

10-1-2012

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Ibironke T. Odumosu-Ayanu

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### Recommended Citation

Odumosu-Ayanu, Ibironke T. (2012) "Foreign Direct Investment Catalysts in West Africa: Interactions with Local Content Laws and Industry-Community Agreements," *North Carolina Central Law Review*: Vol. 35 : No. 1 , Article 5.  
Available at: <https://archives.law.nccu.edu/ncclr/vol35/iss1/5>

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# FOREIGN DIRECT INVESTMENT CATALYSTS IN WEST AFRICA: INTERACTIONS WITH LOCAL CONTENT LAWS AND INDUSTRY-COMMUNITY AGREEMENTS

IBIRONKE T. ODUMOSU-AYANU\*

## I. INTRODUCTION

This article analyzes select West African countries' policy and legal initiatives for attracting and protecting foreign direct investment ("FDI"). It analyzes the relationship between investment promotion and protection mechanisms, and initiatives that governments adopt to facilitate the participation of local actors in sectors with dominant foreign presence. It also contrasts these investment promotion and protection mechanisms with industry-community initiatives that promote interaction between FDI and local communities in Ghana and Nigeria, often as a way of facilitating socio-economic development. Prominent among development theories are neo-liberal perspectives on economic development advocated *inter alia* by international financial institutions. These neoliberal perspectives have been critiqued by approaches that challenge the idea of development and the way it is currently conceived.<sup>1</sup> Using lessons from engagements between these often-conflicting approaches to socio-economic development as a background, this article focuses on concrete approaches to foreign investment law-at-work in the lives of people, especially poor people.

The history of the international economic order invites cautious optimism or even cynicism about the role of (formal) law in economic development. To observe that law is Janus-faced is not a novel obser-

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\* LLB (Hons) (Lagos), LLM (Calg.), PhD (UBC); Assistant Professor, College of Law, University of Saskatchewan. Many thanks to the Social Sciences and Humanities Research Council of Canada for providing research funds for this project, to Benjamin Omoruyi for research assistance, and to Robin Hansen, Jalia Kangave and Richard Oppong for valuable comments on drafts of this paper. An early version of this article was presented on April 13, 2012 at the R.J. Reynolds' Symposium – Obstacles and Opportunities: The Role of Law in Doing Business in New and Old Economies in the Global Marketplace, hosted by the North Carolina Central University School of Law, Durham, United States.

1. See Gustavo Esteva, *Development*, in THE DEVELOPMENT DICTIONARY 6 (Wolfgang Sachs ed., Univ. of Witwatersrand Press, 1993)(1992); ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (1995). For an analysis of radical perspectives on development, see Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT'L. L.J. 1 (2004).

vation and its mixed encounters with economic development themes are evident. Law both creates and could remedy oppression.<sup>2</sup> Some of Africa's development challenges are results of laws that did not, and still do not, favour Africans. These laws include some unfavourable international economic laws, some domestic colonial laws enforced by colonial administrators, autocratic rules devised under military regimes, and certain economic policies including some structural adjustment policies enforced under domestic laws.<sup>3</sup> Yet, the law has also demonstrated its ability to reverse oppressive situations. But the law is not a panacea for all socio-economic challenges that African countries, or any other group of states, face. Questions of economic development are not only settled in law. They simultaneously involve issues of politics, economics, social justice and others. To retain its relevance, the law must engage these issues on a sophisticated level in order to fully encompass thoughts from all these arenas. As demonstrated in this article, foreign investment law in some West African countries is moving in this direction.

African countries are actively seeking FDI.<sup>4</sup> Favourable legal instruments and policies<sup>5</sup> are part of the methods by which these countries work towards attracting FDI to their territories.<sup>6</sup> While governments work towards promoting FDI, there are reports that FDI

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2. See Ibironke T. Odumosu, *Challenges for the (Present/ Future of Third World Approaches to International Law*, 10 INT'L COMM. L.R. 467 (2008).

3. On the colonial origins of international law see generally, ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004).

4. The commitment to attracting foreign direct investment (FDI) is evident in the rapid rate at which investment promotion treaties are concluded, old policies of indigenization are reversed, policies of liberalization and privatization are instituted, investment promotion and protection legislation are enacted, and constitutional protections are provided for investment in African countries.

5. See Amanda Perry, *Ineffective Legal Systems and Foreign Direct Investment: In Search of the Evidence*, 49 INT'L. & COMP. L.Q. 779 (2000); Ibironke T. Odumosu, *Towards Mechanisms for Assessing the Impacts of Foreign Direct Investment Law and Policy in Post-Conflict Rwanda*, in *FOREIGN DIRECT INVESTMENT IN POST-CONFLICT COUNTRIES* 157 (Virtus Igbokwe et al, eds., 2010) [hereinafter Odumosu, *FDI Law and Policy in Post-Conflict Rwanda*]. See also Jacques Morisset, *Foreign Direct Investment in Africa: Policies also Matter*, in *ORG. FOR ECON. CO-OPERATION AND DEV., GLOBAL FORUM ON INTERNATIONAL INVESTMENT: NEW HORIZONS FOR FOREIGN DIRECT INVESTMENT* 167 (2002).

6. The impact of legal instruments, especially bilateral investment treaties (BITs), in attracting FDI has been the focus of legal commentary. See Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite* (World Bank, Working Paper No. 3121, 2003), available at <http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-3121>; Jennifer Tobin & Susan Rose-Ackerman, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties* (Yale Law Sch. Ctr. for Law, Econ. and Pub. Policy, Research Paper No. 293, 2005), available at <http://ssrn.com/abstract=557121>; Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment in Developing Countries?*, 33 *WORLD DEV.* 1567 (2005). See also U.N. Conference on Trade & Dev., *THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES* (2009), available at [http://unctad.org/en/Docs/diaeia20095\\_en.pdf](http://unctad.org/en/Docs/diaeia20095_en.pdf).

is not necessarily contributing as much to economic development as expected.<sup>7</sup> For some West African countries that attract FDI, inflows are received, profits are made, and these profits are repatriated without much impact on the local economy and people.<sup>8</sup> While governments adopt policies to attract FDI, sometimes there are not many policies that ensure that FDI makes valuable contributions to the economy and the lives of African people. In response to the challenges regarding the quality of FDI, some government action is being taken to ensure that received investments generate significant benefits locally. In this regard, this article analyzes the local content policies and legislation of Ghana and Nigeria. Private actors – industry and local communities – are also making arrangements for ensuring mutual benefits in the foreign investor and local communities' relationship.

This article, the first in a series of articles that interrogate the engagements of local communities within the foreign investment regime, analyzes investment promotion policies and legislation, and local participation-focused arrangements, in three interconnected parts. First, using Nigeria and Ghana as examples, it briefly outlines the major legal and policy initiatives for attracting FDI in these West African countries. Second, this article analyzes two methods of making FDI responsive to local conditions in order to facilitate economic development: government-led local content laws and community development agreements ("CDAs"). Third, it investigates the compatibility of legal instruments for attracting FDI and the instruments designed to ensure that FDI is responsive to local conditions. Ultimately, the question is whether West African countries are able to effectively attract FDI, protect these investments, and insist that FDI is of such quality that they contribute positively to their economies and the lives of their people. This article considers whether the local content laws and CDAs instituted to facilitate local participation are deterrents to FDI. The focus of the article is not on the merits or otherwise of the investment promotion programs that West African governments adopt and neither is it a comparative analysis of Ghana and Nigeria's investment laws and policies. Its purpose is to assess local community engagement with foreign investment in light of governments' investment promo-

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7. The extent to which FDI contributes to economic development has been the subject of much debate. See Xiaoying Li & Xiaming Liu, *Foreign Direct Investment and Economic Growth: An Increasingly Endogenous Relationship*, 33 *WORLD DEV.* 393 (2004); J. Benson Durham, *Absorptive Capacity and the Effects of Foreign Direct Investment and Equity Foreign Portfolio Investment on Economic Growth*, 48 *EUR. ECON. REV.* 285 (2004). See generally THI ODORÉ H. MORAN, EDWARD M. GRAHAM & MAGNUS BLOSTROM, *DOES FOREIGN DIRECT INVESTMENT PROMOTE DEVELOPMENT* (2005); YINGQI ANNIE WEI & V.N. BALASUBRAMANYAM, *FOREIGN DIRECT INVESTMENT: SIX COUNTRY CASE STUDIES* (2004).

8. Odumosu, *FDI Law and Policy in Post-Conflict Rwanda*, *supra* note 5 at 181.

tion law and policies. This article concludes with an outline of a research agenda that encourages further analysis of the impacts of industry-local community agreements.

## II. LEGAL CATALYSTS FOR FOREIGN DIRECT INVESTMENT IN WEST AFRICAN COUNTRIES

African countries are currently being touted as attractive destinations for foreign investment.<sup>9</sup> In order to boost the perception of foreign investors, African governments enact favourable legal instruments and institute investor-friendly policies. In spite of the focus on attracting FDI, the impacts of FDI on economic development have received mixed reviews.<sup>10</sup> Rwanda, a sub-Saharan African country that has experienced a recent violent conflict and does not have significant natural resources to possess substantial negotiating leverage, has adopted legal mechanisms as a means to attract foreign investment to its territory.<sup>11</sup> Rwanda is not alone in this turn to legal mechanisms for attracting FDI. The West African countries of Nigeria and Ghana have also engaged in significant legal reform of their economies and foreign investment laws. While the goal of attracting FDI might be laudable, there is a difference between FDI inflows (quantity) and a sustainable private investment regime (quality).<sup>12</sup> This article investigates mechanisms adopted for increasing the quantity of FDI and also analyzes initiatives for ensuring that it is of such quality that it positively impacts the lives of African peoples. Given that government is not necessarily synonymous with people, one cannot fully measure the impacts of FDI without considering its effects on the poor masses of Africa.

Many African countries have been working towards attracting FDI since at least the inception of the structural adjustment programs, adopting policies like liberalization, privatization, and deregulation.<sup>13</sup> They have also sought to attract FDI through tax and other financial incentives, free trade zones, and investment protection promises. The

9. See ERNST & YOUNG, IT'S TIME FOR AFRICA: ERNST & YOUNG'S 2011 AFRICA ATTRACTIVENESS SURVEY (2011).

10. See e.g. Samuel Adams, *Can Foreign Direct Investment (FDI) help to Promote Growth in Africa?*, 3 AFR. J. BUS. MGMT. 178, 181 (2009) (noting that: "The review shows that SSA [sub-Saharan Africa] countries have been able to increase the inflow of FDI to the region in recent times; however, the increase has not led to a corresponding positive effect of FDI on economic development.").

11. Odumosu, *FDI Law and Policy in Post-Conflict Rwanda*, *supra* note 5, at 157.

12. *Id.* at 179.

13. For an analysis of structural adjustment programs in light of more recent programs of international financial institutions, see Celine Tan, *The Poverty of Amnesia: PRSPs in the Legacy of Structural Adjustment*, in THE WORLD BANK AND GOVERNANCE: A DECADE OF REFORM AND REACTION 147 (Diane Stone & Christopher Wright eds., 2007).

relevant legal mechanisms for attracting FDI include: constitutions with constitutional guarantees of investment protection, domestic legislation that provide details of African governments' investment programs, one-stop investment centres that facilitate the establishment of foreign investment, investment treaties, and treaty-created institutions like the International Centre for Settlement of Investment Disputes ("ICSID").

This part of the article presents a brief analysis of the legal mechanisms that are being adopted to attract and promote FDI in the West African countries of Ghana and Nigeria.<sup>14</sup> Liberalization and privatization are two of the overarching principles that drive economic reform in much of sub-Saharan Africa. Often, international financial institutions actively encourage African countries to adopt these policies.<sup>15</sup> From Ghana to Nigeria, the policies provide the impetus for economic strategies including foreign investment promotion.

Privatization promises private sector-led growth with enhanced, but sometimes more expensive, services that are sometimes priced beyond the reach of many citizens of sub-Sahara African countries. By its nature, privatization leads to the transfer of government-owned enterprises to private entities, including domestic and foreign investors. Liberalization of African economies and markets involve open liberal trade and investment regimes, minimizing barriers to trade and investment, implementing policies to encourage FDI, and ensuring that restrictions on repatriation of profits, dividends and other returns are as minimal as possible.<sup>16</sup> Both policies are prevalent in Nigeria's economic agenda and strategies. In articulating the National Economic Empowerment and Development Strategy ("NEEDS"), the Nigerian government reiterated that liberalization and privatization are key drivers of the framework by which it would achieve its goals.<sup>17</sup> The four key goals of the NEEDS program, "reorienting values, reducing

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14. For detailed discussion of these legal mechanisms, see U.N. Conference on Trade & Dev., *Investment Policy Review: Nigeria* (2009) [hereinafter UNCTAD, *Investment Policy Review: Nigeria*]; U.N. Conference on Trade & Dev., *Investment Policy Review: Ghana* (2003) [hereinafter UNCTAD, *Investment Policy Review: Ghana*].

15. See MICHEL CHOSSUDOVSKY, *THE GLOBALIZATION OF POVERTY: IMPACTS OF IMF AND WORLD BANK REFORMS* 111-122 (1997). For a detailed analysis of Tanzania's experience with water privatization and *inter alia*, World Bank involvement, see Emma Saunders-Hastings, *The Asymmetrical Legalization of Investment Regimes in Africa: Lessons from Water Privatization*, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW* 457 (Marie-Claire Cordonier Segger, Markus W. Gehring & Andrew Newcombe eds., 2011).

16. On FDI, liberalization and capital controls, see Elizabeth Asiedu & Donald Lien, *Capital Controls and Foreign Direct Investment* 32 *WORLD DEV.* 479 (2004).

17. Nigerian National Planning Commission, *Meeting Everyone's Needs: National Economic Empowerment and Development Strategy* (2004), available at <http://www.imf.org/external/pubs/ft/scr/2005/cr05433.pdf>.

poverty, creating wealth, and generating employment,”<sup>18</sup> are derived from a three-fold focus on empowering people, promoting private enterprise, and changing the way the government does its work.<sup>19</sup> Privatization and liberalization emerged as key strategies for achieving the goals and meeting the focus of the NEEDS program.<sup>20</sup> Nigeria’s Public Enterprises (Privatization and Commercialisation) Act 1999 details Nigeria’s privatization program.<sup>21</sup> The Act in sections 9 and 12 respectively establishes the National Council on Privatisation and the Bureau of Public Enterprises and lists the public enterprises for privatization and commercialization. Nigeria’s privatization program has been criticized for the low success rate of privatized enterprises and not taking social justice seriously.<sup>22</sup> Ghana has also articulated policies that drive its macro-economy including issues related to FDI.<sup>23</sup> It pursued an active privatization program from 1988.<sup>24</sup> The program proceeded in phases and faced some challenges, including “finding strategic buyers” and concerns regarding benefits reaped from the program.<sup>25</sup>

Without question, both Nigeria and Ghana have adopted the view that divesting government interests in public enterprises and liberalizing the economy are worthwhile policies for growing the economy and attracting FDI. As discussed below, these countries have enacted laws to bring the FDI promotion policies into fruition. While these laws have facilitated a perception that these countries are prepared to accept foreign business interests on terms that are widely-proclaimed by African countries’ economic advisors, the laws alone are not necessarily panacea for resolving the low levels of FDI flowing to African countries.<sup>26</sup>

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18. *Id.* at ix.

19. *Id.* at x-xi.

20. *Id.* at 16.

21. *Public Enterprises (Privatisation and Commercialisation) Decree* (Decree No. 28 of 1999) (Nigeria), available at <http://www.nlii.org/files/privatisation.html.pdf>. This statute was preceded by the *Privatization and Commercialization Decree* (Decree No. 25 of 1988).

22. See Edwin Etiyebo, *Privatization in Nigeria, Social Welfare, and the Obligation of Social Justice* 2 J. ECON. 37 (2011).

23. MEDIUM-TERM NATIONAL DEVELOPMENT POLICY FRAMEWORK: GHANA SHARED GROWTH AND DEVELOPMENT AGENDA (GSGDA), 2010-2013 (2010), available at <http://www.imf.org/external/pubs/ft/scr/2012/cr12203.pdf>.

24. See *The Divestiture Program*, <http://www.dic.com.gh/div-prog/index.html> (last visited Nov. 9, 2012 4:18 PM); *Divestiture of State Interests (Implementation) Act*, P.N.D.C.L. 326 (1993) (Ghana); Kojo Appiah-Kubi, *State-owned Enterprises and Privatisation in Ghana* 39 J. MODERN AFR. STUD. 197 (2001).

25. UNCTAD, *Investment Policy Review: Ghana*, *supra* note 14, at 5.

26. See Khrushchev U.K. Ekwueme, *Nigeria’s Principal Investment Laws in the Context of International Law and Practice*, 49 J. AFRI. L. 177 at 204-206 (2005).

### A. *Domestic Legal Initiatives for Attracting FDI in Nigeria and Ghana*

Nigeria and Ghana adopt various domestic legal initiatives in order to encourage and promote the establishment of FDI in their territories. Beyond establishment, the governments of these countries also make legal provisions for the protection of FDI established in their countries. These legal initiatives include constitutional protection, legislative enactments, and incentives including tax and other financial incentives.

Constitutional protection often includes protection against expropriation/nationalization, an outline of compensation standards, and protection against deprivation of property rights. The Constitution of the Federal Republic of Nigeria 1999 ("Nigeria Constitution") provides for the protection of property, which includes both domestic and foreign investment.<sup>27</sup> Section 44(1) of the Nigerian Constitution provides that:

No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things –

- (a) requires the prompt payment of compensation therefore and
- (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.<sup>28</sup>

Section 46 permits judicial intervention in the event of an actual or intended violation of this right and other related rights.<sup>29</sup> It is noteworthy that the protection from deprivation of property rights is one of the fundamental rights constitutionalized in Nigeria.<sup>30</sup> Section 20 of the Constitution of the Republic of Ghana 1992 ("Ghana Constitution") also includes a fundamental right to the protection of property.<sup>31</sup> In Ghana, compensation must be prompt, fair and adequate.<sup>32</sup> Section 36(4) of the Ghana Constitution specifically provides for the encouragement of foreign investment in Ghana subject to domestic law regulating investment in the country.<sup>33</sup>

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27. CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (1999), § 44, available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>.

28. *Id.* § 44(1).

29. *Id.* § 46.

30. *Id.* § 44.

31. CONSTITUTION OF THE REPUBLIC OF GHANA (1992), § 20, available at <http://www.judicial.gov.gh/constitution/home.htm>.

32. *Id.* § 20(2)(a).

33. *Id.* § 36(4).



Beyond the constitutions, these countries also enact investment promotion legislation and create investment promotion agencies. The Ghana Investment Act, 1994, establishes the Investment Promotion Centre which is charged with the role of encouraging and promoting investment in Ghana.<sup>34</sup> Ghana's Investment Promotion Centre expresses confidence in the country's ability to attract major investors.<sup>35</sup> The Ghana Investment Act encourages participation of foreigners in Ghana's investment landscape.<sup>36</sup> Its provisions are typical, including clauses on benefits and incentives,<sup>37</sup> guarantees against expropriation, and definitions of circumstances under which the Government may acquire investments upon "payment of fair and adequate compensation,"<sup>38</sup> unconditional transferability of profits and dividends,<sup>39</sup> and arbitral forms of settling investor-state disputes.<sup>40</sup> For its part, the Nigerian Investment Promotion Commission Act ("NIPC Act") establishes the Nigerian Investment Promotion Commission to "encourage, promote and co-ordinate investment in the Nigerian economy."<sup>41</sup> The NIPC Act liberalizes the ownership of investment in Nigeria,<sup>42</sup> allowing foreign investors, subject to a few exceptions,<sup>43</sup> to "invest and participate in the operation of any enterprise in Nigeria."<sup>44</sup> UNCTAD notes that "Nigeria adopted one of the most liberal regimes in Africa for the entry of foreign investors, virtually opening all its economy to FDI and reversing the severe restrictions on FDI imposed by the 'indigenization' policy of the 1970s and 1980s."<sup>45</sup> Like Ghana's statute, unconditional transferability of profits and dividends,<sup>46</sup> protection against expropriation,<sup>47</sup> and arbitral settlement of

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34. Ghana Investment Act (No. 478) (1994), § 1-2, available at [http://www.gipcghana.com/publications/1318871581\\_Investment\\_Law070627114453.pdf](http://www.gipcghana.com/publications/1318871581_Investment_Law070627114453.pdf).

35. Ghana Investment Promotion Centre, *First Quarter 2012 Investment Report*, 8 The GIPC Quarterly Update 1, (2012), [http://www.gipcghana.com/publications/1336661671\\_Q1%202012%20Investment%20Report.pdf](http://www.gipcghana.com/publications/1336661671_Q1%202012%20Investment%20Report.pdf).

36. Ghana Investment Act § 3.

37. *Id.* § 23-25.

38. *Id.* § 28.

39. *Id.* § 27.

40. *Id.* § 29.

41. Nigerian Investment Promotion Commission Act No. 16 (1995) Cap. (N117), § 1, 4, available at <http://www.nigeria-law.org/Nigerian%20Investment%20Promotion%20Commission%20Act.htm>.

42. See Ekwueme, *supra* note 26, at 177 ("The basic philosophy underpinning the NIPC Act is liberal, open door policy to investments, and its aim is the stimulation of local and foreign investments.").

43. Nigerian Investment Promotion Commission Act § 18.

44. *Id.* § 17.

45. UNCTAD, *Investment Policy Review: Nigeria*, *supra* note 14, at 23.

46. Nigerian Investment Promotion Commission Act § 24. See also Foreign Exchange (Monitoring and Miscellaneous Provisions) Act Decree No. (17) (1995) Cap. (F34), § 15(4) (Nigeria).

47. Nigerian Investment Promotion Commission Act § 25.

disputes between the government and investors,<sup>48</sup> are guaranteed in the NIPC Act.

Tax and other fiscal incentives are also common as investment promotion initiatives. Nigeria grants tax holidays to industries with pioneer status,<sup>49</sup> tax relief for research and development, and extensive incentives in free trade zones.<sup>50</sup> Sometimes, extensive fiscal incentives are granted on a project-basis, a good example being the capital-intensive Nigeria Liquefied Natural Gas ("NLNG") project.<sup>51</sup> The Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act provides extensive incentives for the NLNG project while also providing international arbitration for the settlement of investor-state disputes.<sup>52</sup> The Deep Offshore and Inland Basin Production Sharing Contracts Act is another Nigerian statute that provides fiscal incentives to the companies that operate under production sharing contracts in the deep offshore and inland basin areas.<sup>53</sup>

Ghana's Free Zone Act of 1995 establishes free zones in Ghana and a Free Zones Board.<sup>54</sup> With the purpose of facilitating economic development and regulating activities in free zones in Ghana, the Free Zone Act provides incentives to investors in free zones.<sup>55</sup> Incentives include exemption from paying income tax on profits for the first ten years of a project, an income tax rate not exceeding eight percent after ten years, and exempting shareholders from withholding taxes on dividends generated from free zone investments.<sup>56</sup> In addition to these incentives, enterprises in free zones are guaranteed unconditional transfer of profits, dividends and other funds,<sup>57</sup> they are protected from nationalization and expropriation,<sup>58</sup> and they may have recourse to international arbitration in addition to other dispute settlement mechanisms.<sup>59</sup> Additional incentives are available in other statutes,

48. *Id.* § 26.

49. See Industrial Development (Income Tax Relief) Act (1971) Cap. (179) (Nigeria), available at <http://www.placng.org/lawsfnigeria/node/182>.

50. See Nigeria Export Processing Zones Authority Decree No. (63) (1992), §18.

51. See Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act No. 39 (1990) amended by Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act No. 113 (1993).

52. *Id.*

53. See Deep Offshore and Inland Basin Production Sharing Contracts Decree No. (9) (1999), available at <http://www.nigeria-law.org/DeepOffshoreAndInlandBasinProductionSharingContractsDecree1999.htm>, amended by Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Decree No. (26) (1999), available at [http://www.nigeria-law.org/DeepOffshoreAndInlandBasinProductionSharingContracts\(Amendment\)Decree1999.htm](http://www.nigeria-law.org/DeepOffshoreAndInlandBasinProductionSharingContracts(Amendment)Decree1999.htm).

54. The Free Zone Act No. (504) (1995) (Ghana), available at [http://www.gipcghana.com/publications/FREE%20ZONES%20ACT%201995%20\\_ACT%20504\\_070627120415.pdf](http://www.gipcghana.com/publications/FREE%20ZONES%20ACT%201995%20_ACT%20504_070627120415.pdf).

55. *Id.*

56. *Id.* § 28.

57. *Id.* § 30.

58. *Id.* § 31.

59. *Id.* § 32.

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including “tax holidays, capital allowances, locational incentives, customs duty exemptions and other inducements.”<sup>60</sup>

Both Ghana and Nigeria adopt extensive incentive schemes in order to attract foreign investment. The sustainability of these schemes has been the subject of debate, with the incentives in Ghana’s Investment Act, being critiqued as follows:

The Ghana Investment Act, 1994, Act 478 provides no incentives to local SMEs [Small and Medium Scale Enterprises]; the incentive regime only favours foreign direct investments to the disadvantage of local SMEs. This, clearly, is an anomaly, which the new GIPC [Ghana Investment Promotion Centre] law shall address. It will also be necessary to include SMEs in all PPPs and local content arrangements.<sup>61</sup>

On the domestic plane, Nigeria and Ghana are heavily invested in attracting FDI. In fact, Nigeria’s current government attaches its foreign policy initiatives to attracting FDI.<sup>62</sup> Following a brief discussion of international investment promotion mechanisms, this article focuses on the extent to which local content initiatives and community development agreements facilitate or inhibit the investment promotion agenda of the Nigerian and Ghanaian governments.

### B. *International and Regional Investment Treaties*

African countries, like other countries around the world, conclude investment treaties. Many of these treaties are concluded with developed countries, but by 2008, African countries had concluded 335 bilateral investment treaties (“BITs”) with other Third World countries.<sup>63</sup> African countries account for twenty-seven percent of all BITs.<sup>64</sup> Like most African countries, Ghana has concluded BITs with both developed countries and Third World countries.<sup>65</sup> Its treaties include the traditional standards of treatment for protecting foreign investment and investors.<sup>66</sup> Nigeria has also concluded several BITs with both developed and Third World country-partners.<sup>67</sup> The ratified

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60. UNCTAD, Investment Policy Review: Ghana, *supra* note 14, at 29-30. See also Ghana Inv. Promotion Ctr., *Investment Incentives, Benefits and Guarantees*, GIPC <http://www.gipcghana.com/page.php?page=176&section=28&typ=1&subs> (Last visited Oct. 30, 2012).

61. GSGDA, *supra* note 23, at 30.

62. Ahamefula Ogbu, *Nigeria’s Foreign Policy Now Tied to FDI*, This Day Live Newspaper (July 21, 2011), <http://www.thisdaylive.com/articles/nigeria-s-foreign-policy-now-tied-to-fdi/95418/>.

63. U.N. Conference on Trade & Dev., *Economic Development in Africa Report 2010-South-South Cooperation: Africa and the New Forms of Development Partnership* (New York: Geneva: United Nations, 2010) 91.

64. *Id.*

65. See UNCTAD, Investment Policy Review: Ghana, *supra* note 14, at 25-26.

66. *Id.* at 26-27.

67. For a list of Nigeria’s BITs, see UNCTAD, Investment Policy Review: Nigeria, *supra* note 14, at 28.

treaties contain investment protection guarantees including national treatment, most favoured nation treatment, fair and equitable treatment, repatriation of investment and returns, and prompt, adequate and effective compensation in the event of lawful expropriations.<sup>68</sup>

Regional investment treaties are also becoming prevalent in Africa. The Economic Community of West African States ("ECOWAS") Energy Protocol,<sup>69</sup> the South African Development Community ("SADC") Protocol on Finance and Investment ("SADC Finance and Investment Protocol")<sup>70</sup> and the Common Market for Eastern and Southern Africa's ("COMESA") Investment Agreement for the COMESA Common Investment Area (CCIA) ("COMESA Investment Agreement"),<sup>71</sup> are examples of African governments' initiatives to include investment promotion and protection in their regional integration efforts. Contents of these regional treaties vary with the ECOWAS Energy Protocol being the most traditional and the SADC Finance and Investment Protocol incorporating more economic development clauses and exceptions. Regional investment treaties and other South-South investment treaties are potentially important instruments for African countries given the volume of FDI that is exchanged between regions or among African countries and their Third World partners. In the first quarter of 2012, Ghana reports that Nigeria ranked second on its list of top ten foreign investors by the number of registered projects.<sup>72</sup> China, India, Lebanon and South Africa are the other Third World countries on Ghana's list of top ten investor countries by number of registered projects.<sup>73</sup> African countries, with exceptions like Angola and Libya, are also parties to multilateral treaties like the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").<sup>74</sup>

68. *Id.* at 29.

69. *ECOWAS Energy Protocol A/P4/1/03*, Jan. 31, 2003, [http://www.comm.ecowas.int/sec/en/protocoles/WA\\_EC\\_Protocol\\_English\\_DEFINITIF.pdf](http://www.comm.ecowas.int/sec/en/protocoles/WA_EC_Protocol_English_DEFINITIF.pdf). ECOWAS states are also working on investment promotion and protection through the *Supplementary Act. Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the modalities for its Implementation within ECOWAS*, Dec. 19, 2008, [http://www.privatesector.ecowas.int/en/III/Supplementary\\_Act\\_Investment.pdf](http://www.privatesector.ecowas.int/en/III/Supplementary_Act_Investment.pdf).

70. *Protocol on Finance and Investment*, Angl.- Bots. – Dem. Rep. Congo – Lesotho – Madagascar – Malawi – Mauritius – Mozam. – Namib. – S. Afr. – Swaz. – Tanz. – Zam. – Zim, 2006, <http://www.sadc.int/english/key-documents/protocols/protocol-on-finance-and-investment/>.

71. *Investment Agreement for the COMESA Common Investment Area*, COMESA Authority of Heads of State and Government, May 23, 2007, [http://programmes.comesa.int/index.php?option=com\\_content&view=article&id=111&Itemid=149](http://programmes.comesa.int/index.php?option=com_content&view=article&id=111&Itemid=149).

72. Ghana Investment Promotion Centre, *supra* note 35, at 2 (Nigeria ranks third on the list of top 10 by the value of registered FDI projects).

73. *Id.*

74. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 5 I.L.M. 532, available at [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf). For a list of ICSID member states see, International Centre for Settle-

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958<sup>75</sup> also has a large African representation even though countries like Angola, Gambia, Equatorial Guinea, Libya and Sierra Leone are not parties to the Convention.<sup>76</sup>

### III. FDI, LOCAL ECONOMIES AND LOCAL COMMUNITIES

As demonstrated in the foregoing discussion, the governments of Ghana and Nigeria have adopted legal mechanisms to attract FDI. In spite of these legal changes and other macroeconomic changes that are being made, African peoples remain among the poorest groups of people in the world. In order to address the gap between adopting policies and laws that reflect prescribed 'best practices' and continuing to face serious socio-economic challenges, several mechanisms are being adopted *inter alia* to addresses endemic corruption, revamp ailing physical infrastructure, train regulators in order to ensure that they acquire the much-needed capacity, and generally work towards democratic governance. Among these gap-filling exercises has been a specific turn to local content policies and legislation in some sectors of West African countries' economies. Nigeria and Ghana have adopted local content policies and legislation in the oil and gas industry. In addition to government-led local content policies and legislation, private initiatives that foreign investors and local communities engage in to facilitate the socio-economic development of these communities – CDAs – are also garnering attention. Such initiatives are now common in various parts of the world, and following a discussion of local content laws, the balance of this part of the article focuses on Nigeria and Ghana's experiences with CDAs. The discussion here focuses on the extent to which these initiatives effectively address the concerns of local communities and whether responding to the concerns of these communities in an effective manner is compatible with the investment promotion and protection standards that many African governments have overtly pursued. In essence, to what extent are initiatives that incorporate the quest of local communities for agency and concrete participation in decision-making, in addition to socio-economic devel-

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ment of Investment Disputes, *List of Contracting States and Other Signatories of the Convention (as of July 25, 2012)*, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=english> (158 states have signed the ICSID Convention and 147 states have ratified.).

75. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 330 UNTS 3 (1959), available at [http://www.uncitral.org/pdf/english/texts/arbitration/NY-convention/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-convention/XXII_1_e.pdf).

76. U.N. Comm'n on Int'l Trade Law, *Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Nov. 10, 2012).

opment, compatible with the active investment promotion and protection initiatives of West African governments?

A. *Government-Led Initiatives: Local Content Policies and Legislation*

The Nigerian Oil and Gas Industry Content Development Act (“Local Content Act”) was enacted in order to ensure that Nigerians benefit directly from contracts and employment in the oil and gas industry.<sup>77</sup> The Local Content Act, which establishes the Nigerian Content Development and Monitoring Board, regards compliance with the Act and promotion of Nigerian content development as major criteria for the award of licences, permits and other interests in operations in the Nigerian oil and gas industry.<sup>78</sup> The Act requires that “first consideration” should be given to Nigerian independent contractors in the award of oil blocks, licences, and other contracts.<sup>79</sup> “Exclusive consideration” is to be given to “Nigerian indigenous service companies which demonstrate ownership of equipment, Nigerian personnel and capacity to execute such work to bid on land and swamp operating areas of the Nigerian oil and gas industry for contracts and services contained in the Schedule” to the Act.<sup>80</sup> Operators must submit a Nigerian Content Plan,<sup>81</sup> which must contain provisions that ensure that first consideration is given to services provided in Nigeria and goods manufactured in Nigeria, and also ensure that Nigerians are given first consideration for training and employment in the plan’s work programme.<sup>82</sup> The Act also requires operators to make reasonable efforts to supply training for Nigerians where they are not employed because they lack the requisite training<sup>83</sup> while also allowing, at the management level, for “expatriate positions to take care of investor interests.”<sup>84</sup> Employment at the junior or intermediate levels is reserved for Nigerians.<sup>85</sup> Other provisions include principles for evaluating bids,<sup>86</sup> technology transfer,<sup>87</sup> use of insurance brokers registered in Nigeria,<sup>88</sup> retaining the services of Nigerian lawyers or

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77. Nigerian Oil and Gas Industry Content Development Act, 2010, *available at* [http://www.ncdmb.gov.ng/images/DOWNLOADS/nc\\_act.pdf](http://www.ncdmb.gov.ng/images/DOWNLOADS/nc_act.pdf) [hereinafter Local Content Act].

78. *Id.* § 3(3).

79. *Id.* § 3(1).

80. *Id.* § 3(2).

81. *Id.* § 7.

82. Local Content Act § 10(1).

83. *Id.* § 30.

84. *Id.* § 32.

85. *Id.* § 35.

86. *Id.* § 16.

87. *Id.* § 44.

88. *Id.* § 49.

Nigerian law firms with offices located in Nigeria,<sup>89</sup> and financial services.<sup>90</sup> The schedule to the Act outlines the level of Nigerian content required for activities and services and also sets the unit of measurement. The Local Content Act applies to “all *subsequent* oil and gas arrangements, agreements, contracts or memoranda of understanding relating to any operation or transaction in the Nigerian oil and gas industry . . . .”<sup>91</sup>

The Local Content Act is a recent piece of legislation and the extent to which its purposes will be achieved can only be measured after implementation. The extent to which the indigenous companies can provide the required services may determine the success of the provisions. Also, indigenization was a major policy that Nigerian governments pursued in the 1970s but ultimately reversed in favour of foreign investment following liberalization of the economy.<sup>92</sup> Hence, the extent to which the Local Content Act can be reconciled with the foreign investment promotion focus of the government is a necessary inquiry. In addition, Nigeria is a party to several investment treaties, many of which require national treatment standards for foreign investment, and some of which prohibit some local content requirements.<sup>93</sup> Reconciling the provisions of the Local Content Act with these treaty provisions should be an important research agenda in the coming years.

Nigeria is not alone in the local content focus in the oil and gas sector. Ghana’s Ministry of Energy released the Local Content and Local Participation in Petroleum Activities Policy Framework.<sup>94</sup> The Ghanaian government’s vision is “deploying an effective local content, capacity development and local participation policy as the platform for achieving the goals for the oil and gas sector with participation by Ghanaian citizens in all roles, at all levels and in all activities relating to the oil and gas value chain.”<sup>95</sup> The policy directions resemble, to an extent, the provisions in Nigeria’s Local Content Act.<sup>96</sup> First, all entities involved in Ghana’s oil and gas industry are to incorporate local content in their project development as well as have a Local Content

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89. *Id.* § 51.

90. *Id.* § 52.

91. *Id.* § 6 (emphasis added).

92. See UNCTAD, *Investment Policy Review: Nigeria*, *supra* note 14, at 3-4 (discussing Nigeria’s indigenization policy of the 1970s). See also Chibuzo S.A. Ogbuagu, *The Nigerian Indigenization Policy: Nationalism or Pragmatism?*, 82 AFR. AFF. 241 (1983) (a critique of Nigeria’s indigenization policy of the 1970s).

93. See, the discussion in part IV of this article.

94. MINISTRY OF ENERGY, REPUBLIC OF GHANA, *LOCAL CONTENT AND LOCAL PARTICIPATION IN PETROLEUM ACTIVITIES – POLICY FRAMEWORK* (2011), available at <http://www.energymin.gov.gh/wp-content/uploads/New-Local-Content-on-Petroleum-Activities.pdf>.

95. *Id.* at 8.

96. *Id.* at 10-19.

Plan.<sup>97</sup> Second, Ghanaian independent operators receive first consideration in the award of oil blocks, lifting licences and contracts, where they demonstrate capacity.<sup>98</sup> Third, “as far as practicable,” all operators in the oil and gas industry are to use goods produced and services provided in Ghana.<sup>99</sup> Where all else is equal, a preference for Ghanaian entities is mandated.<sup>100</sup> For bids, where they are otherwise equal, “the bid containing the highest level of local content shall be selected.”<sup>101</sup> Fourth, the policy requires the employment and training of Ghanaians with specific targets for different levels.<sup>102</sup> Fifth, technology transfer is required<sup>103</sup> and sixth, measures are to be adopted to support local capability development.<sup>104</sup> The seventh policy directive encourages the participation of women in the oil and gas industry.<sup>105</sup> Implementation of the policy directions through legislation is the eighth policy direction<sup>106</sup> and the ninth provides for the establishment of the oil and gas business development and local content fund to “be used primarily for education, training, research and development in oil and gas.”<sup>107</sup>

Ghana’s oil and gas industry and local content policy are fairly new.<sup>108</sup> This policy is being adopted at a time when the government is actively seeking to attract FDI. To what extent are these reconcilable? The oil and gas industry in African countries has a significant foreign presence.<sup>109</sup> With the increasing demand for energy resources all over the world, it is unlikely that foreign oil and gas companies would refrain from investing in countries like Ghana and Nigeria because of their local content policies and legislation. If any financial benefit might be lost through local content laws, it is likely compensated through financial and other incentives. In addition, if appropriately managed and effectively executed, the local content laws have the potential to integrate the local economy with foreign investment activities. However, concerns remain about the arguable trade-distorting tendencies of local content measures and their compatibility with in-

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97. *Id.* at 11.

98. *Id.*

99. *Id.* at 12.

100. *Id.*

101. *Id.*

102. *Id.* at 14-15.

103. *Id.* at 16.

104. *Id.* at 16-17.

105. *Id.* at 18.

106. *Id.*

107. *Id.*

108. *Id.* at 5.

109. EVARISTUS OSHIONEBO, REGULATING TRANSNATIONAL CORPORATIONS IN DOMESTIC AND INTERNATIONAL REGIMES: AN AFRICAN CASE STUDY 7 (Univ. of Toronto Press 2009).



ternational obligations. These concerns are discussed in part IV of this article.

### B. *Private Initiatives: Community Development Agreements*

For several decades, many African countries have been involved in mineral and petroleum extraction. While these natural resources have been the source of significant revenue for some of these countries, a recurring theme has been local community dissatisfaction with activities surrounding natural resource extraction, the disbursement of revenue from the exploitation of these resources, and general dissatisfaction with the endemic poverty that has plagued some of these countries and people. Sometimes, natural resource extraction has contributed to factors leading to civil war in some African countries.<sup>110</sup> Hence, the story of foreign investment promotion is incomplete without navigating the complex social framework within which FDI policies and laws are situated.

As a result of the intensity of some encounters between foreign investors and host communities, some African countries are becoming more aware of the relevance of local community participation to the socio-economic empowerment of African peoples. Foreign investors also sometimes participate in initiatives that ensure that they acquire a “social licence” to operate in these communities.<sup>111</sup> Prominent among these initiatives are the Community Development Agreements (“CDAs”).<sup>112</sup> Companies like Chevron and Shell have adopted the Global Memorandum of Understanding (“GMOU”) model of investor-community agreements in Nigeria.<sup>113</sup> Newmont has also con-

110. See Paul Collier & Anke Hoeffler, *Greed and Grievance in Civil War*, 56 Oxford Econ. Papers 563 (2004); Understanding Civil War: Evidence and Analysis. Volume 1: Africa (Paul Collier & Nicholas Sambanis eds., 2005); *But see* MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* (Princeton Univ. Press 2001).

111. See Katherine Trebeck, *Corporate Social Responsibility and Democratisation: Opportunities and Obstacles*, in *Earth Matters: Indigenous Peoples, the Extractive Industries and Corporate Social Responsibility* 12-13 (Ciaran O’Faircheallaigh & Saleem Ali eds., Greenleaf Publishing Ltd. 2008) (noting that “[g]ood corporate community relations, stakeholder engagement and consultation and efforts to meet particular community demands are therefore means by which companies seek to improve reputation among those with the ability to impact operations, and thereby attain a social license to operate.”).

112. See Sunrita Sarkar et al., *Envtl. Res. Mgmt. Mining Community Development Agreements – Practical Experiences and Field Studies* (2010) [hereinafter ERM, Mining CDAs].

113. On Chevron’s GMOU’s in Nigeria, see *GMOU Participatory Stakeholder Evaluation: A Joint Evaluation of the Global Memoranda of Understanding between Chevron, Community Organizations and State Governments in the Niger Delta* (Oct. 2008), available at [http://cbuilding.org/sites/default/files/GMOU\\_Evaluation\\_Final.pdf](http://cbuilding.org/sites/default/files/GMOU_Evaluation_Final.pdf). For Shell’s GMOU’s, see *Shell in Nigeria: Global Memorandum of Understanding*, available at [http://www-static.shell.com/static/nga/downloads/pdfs/briefing\\_notes/gmou.pdf](http://www-static.shell.com/static/nga/downloads/pdfs/briefing_notes/gmou.pdf) (Apr. 2012). Oil producing companies in Nigeria also adopt traditional philanthropic approaches when engaging with local communities. See Olatoye Ojo, *Nigeria: CSR as a Vehicle for Economic Development*, in Samuel O. Idowu & Walter Leal

cluded CDAs with communities in the Ahafo mine community in Ghana. These private initiatives, which involve a significant non-state actor presence, are agreements between local communities and investors. Private initiatives are usually investor and/or local community driven. Nevertheless, some of these instruments are not entirely privately formulated. Some are mandated by legislation.<sup>114</sup>

Broadly defined, CDAs are “any negotiated agreement between industry . . . and communities agreeing how these communities will access development initiatives.”<sup>115</sup> When defined this broadly, CDAs include GMOUs and Impact and Benefits Agreements (“IBAs”). IBAs are commonly used in northern Canada and are based on the government’s relationship with Canada’s Aboriginal communities.<sup>116</sup> GMOUs, which are used in Nigeria, are specific to the oil and gas industry.<sup>117</sup> Chevron and Shell use GMOUs which are successors of the old Memoranda of Understanding.<sup>118</sup> They are somewhat philanthropic gestures couched in the form of agreements. GMOUs are essentially a social license to operate; a means of mitigating social risk in Nigeria’s Niger Delta.

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Filho eds., *Global Practices of Corporate Social Responsibility* 393, 402-09 (Springer 2009); Uwem E. Ite, *Multinationals and Corporate Social Responsibility in Developing Countries: A Case Study of Nigeria*, 11 Corp. Soc. Responsib. Env’t Mgmt. 1 (2004); Uwem Ite, *Poverty Reduction in Resource-Rich Developing Countries: What have Multinational Corporations got to do with it?*, 17 J. Int’l Dev. 913 (2005).

114. See, e.g., Nigerian Minerals and Mining Act (2007) Act No. (20), available at <http://faolex.fao.org/docs/pdf/nig92382.pdf>.

115. ERM, MINING CDAs, *supra* note 112, at 2.

116. On IBAs in Canada, see generally Janet Keeping, *Thinking about Benefit Agreements: An Analytical Framework* (Northern Minerals Program, Working Paper No. 4: Canadian Arctic Res. Comm. 1998); Irene Sosa & Karyn Keenan, *Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada*, CANADIAN ENVTL. LAW ASS’N, Oct. 2001, <http://s.cela.ca/files/uploads/IBAeng.pdf>; Lindsay Galbraith et al., *Towards a new Supraregulatory Approach to Environmental Assessment in Northern Canada*, 25 IMPACT ASSESSMENT AND PROJECT APPRAISAL 27 (2007); Courtney Fidler & Michael Hitch, *Impact Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice*, 35 ENVIRONMENTS J., 49 (2007); Steven A. Kennett, CAN. INST. OF RES. LAW, ISSUES AND OPTIONS FOR A POLICY ON IMPACT AND BENEFIT AGREEMENTS FOR THE NORTHERN TERRITORIES (1999) (prepared for the Mineral Res. Directorate, Dep’t of Indian Affairs and Northern Dev.); Janet Keeping, *The Legal and Constitutional Basis for Benefits Agreements: A Summary*, 25 Northern Perspectives (1999-2000); Sandra Gogal et al., *Aboriginal Impact and Benefit Agreements: Practical Considerations*, 43 ALTA. L. REV. 129 (2005); Ken J. Caine & Naomi Krogman, *Powerful or Just Plain Power-Full?: A Power Analysis of Impact and Benefits Agreements in Canada’s North*, 23 ORGANIZATION & ENV’T 76 (2010).

117. See Uwafiokun Idemudia, *Oil Extraction and Poverty Reduction in the Niger Delta: A Critical Examination of Partnership Initiatives* 90 J. BUS. ETHICS 91 (2009). See also Anna Zalik, *Oil Futures: Shell’s ‘Trilemma Triangle’ and the ‘Force of Community’* (Nov. 3, 2006), <http://globetrotter.berkeley.edu/bwep/colloquium/papers/Zalik2006.pdf>.

118. Ibrionke T. Odumosu-Ayanu, *An Alternative Investment Law Approach?: Analysis of a Multi-Actor Investment Framework* (unpublished manuscript) (on file with author).

Like other cases of community-industry agreements,<sup>119</sup> CDAs are not entirely new forms of agreement. While analyses of these instruments in the context of African countries is fairly recent, these agreements have been used in industrialized countries like Canada and Australia, especially in relationships between Aboriginal communities and mining companies for a longer period of time.<sup>120</sup> Some CDAs are (mostly) corporate social responsibility (“CSR”) initiatives. In this article, the term CSR mostly refers to industry’s service provision initiatives. CDAs are local agreements that often involve transnational actors, thereby generating analysis that extends beyond local borders.<sup>121</sup> CDAs purport to ensure benefit sharing.<sup>122</sup> These negotiated agreements incorporate provisions that determine how local communities will access development initiatives. They are most common in the extractive industries. They are strategic community investment initiatives fostering social licenses to operate in host communities.<sup>123</sup> Just as the contents of CDAs vary from agreement to agreement, the impetus for CDAs varies across stakeholders. While local communities may support community development, they may be wary of CDAs that may involve a long negotiation process and prefer “immediate tangible benefits resulting from classic philanthropy.”<sup>124</sup> Governments may encourage CDAs, but may be reluctant where conflicts of interest exist between the local communities and government.<sup>125</sup> For industry, it appears that there is recognition and even an embrace of the notion that CSR initiatives are good for business.<sup>126</sup> However, it

119. See Natasha A. Affolder, *Rethinking Environmental Contracting*, 21 J. ENVTL. L. & PRAC. 155 (2010), for a discussion of environmental contracts.

120. See Ciaran O’Faircheallaigh, *Understanding Corporate-Aboriginal Agreements on Mineral Development: A Conceptual Framework*, in EARTH MATTERS: INDIGENOUS PEOPLES, THE EXTRACTIVE INDUSTRIES AND CORPORATE SOCIAL RESPONSIBILITY, *supra* note 111, at 67.

121. On CSR in international law, see Peter Muchlinski, *Corporate Social Responsibility and International Law: The Case of Human Rights and Multinational Enterprises*, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 431, 432-33 (Doreen McBarnet et al. eds., 2007); JENNIFER ZIERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW (2006). See Jarrod Hepburn & Vuyelwa Kuuya, *Corporate Social Responsibility and Investment Treaties*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 585 (Marie-Claire Cordonier Segger et al. eds., 2011), for specific commentary on CSR and foreign investment law.

122. ERM, MINING CDAs, *supra* note 112, at 11.

123. *Id.*

124. *Id.*

125. *Id.* at 14.

126. See Ciaran O’Faircheallaigh, *Introduction* in EARTH MATTERS: INDIGENOUS PEOPLES, THE EXTRACTIVE INDUSTRIES AND CORPORATE SOCIAL RESPONSIBILITY *supra* note 111, at 3 (“[A] quick check of the websites of most major companies operating in the extractive industries will quickly reveal the widespread acceptance of CSR and the scale of activities and expenditures companies undertake to demonstrate their support for CSR principles.”). *Id.* at 4 (“[A]s the risks of being sued increase and now involve multiple legal systems, many companies feel it is better to use CSR policies to try to avoid problems that cause legal suits in the first place.”).

has been noted that government regulation of CDAs might not gather as much industry support.<sup>127</sup>

Many CSR initiatives are often philanthropic gestures, with the impetus for CDAs being “sustainable benefit sharing models” driven by governments and civil society.<sup>128</sup> There is no single CDA model since the needs and ideas of stakeholders vary across projects and regions.<sup>129</sup> Government approaches to CDA regulation also varies. Depending on the country and the sector, CDAs may be mandated by legislation or they may be voluntary. In Ghana, there is no legal requirement for CDAs although there are some CDAs in the mining industry; however, it is reported that the country is seeking to include community development programs in its policy framework.<sup>130</sup> In Nigeria, The Nigerian Minerals and Mining Act of 2007, defines CDAs and makes provisions for the contents of these agreements. Section 116(1) of the Act provides as follows:

Subject to the provisions of this section, the Holder of a Mining Lease, Small Scale Mining Lease or Quarry Lease shall prior to the commencement of any development activity within the lease area, conclude with the host community where the operations are to be conducted an agreement referred to as a Community Development Agreement or other such agreement that will ensure the transfer of social and economic benefits to the community.<sup>131</sup>

For inclusion in Nigeria’s CDAs are issues like educational scholarships, technical training, employment opportunities, financial or other support for the development and maintenance of infrastructure like roads, water and power, assistance with the creation, development and support of small scale enterprises, and marketing of agricultural products.<sup>132</sup> The overarching theme of the CDAs is “undertakings with respect to the social and economic contributions that the project will make to the sustainability” of host communities.<sup>133</sup> According to section 117 of the Nigerian Minerals and Mining Act, CDAs are to “specify appropriate consultative and monitoring frameworks between the Mineral title holder and the host community, and the means by which the community may participate in the planning, implementa-

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127. ERM, MINING CDAs, *supra* note 112, at 16.

128. *Id.* at 11.

129. The World Bank Group commissioned a consultant to draft a model Community Development Agreement Regulations. See James M. Otto, *Community Development Agreement: Model Regulations and Example Guidelines* (World Bank Group Contract Number 7154096 – Final Report) June 2010, [http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2011/05/02/000386194\\_20110502032111/Rendered/PDF/614820WP0P11781nal0Report0June02010.pdf](http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2011/05/02/000386194_20110502032111/Rendered/PDF/614820WP0P11781nal0Report0June02010.pdf).

130. ERM, MINING CDAs, *supra* note 112, at 16.

131. Nigerian Minerals and Mining Act, 2007, *supra* note 114, § 116(1).

132. *Id.* § 116(3).

133. *Id.* § 116(2).

tion, management and monitoring of activities carried out under the agreement.”<sup>134</sup> The CDA model articulated in the Nigerian Minerals and Mining Act adopts a classic CSR approach with a focus on service provision.

While there is not yet a legal requirement for CDAs in Ghana’s mining industry, some industry partners adopt voluntary community development initiatives.<sup>135</sup> The Newmont Ahafo project is a prominent example. Newmont, a transnational mining company, entered into negotiations with the chiefs and people of the Ahafo Mine Local Community in Ghana.<sup>136</sup> Over the course of about three years, CDAs were developed and concluded with the communities.<sup>137</sup> The Ahafo Social Responsibility Forum<sup>138</sup> was created and three agreements have been concluded – the Ahafo Social Responsibility Agreement,<sup>139</sup> the Newmont Ahafo Development Foundation Agreement<sup>140</sup> and the Ahafo Mine Local Community Local Employment Agreement.<sup>141</sup>

The Ahafo Social Responsibility Agreement, signed in May 2008, is an agreement between Newmont Ghana Limited and the chiefs and peoples of ten community towns that comprise the Ahafo mine community.<sup>142</sup> These are community towns “physically located on the Mining Lease of Newmont Ghana Gold Limited,” as well as communities and traditional areas with significant amounts of their traditional land covered by the Mining Lease, within the current area of the Ahafo Mine Project’s operational area.<sup>143</sup> Through the Social Responsibility Agreement, which remains in force until the final surrender of the Ahafo Mine Mining Lease,<sup>144</sup> the company commits itself to sustainable economic and social development and the community is

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134. *Id.* § 117.

135. ERM, MINING CDAs, *supra* note 112, at 22.

136. *Id.* at 26.

137. *Id.* See Newmont Ahafo Development Foundation, 2009 Annual Report: Creating Sustainable Futures through Partnerships, 4, <http://www.nadef.org/downloads/2/228.pdf> (In the 2009 Annual Report of the Newmont Ahafo Development Foundation, it is reported that deliberations went on for over two years.).

138. Newmont, *The Ahafo Social Responsibility Forum (ASRF)*, <http://www.newmont.com/features/our-communities-communities-features/The-Ahafo%20Social-Responsibility-Forum-A-SRF>.

139. The Ahafo Social Responsibility Agreement between the Ahafo Mine Local Cmty. and Newmont Ghana Gold Ltd. (May 29, 2008), [http://www.newmont.com/sites/default/files/social\\_resp\\_agreement\\_sign\\_08.pdf](http://www.newmont.com/sites/default/files/social_resp_agreement_sign_08.pdf) [hereinafter Social Responsibility Agreement].

140. Agreement between Newmont Ahafo Dev. Foundation and Newmont Ghana Gold Ltd., (May 29, 2008), [http://www.newmont.com/sites/default/files/social\\_resp\\_local\\_employment\\_agr\\_sign\\_08.pdf](http://www.newmont.com/sites/default/files/social_resp_local_employment_agr_sign_08.pdf) [hereinafter Development Foundation Agreement].

141. Agreement between Newmont Ghana Gold Ltd. and the Ahafo Mine Local Cmty. on Local Employment, (May 29, 2008), [http://www.newmont.com/sites/default/files/social\\_respon\\_develop\\_founda\\_sign\\_doc\\_08.pdf](http://www.newmont.com/sites/default/files/social_respon_develop_founda_sign_doc_08.pdf) [hereinafter Local Employment Agreement].

142. Social Responsibility Agreement, *supra* note 139.

143. *Id.* at schedule 1, s. 1.

144. *Id.* § 1.

committed to discussions and consultations with the company.<sup>145</sup> Among the aims of the agreement are ensuring “sustainable development of the community”, providing “for the establishment of the Newmont Ahafo Development Foundation” and concluding a Local Employment Agreement.<sup>146</sup> It creates a forum with “oversight responsibility” for implementing the agreement with the governance structure of the forum being covered over various sections of the Agreement.<sup>147</sup> In addition, the agreement establishes the Newmont Ahafo Development Foundation.<sup>148</sup> This Foundation is operational with a website that details its activities including downloadable versions of its Annual Reports for 2009 and 2010.<sup>149</sup> The dispute resolution provision of the Agreement, which excludes litigation and arbitration as dispute settlement methods, is worth noting:

The parties further agree, acknowledge and confirm that this document does not create any legally enforceable rights to the benefit of either of them and that all disputes or grievances of any kind arising out of or related to this document or the policies described herein, shall be settled through mediation and conciliation making use of the Dispute Resolution Committee provided for in this Agreement. The parties hereby renounce their rights to enter into any form of litigation or arbitration on any disputes or grievances arising out of this Agreement.<sup>150</sup>

The Newmont Ahafo Development Foundation Agreement is an agreement for the utilization of funds which sets out “the terms and conditions under which Newmont shall fund the operations and objectives of the Foundation.”<sup>151</sup> The Agreement outlines the Foundation’s funding sources. Central among these sources is Newmont’s one U.S. dollar for every ounce of gold that Newmont sells in its operations under the Ahafo Mining Lease.<sup>152</sup> Also included is one percent of Newmont’s net pre-tax income after some computing considerations.<sup>153</sup> The Agreement defines sustainable development, outlines “acceptable sustainable development projects,” and provides “guidelines for allocating funds” for projects.<sup>154</sup> Ghanaian law governs the Agreement and disputes not settled amicably may be submitted to ar-

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145. *Id.* § 2.

146. *Id.* § 3.

147. *Id.* § 5.

148. *Id.* § 22.

149. NEWMONT AHAFO DEV. FOUND., <http://www.nadef.org>.

150. Social Responsibility Agreement, *supra* note 139, § 4.2 (section 23 provides for conflict resolution management.).

151. Development Foundation Agreement, *supra* note 140, § 2.1.

152. *Id.* § 11.1(i).

153. *Id.* § 11.1(ii).

154. *Id.* §§ 12-14.

bitration in Accra, Ghana under the Arbitration Act of Ghana.<sup>155</sup> Similar to the Ahafo Social Responsibility Agreement, the Newmont Ahafo Development Foundation Agreement will continue until the Ahafo Mining Lease is surrendered.<sup>156</sup>

Like the Ahafo Social Responsibility Agreement, the Ahafo Mine Local Community Local Employment Agreement departs from the arbitration option of the Newmont Ahafo Development Foundation Agreement. By the Local Employment Agreement, which sets the Company's policies regarding employment,<sup>157</sup> the parties renounce their rights to settle disputes by litigation or arbitration.<sup>158</sup> Instead, they opt for mediation and conciliation.<sup>159</sup>

It is remarkable that these agreements, with the potential to generate enforceable rights that may be contested, do not permit litigation and/or arbitration. Mediation and conciliation appear to reflect the conciliatory nature of these agreements. While these dispute settlement methods are viable mechanisms for negotiating parties' interests, they are not as confrontational as compulsory litigation or arbitration. As a result, they have the tendency to appear less threatening, not only to the communities, but especially to the industry participants that are unlikely to favour overly confrontational dispute settlement methods in CDAs. The extent to which these dispute settlement provisions are beneficial to the communities is yet to be fully determined.

The Local Employment Agreement sets out the general principles for employing people. One of the major principles in this regard is that the "company shall adopt a policy to ensure that at least 35% of its national workforce in the Ahafo Mining Area, including contractors," are citizens of the Ahafo Mine Community.<sup>160</sup> Employment of skilled labour is to be based on applicants' qualification and experience as required by the company, while the company commits to "make its best efforts" to employ only validated citizens of the community towns that satisfy its internal assessment criteria for the employment of unskilled labour.<sup>161</sup>

The Newmont Ahafo CDAs, and the CDA model that the Nigerian Minerals and Mining Act adopts, provide avenues for companies to make benefit commitments to local communities. However, these

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155. *Id.* § 21.

156. *Id.* § 18.1.

157. Local Employment Agreement, *supra* note 141, § 1.1.

158. *Id.* § 1.2.

159. *Id.*

160. *Id.* § 2.1(f) ("The Company shall use its best endeavours to increase the percentage to 50% within ten (10) years of commencement of gold production by the Company in the Ahafo Mine Area.").

161. *Id.* § 2.1(a)-(b).

agreements could constrain legal and social action that communities may undertake in the event of dissatisfaction with companies' activities. Dispute settlement clauses in CDAs may constrain the legal avenues available to local communities, confidentiality clauses may limit the extent to which communities can communicate with media and civil society, and commitments to support the project may preclude communities from some forms of opposition.<sup>162</sup> As more of these agreements are concluded, judicial decisions may help to further clarify the purview of the imposed limitations. Nevertheless, as formulated, the CDA model adopted in the Nigerian Minerals and Mining Act and by Newmont in its relationship with the Ahafo community towns is unlikely to deter foreign investors from investing in mining in Nigeria and Ghana. This CDA model does not contradict the investment promotion focus of the Nigerian and Ghanaian governments.

#### IV. SITUATING LOCAL CONTENT AND COMMUNITY DEVELOPMENT INITIATIVES IN FDI PROMOTION AGENDAS

Often, there is a tendency to separate government-led initiatives and private arrangements between industry and local communities. However, such an approach is not always apposite. It has been noted that “[g]overnments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business.”<sup>163</sup> Both local content initiatives and CDAs involve some government presence, albeit, to varying degrees. In fact, in an era of market-led growth that relies on strong governments that foster market initiatives, the lines between the public and private are increasingly blurred.

In adopting the law as a catalyst for attracting FDI, there is the pressure to both ensure that the quantity of FDI increases and that the local economy benefits from FDI. But the question regarding the

162. O’Faircheallaigh, *supra* note 120, at 72-76.

163. Special Representative of the U.N. Secretary-General for Bus. and Human Rights, *Protect, Respect and Remedy: A Framework for Business and Human Rights: Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 22, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie). John Ruggie’s work on human rights and business has been the subject of academic commentary. See generally THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION (Radu Mares ed., 2012). On human rights and business, see generally SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS (Routledge, 2012); Peter Muchlinski, *Social and Human Rights Implications of TNC Activities in the Extractive Industries*, 18 TRANSNAT’L CORPS., Apr. 2009, at 125; Peter Muchlinski, *Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by Intergovernmental Organizations*, 3 NON-STAT. AC. FORS & INT’L L.123 (2003).



extent to which governments' investment promotion initiatives fit with active local content laws and CDAs remains. Do local content laws and the CDA models adopted in Ghana and Nigeria, discussed earlier, deter investment establishment or could they contribute to and foster investment promotion? What do the FDI promotion initiatives, and the local content and CDA initiatives, contribute separately and as a combined whole to the socio-economic well-being of West African peoples? The purpose of this part of the article is to demonstrate that, rather than being at cross-purposes, these initiatives are unlikely to deter FDI. As crafted, they are not radical instruments. Rather, they are initiatives that seek to 'accommodate' local communities in a foreign investor-dominated framework. Two caveats are necessary in this discussion. First, the local content legislation and policies might contravene some international that governments concluded to attract foreign investment without much attention to their impacts on local communities. Second, CDAs require some extra commitments from foreign investors; yet these agreements also provide foreign investors with a social license to operate.

As noted in the introduction, this article does not examine the merits or challenges of the investment promotion mechanisms that Nigeria and Ghana adopt. It analyzes initiatives with potential for local participation in light of investment promotion mechanisms. FDI has the potential to provide significant benefits for local economies. However, if appropriate policies are not adopted, negative impacts of FDI could be devastating for the local economy, peoples, and environment. Aspects of the local content legislation and policy in Nigeria and Ghana respectively emphasize the employment and training of local people. An educated workforce is both beneficial for African countries and foreign investment. FDI is more likely to thrive in countries with a highly educated workforce. In a similar vein, if properly executed, local content policies may also foster the development of local entrepreneurs. More developed economies are more prone to better absorb FDI and the existing mechanisms that facilitate local business, such as financial regulations and dispute resolution systems, may be highly beneficial for foreign investment. Lall and Narula express the view that:

[L]iberalisation has not always increased FDI inflows into host developing countries. The reason is simple. The removal of restrictions on FDI does not create the complementary factors that MNEs need; it only allows them to exploit existing capabilities more freely. Thus, FDI response tends to be most vigorous where local capabilities are strong when liberalisation takes place, and feeblest where they are weak (of course, excluding resource extraction). Similarly, over time,

FDI inflows rise where local capabilities are strengthened and new capabilities are created; they stagnate or fall where they are not.<sup>164</sup>

Local content laws and policies have the potential to foster both local entrepreneurship as well as FDI (although they may be regarded as discriminatory). The fact that more developed economies attract more sustainable FDI supports this position. If local content policies and legislation would indeed create stronger West African economies, they are not incompatible on their face with an investment promotion agenda. As well, Nigeria's Local Content Act appears to suggest that its contents would only apply to subsequent investments in the oil and gas industry.<sup>165</sup> If this interpretation holds true, subsequent investors would be able to include the local content requirements in their risk and profits assessment before investing in the country.

However, as framed, contents of Nigeria's local content legislation arguably contravene national treatment and other clauses in the country's investment as well as trade treaties. The World Trade Organization's (WTO) Agreement on Trade-Related Investment Measures ("TRIMs Agreement") is one of the agreements that may be contravened.<sup>166</sup> In fact, the United States, the European Union, and Japan have expressed concerns about Nigeria's Local Content Act.<sup>167</sup> The WTO reports that "Nigeria maintained that the measures in question complied with the TRIMs Agreement."<sup>168</sup> Furthermore, it is reported that Nigeria indicated that it had commenced bilateral consultations with the United States and it would provide answers to the questions that were raised. The TRIMs Agreement, in addressing national treatment and quantitative restrictions, provides in article 2 that "no Member shall apply any TRIM that is inconsistent with the provisions of article III or article XI of GATT 1994." The Annex to the TRIMs Agreement includes an illustrative list that provides for measures that are inconsistent with the parties' national treatment obligations and elimination of quantitative restrictions. UNCTAD interprets the measures outlined in the illustrative list to include local content require-

164. Sanjaya Lall & Rajneesh Narula, *Foreign Direct Investment and its Role in Economic Development: Do We Need a New Agenda?*, 16 *EUR. J. DEV. RES.* 447, 449 (2004).

165. Local Content Act, *supra* note 77, § 6.

166. WORLD TRADE ORGANIZATION, *Agreement on Trade-Related Investment Measures*, in *THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 143 (Cambridge Univ. Press 1999). On TRIMs, FDI and development, see generally U.N. Conference on Trade & Dev., *Elimination of TRIMs: The Experience of Selected Developing Countries*, U.N. Doc. UNCTAD/ITE/IIA/2007/6 (2007).

167. News item, World Trade Organization, *Trade and Investment: Investment Measures Questioned* (Oct. 3, 2011), [http://www.wto.org/english/news\\_e/news11\\_e/trim\\_03oct11\\_e.htm](http://www.wto.org/english/news_e/news11_e/trim_03oct11_e.htm) (last visited Nov. 10, 2012).

168. *Id.*

ments.<sup>169</sup> In terms of exceptions in the WTO Agreements, it is unlikely that the exception in article 4 of the TRIMS Agreement, which permits temporary deviation from the provisions of article 2 for developing countries, would apply to Nigeria's Local Content Act.

In addition to the TRIMS Agreement, it is arguable that Nigeria's Local Content Act violates national treatment provisions in its BITs. Compliance with national treatment clauses in investment treaties would be determined based on the language of each treaty. While most treaties include national treatment standards, others modify or exclude the standard. Incorporating some modifications, article 2(4) of the Nigeria-Egypt BIT states that "either Contracting Party may grant within the framework of its development policy to its own nationals and companies special incentives in order to stimulate the creation of local industries, provided they do not significantly affect the investment and activities of nationals and companies of the other Contracting Party."<sup>170</sup> A similar clause is included in article 3(3) of the Nigeria-United Kingdom BIT<sup>171</sup> and in article 4(5) of the Nigeria-Germany BIT.<sup>172</sup> The extent to which these provisions are applicable depends perhaps on the interpretation of "special incentives" that "significantly affect" the investments and activities of foreign investors. In addition, some investment treaties also omit the national treatment standard.<sup>173</sup> Irrespective of the requirements, as well as modification and omissions of national treatment in some treaties, the compatibility of local content legislation and policies remains a debatable issue in practice and in theory. This warrants a more nuanced conclusion on the impacts of such laws and policies on perceptions of investment promotion. While authors like Lall and Narula note that "[i]t is difficult to see how host countries that have FDI can tap its potential fully without such strategies as local content rules, incentives for deepening technologies and functions, inducements to export and so on"<sup>174</sup> others are opposed to the use of local content measures.<sup>175</sup>

169. U.N. Conference on Trade & Dev., *Creating Business Linkages: A Policy Perspective*, 11, UNCTAD/DIAE/ED/2009/1 (2010).

170. Agreement Between the Government of the Federal Republic of Nigeria and the Government of the Arab Republic of Egypt for the Reciprocal Promotion and Protection of Investments, Nigeria-Egypt, art.2, ¶ 4, Jun. 20, 2000, [http://unctad.org/sections/dite/ia/docs/bits/Egypt\\_Nigeria.pdf](http://unctad.org/sections/dite/ia/docs/bits/Egypt_Nigeria.pdf).

171. Agreement Between the Government of the Federal Republic of Nigeria and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments, Nigeria-U.K., art. 3, ¶ 3, Dec. 11, 1990, 1658 U.N.T.S. 523.

172. Treaty Between the Federal Republic of Germany and the Federal Republic of Nigeria Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Nigeria, Mar. 28, 2000, 2481 U.N.T.S. 344 art. 4, ¶ 5.

173. See generally Lauge Skovgaard Poulsen, *The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis*, 30 Nw. J. INT'L L. & BUS. 101 (2010).

174. Lall & Narula, *supra* note 164, at 459.

Essentially, while the treaty language varies from treaty to treaty, academics also present “diametrically opposed” views of the impacts of these mechanisms.<sup>176</sup> The practical impacts of local content policies are not without controversy. However, with regard to the issue that animates discussion in this article – the compatibility of local content laws and CDAs with FDI promotion measures in Nigeria and Ghana – only time will tell whether these recently-enacted local content laws contradict the FDI promotion measures in practice.

While crafting local content policies and legislation is largely within the domain of governments, the other locally-focused initiative analyzed in this article – the CDAs – have a very visible private presence. The Newmont agreements in Ghana and the provisions in the Nigerian Minerals and Mining Act, are unlikely to serve as deterrents to foreign investment. To the contrary, these CDAs are at best favourable to foreign investment and, at worst, neutral instruments. If many of the CDAs include provisions similar to the Newmont Ahafo CDAs, these are unlikely to constitute overwhelming burdens for investors. CSR initiatives are common, especially in industries like mining where businesses engage closely with local communities. Negotiating agreements that require investors to provide about the same services as they would under general CSR programs, while also extracting commitments from local communities not to disrupt investment activities and projects, affords investors some significant benefits.

Some qualifications are necessary in this analysis. First, all CDAs are not equal. Some would be more favourable to foreign investors than others. As a result, these conclusions are limited to the CDAs and CDA models analyzed in this article, that is, the Newmont CDAs in Ghana and the model provided in the Nigerian Minerals and Mining Act. Second, while CDAs could serve as an avenue for using private law as a catalyst for investing in African countries, it is arguable that investors may not favour mandated CDAs. In this regard, it has been noted that:

In regions that struggle with reduced capacity and a lack of resources, stakeholders worry that, if the government were to institute overly specific requirements regarding CDAs, these may function as obligation to industry to fulfill a service provision and development role that should be the remit of the government. Ultimately this could reduce the mining sector’s willingness to invest in the country and reduce potentially associated development benefits.<sup>177</sup>

However, CDAs could be favourable to foreign investors as companies use them to acquire the consent of the local community to oper-

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175. See U.N. Conference on Trade & Dev, *supra* note 169, at 10.

176. See *id.* at 11.

177. ERM, *Mining CDAs*, *supra* note 112 at 24.

ate without disturbance. Often, these industry actors would engage in voluntary service provision and other CSR initiatives and might not acquire the goodwill of the community or the social licence to operate. But with these agreements, the communities are committed to fulfill their part of the bargain, which often includes a commitment to peaceful operations. It is in this sense that CDAs could be categorized as investment. Some CDAs are essentially service and benefits provision initiatives and some companies sometimes include these initiatives in their policies whether or not they are reflected in commitments made in agreements. Also, these CDAs appear less threatening since they often exclude dispute resolution methods like litigation and arbitration.

As currently framed, the CDAs discussed in this article largely resemble CSR initiatives. Time has taught us that CSR initiatives, especially those initiatives that focus on service provision, are not a panacea for socio-economic development. Governments, and not industry, are ultimately the service providers. Research on community-company relations in gold mining communities in Ghana suggests that communities and industry view impacts of projects as well as the benefits provided differently.<sup>178</sup> Hence, the conflict between communities and industry remains. As a result, the visible presence of a capable government cannot be overemphasized. However, some communities may prefer to avoid government involvement in CDAs.

While it is not the focus of this article, it is important to note that CDAs might not always be beneficial to local communities.<sup>179</sup> Without these agreements, the communities may still receive similar benefits from industry, but without the commitment that these benefits would be forthcoming. Local communities would continue to have the option to adopt legal avenues available in general laws if they disagree with some of the activities of industry operators. Hence, limitations on enforceability and a focus on service provision limit the effectiveness of these agreements for local communities. Following Simon et al.,<sup>180</sup> Idemudia and Ite distinguish negative injunction duties from affirmative duties:

The failure of oil companies to observe the moral minimum or demonstrate that they are doing all they can do within their power to observe this moral minimum has helped to reinforce community per-

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178. Theresa Garvin et al., *Community-Company Relations in Gold Mining in Ghana*, 90 J. ENVTL. MGMT. 571, 583 (2009).

179. See Ken J. Caine & Naomi Krogman, *Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North*, 23 ORG. & ENV'T. 76 (2010).

180. Uwafiokun Idemudia & Uwem E. Ite, *Corporate-Community Relations in Nigeria's Oil Industry: Challenges and Imperatives*, 13 CORP. SOC. RESP. ENVTL. MGMT. 194, 201 (2006) (citing G.J. Simon, W.C. Powers & P.J. Gunnemann, *The Responsibility of Corporations and their Owners*, in ETHICAL THEORY AND BUSINESS 60, (T.L. Beauchamp & NE Bowie eds., 1972)).

ceptions of oil companies as adversaries to be confronted and tamed. This is because no amount of road or bridge construction, provision of electricity or the award of scholarships can compensate for 24 hours of daylight resulting from gas flaring by the oil companies. At the same time, such affirmative duties would not have the same effect on the communities as the observation of negative injunction duties by the oil companies. The issue being raised is that affirmative duties cannot be a substitute for not observing the moral minimum. Affirmative duties are likely to create more added values if negative injunction duties are observed.<sup>181</sup>

Without doubt, CDAs have the potential to facilitate economic development and ensure a focus on the quality of investment rather than just the quantity. If governments place an unbalanced focus on the quantity of investments, the local participation initiatives in place in Ghana and Nigeria would be sufficient. But, if the ultimate goal being actively pursued is ensuring that FDI is of such a quality that it fosters the economic advancement of West African countries as well as the socio-economic wellbeing of West African peoples, a rethink of the CDA initiatives in Ghana and Nigeria is necessary. Truly holistic agreements would require the involvement of governments, investors and host communities and define the roles, rights and obligations of the parties in this tripartite relationship.<sup>182</sup> They would also include dispute settlement provisions that demonstrate commitment to both 'affirmative' and 'negative injunction duties.'

## V. CONCLUSION: A RESEARCH AGENDA

FDI is a major provider of much needed foreign capital flows for West African countries. Legal reforms of the Nigerian and Ghanaian economies have involved a significant focus on foreign investment promotion. At the same time, there is an increasing realization that law and an overly narrow focus on government-foreign investor relationships are unable to completely answer questions regarding the utility of FDI for local peoples in West African countries. All over the world, and in West Africa, people are demanding initiatives that are directly beneficial. With a turn to democratic forms of governance, West African governments are becoming increasingly aware of the demands of their local communities. Hence, governments are simultaneously adopting seemingly incompatible laws for promoting FDI and laws for local participation in the economy.

This article has demonstrated that the CDA models adopted in Nigeria's Minerals and Mining Act and Newmont's Ahafo projects in

181. *Id.* at 202.

182. See Odumosu-Ayanu, *supra* note 118, for the details of tripartite investment agreements, which I term "multi-actor investment agreements."

Ghana do not appear to be deterrents to FDI. The local content laws warrant a more nuanced conclusion, with the evidence not being conclusive with regard to the impacts of measures of this nature on FDI promotion in practice. Having made these initial findings, there is room for research on how these initiatives impact local communities in these countries and what contributions they make to both domestic and international laws on foreign investment. Given that local content requirements have been the subject of more sustained attention, this article calls for more research focus on CDAs. While instruments like the Impact and Benefits Agreements in Canada have enjoyed some research focus, the CDA models in West African countries, are less well-researched. From the GMOUs in Nigeria's oil and gas industry, the CDAs required in Nigeria's mining legislation, to CDAs in Ghana's mining industry, it is important to turn a critical lens to these agreements and examine their contents, the process of their negotiation, and their impacts on local peoples in West African countries. The fact that they do not necessarily act as deterrents to FDI does not suggest that the best models for all parties involved, especially the local communities, are being adopted. Perhaps, the current limited CDA model adopted in West African countries could provide the impetus for truly holistic legal arrangements that take West African peoples interests and perspectives more seriously.