONOMIC REFORM: THE EXTERNAL DIMENSION (POLICY ANALYSIS IN INTERNATIONAL ECONOMICS-33)June 1991, p.4

and communication infrastructure.[43] The newly independent countries were facing formidable development challenges but had limited resources. Understandably, therefore,these countries were anxious to promote their development programs.

A Second major cause for the debt burden was the accumulated problems of economic mismanagement by the African governments. This was the result of ' a combination of the weak capacity of many governments (including a lack of economic expertise, poor organization and training of government officials, too many and conflicting agencies or institutions and poor leadership), the overriding political goals of leaders, and tendency of many African politicians and bureaucrats to regulate as much of their economies as was feasible'.[44] Some writers have called this the 'miscalculation of the early post-independence leaders in asserting a philosophy and praxis of development that did not place Africa's interest above any other geo-political consideration'.[45]

The third cause of debt accumulation had to do with the exports oriented nature of most African economies. This makes these economies highly sensitive to conditions in the

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[43]Id. Zaire had fewer than 20 college graduates at the time of independence. Communication systems linking African capitals had to be relayed through capitals. Most all weather roads in the interior of Africa typically run from the hinterland to the coast in service of export oriented economies.

[44]Id.

[45]THOMAS ODHIAMBO, HOPE BORN OUT OF DESPAIR, (NAIROBI,ENGLISH PRESS LTD, 1988), p.xiii

product markets.[46] So when the terms of trade significantly improved in the early 1970's, many African governments suddenly found themselves with windfall of foreign exchange earnings. Instead of investing or saving these earnings, they spent them on poorly planned and unproductive projects.

ii) A Profile of the Crisis:

The above discussion gives a background picture of the circumstances that snared some African countries into the deep hole of the debt trap. Many governments had borrowed against future export earnings.

Beginning in the late 1970's, commodity prices collapsed, leading to a sharp deterioration in the terms of trade.The governments were now juxtaposed in a situation whereby 'their imports, government employment, and expenditures had expanded while their export and budgetary revenues had dropped'.[47] This led to further commercial borrowing and additional aid to offset loss of revenue in export earnings.The loss of export revenues was particularly severe on the oil importing economies. When the debts came due for repayment many of these governments found that they did not have sufficient revenues to service these loans.

Over the past decade, African countries registered some of the slowest growth rates in the world. Per capita income which remained fairly stagnant between 1973 and 1980, slid nearly 3 percent per year between 1981 and 1987. Only four countries had per capita income growth in 1981-84.[48] Even with the modest growth in some, the majority of the African

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[46] *See*, CAROL LANCASTER, *Supra note 34.*

[47] Id at p.3

[48] WORLD BANK REPORT, 1990 P.55

countries have consistently experienced below average economic growth throughout the 1980,s as compared with other low income areas of the world. There is no doubt therefore, that the debt problem is just part of Africa's broader problems of poor economic mismanagement, poor use of economic aid and deterioration in terms of trade.[49]

iii) The Economic and Social impact on Low Income Sub-Saharan Economies:

The debt burden has impacted African economic performance in three principal ways. First, the heavy debt tended to discourage voluntary capital inflows, both private inflows and repatriation of capital from abroad. Both foreign and local investors were unwilling to invest in heavily indebted economies for fear of future restrictions on their ability to gain access to their profits or to finance needed imports.

Second, because high foreign debt resulted in high inflation and artificially repressed interest rates, many debtor countries suffered from capital flight. This is the situation whereby nationals with capital, move it to financial institutions abroad in order to protect their assets from future economic uncertainties. A recent study has suggested that net capital outflows from Sub-Saharan Africa as a whole, although estimated at only $40 billion between 1976 and 1987, "are comparable to flows from a country such as Argentina, Brazil, or Venezuela".[50]

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[49] Carol Lancaster, *Supra* note 34 at p.29

[50] Chang, P.H Kevin and Robert E.Cumby 1990, "*Capital Flight in Sub-Saharan Countries*". A paper to a World Bank Symposium on African External Finance, Washington (September), p.19. Capital flight from Nigeria alone is estimated to have totaled $17.5 billion, with $11 billion outflows between 1985

Finally, heavy debt discouraged commercial lending which negatively impacted the flow of new private investment. Most low income African countries had limited access to medium and long term foreign bank lending; but even this limited access dried up as soon as these countries became unable to service their debts.

iv) Structural Adjustment and Political Reform:

The immediate predicament facing the heavily indebted countries was starvation of external finance for new investment, rising taxation, high inflation and diminished incentive for economic reform and long years of economic stagnation and social deterioration. Under these desperate circumstances, the African countries turned to their only hope left for rescue; the World Bank and the IMF. In order to be of help to the African countries, these two institutions formulated two broad policies to which the needy countries were required to conform. These were structural adjustment and conditionality.[51]

Under structural adjustment, The World Bank and foreign aid donors asked African governments to implement programs intended to improve the efficiency of national economic resources,encourage additional production and economic growth and to create a positive environment for private investment. Conditionality or economic restructuring, on the other hand, are usually short term stabilization programs supported by the IMF. They involve both macro and micro

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and 1987.

[51]For a comprehensive study see the following: Justin B. Zulu and Saleh M. Nsouli, *Adjustment Programs in Africa: The Recent Experience*, (Washington D.C., THE INTERNATIONAL MONETARY FUND, 1985);Heller G.K., *The IMF and Africa in the 1980s,* 17(1) CANADIAN JOURNAL OF AFRICAN STUDIES (1983), P.23

economic policies designed to reduce the gap in the country's balance of payments.[52] The thrust of the policy was 'to shrink the budget deficit, devalue the currency, remove subsidies, free prices, liberalize trade, sell off state owned enterprises and devise new investment codes that promote private investment. The goal of the Bretton Woods Institutions-The IMF and The World Bank- was to reduce the role of African governments in economic management and foster free market conditions. Over 30 African countries are currently engaged in or have recently implemented programs of stabilization, structural adjustment or both.[53]

The general belief behind these programs shared by the Bretton Woods institutions, the donor governments and African economists is that Africans, like individuals elsewhere, 'will respond to economic incentives in predictable ways'.[54] That structural differences, like cultural values, limited physical infrastructure, vested political interests are temporary obstacles which will eventually give way to such response. Implicit in this belief is the assumption, based on past experience, that African governments are characteristically incapable of implementing effective state-led growth strategies.[55]

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[52]Carol Lancaster, *Supra* note 34, p.12

[53]Id.

[54]Id at p.13

[55]Id. *But see*, Report of Economic Commission for Africa 1989, *African Alternative Framework for Structural Adjustment Programs for Socio-Economic Recovery and Transformation*. New York: United Nations. In this report, the commission challenged the Bretton Woods institutions supported economic reforms in Africa and argued for a greater role for the state in African economic reform. The also acknowledged, however, that in the past African governments have proved to be poor

Table 1 below shows that according to World Bank analyses, overall economic growth, growth in the volume of exports, and growth in gross domestic saving have all been consistently higher in those countries undertaking strong reform programs than in those whose reforms were less comprehensive or intense.[56]

TABLE 1 GDP growth rates in four African countries, 1981-89 (percentages)[a]

Country	1981-84	1985-87	1988-89
Ghana	-2.3	4.7	5.9
Madagascar	1.6	1.8	3.9
Malawi	1.8	1.8	3.5
Togo	-3.0	3.0	4.7

[a] Annual sales

Source: World Bank (1990b,13).

v) Current International Debt Management Arrangements:

At the onset of the debt crisis international debt management consisted of three types of arrangements involving private and public creditors, international financial institutions(IFIs) and individual creditor countries. Typically, when a country finds itself unable to fully meet its debt servicing obligations, it will seek rescheduling of its public bilateral debt through the so-

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economic managers.

[56]"Strong" reformers according to the World Bank's (1990, 13) criteria for that time period include Burundi, Gambia, Ghana, Kenya, Madagascar, Malawi, and Togo. "Average" performers include the Central African Republic, Chad, Guinea, Guinea-Bissau, Mali, Mozambique, Sao Tome and Principe, Senegal, Tanzania and Uganda.

called Paris Club (a group creditor governments) and of its private debt through the London Club (a group of private creditor financial institutions, usually chaired by the bank with the largest exposure in the debtor country).

Before a creditor government or financial institution agrees to a rescheduling, a creditor government or bank will usually require the debtor government to obtain a stabilization agreement approved by the IMF executive board. An IMF supported stabilization program will typically be accompanied by a loan from the fund made on near commercial terms, intended to ease the downward pressure on import levels resulting from the stabilization measures.

In addition to the above debt management and stabilization measures, other international financing arrangements have been employed to mobilize development financing for Africa. These include Consultative Groups (CGs), Roundtables and The Special Program Of Assistance (SPA) of low-income debt-distressed African countries.[57]

In sum, there has been a two pronged approach to try and resolve Africa's debt crisis and to finance economic reform.One approach focused on stabilization and debt management and is led by the IMF; the other focused on economic growth and is led by the World Bank.

B) PRELIMINARY RESULTS AND LESSONS OF THE DEBT CRISIS:

The results from Africa's debt crisis management and economic reform have not been to date so clear cut and conclusive. Although there has been remarkable successes in

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[57]For a detailed discussion of these programs *see*, World Bank. 1990b. *World Development Report*. Washington: World Bank; World Bank. 1990c. *Special Program of Assistance:Growth,Aid Debt:Proposal for the Second Phase*. Washington: World Bank Africa Region (July).

some selected African countries, it is safe to say that, in general, structural adjustment has not met the expectations of all the parties involved. Countries like Ghana, Burundi, Mauritius and the Seychelles which adopted IMF and/or world Bank-backed reforms have shown signs of exceptional transformation.These countries have begun to experience accelerated GDP growth rates, lowered inflation, declining fiscal deficits and expanding exports.[58]

On the other hand, countries like Kenya, Zambia, Zimbabwe; to name but a few which have dragged their feet and sometimes resisted making necessary and overdue reforms have not fared so well. For these economies growth has been very slow indeed in per capita terms; some have seen per capita output fall. Their export prices have fallen sharply and their debts remain beyond their capacity to pay. Against this background, chances of attracting more new foreign capital are becoming increasingly dimmer.[59]

There are several lessons that have been attributed to the experiences of the debt crisis. First, African countries now realize that with the end of the cold war, rich-world priorities have changed and the former no longer take its sources of foreign assistance for granted. African countries are now competing with all other countries, sometimes better endowed, for increasingly limited capital resources. The flip side of this, is that the rich countries; no longer shackled by cold war needs, are redefining the purposes of

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[58]Feldman, Gerald M.,*Sub-Saharan Africa is poised for renewed private sector growth: Commitment to free enterprise was reaffirmed* in 1992 BUSINESS AMERICA,April 19, 1993, at p.33(2)

[59]*Debtors' Prison. (A survey of Third World Finance)* ECONOMIST, Sept. 25, 1993, at p.T7(4).

their financial assistance and redirecting their investments.[60]

Second, African countries are now learning that countries that are attracting most of the foreign capital from the private market have two main things going for them. One is that their debt-service obligations look manageable, either because they have usually avoided high debt obligations or because they have completed comprehensive debt-reducing arrangement with their financiers. The other is that their economic policies tend to be conducive to macroeconomic stability and private initiative.[61] This has meant cutting government spending to live within means, and avoiding or reducing over-reliance on debt financing to increase price stability.

Third, the debt crisis has genuinely and definitely affected African attitudes towards private investment in particular, and business in general. Many of these countries are recognizing the close relationship between their socio-political aspirations and the imperative economic priorities.Thus governments which have taken a leading role in implementing structural reform to eliminate waste, mismanagement, corruption and encouraging of private enterprise have seen far better results.

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[60] [60]*The White Man's Burden. (Financial Aid To Africa)* 328 ECONOMIST p.49(2), Sept 25, 1993. The Magazine reports that(quoting UNICEF sources) that" Only a tiny share of aid-- less than 10%---- goes directly to things that help the poor: primary health care, basic literacy and education (especially for women), clean water, family planning."

[61]*More Money (A Survey Of Third World Finance)* 328 ECONOMIST p.T15(4), Sept 25, 1993. The report says that countries which meet the first criterion also meet the second;i.e countries that have good economic policies tend to avoid serious debt problems.

Effective and successful policies now recognize that the private sector has to play a greater role in allocating scarce resources and in achieving optimal production of goods and services. Africans also realize that genuine reform will occur only if the initiative is generated from within and not 'imposed' from without. The Nigerian statesman once said:

> I believe that for us in Africa, our salvation lies in our own hands and nowhere else. Only we can be the architects of our future; as we have been the architects of misfortune by and large for the past quarter of a century. [62]

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[62]Quoted in Aronson David, *why africa stays poor:and Why it Doesn't have to* 53 HUMANIST P.9(6) March-April, 1993. Also the Africa's new attitude towards economic reform could be noticed at the recent 1994 Organization of African Unity Conference in Tunis: *See, Business First Says OAU (Cover Story)* AFRICAN BUSINESS July/August, 1994

CHAPTER III

CURRENT DEVELOPMENTS IN INVESTMENT REGULATION:

In the developing economies, the function of investment is to push those factors which may lead to economic progress. During the 1960s, the newly independent African countries formulated economic policies and drafted development plans in attempts of realizing their economic and social aspirations. New investment laws were promulgated and old laws were modified in order to create a framework and to facilitate the realization of those aspirations. But the interests of the developing society are, more often than not, not congruent to those of the investors and suppliers of capital. It is, therefore, not surprising that this area of law that has seen a lot of changes in the past two decades.[63]

According to the 1965 United Nations Economic Commission For Africa study, the function of a comprehensive investment legislation is to declare and define the policy of the government with respect to areas of needed

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[63]"... any major change in economic and social arrangements which a government wishes to introduce must be procured by revision of law; change of law is thus an *instrument or consequence of* economic changes". See "*Legal Development and Economic Growth in Africa*" by Dr. A.N. Alott in Changing Law in Developing Countries. Studies in Modern Asia and Africa 2. (Ed.) J.N.D. Anderson. London, 1963. pp.195-6

investment.[64] The study also stated that investment codes typically represent a good faith attempt to present in, one piece of legislation, the basic provisions on investment in the country concerned. The primary purpose of such laws is to promote and facilitate investment by easing prospective investors' task in identifying the relevant local law.[65] Since capital, both domestic and foreign, is scarce; the codes will usually provide for ways to administer and channel it in order to effectively contribute to establishment of infrastructure.[66]

According to the study cited above, a typical investment code will contain certain legal attributes.[67] It will enumerate and classify categories of 'approved' industries.[68] The code will describe the authority

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[64] United Nations. Economic Commission For Africa: Standing Committee on Industry and Natural Resources. Investment Laws and Regulations In Africa at 2, U.N. Doc.E/CN.14/INR/28/REV.2, Sales No.65.II.K.3 (1965)

[65] Id.

[66] For example, See Thomas Allen *The Law Relating to Private Foreign Investment in Manufacturing in Botswan, Zambia and Zimbabwe* 4 RADIC 44 (1992). The Author cites section 3 and 4 of the Botswana Industrial Development Act 1988 as establishing The Industrial Licensing Authority for the purpose of administering and controlling foreign investment.He also cites section 17(c) of the Zambia's Investment Act of 1986 which gives the Investment coordinating committee the authority to approve license "if it finds that:
...(b) the activity planned to be undertaken by the business enterprise is not unlawful or contrary to the interests of Zambia."

[67] United Nations *Supra note* 64, at page 4.

[68] *See* Chris Maina Peter, *Promotion and Protection of Foreign Investment in Tanzania: A New Investment Code* 6(1) ICSID REVIEW 42, 53; This article discusses these provisions found in Part A of the schedule of Tanzania Investment (Promotion and Protection) Act, 1990. *See also* Ndiva Kofele-

responsible for examining supervising of investments.[69] It will contain regulations pertaining to entry or admission of foreign capital into the territories of a country. It will also contain regulations concerning a variety of guarantees and tax and other incentives designed to woe potential investors. Other features of these laws may include provisions relating to the employment of nationals and foreign nationals, rules to the standards and conditions of expropriation or nationalization and the settlement of disputes between foreign investors and the host states.[70]

In recent years African countries, like other developing counties, have used investment laws as instruments for promotion of industrial development. Since independence, governments of African countries have pursued a variety of policies and schemes to induce private enterprise, both domestic and foreign, to get involved in the economy. However, the role of private investment vis a vis the role of government, in economic development has been

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Kale, *Investment Codes as Instruments of Economic Policy: A Cameroon Case Study* 25(4) THE INTERNATIONAL LAWYER 821,829(1991), which discusses the same provisions in reference to the Cameroon Investment Code of 1990

[69]*See* Thomas Allen note 66 at 50, for example, discusses sect.5 of Bostwana Industrial Development Act, 1988 establishing the Industrial Licensing Authority.

[70]United Nations *Supra* note 64 at pp.4-17; *See also generally* Legal aspects of Doing Business in Africa in Vol.4 International Business Series(Dennis Campbell ed. 1991)and T.M Ocran *The Legal Framework of Foreign Investment in Africa* 12 ZAMBIA L.J.1 (1980)

the subject of wide debate and many issues remain unresolved.[71]

Likewise, there is little information on what effect,if any, investment laws and regulations have on the inflow of private investment.[72] There are, however, several studies

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[71]Some writers have argued that " the aggregate effects of foreign direct investment(FDI) are usually positive on national income, jobs, and government revenues in host countries...[though] major doubts remain about the impact of foreign direct investment on both the capital and current accounts of host-country balance-of-payments position" *See*, C.Fred Bergsten Et. Al., AMERICAN MULTINATIONALS AMERICAN INTERESTS 1978, pp.368-9. Also See, Grant L.Rueber PRIVATE FOREIGN INVESTMENT IN DEVELOPMENT (1973). But critics argue that:

> multinationals take out of developing countries more than they put in; and thus, if annual repatriation of earnings exceed annual infusions of new foreign capital, multinationals undermine balance-of-payment positions. They increase unemployment by using capital intensive techniques developed for their own labor-scarce, high-wage economies, rather than labor-intensive techniques thought to be more appropriate for developing countries. They promote unequal income distribution, local high-income groups strengthen their positions through alliances with foreign investors. Economic growth itself may be stunted, both short and long term, because the foreign firms drain away local capital brain power that could otherwise create strong indigenous industries. In addition, they generate, though advertising, consumption patterns inappropriate for countries early stages of development; and they limit the countries' technological progress by doing the bulk of their research and development elsewhere.

See, BERGSTEN ET AL., *SUPRA,* AT 355

[72]Some studies have shown link between fiscal incentives and direct foreign investments in developing countries; *See*, S.M.S. Shah & J.F.J. Toye, *Fiscal Incentives For Firms In Developing Countries:Survey and Critique,*in TAXATION AND ECONOMIC DEVELOPMENT 269(J.F.J Toye ed., 1978). *See also,* Stephen E. Guisinger Et Al.,INVESTMENTS INCENTIVES AND PERFORMANCE REQUIREMENTS: PATTERNS OF INTERNATIONAL TRADE, PRODUCTION, AND INVESTMENT(1985).

and publications which have focused on the legal aspects of doing business in developing countries and on the legal dominions governing foreign direct investment.[73] These studies have provided useful information on the legal environment and regulatory framework of doing business in Africa and other developing countries.

One major problem with most of these studies is their lack of recognition of relationship between regulatory control of investment, attitudes towards investment and the flow of foreign direct investment.One comprehensive study analyzed the link between investment laws and other social and economic factors.[74] According to this study, there is a positive relationship flow of FDI and generosity of incentives package offered by the host country, taking into account the natural resources, economic development and rate of economic growth. It is, therefore possible, according to this study, to gauge the direction of FDI flow given the factors under study.[75]

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[73]*See, Legal Aspects of Doing Business In Africa In* International Business Series *Vol 4.(Dennis Campbell ed., 1986);*Also See Duane E.Sams *The Legal Aspects of Doing in Cameroon,* 17 INT'L LAW *489(1983)*

[74]Ndiva Kofele-Kale, *The Political Economy Of Foreign Direct Investment: A Framework For Analyzing investment Laws and Regulations in Developing Countries* 23 LAW & POLICY IN INTERN'L BUSINESS 619, (1992). This study involved an empirical analysis,using regression method, to investigate the relationship between Foreign direct investment (FDI) and other factors like the generosity of incentive package(GIC) offered by the host country, the natural resources (NR), economic development (ED), and the rate of economic growth (GR). The study investigated investment laws of three countries: Cameroon, Ivory Coast and Kenya which the author picked as offering the most conducive climate for direct investment in Africa.

[75]Id at p. 670.

As the author of this study admits,the above analysis provides but only a partial explanation of the dynamics of investment flow. Other factors, which are extraneous but closely connected to the legal regime, also play a significant role. One of these factors, it is submitted, is the attitude of the host government's towards foreign investment, in particular and business in general.

A) ATTITUDE TOWARDS INVESTMENT:

The present analysis will attempt to offer a comparative analysis of selected aspects of some investment laws in Sub-Saharan Africa. On the issues discussed the analysis will attempt to look at the state of investment regulation during two time periods which tend to reflect generational changes in attitudes towards investment, both domestic and foreign.The first period, beginning early sixties to mid-seventies, the early post independence period; which was characterized by restrictive and unattractive policies towards foreign investment.The second period extends from the late seventies to present (or the post debt crisis period) which marks the liberalization and relaxation of a whole generation of investment laws and the general regulatory environment.

The belief here is that future analyses of long term investment opportunities in Africa must include a serious recognition of attitude as a valid indicator of investment prospects. In an attempt to understand the changes of attitudes that underlie the generational shifts in investment legislation, this paper addresses four important issues, namely the (a) opportunities for admission or entry, (b) the treatment of admitted investment, (c) the expropriation of foreign investment and,(d) the mechanisms for settlement of disputes.[76]

i)Admission:

During the early post independence period, there were two patterns to investment laws in Africa: (a) the 'comprehensive' laws which were in the form of an investment code; and (b) the 'compound' laws usually less integrated and where some component parts would be referred to in another piece of legislation or in administrative practice, for example company taxation or exchange control. One common characteristic pervading all these was the fact that they all alike in framework for attracting foreign capital but doing so in multiple and divergent ways.[77]

During this period the admission or entry provisions of most investment laws usually consisted of enumerations and declarations of categories of persons, businesses and industries eligible for grant of special, favored, approved or priority status. Most African countries determined these categories in terms of their primary economic objectives.

They did this in a variety of ways. Most French-speaking African had integrated investment codes which provided in great detail categories and classifications of

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[76] This part of the analysis adopts the classification used in the study of national investment codes by ANTONIO R.PARRA *Principles Governing Foreign Investment,as Reflected in National Investment Codes* 7(2)ICSID REVIEW 1992, PP.428-454

[77]This fact was deplored by the then Legal Advisor of the United Nations Economic Commission for Africa, for lack of cooperative perspective and their tendency to outbid competitors with better incentives; *See*, A.M. Akiwumi, *A Plea for the Harmonization of Africa Investment Laws*, Vol 19 JOURNAL OF AFRICAN LAW 1975, p.134

'approved' industries. For example, in Niger, preferential treatment was given, among other things, enterprises producing power,mining enterprises, enterprises engaged in mechanical spinning, weaving, dyeing and knitting, the manufacture of fertilizers and products necessary for agriculture and fishing, including processing.[78]

Many English-speaking African countries, on the other hand, did not have integrated investment codes.Some investment laws did not enumerate a list of 'approved' industries. In Kenya and Uganda, for instance, the Minister of finance was vested with discretionary powers to grant certificate of approval in respect of foreign investment 'if he is of the opinion' that the investment would further the economic development of the country.[79] Others did provided a list of 'approved' industries but in a different government publication. In Nigeria, a long list of 'pioneering' industries included mining, smelting and refining, canned foodstuffs, rubber soled shoes, tires, hotel keeping etc. But for registered companies to obtain 'pioneer status', they had to procure a finding from the Federal Executive Council that the industry in question was not already being carried on in Nigeria, or not on a scale suitable to the country's economic requirements, or that it was expedient and in the public

[78]Niger Investment code, Law No. 68-24/PRN of July 31st, 1968, art.5.

[79]Kenya Foreign Investments Protection Act, 1964, (Cap 518) Laws of Kenya s.3(2)

interest to encourage the development, or establishment, of the industry in Nigeria.[80]

It is important to recognize that virtually all African investment were and are still closely linked to national economic policies and are, therefore, complimentary to the country's development plans.It is important to investors looking for opportunities of entry into the host country's economy to determine the objectives of the country's development; so as to more precisely determine their role in achieving those objectives. Some investment laws referred to such development plans, others did not. The Ghana Capital investments Decree[81] and the Kenya Foreign Investments Protection Act referred to national development plans. Rwanda Law provides that, in considering applications by enterprises wanting to enjoy favored status, the Ministerial Commission handling such application shall base its decision, first of all, on the " special effectiveness of the enterprise within the framework of the Plan of Economic and Social Development".[82]

The second debt-crisis period saw a new generation of investment laws which were more liberal and more easier to foreign investors to work with.The new codes often set forth simplified procedures for such matters as the approval of foreign investments. In matters of restrictions to rights of entry or admission of investments, these the sub-saharan African codes can be classified into three groups. The First

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[80]Nigeria Industrial Development(Income Tax Relief) Decree, 1971, No 22

[81] 1973, N.R.C.D. 141, ss. 7 and 25

[82]Rwanda Investment Code, art. 10, Law No.21/1987

group contains no stated special restrictions on entry; the second group contains restrictions but imposes almost no limits on the discretion on the administering authority to grant or deny permits; and the third group also contains restrictions in form of requiring permits of entry but imposes some limits on the discretion of administering authority to grant or deny permits.[83]

The first group of codes of investment imposes very few or no special restrictions on entry except for the elementary requirements of public order. Typically, the code would state that investments can be 'freely made' in the country if not offensive to public health, morals, environment etc...[84] For instance, the 1989 Investment Code of Madagascar, which replaced the 1985 code, places very minimal restrictions which are easily quantifiable.Under this code, the general obligation imposed investors are limited to the requirements that they comply with the laws and regulations in force in the country.[85]

The second group of investment laws are the ones with so called 'high discretion' provisions. Under these provisions, the competent authority is given unlimited or very few restrictions on discretion to grant or deny the necessary permit applications.[86]

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[83] *SEE*, ANTONIO R. PARRA, *supra* note 76 at p.430; The classification used in this study makes sense in view of the similarity of the many provisions of African investment laws.

[84] Id

[85] Loi No. 89-026 relative au Code des Investissements, Official Journal, Jan 2, 1990, at p. 18

[86] See ANTONIO PARRA *supra note 76,* at p.430; This study suggests that "high discretion" codes also tend to have a high degree of bureaucratic involvement and a lot of restrictions

TABLE 2: ADMISSION REQUIREMENTS

NO SPECIAL RESTRICTIONS ON ENTRY	SPECIAL PERMIT REQUIRED (NO LIMIT ON DISCRETION)	SPECIAL PERMIT (LIMIT ON DISCRETION)
Benin	Angola	Egypt
Burundi	Djibouti	Ghana
Cameroon	Gabon	Sudan
Central African Rep.	Guinea-Bissau	Zambia
Chad	Mozambique	
Comoros	Somalia	
Congo	Tanzania	
Cote D'Ivoire		
Guinea		
Madagascar		
Mauritania		
Namibia		
Niger		
Rwanda		
Senegal		
Togo		
Zaire		

Source: ICSID REVIEW Vol 7, 1992, Table 1, p.432

As shown in table 2, about seven sub-saharan countries involved in an ICSID study were identified as falling in this group.The countries in this group reserve to

on foreign investment. They also make performance indices, such as minimum local content, general requirements for the admission of investments.

the state, extensive legal control over the admission of foreign investment.

The third group comprises of investment codes which make special authorizations necessary but give the competent authority clearly defined and limited discretion for denying applications.Under these codes, authorizations will usually only be refused for such cases as violation of local laws. Codes in this group will specifically provide that a decision to deny an application must be reasoned.[87] For instance, under the Zambian Investment Act of 1986,[88] the committee (which is the competent authority), *must approve* an application for investment license "if it finds that:-

(a) The application is in accordance with the provisions of [the] act; or

(b) the activity planned to be undertaken by the business enterprise is not unlawful or contrary to the interests of Zambia."[89]

Under the same act, the council , which is the final decision making body in cases of denial by the committee, is required to give reasons if it concurs with the committee.[90]

In Sum, several positive features run through the current generation of investment codes admission requirements. First, most of them have a general bias in

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[87]Id at 431

[88] No 5 of 1986; *See also* Thomas Allen *Supra* note 66 and Mbao, *The Investment act , 1986 of Zambia,* 30 JOURNAL OF AFRICAN LAW 197, (1986)

[89]Id, Section 17(2); This section has been criticized for being vague and blamed for the lack of enthusiasm by foreign investors in Zambia- See Thomas Allen, *supra* note 76 at p.52.

[90]Id, Section 42(2). The Council, however, is the final body of appeal

favor of admission while at the same time reserving to the state varying degrees of control of the process. Second, there is a common desire to speed up and facilitate the admission process. Third, the codes, even those containing bureaucratic discretionary provisions, suggest that the admission process is much more predictable, systematic and is administered in accordance with law.

ii) Treatment:

This involves discussion of general standards of treatment accorded to foreign investments, once they have been admitted into the host country. This covers aspects like non-discriminatory provisions in terms of incentives and taxation and repatriation of profits.

In the early post independence period, many African investment codes provided specific clauses putting all investors foreign and domestic equal on footing. The codes in Algeria, Congo(Brazzaville), Rwanda, Chad and Dahomey provided striking examples of this type of treatment.[91] This meant that both private and foreign investment, if they qualified, received equal treatment under the law and were eligible for the same tax benefits and incentives except for the repatriation of capital, profits and protection from expropriation which were reserved for foreign investors only.

On the other hand, some African countries had designated their investment codes to apply only to foreign investments. The early post-independence laws of Tanzania, Kenya and Uganda had been clearly formulated to deal with only foreign owned investments. For instance, the Tanzania

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[91] *See* United Nations, *Supra* note 64 pp.6-9

Foreign Investments Protection Act of 1963 was promulgated as 'An act to give protection to certain approved foreign investments and matters incidental thereto'. Similarly, the Kenya and Uganda laws also provided that economic benefits were to apply only to foreign assets invested or to be invested by foreign nationals in those countries.[92]

Repatriation of capital and profits is usually an issue that has mainly to do with foreign investments; since local investments investors would not, in the normal course of things, need to transfer profits out of the country. However, in a free market environment and in situations of scarce local resources, the regulatory control on repatriation of profits has great effect on the interaction between local and foreign capital.

In general, post-independence investment legislation dealt with the issue of repatriation of profits in two ways. One approach was to place no restrictions on remittances of capital and profits in the hope that the foreign investments would flow in and stay. For instance, Gabon placed on remittances apart from the procedural requirements and the availability of foreign exchange resources.[93] The Chad Investment Code also provided under article 3 that 'within the framework of exchange regulations, the state guarantees the right of transfer of capital; especially in case of:(1) duly audited profits; (2) funds derived from transfer or cessation of business.[94]

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[92]*See*, Kenya Investments Protection Act(1963) and Uganda Foreign Investments (Protection) Act (1964).

[93]*See*, Gabon Investment Law, ordinance No.16/67, art.3

[94]*See*, Chad Investment Code, Ordinance No.025/PR/87

The other approach was to place restrictions and various conditions on the transfer of funds out of the host country. Countries such as Algeria, Kenya, Somalia and Uganda placed restrictions on the amount of capital and profits out of the host countries. For instance, under the Kenya Foreign Investment Protection Act of 1964 an approved enterprise was entitled to repatriate, in the approved foreign currency, profits after payment of taxes on its investment capital, an approved proportion of the net proceeds, principal and interest on loans and any compensation paid upon nationalization.[95]

Fair and equitable or better yet, special and preferential treatment under the host country's tax system is a major determining factor for potential foreign investors considering opportunities in the African countries. The general purpose of tax incentives and other fiscal inducements is to help out new industries overcome initial hardships of establishment and also help steer investment flow into selected and predetermined geographical and economic areas.[96]

A whole range of tax inducements were available to foreign investors under post-independence investment laws. These included corporate tax holidays, capital allowances, such as investment allowance, initial allowance, annual allowance, all resulting in accelerated depreciation, carry forward of losses, tax free dividends to shareholders,

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[95]Article 7(a),(b) and (c). *See also* The Exchange Control Act Cap 113, Laws of Kenya.

[96]T.M. Ocran, *The Legal Framework of Foreign Investment in Africa* 12 ZAMBIA L.J. 1,4-5(1980)

exemptions from taxes on property, income and profits and so on..

The new generation of investment codes after the debt crisis have somewhat changed in terms of treatment accorded to foreign investors.The majority of current sub-saharan investment codes do contain provisions to the effect that foreign investors shall enjoy the same treatment accorded to nationals[97] For instance, under the Namibian Investment Code of 1990, all foreign investments in Namibia not classified as status investments shall be entitled to treatment equivalent to that of enjoyed by Namibian investors.[98] There is no standard definition for the term 'national treatment' and therefore this may have different meanings in different countries. Some codes extend fiscal and other privileges to foreigners that may not be available to nationals. So many African countries have concluded treaties requiring them to extend standards of treatment to aliens that may differ from the national treatment. Some countries have no provision stating what kind of treatment available for foreign investors.

On transfer of capital and profits, no African country has provision for unconditional repatriation of capital and

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[97]In bilateral treaty practice, the national treatment standard is frequently combined with a most favored-nation clause, so that as regards particular issues, investors of each contracting party are assured of the most favorable conditions available in the other state.

[98]Section 3(2) (Act 27 of 1990),published in the Government Gazette of the Republic of Namibia, no.129, Dec 28,1990. This is also supplemented by section 3(1) which specifies that in foreign nationals " may invest and engage in any business activity in Namibia which any Namibian may undertake". For a general of the Namibian Investment Code *see*, Stephen C. Vasciannie, *supra* note 6.

profits. The majority of them do guarantee the repatriation of capital and profits, but make this guarantee subject to foreign exchange, tax and other relevant regulations. For instance, Under the new Tanzanian National Investment (Promotion and Protection) Act of 1990, a foreign investor can, with the permission of the Bank Of Tanzania, retain in an external account a portion of his foreign exchange earnings for the purposes, among other things, debt servicing, profit and dividend payment obligations.[99]

Again the new Cameroon Investment Code of 1990,[100] guarantees the transfer for foreign investors of dividends, royalties, debt service but transfers outside the franc zone and those exceeding 500,000 CFAF must be declared and authorized by the Ministry of Finance.[101] Some African codes of investment add further restrictions, such as that capital may be repatriated only after a specified period has elapsed or in installments. Under the 1989 Investment Code of Madagascar, for example, the right of free transfer is limited by several restrictions, including, a stipulation that funds received from the sale of an [enterprise] may only be remitted in three yearly installments.[102]

In general terms, the current investment codes in Sub-saharan Africa are more fair and equitable in terms of treatment of both foreign and local investors.[103] In some

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[99]*See*, Section 25 of Act No. 10 of 1990

[100]*See*, Ordinance Law No. 90/001 of Jan. 1990

[101]Id, art. 4(2) and art. 8(1-2)

[102]*Supra* note 69, Art.11 and 13

[103]*See*, the new 1990 Uganda Investment Code which declares itself in it's preamble as `A code to make provision in the law to *local and foreign investments* in Uganda by providing

cases the laws have been more tilted in favor of benefitting foreign investors over local investors.

iii) Protection:

Historically, protection of foreign investment has always been and still remains an issue of major importance to foreign investors.[104] This factor together with the rate of return and ability to remit capital and profits forms a major component part of what is usually described as the *investment climate* in the host country. The other component factor are the fears of domination and exploitation on the part of the host countries.[105]

Investment climate considerations will generally focus on the broad business and socio-political factors that are conducive to the activity which potential foreign investors want to engage in. As part of the assessment, prospective investors will need to know the state of host country's infrastructure, political and social stability, the quality of its labor force and its financial institutions, and the effectiveness of its bureaucracy among other things.

Immediately after independence, most African countries indicated in their policy declarations and constitutional documents their reluctance to embark on policies of nationalization and the acceptance of the principle of compensation if nationalization became inevitable. Some Investment codes contained clauses allowing nationalization

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more favorable conditions for investment,...'

[104] *See*, e.g. GROSSE, FOREIGN INVESTMENT CODES AND THE LOCATION OF DIRECT INVESTMENT (1980)

[105] For a historical treatment of the subject, *see*, FOUILLOUX, LA NATIONALIZATION ET LA DROIT INTERNATIONAL PUBLIC, Librarie generale de droit et de jurisprudence, Paris 1962

only on stated grounds - e.g public interest, public benefit. Others stipulated no such grounds but allowed for nationalization if it was done in accordance with the national laws and was accompanied by appropriate compensation.

During the period from 1960's to early 1970's, some African countries engaged in a rash of terminations and repudiations of contracts with foreign investors and nationalized their assets.While many of them promised `prompt, adequate and effective' compensation, many states paid partial or no compensation and others paid inadequate lump sum compensation.[106]

For example the Kenya Foreign Investments Protection Act provided that no property or interest therein protected by the act shall be compulsorily acquired except in the public interest, and if so acquired, prompt and full compensation will be paid. Ethiopia, Kenya and Uganda had constitutional provisions for the protection of private property and payment of just compensation in cases nationalization.

Such provisions on the law books, in the light of the nationalizations and appropriations that took place in several African states, did not help promote sense of confidence and security among foreign investors. While many capital exporting countries did not question the right of

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[106]For exploration of topic of nationalization of foreign investments in Africa generally, *see*, ADEOYE AKINSANYA,THE EXPROPRIATION OF MULTINATIONAL PROPERTY IN THE THIRD WORLD *(1980);* "Indigenisation or Nationalization of Private Foreign Investments",in Ubogu et al. (Eds), *Development Planning in ECOWAS (1983),pp.365-409; International Protection of Direct Foreign Investments in the Third World* (1987) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY p.58

sovereign states to expropriate alien assets, they were opposed to nationalizations which were not accompanied by " prompt, adequate and effective compensation"[107] which, they believed, were inimical to a good investment climate.[108]

The current generation of African investment codes after the debt crisis have made some changes in an effort to improve the investment climate. A few countries have gone to the extremes of enacting absolute guarantees against expropriation in a desire to reverse previous perceptions of country's hostility towards foreign investment and business

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[107]The rule that *prompt, adequate and effective* compensation has to be paid for expropriation to be lawful appears in a large number of bilateral investment treaties(BITs) and is supported by many western jurists as reflecting customary international law (*see, e.g.,* Domke, 55 AM.J.INT'L L. 603 (1961);*see also* the overview in WHITEMAN, DIGEST OF INTERNATIONAL LAW 1085 (1963-); and 2 RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 712c (1987). The formula was coined by U.S Secretary of State Cordell Hull in a letter to the Mexican government dated July 21, 1938. It was disputed however by the Mexican government at that time (Mexican Minister of Foreign Affairs to Secretary of State of the U.S., August 3, 1938, 3 HACKWORTH DIGEST OF INTERNATIONAL LAW 657 (1942) and has also been disputed by many other writers since then. These writers have maintained that the Hull formula was never a rule of traditional international customary law and cannot, in any case, be considered as existing international applicable to all cases of expropriation of alien property (*see e.g.,*Schachter, *Compensation for Expropriation,* 78 AM.J.INT'L L. 121-30 (1984);Dolzer, *New Foundations of the Law of Expropriation of Alien Property,* 75 AM.J.INT'L L. 561 (1981).

[108]*See,* A. Akinsanya, *International Protection of Direct Foreign Investment in the Third World* (1987) 36 I.C.L.Q 58,p.60. The United States, for example, responded to unilateral acts of nationalizations by adopting the Hickenlopper Amendment to the Foreign Assistance Acts 1962, 1963 and 1964, which suspended bilateral aid programs and also withdrew trade preferential treatment privileges under the United States Trade Act of 1974 from countries expropriating assets of U.S citizens.

in general.[109] However, the majority of African codes do still provide for expropriation but only in public interest and on payment of compensation.[110] Some codes do not contain provisions for expropriation but the same provisions may be found set forth in their constitutional documents.

The provisions for compensation set forth different measures and modalities of payment. Some codes provide that foreign investor will receive compensation equal to the "actual value" of the investment; while others refer to "market value" or " fair and equitable" compensation.[111] In general, these investment protection provisions remain too ambiguous and indefinite for the comfort of potential investors. In fact, many capital generating states believe that damage to the investment climate arises as soon as expropriation occurs.

Some investor countries have concluded bilateral agreements with African countries for the reciprocal promotion, encouragement and protection of direct investments. For example, the United States has concluded bilateral investment treaties (BITs) with several African states for the promotion and protection of United States direct investment in those countries.Such treaties will

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[109]*See*, The Egyptian Investment Law No. 230/89 and Ghanian code *Supra*.

[110]*See*, section 11(1) of 1990 Namibian Foreign Investments Act and article 4 of 1990 Cameroon Investment Code.

[111]*See*, Uganda Investment Code vol.1 Laws of Uganda (1990) s.29(2) states that "Where..a business enterprise, of an investor...is compulsorily..acquired, compensation in respect of the fair market value of the enterprise...within a period not exceeding twelve months from the date of.. acquisition"; *See also* under the Zambian Constitution, art. 18(1) guarantees "payment of compensation" but does not add any other qualifiers.

usually contain references to expropriation, compensation, "most favored nation" treatment and settlement of disputes. These treaties are drafted by the investor countries and they attempt to give investment protection beyond that provided under customary international law and the host country's domestic law.

A typical United States investments promotion and protection treaty will appear as follows:

> Property of nationals and companies of either party shall not be taken within the territories of the other party except for a public purpose nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provisions shall have been made at or prior to the time of taking for the determination and payment thereof.[112]

A BIT concluded between The Federal Republic of Germany and Zambia in december 1966,[113] and which came into force on august 25, 1972, required each state to treat investors from the other state, fairly and equitably and no less favorably than nationals of the host state or other states.[114] The treaty also stated that a protected investment may not be

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[112]*See*, (1963) 2 I.L.M. 1099

[113]Treaty between the Federal Republic of Germany and the Republic of Zambia concerning the Encouragement and Reciprocal Protection of Investments, reprinted in the International Center for the Settlement Of Investment Disputes, *Investment Laws of the World* (looseleaf)

[114]Id, Art.1 (fair and equitable treatment) and Art.2 (national treatment and most favored nation

expropriated, " except for the public benefit and against compensation".[115] According to the treaty, compensation was to "represent the equivalent of the investment expropriated" and " shall be actually realizable, freely transferable, and shall be made without delay".[116]

In addition to negotiating BITs, many investor countries created official state or quasi-state organs to provide their investors with insurance from losses in foreign countries caused by political risks.[117] These institutions provide coverage for their nationals abroad against war, civil war, rebellion, revolution, insurrection or similar disturbance in the host state, inconvertibility, expropriation, confiscation or requisition by the host government. The insuring country usually seeks to conclude an investment guarantee agreement with the host country which provides that the insuring agency may obtain subrogation. These agreements are almost identical and deal with only subrogation and dispute settlement.[118]

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[115]Id, art.3(2)

[116]Id, art.3(2)

[117]There are also private insurance arrangements, not discussed here.

[118]There is little evidence that either BITs or investment insurance actually does encourage foreign investment although that is the general belief.It is, however, likely that absence of these benefits will tend to discourage investment.*See*, Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries, (1990)* 24 INTERNATIONAL LAWYER 655, p.674; Also see, Cable and Persaud, *New Trends and Policy Problems in Foreign Investment:The Experience of Commonwealth Developing Countries,* Cable and Persaud, eds... Developing with Foreign Investment, p.16 (1987).

Dispute settlement is another issue of investment protection that is of major concern to investors. In general, unless parties stipulate otherwise, settlement of investment disputes falls under the jurisdiction of local courts.[119]. This legal position, while not disputed, is generally unsatisfactory to many western writers and investor countries when it comes to investment in developing countries. That is why many investor countries prefer the availability of international arbitration as an alternative recourse to local courts. Of course, international arbitration is a voluntary mechanism which is available if both parties consent and mutually submit to it. However, once they submit, they have to honor that undertaking and cannot unilaterally withdraw.[120]

Many African codes provide for different types of arbitration both local and international. A majority of African Countries are members of the Center for the Settlement of Investment Disputes("ICSID")[121] and

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[119]*See eg.*, REDFERN AND HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 19 (1986).

[120]For a detailed discussion on the principles of international arbitration *see*, SIMPSON AND FOX INTERNATIONAL ARBITRATION 1 (1959);REDFERN AND HUNTER, *Supra;* Institute Of International Law, *Resolution on Arbitration Between States, State Enterprises or State Entities and Foreign Enterprises* (63/II ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 215 (1990) Santiago de Compostela, 1989); SCHWEBEL,INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 14 (1987).

[121]ICSID was established by the Convention on the Settlement Investment Disputes, 575 UNTS 159. Since many African Countries have given the convention municipal effect by enacting it as part of domestic law.

Multilateral Investment Guarantee Agency ("MIGA").[122] ICSID provides investors and states with facilities for the arbitration and conciliation of investment disputes. MIGA's primary activity is the issuance of investment guarantees where they are not available under a national programme.It may also engage in research and, if requested by a member, provide it with technical advice and assistance to improve its investment conditions.[123] Whereas it is not clear that by joining these institutions African countries increase their chances of attracting new investments, it is likely that refusal to join will tend to discourage investment.

Despite their reference to international arbitration, the majority of African codes emphasize that local courts have original jurisdiction in disputes between the investor and the host government. The 1990 Cameroon Investment Code[124] provides a typical example of provisions found in many other African codes. Articles 44 and 45 provide for mechanisms of dispute settlement under the code. Under article 44 the parties may choose to settle disputes in the courts of Cameroon. But under article 45, a foreign investor reserves the right to have any dispute pertaining to the validity and interpretation of the investment agreement arbitrated or conciliated under the rules of the International Chamber of Commerce (ICC) or the ICSID. Alternatively, the parties may

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[122]MIGA was established by the Convention Establishing the Multilateral Investment Guarantee Agency and came into force on April 12, 1988,See (1986) 1 ICSID REVIEW 147.

[123]Id, Art. 23(a) and (c) and also see, Shihata, *Towards a Greater Depoliticisation of Investment Disputes: The Roles of ICSID and MIGA,* (1986) 1 ICSID REVIEW 1.

[124]*Supra note* 100.

resort to the procedures specified under the BIT between Cameroon and investors home state.

In sum, looking at all the measures taken by the African countries and on the international scale for the promotion and protection of direct investment, it is clear that today,s foreign investors in Africa enjoy much better protection than their predecessors in the early post independence period. This trend is further evidence that African attitudes towards foreign investment and business is increasingly changing for the better.

CHAPTER IV

OTHER DEVELOPMENTS AFFECTING ATTITUDE TOWARDS FOREIGN INVESTMENT

Aside from the debt crisis and political and legal reform, there are world events, some not directly connected with Sub-Saharan Africa, which are forcing changes in the way Africans have historically related to outsiders.These events include the integration of Europe into a Single European Market (SEM), the end of the cold war and the end of apartheid in the Republic of South Africa. The next discussion is going to focus on the impact these developments will have in the way Sub-Saharan African countries do business within the sub-continent and with other countries.

A) SINGLE EUROPEAN MARKET AND ITS POSSIBLE EFFECTS ON AFRICA:

In 1985 the European Economic Community (EEC) passed the Single European Act (SEA) which was to initiate a number of actions leading to a full integration of the European market into a single market by the year 1992. An integrated Single European Market (SEM) translates into an internal market of 300 million people, with free movement of people, goods, services and capital within the member states. It is also supposed to bring tremendous business opportunities for the rest of the world through the removal of internal barriers and higher economic growth. On the other hand, this may lead to substantial trade losses for some extra-community producers as the competitiveness of the European Community (EC) firms is enhanced and possibly, protectionist barriers raised to facilitate the burden of adjustment of internal producers.

The Sub-saharan countries have binding relations with the European Community through their membership of the EEC-ACP group.[125] Their links were further strengthened by the adoption of the latest Lome IV convention in 1989, which like all previous conventions, deals with mainly trade concessions, financial and technical aid to the Sub-Saharan countries. Running through are three distinctive features covering aid, stabex and trade.[126]

Under the conventions, the community is obliged to give a certain negotiated amount of aid to ACP countries through the European Development Fund (EDF). This amounted to 8.5 billion ECU under Lome III,[127] and 12 billion ECU under Lome IV.[128] The community also subsidizes short falls in export earnings of selected commodities from the ACP countries under its stabex regulations. An ACP country qualifies for stabex assistance if its export earnings from a listed

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[125]The original EEC-ACP Lome convention was signed at Lome, the capital of Togo in 1975, by Heads of states of the EEC and African, Caribbean and Pacific (ACP) states.

[126]For detailed discussion of the conventions, *see*, C. Stevens *`EEC and Africa'*, AFRICAN CONTEMPORARY RECORD, 1983/84, pp.A203-205:*`The EEC's Year in Africa'*, A.C.R., 1985/86, pp.A208-215, and Tony Hill, *Whither Lome? A Review of the Lome III negotiations,*THIRD WORLD QUARTERLY, (3) July 1985, pp.661-681.

[127]*see,* WEST AFRICA*,* 25 February, 1985, p.362

[128]*see,* THE COURIER*,* No. 119,1990, p.1.

commodity falls by 7.5% below the average price in the community market over the previous four years. Many Sub-Saharan countries have benefited from stabex transfers. Again the conventions grant Sub-Saharan countries trade concessions for their exports to community member states. Over 99% of Sub-Saharan exports enter the community market duty free. Although it is unlikely that the EC will completely abrogate this relationship, it has failed to guarantee its continuation after the expiry of Lome IV.

i) Effect on Trade:

The Sub-Saharan African countries are particularly concerned about the possibility that the currently most restrictive national trade barriers would be extended on a community wide basis and `reciprocity principle' would be used by the EC as a bargaining chip to allow access to the EC market. Whereas other developing countries could gain access to a "Fortress Europe" through direct investment, most African countries do not possess the financial and technical capacity to do so.

In the period 1975-1990, the EC made up between 40-60 per cent of Sub-Saharan Africa's import-export markets. However, since the first half of the 1980s, the EC market share of Africa exports have been shrinking steadily, partly because of the appreciation European Currencies against the US dollar; and partly due to the low competitiveness and supplyside bottlenecks.[129] This is so, despite preferences Africans still enjoy under the Lome convention.

The essence of the SEM is to reduce production costs for EC producers through scale effects and to eliminate

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[129] *See*, IMF YEARBOOK 1989 and 1985.

inefficiencies in the current imperfect customs union. According to the study on the benefits of the Single Market,[130] EC productivity and competitiveness will increase and this will be reflected in the downward pressure on EC consumer prices. The price effect will translate into "trade diversions"[131] as EC producers become more competitive and intra-EC trade increases to the detriment of extra-EC trade. At the same time, price declines and accelerating economic activity will raise real incomes which will lead to "trade Creation" and this will benefit African exporters.

For African countries, Trade diversion (the redirection of trade away from traditional suppliers and towards EC partners of EC members), mainly affects the manufacturing sector. It is not likely to impact any primary products exported by African countries, since the EC does itself produce these products.[132]

In terms of imports from Europe, to the extent that SEM leads to restructuring, it may lead to increased concentration of EC industries and thus, oligopolistic power. This, therefore, may not offer the cheapest source of imports for African countries.

ii) Effect on Investment Flows:

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[130] *See*, CECHINI PAOLO, THE EUROPEAN CHALLENGE 1992: THE BENEFIT OF A SINGLE MARKET (Aldershot: Wildwood Press, 1988).

[131] According to the classical theory of economic integration, trade diversion occurs when a common external tariff replaces national tariffs of countries participating in the customs union.

[132] *See*, Michael Davenport and C. Stevens, *The Outlook for Tropical Products,*in C. STEVENS AND D. FABER (eds), THE URUGUAY ROUND AND EUROPE 1992:IMPLICATIONS FOR FUTURE ACP/EC COOPERATION, EUROPE CENTER FOR DEVELOPMENT POLICY MANAGEMENT, Maastricht, pp.5180.

A Single European Market is likely to direct investment capital towards financial speculation and more "lucrative" endeavors, to the detriment of useful investments in the developing countries. Sub-Saharan African countries have experienced a steady decline of direct foreign investment inflows during the last decade.

Table 3: InFlows Of Foreign Direct Investment (millions of US Dollars)

	1980	1982	1984	1985	1986	1987	1988
World	52212.2	44236.7	50658.9	48959.9	77459.9	118059.7	143869.9
Developing Countries	10887.0	14253.3	12046.5	13291.9	13875.0	23550.9	25096.5
Developing Africa	311.9	1410.8	1378.9	2570.6	1751.3	2227.2	2853.4
Africa's Share in World(%)	0.6	3.2	2.7	5.3	2.3	1.9	2.0
Africa's Share in Developing Countries(%)	2.9	9.9	11.4	19.3	12.6	9.5	11.4

Source: United Nations, Center on Transnational Corporations Based on International Monetary Fund, Balance of payments Tape, Nov.1989 and information from OECD, *Development Corporation*(Paris,OECD, 1991)

Table 3 shows that direct investment inflows towards Africa have been declining consistently over the second half of the 1980s. Whereas, the figures on direct investment in Africa tend to fluctuate from year to year, there is a clear trend of diversion of investment from Africa to the EC. The fluctuation is partly due to changes in the political and economic environment and to the variability of profits and retained earnings valuation effects of the exchange rates changes.[133] SEM will also result in increased competition between firms attempting to sell their products to Europe so that investments, both outside and inside the EEC will be carefully selected. Africa stands little chance of attracting European industrial capital because of its low comparative advantages in relation to other regions.

Some Sub-Saharan African are also concerned about their monetary relations with the European Countries. At their independence, almost all former french African colonies joined the Union Monitaire Oust'Africaine, also known as the Franc zone; which shared a single central bank and a single currency known as the CFA franc. With membership to the franc zone, these countries were guaranteed a fixed parity of one French (FCFA) franc to 50 African (CFA) francs, paid all their foreign exchange earnings into the account in Paris and had unlimited convertibilty into foreign currencies.[134] The Africans were afraid that the new European Monetary union is not going to tolerate any special relationship between the French franc and the CFA franc.

In mid-January of 1994, the fears of Franc zone African countries were realized. To the Shock of the CFA countries and without any consultation, or warning, France devalued

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[133] *See*, Thisen Jean K, *The European Single Market in 1992 and its Possible Effects on African Economies* Vol.18(1) AFRICA DEVELOPMENT pp. 5-25, (1993)

[134] *see*, Kenneth B. Noble, *French Devaluation of African Currency Brings Wide Unrest,* N.Y.TIMES, February 23, 1994 at A1,A6. According to the author, this special `cozy' and sometimes `contradictory' post-colonial economic relationship is subsidized by the French Treasury to the tune of $ 2-3 billion a year. This caused substantial unhappiness among international financial institutions and other western countries, who argued France to stop the subsidies.

CFA franc to 100 to 1, half its previous value.[135] The immediate effects were predictable; price increases, price controls, wage freezes; all of which resulted in labor disputes, wild cat strikes and widespread civil unrest throughout French speaking West Africa.[136] Whereas no one knows the longterm effects of the devaluation, the World Bank believes that this will ultimately encourage new investments in raw materials and discourage misuse of valuable hard currency to buy products these countries can easily produce on their own.[137]

B) THE END OF THE COLD WAR:

The great events of Eastern Europe of the period 1989-1990 marked the end of the Soviet Communist empire and the end of the cold war. The changes that took place in that period were widely interpreted in the west as proof of the supremacy of capitalism over socialism. The main feature of the cold war, was the ideological conflict between the U.S. and U.S.S.R. For the west, the conflict was portrayed as a struggle between democracy and communism.[138]

Thus in their effort to obtain allies in the third world in general, and Africa, in particular, the two sides gave support to opposing sides in regional conflicts; and instead of attempting to resolve them, they simply escalated

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[135]Id; The countries affected were Senegal, The comoros, Burkina Faso, Ivory Coast, Chad, Benin, the Central African Republic, Congo, Gabon, Niger, Togo, Cameroon, Mali and Equatorial Guinea

[136]Id.

[137]Id.

[138]*See*, Harris cheryl L, *The Impact of the End of the Cold War on Africa* GUILD PRACTITIONER, 48(4), p.101, (1991)

them. These regional conflicts usually resulted in disastrous loss of life, destruction of property and much needed infrastructure, and misuse of resources for the newly independent countries.

When it came to developmental aid, donor countries were dispensing aid primarily in support of their geopolitical objectives, regardless of the nature of the recipient government. For example, the government of Zaire, which has one of the worst development records, has been the largest single recipient of American aid in Sub-Saharan Africa since the United States began providing aid to the region in the 1950s. That aid was driven primarily by political motives, including the desire to strengthen the government against internal and external threats, and to deny the Soviet Union the opportunity to gain influence in one of Africa's largest, most strategically located, and potentially richest countries.

2) Political effects:

The decline of the "threat from Communism" has reduced the ideological need for continuation of proxy wars in Africa. The diminished strategic importance of maintaining allied regimes in power, irrespective of their abusive and self-aggrandizing behavior, has meant that unpopular governments can no longer count on endless support from the super powers. This means that African governments are now more susceptible to the pressure from the ground for radical and democratic transformation.

LANCASTER, CAROL. 1991. "The New Politics of US Aid to Africa." AFRICA NOTES 120 (28 January). WASHINGTON: CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES.

see Harris, Cheryl L. supra note 107, at pp.134-135

The end of the cold war has generated tremendous spur to African political and economic development. An increasing number of African countries have followed Eastern Europe in instituting democratic reforms. The trend towards democratic reform cannot be over-emphasized or exaggerated; but it certainly represents the most important political shift the continent has experienced since independence.[141] It is also clear that the democracy movement has far deeper roots than many observers had imagined. At every level of government, indigenous institutions are evolving as a response to popular demands. It is still difficult to determine the future direction of these changes, but many African governments have come to realize that democratic institutions are essential to "sustainable and equitable development".[142] They also understand that democracy brings predictability, accountability, and the rule of law, all of which are indispensable in building domestic and foreign business confidence.

ii) Economic effects:

The end of the cold war has led to opening up of new markets in the former Soviet Union and Eastern Europe. This has sharpened competition with Sub-Saharan Africa's efforts to attract new foreign business. Eastern Europe is in a far better position to attract new industrial capital for several reasons. First, the basic infrastructure (roads, railways, channels, electricity, telecommunications, etc)

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[141]See Aronson David, *Why Africa Stays Poor: and Why It doesn't Have To*. Vol.53 HUMANIST p9(6) March-april, 1993.

[142]Feldman, Gerald M, *Sub-Saharan Africa is poised for renewed private sector growth: Commitment to free enterprise was reaffirmed in 1992. (1993 World Trade Outlook)*,114 BUSINESS AMERICA p.33(2), April 19, 1993.

already exist. Second, all Eastern European countries have experienced a high level of industrialization which Africa still lacks.

Another post-cold war effect has been that Africa has been sliding down the ladder of the Western countries' foreign policy agenda. There has been a significant decline or stagnation in western aid to Africa and a concurrent diversion of aid towards Eastern Europe. As for economic assistance from Eastern Europe and Soviet Union, that ended with the disintegration of the Soviet Empire.[143] Economic aid from Arab oil producers has also dropped significantly and in some cases completely disappeared. In short, there is no real hope that concessional assistance will be increased or even maintained at current levels; in fact all signs are that it will continue to decline.

C) THE END OF APARTHEID IN THE REPUBLIC OF SOUTH AFRICA:

In may, 1994 the Republic of South Africa installed its first democratically elected majority government. This ended 46 years of the white minority rule and the system of separate development or apartheid which was introduced by the Nationalist party in 1948.

A politically stable and economically prosperous post-apartheid will be an economic powerhouse for most of Sub-Saharan Africa. South Africa produces 80 percent of Southern Africa's regional exports and absorbs almost half of its imports. With its much more strong economy, excellent communication infrastructure, highly skilled and technical labor force and talented management and abundance of natural

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[143]U.S. bilateral economic assistance to Africa, after declining for several years, rose in 1991 as Congress appropriated more than the administration requested. *See*, Lancaster C. (1991), *Supra* note 139.

resources, the Republic stands in a good position as a future economic engine and a hub for investment for the rest of Africa.[144] Currently, South Africa trades with most of the African countries although this amounts to only seven percent of its total trade.[145]

With the abolishment of apartheid, came the end of international sanctions against South Africa. This makes South Africa's economy much more attractive for foreign investment, not just for that country but for many of its neighboring countries. Many observers expect future South Africa to be the gateway to the burgeoning larger market in Sub-Saharan Africa. This regional market of 230 million potential consumers, they say, is developing as the `fourth economic bloc' outside North America, Europe, and the Pacific Rim.[146]

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[144]*See*, Miller, W.,*South Africa (after apartheid)* 240 INDUSTRIAL WEEK Nov. 4, 1991 at p.50. *Also see*, Eaton Leslie, *Investors Who Discovered Africa,* THE N.Y. TIMES April 3, at F4. According to this recent report, Sub-Saharan Africa has become " a hot new target for international investors" who have raised over $ 350 million for this purpose. This is largely due to the peaceful and orderly change of power that took place in South Africa in May 1994. Now many investors are adopting a more hopeful and optimistic view about the longterm investment prospects in other parts of Africa.

[145]*See*, Michaels, Marguerite, *Retreat From Africa. (U.S.-Africa relations) (America and the world 1992/93)* 72 FOREIGN AFFAIRS p.93(16), winter, 1993 [145]

[146]Miller W.H., *Supra note* 144.

CONCLUSION

The major question dealt with in this paper has been; what single most positive impact have the great world events like the debt crisis, the end of the cold war and the formation of the Single European Market had on Sub-Saharan African development? It is submitted that the answer lies in the way these and other events have shaped a new attitude and outlook of Africans towards the role of foreign and domestic investment and business in national development. This willingness to change attitudes, has been symbolized by many African government's attempts at implementing genuine democratic political reforms, undertaking of major economic reforms aimed at liberalizing in favor of free markets and economic legislation aimed at attracting new capital investment to and promote free market activity on the subcontinent.

At independence, many African nationalist governments were suspicious and openly hostile to foreign investment and business in general. They were mainly pre-occupied with issues of economic control and political independence from foreign domination. There was less concern for promotion and protection of both foreign and domestic private enterprise. The debt crisis underscored the need for change in political ideology and economic policies. Although many changes have been impressed on the African governments from outside, the degree of success has depended and will continue to depend much on the enthusiasm with which those changes are embraced and implemented. A recent world bank study of African economies found that those countries that carried out the IMF/World Bank sponsored tough austerity economic reforms under *Structural Adjustment* improved their economic growth in their per capita income. The reluctant reformers and the renegades, on the other hand, either stagnated or continued to deteriorate.[147]

This study also reveals a new important factor in African thinking. An increasing number of African leaders have come to one important realization; that salvation from Africa,s enormous socio-economic problems will come from within and not from without the continent. This realization is forcing governments to re-assess their customary views about the role of foreign aid in economic development.The old African traditional values of self-reliance are slowly finding their way into modern political thought.[148] There is now emerging a movement to discourage over-emphasis on foreign assistance as the main tool for development.

Finally, one more sign of change in attitudes in part caused by events beyond Africa's control is the rate of increasing regional trade and cooperation. African governments now realize the need to pool their political and economic resources to foster intra and inter-regional cooperation, trade and investment. Larger markets and

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[147] *See*, WORLD BANK, ADJUSTMENT IN AFRICA: REFORMS, RESULTS AND THE ROAD AHEAD (1994)

[148] President Museveni of Uganda was recently quoted saying that " We have to go back to the year 1500, where we left off building an economy integrated in itself, able to produce its own food, its own tools,its own weapons." *See*, Christopher Hitchens, *African Gothic* VANITY FAIR, 92 at p.112, Nov, 1994

greater commerce among African states will afford populations greater prosperity and promote internal and interstate peace. The influence of foreign investors will also favor larger markets against competition for western investment from Eastern Europe,India, the Far East and elsewhere.[149]

Currently, there are five economic customs unions or "common markets" in Africa. Economic Community of Western African States (**ECOWAS**), headquartered in Nigeria, comprises of 17 Western equatorial nations including Cote D'Ivoire, Nigeria, Senegal and Togo. The Central African Customs and Economic Union (**UDEAC**), headquartered in Central African Republic, and comprises of central equatorial nations including Cameroon, Congo and Gabon. The South African Customs Union (**SACU**) is headquartered in Pretoria, South Africa and comprises of four nations situated along the Cape of Good Hope: Bostwana, Lesotho, Namibia and South Africa. The Preferential Trade Area of East and Southern Africa (**PTA**) is headquartered in Lusaka, Zambia and comprises of 16 nations in East and southern Africa. South African Development Coordination Committee, (**SADCC**) is headquartered in Gaborone, Botswana and comprises of nine countries in Southwest Africa. The last three trading blocks have overlapping memberships; and there is a likelihood in future of a move to get them consolidated.

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[149] *See*, Mazrui Ali A., *The Bondage of Boundaries (Africa)* 328 ECONOMIST p.F28(3), Sept 11, 1993. Dr Mazrui states in this article boundaries that divide nations in Africa will be altered in the coming generations, as the continent seeks to reassert itself in the post-colonial period. There is likely to be more regional integration and ethnic self-determination as part of this process.

Regional integration in Africa offers foreign investors and business opportunity to operate across national borders, with little regard to customs and tariffs, to take advantage of a larger consumer or manufacturing base than is available in just one country, and also to spread potential political risk.

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