

Bilateral Investment Treaties, Mining and National Champions: Making it work

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Written by Aaron Cosbey and Howard Mann with contributions from Maxine Cunningham



Executive Summary

The interest in creating national champions in the Eastern African mining sector is part of a larger suite of dynamic changes affecting that sector. While the African continent is endowed with enormous wealth in the form of natural resources—by some estimates holding 30 per cent of the world’s mineral reserves, with much more significant shares of specific types—that wealth has not often been fully exploited to ensure broad-based poverty reduction and sustainable development. This hard reality has become more poignant since the peak of commodity prices in 2008, and in light of the related rush to develop the region’s mineral wealth by both traditional and non-traditional investors, both in long-standing mining strongholds and in states with newfound mineral wealth.

In that context, the past decade has seen a surge of national and regional efforts to re-envision the role of mining in the development paths of the region’s member states and more broadly in Africa as a whole. The prescriptions of the 1980s, which focused on liberalizing access and creating favourable investment conditions, have given way to a new paradigm concerned with equity, transparency, backward and forward linkages, local community development, social and environmental impacts, and a more significant role for the state. Along these lines, the *Africa Mining Vision* (African Union, 2009), adopted by heads of state and government in 2009, calls for “transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development” (p. 3). In the last 10 years most states with significant mineral wealth have revised or have begun the process of revising their national mining codes.

But the new vision is not a simple return to post-colonial nationalism. It accepts the need for significant private sector involvement in order to maintain global competitiveness. It seeks to carefully balance incentives and demands to derive a greater share of resource wealth at the national level while keeping investment viable, working with the private sector to find solutions that work for all. It looks for more than simple economic progress, focusing also on social and environmental outcomes as an essential part of overall sustainable development. In the end it cares less about sovereign control of natural resources for the sake of control, and more about sovereign ability to effectively manage resource wealth and its exploitation for the benefit of the nation.

In that vein, the preoccupation of this paper is somewhat broader than the quest for national champions. This is not because national champions are insignificant to the development narrative; on the contrary, they are increasingly important. National or state-controlled companies accounted for a full third of the emerging world’s foreign direct investment between 2003 and 2010, and they number among them the world’s 13 biggest oil firms and biggest natural gas company. They do not feature prominently in the mining sector, but their penetration in emerging market sectors such as energy (more than 60 per cent), utilities (more than 50 per cent), telecoms (more than 30 per cent) and finance (more than 30 per cent) is considerable. The starting point for this paper is how mining might best contribute to a range of goals, consistent with the broad approach taken in the *Africa Mining Vision* and in various new mining codes such as those drafted in the last few years by countries such as Angola, Tanzania, Guinea and Mozambique. Clearly, one of the important ways that mining might contribute to achieving those goals is by strategic use of policies to create national champions. But that solution will not be right for all countries in all circumstances.

This paper will focus on the policy tools available to states interested in pursuing this new vision of mining. The approach is a two-step assessment that asks first what we know about the strengths and weaknesses of some of the key policy tools, and about their effectiveness in practice. It then asks, with respect to those tools that are found to be potentially useful, what limitations might be imposed by the legal strictures of international investment agreements. In the course of that second step, it also explores what sorts of policies states might pursue that are informed by both the economic evidence and the legal constraints: how can states best preserve their policy space to foster national champions, and to embed the mining sector in the fabric of their pursuit of sustainable development objectives?

Unpacking the Box: Assessing policy tools

We explore here two types of policies: ownership/equity-related options (some of the classic tools for fostering national champions) and performance requirements (tools to create backward and forward linkages). As noted above, part of the discussion of each of those types of policies is an assessment of effectiveness, since the mere availability of a policy tool tells us nothing about its desirability.

Ownership/Equity-Related Options

There are a number of ownership/equity-related policy options states might employ to pursue the objective of fostering national champions. This section focuses specifically on a non-exhaustive list of those that are commonly used and that potentially raise issues under international investment treaties. The policies assessed here include:

- Free carry obligations
- Joint venture requirements
- Creation/promotion of state-owned (SOEs) as sole actors
- Expropriation of private firms

Free carry obligations require that firms grant, free of charge, a specified percentage interest in their venture to the host government. They are closer in nature to tax reform than to a drive to foster national champions, delivering a stream of revenues through dividends. That said, they also provide a measure of state ownership in sectors of key national interest. And in recent years a number of emerging market governments have become adept at using their minority shares and other means of influence to exercise substantial control over the operations of key firms.

Joint venture requirements demand that any foreign investor in a particular sector must operate as an equity joint venture with some local partner. In operation they are usually expressed as a requirement that any investment have a certain percentage of domestic ownership. These policy tools have been successfully used, primarily in Asia, but the “forced marriages” often lack the basic ingredients for joint venture success: shared objectives, trust and complementary capabilities.

Creation/promotion of SOEs as sole actors involves a high level of government involvement in the sector, and may entail suppression of anti-competition laws, forced mergers of existing SOEs and forced closure of smaller competitors. It will typically involve state-level support via various types of subsidies, often including secure access to low-cost finance from state-owned banks. A recent development involves this level of active state support for national champions that are ostensibly private sector actors, but over which the state exercises considerable control.

Expropriation of private firms involves the transfer of ownership and control of an existing private sector operation to the state, or by force of law to some third party. As discussed in the legal section below, expropriation can be effected in different degrees, from partial to full, and by different manners, from direct to indirect (the latter involving no forced transfer of ownership, but involving a measure or series of measures that in effect deprive the investor of ownership and control).

Recent years have seen a movement away from direct expropriation, which was a staple of the post-colonial years, toward a more complex approach that marries the management capacity and efficiency of the private sector with the broader social, economic and environmental goals of the state. As noted, states are increasingly using minority stakes in key firms, in combination with incentives, support and the sorts of regulatory prods discussed below, to

exert their influence. It is critically important in such arrangements to achieve the right balance of interventionism and hands-off engagement.

Performance Requirements

Performance requirements are stipulations imposed on investors that mandate certain behaviours or outcomes in their operations in the host state. They are of interest to us in the present context because their basic function is to wring more benefits for the host state from regulated investments. Some of the most common types of performance requirements are demands for the investor to:

- Meet requirements for use of local employees, local managers, or local suppliers of goods and services;
- Engage in labour training or supplier development programs;
- Carry out some level of in-country R&D.

Performance requirements can be either voluntary—as a condition for the receipt of benefits such as tax breaks or subsidies—or mandatory, as a condition for continued operation, or as a condition of bidding for a concession or license. They can be spelled out in contracts or in national mining codes. And they can be imposed either at the outset of an investment, or after an investment has taken place (as part of a regulatory revision).

Technology transfer and R&D obligations ask that the investor either bring some level of technology to its operations in country, or undertake some level of R&D in country. They are meant to build up expertise in domestic lead commodity firms. Both requirements are more typically employed in the manufacturing sector than the mining sector. There is not much evidence for the effectiveness of technology transfer requirements—there are major challenges in monitoring such requirements, and it is challenging for governments to specify which technologies particular firms in particular sectors and countries should be using in the first place. R&D requirements are usually voluntary, modeled as conditions for benefits such as tax breaks. But they are rarely effective in and of themselves; they need to be used as part of a much broader strategy to build national systems of innovation.

Policies to build linkages are extensively employed across primary and secondary sectors. The main objective of these measures is to move away from enclave development that contributes very little outside of expenditures on core functions, that imports most inputs, technology and experts needed in the course of operation, and that exports largely unprocessed materials. Perhaps the most common are measures requiring domestic content in purchased goods and services, but also used are requirements for downstream processing (beneficiation), and for building capacity in suppliers and processors. Such measures can be successfully used, but only if they heed the lessons of practice. Foremost among those is not to set levels too far above what the local suppliers and processors can meet. Also critically important is a holistic focus on building capacity in suppliers and processors, and provision of financial and other support. Local suppliers should be defined in a way that avoids having “local” firms simply import inputs.

Policies to improve social and environmental outcomes are also widely used. These range from commitments to build related infrastructure such as roads to commitments of unrelated amenities to enrich local communities, such as schools and hospitals. They might also be in the form of requirements to train or hire certain levels of local employees, or to meet quotas for certain levels of local management. Requirements focusing on environmental outcomes might be inserted to supplement or go beyond national environmental regulations, especially where those are seen as in need of strengthening. Such requirements may be included in permits under national law processes or in exploitation contracts. The effectiveness of requirements for infrastructure and amenities depends on the ability of the host state

to monitor progress on the commitments—something that is done too rarely. The same can be said of commitments to respect environmental norms. Requirements for local hiring and local management must balance the need for local benefits against the realities of existing skills and capabilities; set too high, such quotas can be damaging, can lead to elaborate gaming of the system, and may fail to spread their benefits beyond the local elites. Local hiring quotas should be part of a broader effort to foster skills in line with the needs of investors.

Conclusions

While this paper attempts to survey the evidence on effectiveness of performance requirements, it must be noted that in the absence of counterfactuals any definitive judgment is at best informed speculation. That is, for example, how can we know that a positive outcome that prevailed under certain performance requirements wouldn't have prevailed anyway? Or that the outcome without those requirements wouldn't have been even more positive? Be that as it may, our best efforts to understand the consequences of performance requirements lead to the conclusion that, when they are well-crafted, it is possible to use them to successfully pursue development objectives. Policies to foster forward and backward linkages seem to be the best candidates. This finding is important since it rebuts the basic assumptions that underlie the restrictions found in the international investment agreements discussed below: that these sorts of tools are bad policy, ineffective in the hands of governments, and likely to drive away much-needed investment.

But there is also a powerful narrative about the shortcomings of these tools. For the most part they are weak when used in isolation; they should ideally be used as part of a broader effort to address the challenges. For example, it makes little sense to mandate high levels of local hiring without simultaneously focusing on skills development.

Legal Issues

The policy tools described above may, in various measures, contribute to the development of national champions, or the contribution of mining sector activity to broader economic, social and environmental benefits in the host state. Even so, the option to employ those measures may be circumscribed by international investment agreements to which the host state is party. This section briefly describes those agreements and their key features, and then turns to an assessment of their implications for the types of policies we have considered. It begins with a very brief introduction to international investment treaties.

An Introduction to Investment Treaties

Investment treaties are international agreements between governments that create obligations on states about the treatment of investors from the other treaty party. They may be standalone agreements between two states, usually known as bilateral investment treaties (BITs). As well, they may be regional agreements, such as the one currently applying to the Southern African Development Community (SADC) region and the pending Common Market for Eastern and Southern Africa (COMESA) agreement. Investment treaties may also be found as parts of bilateral or regional free trade treaties.

To date, there are some 3,000 investment treaties in force globally. A review of the UNCTAD database on investment treaties indicates that there are 137 treaties within the region.

The content and structure of investment treaties can be broken into two parts: the substantive provisions and the dispute settlement mechanisms. The substantive provisions found in most investment treaties that are most relevant to this paper are discussed below, followed by discussion of dispute settlement.

National treatment: National treatment means that investors from the other party will be assured treatment “no less favourable” than investors of the host state. In other words, legislation and policies applying to an investment cannot discriminate based on the country of origin of the investor. This provision does not mean that a government cannot distinguish between investments based on issues like environmental impact or the differences directly related to different locations in a country, or for other legitimate reasons.

Most-favoured nation treatment: The most-favoured nation (MFN) provision means that a government cannot treat an investor from the state of the treaty partner any less favourably than it treats any investor from any other third country. Many observers believe that the MFN provision was originally intended to apply to how the host state treats an investor or its investment under its domestic law and policy. However, arbitral tribunals have also interpreted it to include any obligations in another investment treaty that the host state is also a party to that are granted for investors of another state, so this has become a very broad and often controversial obligation.

Rights of establishment/market access: For the most part, the investment treaties that apply now within the region do not create any special rights for investors or obligations on states prior to the establishment or acquisition of an investment. However, some agreements within the region do provide that foreign investors can have the same rights to establish a business on the same terms as would be applied to domestic investors. Such provisions are known variously as market access provisions, rights of establishment, or pre-establishment rights. By requiring national treatment in the making of investments, these provisions can prevent the use of special obligations or restrictions on foreign investors, potentially including requirements for joint venture partners, free carry shares and performance requirements. While the majority of older treaties do not include any such rights, newer treaties and regional treaties now being negotiated globally do include them. The region’s member states can anticipate a growing pressure to include such provisions in future treaties.

Prohibition on performance requirements: Closely related to the inclusion of pre-establishment rights in a treaty is the possible inclusion of an express provision on the use of performance requirements. In some cases these prohibitions repeat or mirror the provisions found in the World Trade Organization’s Agreement on Trade Related Investment Measures (TRIMs) (see below), although some texts have a TRIMs+ approach.

Expropriation: All investment treaties include a provision protecting foreign investors from expropriations without compensation. This is an important qualification: these treaties do not ban expropriations but do impose certain conditions, the most important of which is compensation to the investor.

There are three types of expropriations that are potentially addressed by these provisions: direct, indirect and regulatory expropriations. Direct expropriation is where the ownership of an investment or assets of an investment is transferred to the state or under force of law to a third party. Indirect expropriation is where a government does not transfer the ownership, but effectively takes over the management and direction of the investment. Regulatory expropriation is a controversial concept, under which a regulation that is legitimately taken to promote public welfare objectives (e.g., environmental protection, human health, consumer protection), and that does not impact any ownership or management of the investment, can still be an expropriation if it impacts the economic value of the investment. Treaties such as the COMESA regional investment treaty include provisions to state explicitly that such regulations do not constitute an expropriation.

Fair and equitable treatment: This standard can include elements of due process, transparency and non-arbitrary measures. According to some tribunals and treaty texts, it also includes a concept of the legitimate expectations of the investor, a subjective concept that has been used to create obligations on states in relation to any statements the investor is deemed to have relied upon in making the investment. While initial assessments suggested this standard would require high thresholds of government misconduct, in practice many tribunals have applied very low thresholds. As a result of its unpredictability in an arbitration, some states have decided not to include this standard in their treaties anymore, or to include very restrictive versions of it.

Umbrella clause: An umbrella clause is a provision that essentially says that a government must adhere to any commitments it has made to an investor, and thus makes those commitments part of the fabric of the investment treaty. Tribunals have held vastly different views on how a commitment of a state is to be defined, from general statements by a government in relation to an investment to specific agreements in writing or legislation. In either case, where an umbrella clause is paired with a stabilization clause in an investment contract or in the domestic law of the host state, a powerful combination is formed to preclude government action that is not consistent with the stabilization provision.

Personnel: Most investment treaties include provisions that allow the foreign investor to engage staff from its country of origin or other countries. The goal for the investor is to have the maximum flexibility to engage world-class senior staff and directors. Depending on how the provisions are worded, the provision may allow senior management staff and or other highly-skilled employees to be engaged. While this is an important issue for investors, the training of domestic employees and management personnel is an important element in many performance requirement schemes, as noted above. Thus, how such provisions are formulated can be very important for governments seeking to promote higher levels of skills transfer.

Note on exclusions: Increasingly, investment treaties include provisions and schedules of exclusions from the application of national treatment, MFN and other provisions, or of certain categories of measures such as those aimed at promoting economic empowerment of previously excluded ethnic groups. In some instances these exclusions can be very effective, but they are not a cure for poorly drafted substantive obligations, and they need to be carefully crafted.

Note on investor obligations: There is a growing body of studies and academic work that suggest including investor obligations in the text of investment treaties. The SADC Model Bilateral Investment Treaty Template of 2012 includes model provisions of this type. While these are not present in the existing treaties of member states in this region, these provisions parallel the vision for mining that constitutes the framework for this paper.

The substantive provisions described above are enforced, in almost all international investment treaties, through a special right to international arbitration allowing investors to claim damages for measures alleged to be inconsistent with the treaty obligations on states. The investor–state dispute settlement process allows investors to bypass the domestic courts in favour of international arbitration. The arbitrations are initiated directly and at the sole discretion of the investors, meaning it matters not whether the agreement is with a friendly state, as the other treaty party has no voice in the initiation of an arbitration or its conduct. Arbitral awards cannot be appealed and thus cannot be reversed even if they are wrong in law.

Today, there are over 600 known investor–state arbitrations, making the investor–state the most used dispute settlement process ever under international law. All sectors have been touched by these arbitrations, and a cursory review indicates about 13 have been against regional states, with 5 in the mining and oil and gas sector.

Application of the Legal Issues to Economic Options

Ownership and Equity-Related Measures – Pre-Establishment

This section deals with the options for states *prior to the establishment of an investment*. Under the general principles of international law and customary international law, states have a complete right to determine whether or not, and on what terms, to allow foreign investors to enter into their markets. There is no general right for investors from one state to invest in another. This situation prevails unless a state surrenders these rights by treaty.

This can be changed if a state enters into an investment treaty that allows for pre-establishment national treatment (or market access rights), as discussed above. Most of the treaties in the region do not have such provisions—at this point they appear only in *Rwanda-U.S.*, *DRC-U.S.* and *Canada-Tanzania*. Thus, for most African states dealing with most investors, all of the policy options canvassed above are available.

Even when a treaty does include market access rights for foreign investors, it is common for states to draft exceptions or reservations that preserve existing restrictions on outside ownership in certain sectors. In addition, the parties can agree to exclude sectors or sub-sectors from the national treatment obligations on market access.

There are going to be increased pressures on African states to provide market access rights for investors, especially in the natural resource and extractives sectors. Canada and the United States are both aggressive on this front, and the European Commission has established market access for its investors as a core issue, including the prohibition of joint venture and other local-ownership requirements. The extent to which the EU is moving on this can be seen in the draft *Canada-EU Trade Agreement*. In the investment chapter of that text, the EU has proposed prohibitions against establishing monopolies, joint venture requirements, maximum shareholding levels for foreign investors, and quantitative limits on the value of foreign shareholdings. As these tools are not generally used in either Canada or the EU, the most likely explanation for these draft provisions is the desire to flesh them out for use in other treaties where such tools do exist.

Preserving policy space: Given the potential impact of these issues on the development of national champions, this is an area where officials will need to pay considerable attention to craft the appropriate rules. States have several options in terms of establishing and maintaining national ownership requirements in various forms, including:

- Continuing to not include market access rights in any form in investment treaties.
- Including provisions on market access, but ensuring that there are exceptions for existing measures, as well as for sectors in which it is likely that measures might be taken.
- Including provisions on market access, but through a positive list approach wherein only the specifically listed items are covered.
- Including market access provisions on the basis of a schedule of included or excluded sectors, but allowing for unilateral amendment of the schedules (as per COMESA Common Investment Area [CCIA]).
- Including provisions on market access, but excluding them from any form of investor–state dispute settlement (as per CCIA and Canada–China).

Ownership- and Equity-Related Measures – Post-Establishment

The legal situation changes in very significant ways when ownership restrictions or prohibitions are created in relation to an investment already established by a foreign investor with investment treaty rights.

Expropriation: The following would be considered expropriation, and the compensation required by the applicable treaty would be part of the state's obligation:

- A foreign investment is nationalized in order to create a national champion owned by the government (classic expropriation).
- A domestic ownership or joint venture requirement necessitates the sale of an investment in whole or in part to a domestic investor (this is still expropriation, even though the state is not assuming ownership).
- Free carry obligations are imposed.

National treatment: Measures that target existing foreign-owned investments for some form of divestment of all or part of the ownership stake may also raise issues of national treatment, by virtue of the fact that only foreign-owned businesses are targeted.

Fair and equitable treatment: Such measures might also constitute a breach of a treaty's fair and equitable treatment (FET) provisions. This is especially so when the investment is based on a contract, concession agreement or permit with the host state that discloses no such requirement. Again, compensation would be the required remedy under a treaty

In summary, the public interest nature of any such measures would not eliminate the requirement for compensation. For some of these treaty breaches, however, in particular measures that are less than a full expropriation of the investment, compensation may be payable in forms other than money if an appropriate relationship is established and maintained with the investor. For example, if a 20-year mining permit is extended to 25 years, both sides may agree that this covers the value of the compensation required.

Preserving policy space: There are not many options for preserving policy space for post-establishment ownership and equity-related measures. This does not deny or diminish the importance of the reasons for such measures, but illustrates the difficulties in balancing legitimate public purposes with the costs this might impose on investors, especially those investments made in good faith and unrelated to previous historical inequities.

Of utmost importance in these types of circumstances is the need to negotiate with the investor for an agreed level of payment and method of payment, including options such as extended permits.

At a drafting level, some treaties have created exclusions for empowerment programs for historically disadvantaged people, or for similar development reasons. A model provision on this is found in the SADC Model BIT Template. However, it is very rare that such exclusions would cover a full and direct expropriation of the types being discussed here. Exclusions from FET and national treatment are easier to draft through an exclusion of the extractive sectors, but such an exclusion would not apply to obligations on expropriation. If a treaty includes alternative formulations to full fair market value to define the compensation for expropriation, such as "just and adequate compensation" (as per the SADC Model Bilateral Treaty Template), then there may be some leeway to argue that historic factors should be considered in assessing the level of compensation. Ultimately, however, it is much more difficult to require changes in ownership after an investment has been made than before.

Performance Requirements

The imposition of performance requirements by states on foreign investors raises some of the same legal issues described above, and some additional legal issues. The legal situation is more varied for regional states, because

a significant number of treaties do contain provisions on performance requirements, but these provisions differ in important ways. As a result, the analysis below cannot address the specific legal situation of any individual state. Nonetheless, by highlighting the key legal issues the analysis should allow individual governments to ask the right questions when considering the issues.

A sampling of the existing regional treaties gives a flavour of the diversity of treaty provisions to which regional states have subscribed. A sample of 60 bilateral treaties, two regional treaties and the WTO provisions applicable within the region turned up the following approaches:

- **WTO Agreement on Trade-Related Investment Measures (TRIMs):** The TRIMs Agreement has an illustrative list of trade-related investment measures that breach GATT provisions on national treatment. The list includes any local content requirements that are a condition for receipt of an “advantage,” and any similar conditions linked to the export of goods (such as the requirement to export a percentage of production).
- **DR Congo-U.S.:** This pre-WTO Agreement imposes the same restrictions found in the TRIMs Agreement, but does so on a best-effort basis only (“... each Party shall endeavor to avoid imposing . . .”).
- **Rwanda-U.S. and Tanzania-Canada:** These agreements are so-called TRIMs-plus, meaning they go further than TRIMs in banning most forms of performance requirements, including requirements for technology transfer. They do allow some requirements, such as a demand to invest in particular locations, or to undertake R&D, but only as conditions for receipt of some specific advantage. The Rwanda-U.S. treaty also exempts the investor from requirements to train domestic workers.
- **Burundi-Germany and Kenya-U.K.:** These treaties have provisions entitling either party to more favourable treatment than contained in the BIT if such treatment is part of another agreement between the two parties. This would likely allow private investors to avail themselves of dispute settlement, for example, on the basis of TRIMs commitments that were intended to be enforced on a state-to-state basis.
- **The COMESA Common Investment Area and SADC Finance and Investment Protocol (FIP):** Neither of these regional agreements applicable to member states of this region have provisions on the prohibition of performance requirements. The SADC Finance and Investment Protocol actually tends in the other direction, preserving policy space for key objectives such as the development of upstream and downstream linkages and generating increased employment.

So while performance requirements are widely used, and often effectively used, they are also widely prohibited under investment law. There is a clear conflict here between development practice and the legal provisions in investment treaties.

Mandatory local content requirements are clearly in breach of TRIMs obligations, and may even be subject to the dispute settlement mechanisms under BITs, if TRIMs is directly referenced or indirectly incorporated through references to other international treaties. That said, only three performance requirements have ever been contested under TRIMs, suggesting that states might be reluctant to complain about measures they themselves are using. In the context of BITs, investors would only initiate an arbitration solely on the basis of performance requirements if the requirements were excessively costly. The more likely scenario is that any such complaint would be part of a broader arbitration where the relationship between an investor and the government had largely collapsed.

Downstream processing or other value-added requirements would likely raise TRIMs issues, and issues under most performance requirement prohibitions in investment treaties, despite Botswana’s demonstration that the tool can be beneficial when properly developed.

As noted above, some treaties exempt certain types of voluntary (i.e., imposed as conditions for receipt of advantages such as tax breaks) performance requirements. As well, many treaties will exempt requirements for training of local employees. Environmental requirements, for example to undertake a proper environmental impact assessment, will generally not create a performance requirement issue; they are common regulatory requirements.

Technology transfer requirements may breach investment treaties, depending on the exact language in a treaty in relation to the measure at hand, as well as on applicable intellectual property rights if the technology is proprietary. R&D obligations will also require a very careful assessment of treaty language. Some allow for R&D requirements, some allow them in exchange for specific advantages or incentives, and some allow neither.

As with ownership/equity-related measures, timing matters. Where an investor is able to make fully informed decisions about an investment in full knowledge of the performance requirements it faces, the decision is then properly informed. Where performance requirements are imposed sometime after the investment is already established, the costs and profit estimates will be changed.

Preserving policy space: It has been noted in the discussion above that some performance requirements seem to work better than others, and that many work best when used as part of a suite of measures aimed at overcoming a particular challenge. If on careful consideration a state considers itself likely to use particular performance requirements, then the choice is clear: it should not include them in a treaty text. Other drafting options available to governments that wish to keep performance requirements as a possible tool include:

- An express provision allowing performance requirements to be imposed.
- An express exclusion from the national treatment and MFN provisions in a treaty, for both the pre-establishment phase (if that is included in the treaty), and the operational phases.
- An exclusion from national treatment and MFN obligations for the extractive sectors, allowing performance requirements to be imposed on foreign investors in that sector on a discriminatory basis. However, the exclusion may also have to be extended to an FET provision and an umbrella clause if these are included in the treaty, as well as to any provision limiting the use of performance requirements.
- Exclusion of all performance requirement issues from the scope of the investor-state dispute settlement provisions, allowing only state-state disputes.
- Targeted exclusions for certain types of performance requirements such as best available technology requirements, R&D, or employee training. The specific needs of each state party would have to be factored in here.

Conclusions

The region's governments face a difficult challenge in fostering national champions and, beyond that, making the *Africa Mining Vision* a reality. While the vision itself is clear, the path is complex. It involves finding the right mix of policies to work with each state's unique set of circumstances and actors to ensure that mineral wealth translates more effectively into broad poverty reduction and sustainable development.

An added complication is the suite of legal obligations embedded in the many international investment agreements to which the region's states are party. In some cases these agreements restrict governments' ability to use tools that have been successfully employed to achieve the types of goals sought here. This paper has highlighted where those potential conflicts exist, and explored the ways in which they can be avoided or minimized.

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1.0 Introduction

This paper has been produced for the *Ad Hoc Experts Group Meeting on Bilateral Investment Treaties and National Champions*, convened in conjunction with the United Nations Economic Commission for Africa's *18th Meeting of the Inter-Governmental Committee of Experts (ICE): "National Champions, Foreign Direct Investment and Structural Transformation in Eastern Africa."* The focus of this paper is more specifically on the mining sector, but it draws lessons from a wide variety of sectors, and its conclusions are in turn relevant even beyond the extractives sectors on which it focuses in more depth.

The paper aims to shed light on two distinct lines of questioning:

- What policy tools are available to help ensure that investment results in poverty alleviation and sustainable development, through the fostering of national champions and other means? How effective have those tools been in practice?
- What restrictions exist in international investment agreements that might limit recourse to policy tools that we know to be potentially effective?

Both parts of this analysis work together; it is important to know not just that a policy tool exists, but also to have some sense about what the experience has been with its use, what is the consensus on its effectiveness. And it is critically important to understand what limits governments might face in their ability to employ such tools, both as a means to understanding exactly what can be done under present legal limits, and as an instructional lesson in how future international investment agreements might be drafted so as to allow policy space to pursue nationally enunciated objectives.

2.0 Background

“National champions” are defined in the background paper to this event as “large-scale companies which are potentially or currently deemed competitive in national, regional, or international markets and are owned either by the state or predominantly by nationals or citizens from the region.” The interest in creating national champions in the Eastern African mining sector is part of a larger suite of dynamic changes affecting that sector. While the African continent is endowed with enormous wealth in the form of natural resources—by some estimates holding 30 per cent of the world’s mineral reserves (Prichard [2009], cited in Hany Basada and Philip Martin [2013]), with much more significant shares of specific types of resources—it has in many cases failed to fully exploit that wealth to ensure broad-based poverty reduction and sustainable development. This hard reality has become more poignant since the peak of commodity prices in 2008, which resulted in visibly high resource rents accruing to investors under previous contracts and codes. While commodity prices have receded since that peak, long-term demand is still strong enough to be driving an unprecedented rush to develop the region’s mineral wealth by both traditional (i.e., OECD) and non-traditional (primarily Asian) investors, both in long-standing mining strongholds and in states with newfound mineral wealth.

In that context, the past decade has seen a surge of national-level and regional efforts to re-envision the role of mining in the development paths of the region’s member states and more broadly in Africa as a whole. The “Washington Consensus” prescriptions of the 1980s, which focused on liberalizing access and creating favourable investment conditions, have given way to a new paradigm concerned with equity, transparency, fostering backward and forward linkages, local community development, social and environmental impacts, and a more significant role for the state. Along these lines, the *Africa Mining Vision*, adopted by heads of state and government in 2009, calls for “transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development” (African Union, 2009, p. v) In the last 10 years most African states with significant mineral wealth have revised or have begun the process of revising their national mining codes.

But the new vision is not a simple return to post-colonial nationalism. It accepts the need for significant private sector involvement in order to maintain global competitiveness. It seeks to carefully balance incentives and demands to derive a greater share of resource wealth at the national level without making investment unviable, working together with the private sector to find solutions that work for all. It looks for more than simple economic progress, focusing also on social and environmental outcomes as an essential part of overall sustainable development. In the end, it cares less about sovereign control of natural resources for the sake of control, and more about sovereign ability to effectively manage resource wealth and its exploitation for the benefit of the nation.

In that vein, the preoccupation of this paper is deliberately broader than the quest for national champions. This is not because national champions are insignificant to the development narrative; on the contrary, they are increasingly important. National or state-controlled companies accounted for a full third of the emerging world’s foreign direct investment between 2003 and 2010, and they number among them the world’s 13 biggest oil firms and biggest natural gas company (Wooldridge, 2012). They do not feature prominently in the mining sector, but their penetration in emerging market sectors such as energy (more than 60 per cent), utilities (more than 50 per cent), telecoms (more than 30 per cent) and finance (more than 30 per cent) is considerable (Wooldridge, 2012).

Nonetheless, the starting point for this paper is more broadly how mining might best contribute to a range of goals, consistent with the approach taken in the *Africa Mining Vision* and in various new mining codes such as those drafted in the last few years by countries such as Angola, Tanzania, Guinea and Mozambique. Clearly, one of the

important ways that mining might contribute to achieving those goals is by strategic use of policies to create national champions. However, that solution will not be right for all countries in all circumstances, and so it is useful to consider how else states might achieve those goals in the context of foreign direct investment.

This paper will focus on the policy tools available to states interested in pursuing this new vision of mining. The approach is a two-step assessment that asks first what we know about the strengths and weaknesses of some of the key policy tools, and about their effectiveness in practice. It then asks, with respect to those tools that are found to be potentially useful, what limitations might be imposed by the legal strictures of international investment agreements. In the course of that second step, it also explores what sorts of policies states might pursue that are informed by both the economic evidence and the legal constraints: how can states best preserve their policy space to foster national champions, and to embed the mining sector in the fabric of their pursuit of sustainable development objectives?

The preoccupation with BITs in this context is not new. Pedro (2012) argues strongly that one of the “crucial intervention points” in achieving the Africa Mining Vision is reversing the shrinking policy space in which the types of reforms envisioned can take place. While BITs have been with us for over half a century, it is only in the last decade or so that they have become widely used tools with tangible financial and regulatory impacts on host states (Bernasconi-Osterwalder, Cosby, Johnson & Vis-Dunbar, 2011). As such, the full measure of their capacity to restrict policy space has not yet been taken in a number of specific contexts—a shortcoming that the present paper seeks to address.

3.0 Analysis of Policy Options for National Champions and Other Tools for Maximizing Benefits From Investment

There is a wide array of policy tools available to national governments to pursue their objectives around creating national champions and deriving national benefits via their management of foreign direct investment. The list below is not exhaustive, but features primarily those tools that have some potential interest from the perspective of the second part of this analysis—that is, those that may run into difficulties with international investment agreements.

The analysis begins with ownership- and equity-related policy options i.e., tools primarily designed to foster national champions. It then assesses performance requirements as policy tools both for creating national champions and more broadly for deriving greater national benefit—economic, social and environmental—from foreign direct investment. Where there is experience and scholarship on which to draw, the analysis briefly surveys what we know about the potential effectiveness of the tools examined.

3.1 Ownership-/Equity-Related Options

There are a number of ownership-/equity-related policy options states might employ to pursue the objective of fostering national champions. This section focuses specifically on a non-exhaustive list of those that are commonly used and that potentially raise issues under international investment treaties. The policies assessed here include:

- Free carry obligations
- Joint venture requirements
- Creation/promotion of SOEs as sole actors
- Expropriation of private firms

3.1.1 Free Carry Obligations

Free carry obligations require that firms grant free of charge a specified percentage interest in their venture to the host government. The Democratic Republic of the Congo, for example, demands a 5 per cent stake under its 2002 Mining Code, but is looking to raise that number to 15 per cent in the ongoing revision of that law (down from a proposed 35 per cent). Kenya's 2012 Mining Regulations mandate a 35 per cent stake, but this is being revised under pressure from investors and will likely end up at 10 per cent. A number of other African states—including Botswana, Burkina Faso, Ivory Coast, Ethiopia, Senegal and Tanzania—have these sorts of obligations.

Equity stakes are usually transferred to the government at the time that exploitation permits are issued for the resource being mined. Governments benefiting from free carry provisions are typically not responsible for bearing the operational or capital costs that equity ownership would normally imply. In most cases the government does not have the right to sell its stake.¹

Free carry obligations are more in the nature of a tax reform than a drive to foster national champions, delivering a stream of revenues through dividends. That said, they also provide a measure of state ownership in sectors of key national interest, and can be combined with other measures surveyed below to effect some measure of state influence in sectors of interest. There is no consensus on the utility or right level of free carry requirements as yet, making the design and application subject to case specific review and assessment.

¹ See, e.g., the discussions in Wells (2014) and James and Vaaler (2013).

3.1.2 *Joint Venture Requirements*

These are requirements that any foreign investor in a particular sector must operate as an equity joint venture (joint venture) with some local partner. In practice, they are usually expressed as a demand that any investment have a certain percentage of domestic ownership. Prior to 1990, countries like India and Nigeria prohibited majority ownership of any investment by a foreign company (Miller, Glen, Jasperson, & Karmokolias, 1996). They may also be structured more indirectly, as a regime of incentives and disincentives that makes it more attractive to enter a market in the form of a joint venture than as a wholly owned subsidiary. Baoteng and Glaister (2003) found that, even after extensive investment regime liberalization, Ghana retained enough incentives in its regulations to significantly influence investors to engage in joint ventures.

Historically, joint venture requirements have been used to address the problem of lack of capital, and achieve the objective of decreasing foreign dominance in a given sector (Afriyie, 1988). They have also been seen as a way to create national champions or carve out space for domestic players in sectors considered vital to the interests of the host country. More recently, they have been aimed at building competitive capacity in domestic partners, who are ideally exposed to modern technologies, improved management practices, and global marketing channels and experience. China used these sorts of requirements heavily in its drive to foster globally competitive national champions in the manufacturing and heavy industries sectors, starting as early as the late 1970s (Pearson, 1991), but most prominently in the 1980s and 1990s. Most joint venture requirements focus on the manufacturing or agricultural sectors, though primary sectors are also covered.

Joint venture requirements have a number of caveats as a tool of industrial policy. First, they are not well received by investors. Joint ventures are normally a union of entities with shared objectives and complementary strengths, but mandatory joint ventures in countries with under-developed partners will bring neither of these prerequisites for the foreign firm. Moreover, there is a basic element of mistrust in a forced arrangement, particularly with respect to the appropriation of technology. Moran (2002, cited in United Nations Conference on Trade and Development [UNCTAD], 2003, p. 27) finds that technology employed in mandatory joint ventures is on average 3 to 10 years out of date, and technical training provided to local affiliate staff is a fraction of that provided in wholly owned subsidiaries. These unique characteristics of mandatory joint ventures may make them more prone to failure; citing a 1992 study by the British Nigerian Chamber of Commerce, Baoteng and Glaister (2003) note that of some 50 agricultural joint ventures set up in Nigeria in the mid-eighties, only 10 were still viable as of 1990.

The examples of China, Korea and others, however, show that joint venture requirements can be effectively employed. In the end, host countries need to delicately balance the benefits derived (both economic and non-economic) against the potential to deter foreign direct investment (FDI). Only countries in a position of strength vis-à-vis the investor can contemplate their use (ownership of natural resources is, of course, inherently a strong position).

3.1.3 *Creation/Promotion of State-Owned Enterprises as Sole or Main Actors*

There are a number of reasons why states might want to create state-owned enterprises (SOEs) as sole or major actors. The classic reasoning argues that there are significant economies of scale in the sector that cannot be achieved if there are multiple firms competing at the domestic level. This combines with the argument that in a competitive global market it is even more important to achieve an optimum (i.e., large) scale. If the desire is to create a national champion, the argument goes, then it should have a significant domestic presence.

There are several supplementary arguments for large SOEs, but which are not arguments for maintaining them as sole actors. For one thing, significant state influence in a sector allows for fine tuning and influence that can form part of an overall industrial policy strategy—a strategy that might be more difficult to effect in the presence of many firms, or of less significant domestic presence in the sector. For another thing, major state players can be a significant source of government revenue. Codelco, Chile’s national copper company, contributed over 13 per cent of total government revenues in 2010, for example—the result of taxes and charges, many of which are in excess of those payable by foreign operators (Korinek, 2013).

There are a number of tools by which this might be effected. The most straightforward is to refuse entry to foreign investment in the sector, where states have maintained their legal right to do so (as discussed below). Existing foreign firms can be expropriated, an option discussed in the following section. Existing national firms can be consolidated by means of arranged mergers, where the state has the influence to force such an arrangement, and where existing competition law allows it or can be relaxed to allow it. Particularly in the early stages, there will be a need for government financial support for the SOE, or for support from national banks.

A number of caveats should follow that extensive list of tools. For one thing, however the process is carried out it will be resource-intensive, particularly in the early years. States, and their national banks or development banks, may need to have the patience and the deep pockets to support years of losses and dole out large low-interest loans before a profitable enterprise emerges. In some cases the result will never be completely successful; the second caveat is that, like any exercise in industrial policy, creating or promoting an SOE must involve objective and regular assessments of evidence to determine whether support should be terminated, whatever the politics of the situation. Good practice in this area also dictates that at some point support should be scaled back to force the firm to compete unaided on the global market, bringing the discipline of competition to what might otherwise be a too-comfortable sheltered enterprise.²

Sørgard (2007) and Geroski (2005) argue that weakening competition policy to create national champions is ill-advised, but their chief criticisms seem misplaced in the present context. They argue that the increased monopoly power at the domestic level has detrimental effects on domestic consumers that might outweigh any benefits accruing from fostering a national champion. However, in the East African mining sector there is seldom a domestic market to be distorted; the products are almost always exported to the world market where the ability of a national-level monopoly to affect prices is negligible.

When mergers are forced between domestic firms to create national champions, some specific caveats are in order. In some cases such “marriages” have offered a chance for a weak state-owned player to be taken over by a stronger one, the benefit being in large part the ability for the stronger player to absorb the workforce liabilities and underperforming segments of the weaker player—in essence to subsidize some of the job-creation mandate with which the weak player was struggling. China’s Baosteel Group, now a major player, was made to stumble heavily in its path to achieving national champion status when it was forced to merge with Shanghai Metallurgical Holding Company and Meishan Iron & Steel Company in November 1998, a move that significantly weakened it (Sun, 2005). The lesson is that there are other public policy objectives behind forced mergers that might impede the objective of creating a competitive national champion.

A caveat with respect to SOEs as major players in the domestic market is that they may become too powerful to be effectively monitored, particularly when dealing in high-value commodities, and in states with limited administrative

² A set of good practice guidance on smart industrial policy is offered by Rodrik (2004).

resources. Cobham, Jansky and Prats (2014) track commodity trade from developing countries to Switzerland (a major commodities trade hub) and estimate that the trade flows involve a loss to exporters of some \$8 billion³ annually, some portion of which is surely lost by corruption in SOEs operating beyond the control or oversight of their host governments. A clear lesson here is the need for transparency in contract dealings.⁴

A general caveat for the strategy as a whole is that there should be some manner in which the SOE maintains the character of a private sector firm in terms of its competitiveness, and its innovation. But none of that is inherent in the model; it must somehow be proactively fostered. In some cases this can be done via collaborations with in-country private sector competitors, as in the case of Codelco's collaboration with BHP-Billiton to develop "world-class suppliers" (Korinek, 2013).

A recent development shuns the idea of a completely controlled SOE and has the state exert influence in key publicly traded firms through minority shareholding (either directly by the government or by national development banks), control of scarce credit at concessional rates, and various other means. Lazzarini and Musacchio (2011) show that Brazil's National Bank for Economic and Social Development operates along these lines, with holdings in 2009 of \$53 billion, or roughly 4 per cent of the national stock market. However, the influence of the government on key firms is far greater than that percentage shows. The Brazilian government wields considerable influence over the private firm Vale, for example, in 2011 going as far as to effectively force a replacement of its CEO. Russia similarly holds minority shares but wields huge influence in its biggest and most strategic companies: Transneft (pipelines), Sukhoi (aircraft), Rosneft (oil), Sberbank, Aeroflot and Gazprom ("A choice of models," 2012). And China's State-Owned Assets Supervision and Administration Commission is the world's largest controlling shareholder, with a record of shuffling CEOs among sector champions at will. The new model offers the advantage that it allows firms to operate as private sector entities, ensuring some degree of efficiency and competitiveness, but still allows the state to exercise control over the actions and direction of the key firms. It also leverages foreign equity in place of state funds or state support to capitalize the firms.

3.1.4 Expropriation of Private Sector Firms

This is a straightforward and well-known policy tool, which was heavily employed in the post-colonial period. At that time it was part of a move to rid states of their colonial heritage of commercial exploitation by foreign interests, and to assert national control over resources as part of a broader move to establish national sovereignty and identity.

Expropriation in the sense used there was a full and direct taking by the state—a transfer of private assets in full to either a state-owned entity or a private entity with state backing. As discussed below, from a legal perspective there are other less complete and direct actions which might also constitute expropriation. Replacing the board of a company with government appointees, for example, would remove the ability of the company to manage itself and would thus put the assets beyond their control in a manner equivalent to an expropriation.

Beyond that, there are different ways in which expropriation might be accomplished. The classic example of an orderly, almost "friendly," expropriation is Saudi Aramco, now the largest oil company in the world but which in the early 1970s competed with the national oil company Petromin. The Saudi government gradually bought shares in the company from the U.S. parent companies and by 1974 owned a 60 per cent controlling stake. The threat of proclaimed nationalization surely contributed to the willingness of the U.S. owners to accede to an orderly transition

³ All figures in U.S. dollars unless otherwise indicated.

⁴ For an excellent example of this sort of transparency see the case of Guinea, where, as of February 2013, all mining contracts (existing and prospective) are posted publicly on line.

to a sort of consensual “participation” of the state (Hertog, 2008). While still under U.S. managerial control, Aramco began introducing increasing numbers of Saudis into management, training them for executive positions. By 1980 Aramco had become fully Saudi-owned, but the roots were laid for a takeover wherein the core expertise was not lost, but rather was transferred to Saudi nationals.

The Aramco story presages the modern developments in national champions described above: the control of key firms by a variety of means including shareholding, finance and regulations, but without engaging in direct expropriation. While the Aramco model eventually led to full government ownership of assets, the modern models do not always bother to do so, leveraging foreign equity to achieve much the same ends. It also serves as a lesson for avoiding the classic problem associated with aggressive nationalization: that the core expertise of expropriated firms is lost in the transition, that the winning of the prize spoils what was won. The Aramco case attests to the wisdom of this lesson, as arguably the world’s most efficient national oil company, and one of the most efficient overall.

3.2 Performance Requirements

Performance requirements are stipulations imposed on investors that mandate certain behaviours or outcomes in their operations in the host state. They are of interest to us in the present context because their basic function is to wring more benefits for the host state from regulated investments. Some of the most common types of performance requirements are requirements for the investor to:

- Meet specified levels of local employment, or of local suppliers of goods and services.
- Engage in labour training or supplier development programs.
- Carry out some level of R&D in country.

Export-related performance requirements are also widely used. These mandate that the regulated firm must achieve some specified level of exports, for example linked to levels of production. These are mostly used in the manufacturing sector as a tool of industrial policy, and are not common in natural resource sectors where there is typically no need to encourage exports. As such they are not considered here.

Performance requirements have two basic forms: voluntary and mandatory. Mandatory performance requirements are imposed as a condition of establishment of an investment, as a condition of continued operation, or as a condition of bidding for a concession or licence. As discussed below, from a legal perspective it may matter significantly whether performance requirements are imposed at the outset of an investment, or as a change in the regulatory environment affecting existing operations.

Voluntary performance requirements are formulated as conditions for the receipt of some advantage, such as tax preferences or subsidies.⁵ Up until the late 1990s, states were increasingly moving toward using voluntary as opposed to mandatory performance requirements (UNCTAD, 2003), but since then this trend has reversed.

A final distinction centres on the mode of regulation. Performance requirements can be imposed by law (in national mining codes or general investment law) or they can be spelled out in contracts (mining, exploration and development agreements)—specified as individual legal agreements between operators and the host government, and in some cases through the application of regulatory and contractual mechanisms. Outside of contract-based requirements

⁵ In fact the distinction between voluntary and mandatory performance requirements is not a bright line. Mandatory performance requirements are ultimately incentive-based, with the advantage conferred being the award of a licence to operate. Whether this constitutes an “advantage” as per investment law has not yet been explored.

they can take the form of explicit threshold conditions of operation, or they can feature as part of bidding evaluation guidelines, wherein preferential consideration is given to those proponents that satisfy certain criteria.

There are a number of types of performance requirements, aimed at achieving different objectives:

- **Developing domestic expertise in the lead commodity sector:** technology transfer requirements, R&D requirements.
- **Developing domestic expertise in related sectors** (backward and forward linkages): local content requirements, mandates for supplier development programs; requirements for downstream processing of product.
- **Improving environmental and social outcomes:** environmental and social requirements, mandates for local employment.

Each of these is considered in turn below.

3.2.1 Developing Domestic Expertise in the Lead Commodity Sector

The primary aim of performance requirements of this type is to bring about horizontal spillover effects—the transfer of expertise, good management practice, tacit knowledge about the lead commodity sector, to host country nationals. This effect lays the groundwork for successful domestic entrepreneurs to compete in the sector, and has the spin-off benefit of increasing capacity and income levels of domestic employees. It can also increase the chances that spillovers will occur into other unrelated sectors that are able to make use of the same technology or know-how (Kaplinsky, 2011). These performance requirements are often combined with policies encouraging joint ventures or some degree of domestic ownership.

Technology transfer requirements mandate that the investor bring to its in-country operations some specified level of technology (usually proprietary), with the aim being that investments operate at a global industry standard, or with best available technology. This type of requirement is more often seen in the manufacturing sector than the extractives sectors, but it featured, for example, in Nigeria's Content Policy, which required oil and gas sector firms to submit an annual technology transfer plan (Nwaokoro, 2011). UNCTAD (2003) surveys the few instances of this type of requirement and finds little evidence of its success. They argue that this should not be surprising; there are major challenges in monitoring such requirements, and moreover it is challenging for governments to specify what technologies particular firms in particular sectors and countries should be using in the first place.

R&D requirements mandate that R&D be carried out in-country at some particular level, usually specified as a percentage of operating costs. Like technology transfer requirements, these are more often applied to the manufacturing sector, where they are usually formulated as voluntary performance requirements, as the condition for receipt of fiscal support. Mandatory applications of this sort of requirement are quite rare. And voluntary requirements tend to be ignored; the problem is that setting up an effective local R&D facility is particularly challenging in the absence of local capacity to absorb, adapt and develop the technology, and the costs of doing so often exceed the government incentives on offer (UNCTAD, 2003). Clearly any such requirements, if they are to be successful, would need to be accompanied by national efforts at establishing working national systems of innovation, including support for education and training.

3.2.2 *Developing Domestic Expertise in Related Sectors: Fostering linkages*

These sorts of performance requirements are extensively employed, and increasingly so as a shift in orientation sees governments turning from taxes and royalties as the main preoccupation to explore other ways in which mining (and other) companies can contribute to the broader development of national and local economies. The main objective of these measures is to move away from enclave development that contributes very little outside of expenditures on core functions, that imports most inputs, technology and experts needed in the course of operation, and that exports largely unprocessed materials. Among other things, this model of operations (which has been prevalent in Africa's extractive sectors during the boom and bust of the last decade) leaves the continent stuck at the low-value added end of the value chain. As well, enclave development leads to "Dutch Disease"-type problems for other productive sectors, driving up the prices of their exported goods while creating few broader benefits to the economy that might act as counterbalance. An oft-cited example of the desired end state for backward linkages is Codelco in Chile, which sources roughly 90 per cent of its goods and services inputs domestically (IMF, 2012). Botswana's diamond processing sector (discussed below) is widely cited as an example of well-developed forward linkages.

The most straightforward of this class of requirements is a demand that a certain percentage of procurement come from local or national firms. As noted below, the definition of local or national can be difficult, but the intent is clear. Also widespread is a demand that investors use local goods and services where they are of comparable quality to foreign supplies. Uganda's *2013 Petroleum Act*, for example, stipulates: "The licensee, and the contractors and subcontractors of the licensees shall give priority to the purchase of local products and services from Ugandans wherever they are competitive in terms of quality and timely availability."⁶ Although this requirement is enforced with criminal penalties, it is unlikely to have the same effect as a percentage requirement; most investors would rather source locally if they could find competitive suppliers, so in the final result not much changes. Moreover, competitiveness in terms of quality is at best a quasi-subjective measure that is subject to interpretation.

More indirect yet would be a requirement to implement programs to bring domestic suppliers up to acceptable standards (supplier development programs), though this is more often done voluntarily by firms in response to mandatory local procurement requirements. Less used, but still significant, are requirements for downstream processing or refinement of the mined product.

Local procurement requirements can be successfully employed, given the right circumstances and accompanying policies (UNCTAD 2003; Sutton, 2005 [cited in Rodrik, 2006]). Brazil's national agency for oil and gas and biofuels (ANP) uses local content as one of its three criteria for awarding petroleum rights, and has seen commitments to local content increase from 25 per cent in the year the program started to almost 80 per cent a decade later (Sigam & Garcia, 2012). Part of its success stems from the leadership demonstrated by Petrobras, the national champion, in fostering backward linkages in the sector, and a large part is due to Brazil's vision for localization, its broad policy support for that vision that goes well beyond performance requirements, and its avoidance of the pitfalls described below.

Local procurement requirements face a number of well-known pitfalls to be avoided. Most important, the quotas should not be set higher than local suppliers are able to meet, though they should be set high enough to push suppliers to greater efficiencies. Some have argued, for example, that Nigeria's *Oil and Gas Industry Content Development Act* was over-ambitious in its targets for local content, envisioning an increase from 2 per cent in 2009 to 35.5 per cent in 2010 and to 70 per cent by 2013 (Morris, Kaplinski & Kaplan, 2012). In other words, it is important to push suppliers, but not to push them to jump across a gulf they cannot span. And support from both the government and the firms

⁶ Part VII: State Participation and National Content, paragraph 53(3).

involved (in the form of supplier development programs) is critical in helping build up the capacity to meet ambitious quotas. As well as capacity building, government support for lending to potential suppliers can also be effective; most are SMEs whose access to finance is difficult at best.

Policy coherence is also important. Morris, Kaplinski and Kaplan (2012) argue, for example, that Ghana's drive for greater local content would be more effective if the tariff breaks given to mining companies on their imported inputs were also given to local supplier firms. The definition of local is also complicated. Simple local ownership, which some countries use as a criterion, can lead to procurement from local firms expressly set up to import the goods in question, which merely adds another layer of middlemen to the chain without bringing any of the expected local benefits (Morris, Kaplinski and Kaplan, 2012). Greater effect comes from a focus on value added in country, rather than on ownership. As well, preference should ideally be given for classes of goods and services more likely to lead to economic development, such as goods with high capital or knowledge content, or fundamental business services such as finance.

Services are often the subject of local content requirements. For example, Angola in 2010 mandated that oil companies operating in-country would from that point on have to use domestic banks to process all their transactions, in an effort to strengthen the domestic banking sector (Morris et al., 2012).

While we can clearly say that parallel efforts by government are a critically important complement to the use of local content requirements, we can also note that Chile, noted above as a model of success, employed no such requirements, and instead sank a great deal of public resources into good governance and a conducive investment environment (Morris et al., 2012).

Botswana was cited above as a successful model of developing forward linkages in its diamond mining sector. In 2005 the government negotiated its renewed diamond mining lease with De Beers to include requirements that significant portions of downstream activities (cutting, polishing and some jewelry making) occur in country (Morris et al., 2012). This requirement was preceded by careful analysis of the potential of this sector to flourish in Botswana, and by in-depth consultations with De Beers and other private sector players to arrive at consensus as to what was feasible. It was followed by a suite of complementary policies designed to make the effort a success, including both negative and positive incentives.

3.2.3 Improving Environmental and Social Outcomes

These are requirements for investors to undertake specific practices, either to improve the environmental and social impacts of their core activities, or to improve environmental and social conditions in the communities in which they are based. They are typically agreed in the context of the concession contract, and might involve, for example, undertakings to build roads, schools or hospitals. Requirements focusing on environmental outcomes might be inserted to supplement or go beyond national environmental regulations, especially where those are seen as in need of strengthening.

Local employment and training requirements are also common, and are usually spelled out in national codes, though they can also be part of contract negotiations. Requirements for indigenous management demand that a certain percentage of the firm's in-country management be host country citizens, or be members of historically disadvantaged groups. South Africa's broad-based Black Economic Empowerment Act (BEE), for example, has management control as one of the scoring pillars by which firms must be measured, with targets ranging from 40 per cent to 50.1 per cent.

Local employment requirements can be expressed in a number of ways. They can be cast as absolute hiring thresholds

that firms have to meet to qualify for preferential tax treatment (e.g., firms hiring over 100 people to be given a specific level of tax break, with breaks increasing as the number of hires increases). They can be cast as mandatory requirements to employ a certain percentage of the workforce, or management, from the national labour pool or from a disadvantaged group. The motivation for such requirements is to try to maximize the employment impacts of a given investment. Mining, being a capital-intensive activity, typically employs very few people relative to its share of national GDP. Even in countries with large mining sectors such as Botswana, Chile and Peru, employment of the local work force in the sector ranges from 3 per cent to 0.7 per cent (UNCTAD, 2007).

As in the case of local procurement requirements, the key with local employment requirements is to help ensure that there is in fact adequate local supply to fill the needs. In many countries the labour force skills do not match well with the needs of investors, who are forced to hire from abroad, especially at senior levels (Morris et al., 2012; Peek & Gantès, 2008). Implementing a demand for local hiring without addressing this problem—through consultation with the firms involved to gauge their needs, and appropriate investment in education and specialized training—greatly increases inefficiencies and costs in the regulated firms. As a positive example, since the 1990s Brazil has set aside a percentage of oil sector royalties for the Oil and Gas Sectoral Fund, which supports, among other things, specialized learning at existing institutions. It has provided over 5,000 post-graduate scholarships since 1999 for professionals destined for the oil, gas and biofuels sectors (Korinek, 2013).

Requirements for indigenous management are not particularly common, but where they are in effect one challenge is to find the appropriate level of requirement such that the ultimate goals are in fact achieved. A proposed Local Content Act in Nigeria (2003) would have specified that over 10 years international oil companies must ensure that 95 per cent of their managerial, professional and supervisory staff be Nigerian.⁷ Most observers criticized this proposal as too high a benchmark to be effectively met. Another challenge, shared by programs such as BEE, is in ensuring that the benefits actually accrue to those that are in need, rather than to an existing elite that is further enriched.

Requirements for training of local employees are widely used. Countries such as South Africa and Malaysia have established skills development funds into which private sector actors pay, and these have been relatively successful at improving employee skills.⁸ Often, such training is done as a quasi-voluntary effort by the firms involved in response to requirements for localization of the labour force, to overcome the critical problem of lack of appropriate skills.

3.3 Conclusions on Performance Requirements

Before venturing any conclusions on the use of performance requirements to foster the objectives of governments around creating national champions and creating national value, it is important to note that these are not the only available policy tools. The Overseas Development Institute (ODI) (n.d.), for example, runs through an extensive set of ways in which engineering services contractors might be incentivized to innovate in social and economic performance, including extending the provisions for cost-recoverable expenditures.

That said, performance requirements can be an important part of state efforts to build linkages around lead commodities, and to deliver local social and environmental benefits. The analysis above has shown that many of these tools have been successfully used to do so. While there have been many negative experiences as well as positive, this does not validate the Washington Consensus view that such tools should not be used – a view that underpins the prohibitions they face in investment law, as explained below. Rather, it demands a focus on how to do

⁷ *Nigerian Content Development Bill, 2003*, Section 12. The bill was not passed into law.

⁸ UNCTAD 2003: 31.

the job right. Doing this is not a formulaic exercise, and the right tools will be different from country to country, sector to sector. But the experience drawn on above will be helpful in identifying the key issues and questions.

An important lesson of practice is that performance requirements are seldom enough in and of themselves, that they need to be used as part of a suite of complementary measures. This is particularly obvious in cases where they demand the use of local suppliers, or local workers; in such cases it is imperative that parallel efforts be supported to build the capacity necessary to meet those quotas in ways that work for the regulated firms as well as for the favoured domestic actors.

Another lesson is the importance of finding the right balance point. Demands imposed by performance requirements need to be strong enough to have an impact, but not so strong that they make the business model unviable. The right point of balance is a difficult thing to find, and it can only be approximated in consultation with the affected actors: the regulated firms, the local suppliers or processors, the workers' associations, etc. This sort of consultation is no magic recipe in and of itself, but it is an essential ingredient in success.

4.0 The Legal Issues

Given the range of issues and options described above, this section considers the linkages between those national champion options and performance requirement options likely to be most beneficial (with the right flanking policies) and the international law constraints imposed by international investment treaties. It begins with a very brief introduction to these investment treaties, with an emphasis on a general description of their content and their prevalence in the region. We then turn to a consideration of how these instruments relate to the ownership and equity-related approaches to national champions set out above, and to performance requirements.

4.1 What Are Investment Treaties?

Investment treaties are international agreements between governments that create obligations on states as to how they treat investors from the other treaty party. They may be stand-alone agreements between two states, usually known as bilateral investment treaties or BITs. As well, they may be regional agreements, such as one currently finds applying to the SADC region and the still to enter into force COMESA agreement. Investment treaties may also be found as parts of broader free trade treaties concluded either on a bilateral or regional level. Indeed, it is becoming increasingly common for free trade agreements to include chapters on investment that closely parallel BITs in terms of the scope and content.

To date, there are some 3,000 investment treaties in force globally. Within the region, a review of the UNCTAD database on investment treaties indicates that there are 137 treaties that states are party to. Of these, only three are between regional states: Burundi-Comoros, Burundi-Kenya, and Eritrea-Uganda. Thus, some 134 are between states within the region and from outside the region. A full list is found in Annex 1.

In addition, some states can become parties to two regional agreements on investment: the Investment Agreement for the COMESA Common Investment Area, which has not yet been ratified and is not in force but which has the potential to include 12 regional states as parties;⁹ and the SADC Protocol on Finance and Investment, which has entered into force. Four regional states, DRC, Madagascar, Seychelles and Tanzania are/could be party to this SADC investment treaty.

Increasingly, investment treaties are being negotiated as parts of broader free trade negotiations or as part of regional integration processes, of which the SADC and COMESA agreements are examples.

Given these different sources and forms, investment treaties are now more defined by their content than the specific form they take. The next section provides an introduction to this content.

4.2 The Content and Structure of Investment Treaties¹⁰

The content and structure of investment treaties can be broken into two parts, both equally important. These are the substantive provisions and the dispute settlement mechanism.

⁹ Burundi, Comoros, DRC, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Rwanda, Seychelles, Tanzania, Uganda. The status of South Sudan under the COMESA process has not been considered here.

¹⁰ This section provides a brief synopsis of a broader introductory text prepared by IISD in 2011 (Bernasconi-Osterwalder et al., 2011).

4.2.1 *The Substantive Provisions*

The substantive provisions found in most investment treaties, that are most relevant to the issues discussed in this paper, are:

National treatment: The parties to the treaty promise that the investors who come from the other party will be assured treatment “no less favourable” than investors of the host state (the state where the investment is to be located). This does not always mean the treatment must be identical, but the impact of any differences may not be such as to create a less favourable environment for the investment to operate in compared to domestically owned companies. Legislation and policies applying to an investment cannot discriminate based on the country of origin of the investor.

This provision does not mean that a government cannot distinguish between investments based on issues like environmental impact or the differences directly related to different locations in a country, or for other legitimate reasons. But a government cannot treat a foreign investor or its investment less favourably because it is a foreign owned company.

Most-favoured nation treatment: The most-favoured nation (MFN) provision has a long history in trade law. In investment law terms, it means that a government cannot treat an investor from the state of the treaty partner any less favourably than it treats any investor from any other third country. It is thus the equivalent of the national treatment obligation on states, but applies as a comparison to other investors. Many observers believe that the MFN provision was originally intended to apply to how the host state treats an investor or its investment under its domestic law and policy. However, arbitral tribunals have also interpreted it to include any obligations in another investment treaty that the host state is also a party to that are granted for investors of another state. So this has become a very broad and often controversial obligation in many instances.

Rights of establishment/Market Access: Closely related to the above two obligations is the issue of the right of foreign investors to establish an investment. For the most part, the investment treaties that apply now within the region do not create any special rights for investors or obligations on states prior to the establishment or acquisition of an investment.

However, some agreements within the region do provide that foreign investors can have the same rights to establish a business on the same terms as would be applied to domestic investors. Such provisions are known variously as market access provisions (i.e., to the investment market in the would-be host state), rights of establishment or pre-establishment rights.

Many less informed commentators have argued that the inclusion of such provisions in a treaty means there are no obligations that apply to the making of such foreign investments. This is not correct. However, by requiring national treatment in the making of investments, these provisions can prevent the use of special obligations or the imposition of special limitations and restrictions specifically on foreign investors, including requirements for joint venture partners, free carry shares and performance requirements. Thus, the timeframe at which the national treatment and MFN provisions apply become a critical factor. Importantly, while the majority of older treaties involving regional states do not include any such obligations, newer treaties do include them. African states can anticipate a growing pressure to include such provisions in any future treaties and thus need to be aware of their consequences.

Prohibition on performance requirements: Closely related to the inclusion of pre-establishment rights in a treaty is the possible inclusion of an express provision on the use of performance requirements. In some cases these

prohibitions either repeat or mirror the provisions found in the World Trade Organization's Agreement on Trade Related Investment Measures (TRIMS). Some texts, however, have a TRIMS-plus approach, imposing higher levels of restrictions on how states may impact the operations of an investment by imposing performance requirements. The inclusion of any provision that restricts or prohibits the imposition of performance requirements will obviously have an impact on the types of measures described above.

The competing theories are that any imposition on the investor will limit its freedom to maximize efficiencies and profits. On the other side, a prohibition on performance requirements in a treaty will preclude a government from being able to use some of the most important development-related tools that may be available to it.

Expropriation: All investment treaties include a provision to protect foreign investors from expropriations without compensation. This is an important qualification: these treaties do not ban expropriations but do impose certain conditions, the most important of which is compensation to the investor for the value of the expropriated investment. There are three types of expropriations that are potentially addressed by expropriation provisions: direct, indirect and regulatory expropriations.

A direct expropriation is one where the ownership of an investment or assets of an investment are transferred to the state or under force of law to a third party. Indirect expropriation is where a government does not transfer the ownership, but effectively takes over the management and direction of the investment and displaces the effective rights of the owner. Regulatory expropriation is a controversial concept that many treaties now draft special language to either limit in the treaties or exclude completely. The concept is intended to be that a regulation that is legitimately taken to protect the environment, human health, consumer protection and other proper measures to protect or promote the public welfare, and which does not impact any ownership or management of the investment, can still be an expropriation if it impacts the economic value of the investment. Some arbitrations have applied this approach, while others have rejected this with equal fervor. As a result, treaties such as the COMESA regional investment treaty include provisions today to state specifically that such regulations do not constitute an expropriation under the treaty.

Fair and equitable treatment: The standard of fair and equitable treatment (FET) is a very misleading one in many ways. In its normal social use it seems fairly simple: what state would not say it will treat foreign investors fairly and equitably? However, once included in a treaty, FET becomes a legal standard that has attracted an extremely broad meaning in several arbitrations. The standard can include elements of due process, transparency and non-arbitrary measures. According to some tribunals and treaty texts, it also includes a concept of respecting the legitimate expectations of the investor, a subjective concept that has been used to create obligations on states in relation to any statements the investor is deemed to have relied upon in making the investment.

While initial assessments suggested this standard would require high thresholds of government misconduct, (Mann & von Moltke, 1999) in practice many tribunals have applied very low thresholds, making this standard the one that has become of highest utility to investors in seeking damages for measures taken by governments. As a result of its unpredictability in an arbitration, some states have decided not to include this standard in their treaties anymore, or to include very restrictive versions of it.¹¹

Umbrella clause: An umbrella clause is a provision that essentially says that a government must adhere to any commitments it has made to an investor, and thus makes those commitments part of the fabric of the investment treaty. There have been very expansive interpretations of what these provisions mean in some arbitrations, and how

¹¹ This is the recommendation found in the SADC Model Bilateral Investment Treaty Template, 2012.

a commitment of a state is to be assessed. Some tribunals have been very open as to how this might be constituted, including general statements by a government in relation to an investment. Others have held that only specific agreements in writing or legislation can be covered here. In either case, where an umbrella clause is paired to a stabilization clause in an investment contract or in the domestic law of the host state, a powerful combination is formed to preclude government action that is not consistent with the stabilization provision.

Many states have decided not to include such provisions in future treaties. In other instances language is being used to ensure that only written agreements specific to an investment may be relied upon. In this, there are many parallels to the concept of legitimate expectations associated with the FET issues discussed above.

Personnel: Most investment treaties include provisions that allow the foreign investor to engage staff from its country of origin or other countries. The goal for the investor is to have the maximum flexibility to engage world-class senior staff and directors. Depending on how the provisions are worded, the provision may allow senior management staff and or other high skilled employees to be engaged. While this is an important issue for investors, the training of higher-skilled domestic employees and management personnel is an important element in many performance requirement schemes. Thus, how such provisions are formulated can be very important to governments seeking to promote higher levels of skills transfer.

Note on exclusions: Increasingly, investment treaties include provisions and schedules with exclusions from the application of national treatment, MFN, and other provisions, or of certain categories of measures such as those aimed at promoting economic empowerment of previously excluded ethnic groups. In some instances these exceptions can be very effective, but it is essential that they be carefully crafted. While exclusion clauses can be very useful, they should not be seen as a cure for poorly drafted substantive obligations on states. Both the provisions that create obligations on states and those that craft the exclusions must be well drafted to maximize the opportunities for benefits from FDI.

Note on investor obligations: Finally, there is a growing body of studies and academic work that suggest moving to include investor obligations into the text of investment treaties. The SADC Model Bilateral Investment Treaty Template of 2012 includes model provisions toward this end.

While these are not present in the existing treaties of member states in this region, the template is there for considering them. The issues addressed in the template are very consistent with the type of pro-development issues addressed in the present paper. In particular there is a strong focus on the contribution of the investment to the economic and social development of the host state. These provisions parallel those now being developed in many new domestic laws addressing the entry conditions for FDI, especially in the extractives sector.

4.2.2 The Dispute Settlement Mechanism

A central feature of almost all the investment treaties that apply in the region and globally today is the inclusion of a special right to international arbitration given to investors to claim damages for measures alleged to be inconsistent with the treaty obligations on states. Some treaties may go farther than this and also allow international arbitration for “any matter” relating to an investment, or in relation to alleged breaches of contracts or other agreements between the host state and the investor. In this way, the so-called investor–state dispute settlement process can be a very expansive tool for investors, which allows them to bypass the domestic courts in favour of international arbitration.

The treaties provide an automatic right for investors to utilize the process. The first such arbitration was initiated in 1987 against Sri Lanka, but the process saw limited use until the North American Free Trade Agreement chapter

on investment spurred a series of arbitrations in the late 1990s. Today, there are over 600 known investor-state arbitrations worldwide, making investor-state arbitration the most used dispute settlement process ever under international law. All sectors have been touched by these arbitrations, with some 25 per cent of them dealing directly with mining, oil and gas. In addition, the value of the claims and awards in the mining, oil and gas arbitrations far outstrips those of any other sectors (Cameron, 2014), making ISDS a critical issue for states to consider carefully in negotiating investment treaties.

The ability of investors to initiate these claims has created a concern for “regulatory chill” in many public policy areas. By this we mean that investors frequently use the threat of filing an arbitration to try to dissuade a government from taking measures that may be detrimental to them or their investment. This is seen in particular in relation to environmental and human health protection measures, contract reviews, and mandated renegotiations and tax increases.

Two particular elements of the investor-state process make these threats potentially potent. One is that there are varying interpretations of the key provisions noted above in the arbitral decisions, in some cases interpretations that cannot be reconciled with each other. As a result, it is impossible to foretell with a large degree of certainty what interpretation a tribunal will take as this depends on the three people who compose the tribunal and their particular approaches to investment treaty interpretation.

The second element is that arbitral awards cannot be appealed and thus cannot be reversed just because they are wrong in law. Domestic courts that can review awards have a very limited basis for doing so under domestic laws on arbitration. There is a consistent understanding across jurisdictions whereby judges have long noted that an error in law is not a basis for overturning or refusing to enforce an arbitral award, even one for hundreds of millions of dollars. The basic reason is that arbitration laws and treaties under which these reviews can take place put a higher value on finality than correctness in law. The origins of this lie in commercial arbitrations between private parties. But the same approach is now applied to arbitrations against governments on public law matters, leading to final decisions that compel states to pay damages based on awards found to be wrong in law. In short, arbitrators have the right to be wrong, and governments with awards against them must still pay damages when they are.

As noted, there are over 600 known arbitrations against states under this process, with about 25 per cent in the mining and oil and gas sectors. A cursory review of some databases that cover these disputes indicates about 13 have been against regional states, with five in the mining and oil and gas sector. This percentage is a little higher than the global range, a fact that can easily be explained by the disproportionate role of these sectors in attracting foreign investors.

As a final note on the investor-state system in general, it is important to note again that the arbitrations are initiated directly and at the sole discretion of the investors. Home states of the investors do not have to approve these arbitrations and are not involved with them. Hence, it matters not whether the agreements is with a friendly state, as the other treaty party has no voice in the initiation of an arbitration or its conduct.

With this background on what investment treaties are and what the key provisions are, we now turn to how they relate specifically to the national champions and performance requirements issues. We look specifically at

- The imposition of different types of ownership-related options prior to the establishment of an investment;
- The imposition of different types of ownership-related options after an investment has been established; and
- The use of performance requirements.

4.3 Investment Treaties and Key Ownership- and Equity-Related Measures – Pre-Establishment

The starting point of this analysis from a legal perspective is absolutely clear: under the general principles of international law and customary international law, states have a complete right to determine whether or not, and on what terms, to allow foreign investors to enter into their markets. There is no general right for investors from one state to invest into another one. This situation prevails unless a state has entered into one or more treaties that restrict their rights in this regard.

Consequently, unless a treaty commitment has been made not to do so, governments can limit or condition access to investment in any sectors they wish to. This of course includes the natural resource and extractive sectors. So the question becomes what kinds of provisions might limit the ability of governments to limit or condition foreign investment?

Generally speaking, for the initial starting point of the right of states to control all investments into its territory to be restricted, an investment treaty will have to contain a provision that establishes the right of a foreign investor to invest into the territory of the other state party. This refers back to the discussion of pre-establishment or market access rights in the previous section. Most of the treaties in the region do not have such provisions, but there are growing pressures from developed country negotiators to include them. This is especially true for those states with large extractive sectors that are active in developing countries. Canada is one such state, and the United States has routinely done so for many years. Indeed, the three treaties between regional states and the United States (Rwanda and DRC) and Canada (Tanzania) appear to be the only ones with pre-establishment rights.

Thus, subject to further review of all the currently applicable treaties within the region, there are few treaties that limit government policy space in terms of prohibiting foreign ownership of designated sectors or imposing other forms of ownership requirements. All of the options canvassed above for establishing limitations on foreign investment in order to promote national champions are, therefore, largely available.

It should be noted that, even when a treaty does include market access rights for foreign investors, it is very common for states to make exceptions or reservations to those rights. For example, the 2013 Tanzania-Canada investment treaty contains an exclusion for all existing measures that do not conform to this standard, thus preserving any existing laws that call for restrictions of local ownership in any sectors. In addition, both governments can schedule sectors or sub-sectors that will not be subject to the national treatment obligations on market access. It is therefore important for governments to fully understand the mechanisms available to preserve the desired policy space in different sectors, including those where the concept of national champions is a policy option through whatever mechanism described previously, or where national ownership rights are part of the policy mix for economic empowerment or other reasons.

It is important to note that there are going to be increased pressures on African states to provide market access rights for investors, especially in the natural resource and extractives sectors. Canada has been exerting pressure on some states by withholding foreign aid resources unless such rights are granted in investment treaties. The United States is becoming aggressive as well, and the European Commission has established market access for its investors as a core issue in the trade and investment negotiations, including the prohibition of joint venture and other local-ownership requirements.

The extent to which the EU is moving on this can be seen in the draft Canada-EU Trade Agreement. In the investment chapter of that text, the EU has proposed, and it appears Canada is in general terms agreeing to, express prohibitions on the states party against establishing monopolies, joint venture requirements, maximum shareholding levels for foreign investors, or quantitative limits on the value of foreign shareholdings.¹² As these tools are not generally used in commercial sectors in Canada or the EU, the most likely explanation for these draft provisions is the desire to flesh them out for use in other treaties where such tools exist and are growing. Asia and Africa are clearly the most likely places where they will be brought out for future use, and if used they would expressly preclude almost all types of approaches to establishing national champions as well as most likely formulations of Black Economic Empowerment Act-type measures.

4.3.1 Options to Preserve Policy Space

Given the potential impact of these issues on the development of national champions, this is an area where officials will need to pay considerable attention to crafting the appropriate rules. States have several options in terms of establishing and maintaining national ownership requirements in various forms, be it state-owned companies, domestically owned private sector companies, joint venture requirements, free carry requirements for government share ownership, economic empowerment programs or other similar tools. These options include:

- Continuing to not include market access rights in any form in investment treaties, recognizing this preserves the maximum policy space for states and that it is perfectly consistent with international law.
- Including provisions on market access but ensuring that there are exceptions for any existing measures that do create such restrictions, as well as for sectors in which it is likely that such restrictions might be taken. It should be noted that such exceptions are extremely common and are not in any way seen as having a negative impact on states when done in a transparent manner. In addition, if this approach is used it is essential that a further provision be included in the treaty allowing for amendments to be made to these preserved measures while still maintaining their preserved status.
- Including provisions on market access but through a positive list approach as is currently used in the WTO's General Agreement on Trade in Services. Under this approach, only those sectors actually listed in a schedule are made subject to markets access rights. It is also possible under this approach to exclude sub-sectors and specific measures that may restrict market access rights.
- Including market access provisions on the basis of a schedule of either included or excluded sectors, but allowing for unilateral amendment of the schedules, thus leaving each state with individual options to expand or restrict future directions. This approach is found in the CCIA, subject to the obligation that the full status and rights of any investment already established not be terminated because of a change in the open/closed status of the sector. (Treatment of established investments is discussed in the section below.)
- Having provisions on market access, but excluding them from any form of investor-state dispute settlement. The COMESA investment agreement does this, as does the recently signed (2013) Canada-China investment treaty.

Other options may also be contemplated. Of note, the SADC Model Bilateral Investment Treaty Template recommends first that member states not include any market access rights in investment treaty negotiations.

¹² The draft text of the investment chapter of the Canada-EU Trade Agreement was leaked in November 2013. The provisions noted here are in draft Art. X.4.

4.4 Investment Treaties and Key Ownership- and Equity-Related Measures – Post-Establishment

The legal situation changes in very significant ways when ownership restrictions or prohibitions are created in relation to an investment already established by a foreign investor with investment treaty rights.

Different types of measures with retroactive application to existing investments can raise different types of issues, including breaches of national treatment obligations, FET, and the provisions on expropriation.

If a foreign investment is nationalized, for example, in order to create a national champion owned by the government, this would be a classic form of an expropriation, and the compensation required by the applicable treaty would be part of the state's obligation. International treaties often require higher levels of compensation than one finds in domestic legal regimes. One may recall here that expropriation is not illegal under investment treaties, as long as the required level of compensation is paid.

A measure requiring the sale of an investment in whole or in part to a domestic investor, as opposed to the government or a state-owned enterprise, in order to meet domestic ownership requirements would also be considered an expropriation even though it is not being bought by the state. This is because it is a sale that would be required to take place by law. The government may or may not be required to pay compensation here, depending on the amount the ownership stake is actually sold for and what its value might have been prior to the expropriatory measure being made known. But an investor might well have a claim under an applicable treaty to the difference between these two valuations.

Under some programs, part of the ownership stake in a company may have to be transferred to a joint venture partner or a state-owned enterprise, or to the state itself. Where the law changes, for example, to require a given percentage of domestic ownership, this too can create an expropriation of the portion of the investment whose ownership must be transferred. Again, any compensation required from the government would have to be assessed in the context of the value of the investment before the measure was taken and the actual value received for the shares.

In some instances, free carry shares are being required by governments as a condition of operating an extractive industry. Effectively, the investor is required to give the defined percentage of the investment to the government. This policy would also be an expropriation if the requirement was implemented after the investment was established.

It may be noted here that compensation may be payable in forms other than money if an appropriate relationship is established and maintained with the investor. For example, if a 20-year mining permit is extended to 25 years, this may cover the value of the compensation required. It is up to the government and the investor to seek ways to adjust for this where possible, especially when an ongoing relationship is desired. However, in the end, if an investor is not satisfied with the value of compensation received, it may commence arbitration under a treaty if one is applicable.

In addition to raising issues of expropriation under a treaty, measures that target foreign-owned investments for some form of divestment of all or part of the ownership stake may also raise issues of national treatment and FET. The national treatment issues arise by virtue of the fact that only foreign-owned businesses are required to divest the ownership stake. The purpose of the measure is not in question here: it is simply the fact of a measure being aimed at foreign investors.

A breach of the FET provision in a treaty might also result from such measures. This is especially so when the investment is based on a contract or a concession agreement or permit with the host state that makes no such requirement known. Again, compensation would be the required remedy of the state under a treaty.¹³

In summary, the public interest nature of such requirements would not eliminate the requirement for compensation. However, a state that seeks to have a longer-term relationship with the investor can initiate negotiations on the amount of compensation and the manner in which it might be paid, including non-monetary means such as an extended term for a permit. However, as noted, absent an agreement between the parties, the investor would be able to resort to arbitration under an applicable treaty if there is one.

4.4.1 *Options to Preserve Policy Space*

The options for preserving policy space for ownership-related measures that are imposed after an investment is made are somewhat more difficult to address. At a basic equity level, altering the ownership structure of an investment after it has been made is difficult. Doing so without compensation when the costs to the investor are significant presents a very difficult situation. This does not deny or diminish the importance of the reasons for doing so, but illustrates the difficulties in balancing legitimate public purposes with the individual costs this might impose on investors.

Of utmost importance in these types of circumstances is the need to negotiate with the investor for an agreed level of payment and method of payment, including options such as extended permits.

At a drafting level, some treaties have created exclusions for black economic empowerment programs or for similar development reasons. A model provision on this is found in the SADC Model BIT Template.¹⁴ However, it is very rare that such exclusions would cover a direct expropriation of the types being discussed here. Exclusions from FET and national treatment are easier to draft through an exclusion of the extractive sectors or certain types of measures related to these sectors, but would not overcome the possibility of an expropriation being found.

If a treaty includes alternative formulations to full fair market value to define the compensation for expropriation, such as “just and adequate compensation” as found in the SADC Model Bilateral Treaty Template,¹⁵ then there may be some leeway to argue that historic factors should be considered in assessing the level of compensation. The effectiveness of this approach may also depend on the extent and duration of connection of the investor with the historical ownership of the investment. A more recent investment by an investor that has no connection to historical (or even more recent) injustices will provide less basis for the reliance on factors or exceptions geared towards adjusting for these factors. Considering the definition of the level of compensation is one of the few tools realistically available to adjust for these types of measures after an investment has been made.

In short, after an investment has been made it is much more difficult to require changes in ownership than before the investment is made. This is simply a logical application of basic principles of equity. To some extent, these types of measures can be excluded from the application of some treaty provisions, but it would be extremely difficult to exclude them from the expropriation article. However, more open drafting of the standard of compensation may provide some leeway for states.

¹³ FET provisions do not contain directions on how to establish damages like expropriation provisions do. Nonetheless one can anticipate a reasonably similar valuation of damages in the present context.

¹⁴ Art. 21.3: 21.3. “Notwithstanding any other provision of this Agreement, a State Party may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement.”

¹⁵ Article 6, as set out especially in options 2 and 3 of Article 6.2.

4.5 Investment Treaties and the Key Performance Requirements Issues

The imposition of performance requirements by states on foreign investors raises some of the same legal issues described above, and some additional legal issues. In addition, the legal situation is more diverse for regional states. This is because a significant number of treaties do contain provisions on performance requirements, but these provisions vary in important ways. As a result, the analysis below cannot address the specific legal situation of any individual state—a much more specific analysis would be required for that purpose. Nonetheless, by highlighting what legal issues to look for it is hoped that the analysis will be sufficiently cogent to allow individual governments to ask the right questions when considering the issues.

A sampling of the existing regional treaties gives a flavour of the diversity of treaty provisions that regional states have subscribed to. Out of a sample of 60 bilateral treaties, two regional treaties and the WTO provisions applicable within the region, we found the following approaches:

4.5.1 WTO Agreement on Trade-Related Investment Measures (TRIMS)

This is a something of a benchmark agreement at the WTO level. Its focus is on trade impacting measures taken in relation to investments, including several described above. The “Illustrative List” in the TRIMS Agreement’s Annex describes those TRIMs that are in breach of non-discrimination provisions in the GATT:

“1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:

- the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or
- that an enterprise’s purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.

2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:

- the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;
- the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or
- the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.”

4.5.2 *DR Congo–U.S.*¹⁶

“Article II. 7. Within the context of its national economic policies and goals, each Party shall endeavor to avoid imposing on the investments of nationals or companies of the other Party conditions which require the export of goods produced or the purchase of goods or services locally. This provision shall not preclude the right of either Party to impose restrictions on the importation of goods into their respective territories.”

This treaty is pre-NAFTA and prior to the negotiation of the WTO TRIMS Agreement. In the Letter of Submittal of the treaty to Congress, Secretary of State George P. Schultz explains that some provisions of the Zaire text differed in some respects from the U.S. model text at the time, including performance requirements: “It was not possible to obtain Zaire’s commitment not to impose performance requirements as conditions for investment, as called for by our model text. Zaire is one of many developing countries which imposes requirements on foreign investors to obtain certain development objectives. Therefore, we accepted hortatory language (Article II, paragraph 7) to the effect that each Party shall ‘endeavor’ within ‘the context of its national economic policies and goals’ to ‘avoid’ the imposition of export or local purchase requirements.”

Post-NAFTA Agreements with the United States and Canada did not generally see similar sensitivity to the development objectives and toolkit.

4.5.3 *Rwanda–U.S. and Tanzania–Canada*

Rather than the flexibility of the DRC–U.S. agreement, both of these more recent BITs impose TRIMS plus obligations that ban the imposition of most performance requirement measures, while allowing some voluntary requirements—that is, requirements necessary to obtain some specific advantage. For example they allow voluntary requirements to invest in particular locations or to undertake research and development in the host state. The Rwanda–U.S. treaty includes an additional footnote of direct importance here:

“For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, from imposing or enforcing a requirement or enforcing a commitment or undertaking to train workers in its territory, provided that such training does not require the transfer of a particular technology, a production process or other proprietary knowledge to a person in its territory.”

These treaties also ban the requirement for technology transfer as a performance requirement, at least in so far as it relates to any specific proprietary technologies. The full scope of this has not been tested in an arbitration as far as we are aware.

4.5.4 *Burundi–Germany*¹⁷

Article 8 of the Burundi–Germany treaty could capture the application of TRIMS through its reference to other international treaties that entitle an investor to more favourable treatment than expressed in the bilateral treaty. This is different from an MFN provision in that it applies other agreements between the two contracting parties rather than with third parties.

¹⁶ http://unctad.org/sections/dite/ia/docs/bits/us_demo_rep_congo.pdf

¹⁷ http://unctad.org/sections/dite/ia/docs/bits/germany_burundi.pdf

“Article 8. If the legislation of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Treaty contain a regulation, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by the present Treaty, such regulation shall to the extent that it is more favourable prevail over the present Treaty.”

The Kenya-U.K. and Burundi-Comoros agreements have similar provisions, as do several others. This general incorporation would likely include the TRIMS agreement, though it appears to fall short of an actual incorporation of TRIMS into the text of the BITs in question. A direct and express incorporation of TRIMS into a BIT text is seen in other treaties outside the region, but we did not find this in the partial review undertaken of regional BITs.

A large number of bilateral treaties make no direct reference to performance requirements and have no direct or indirect incorporation of TRIMS in other text. These treaties are essentially silent on the question, though the national treatment or MNF obligations, as discussed below, may well come into play.

4.5.5 *The CCIA and SADC FIP*

Neither of these two regional agreements applicable to member states of this region have provisions on the prohibition of performance requirements. The SADC Finance and Investment Protocol actually tends in the other direction, calling for the development of upstream and downstream linkages and generating increased employment as key objectives where policy space is preserved.

4.5.6 *Conclusions*

Comparing the last two examples to the previous ones, it is evident that made-in-Africa treaties generally do not share the same approach to barring performance requirements as treaties between African and non-African states, especially developed states.

One might also note that the broader provisions on national treatment can have an application here, as performance requirements are often imposed on foreign investors only. As the national treatment provisions apply to the operation of an investment after it is made, and the performance requirements also apply for the operational life of the investment, national treatment provisions would seem to apply even when the performance requirements are imposed as part of the process of permitting an investment.

So where does this general review of provisions leave the analysis? Performance requirements that fall within the TRIMS Agreement will be inconsistent with WTO law. To date, however, only three WTO cases have involved complaints about performance requirements as prohibited TRIMS.¹⁸ One might surmise that states are reluctant to take matters related to performance requirements to dispute settlement because to some extent all states actually use them.

Where TRIMS is directly referenced in a BIT or indirectly incorporated through references to other international treaties binding on the parties to a BIT, the situation changes: here, the investor will have a right to initiate the dispute settlement process itself. State-state considerations will no longer apply. Whether an investor will initiate an arbitration just on the basis of performance requirement issues included in TRIMS may depend on the actual costs of the requirement to the investor. The more likely scenario is that it would be part of a broader arbitration where the relationship between an investor and the government has largely collapsed.

¹⁸ *Canada - Renewable Energy/Feed-In Tariffs* (AB) (WT/DS412/AB/R, WT/DS426/AB/R); *Canada - Wheat* (Panel) (WT/DS276/R) (unsuccessful); and *Indonesia - Autos* (Panel) (WT/DS54,55,59,64/R).

As described previously, some performance requirements are imposed as a matter of law for an investor to get a permit or other form of agreement to make an investment. Where they are legally mandated, the application of treaty texts is quite straightforward. In other cases, however, performance requirements are connected to the investor receiving certain specific advantages, such as lower tax rates if a certain number of local employees are employed or if an investment is located in a specific geographic area that is economically depressed. These types of incentives to set performance requirements on a more voluntary basis may or may not create a breach of investment treaties with the performance requirement prohibitions, as some allow performance requirements to be tied to the receipt of a specific advantage or benefit. Specific analysis of any given case is therefore required.

In terms of the types of performance requirements, the requirement for local content in product inputs or minimum levels of local purchasing creates a clear risk of a breach of the TRIMS and most if not all performance requirement prohibitions in BITs. There is a clear conflict here between development practice and the legal provisions related to performance requirements.

Technology transfer requirements may or may not breach investment treaties. This will depend on the exact language in a treaty in relation to performance requirements, as well as in relation to intellectual property rights if the technology is proprietary. Performance requirements that seek to require an investor to transfer IP covered technologies to domestic companies will clearly be at risk of breaching a treaty. A general requirement to use best available technology may not create any breaches however. Again, exact language in the treaty will be important.

Training requirements for local employees at different skill levels probably would not breach most treaty provisions. This is a “safer” requirement in that sense. Many treaties with performance requirement prohibitions have exclusions for employee training requirements already.

Environmental requirements, for example to undertake a proper environmental impact assessment prior to a project being allowed or requiring environmental management systems and plans to be developed, will generally not create a performance requirement issue. These are common regulatory requirements. However, if specific technology requirements are imposed this may create an issue, depending on the exact language and scope of a treaty. The more specific the technology transfer requirement the greater the risk of inconsistency will be. In addition, the more specific the requirement is to one investor as opposed to all or several in the same sector, the higher the risk.

Imposing downstream processing or other value-added requirements within the company or in relation to other economic actors outside the investor’s company will likely raise TRIMS issues and issues under most performance requirement prohibitions in investment treaties. This reflects the trade liberalization roots of many provisions restricting performance requirements. Of course, Botswana’s use of this tool shows how beneficial it can be when properly developed, again revealing the disconnect between development practices and treaty provisions for developing countries. Where market prices can be charged so that the actual damages are limited, this may not be a major concern for many producers. However, where market prices are distorted in the domestic market, or where an investor is using the product as part of its own international supply chains, the issues may become starker and the potential for a claim higher.

Research and development obligations again will require a very careful assessment of treaty language. Some allow for R&D requirements, some allow them in exchange for specific advantages or incentives, some allow neither. There is only one arbitration we are aware of directly on this issue. This was an arbitration under NAFTA.¹⁹ But the

¹⁹ *Mobil Investments and Murphy Oil Corporation v. Canada*, Decision on Liability and on Principles of Quantum May 22, 2012. ICSID Case No. ARB(AF)/07/4.

critical issue in this case was that the imposition of the performance requirement came well after the investment was made, thereby not allowing the investors to make decisions on the investment in a fully informed way. The measure enabling the R&D requirement to be imposed by the government existed prior to the investment, but the tribunal found that the enabling provisions had never been applied in a manner similar to that of the challenged requirement, and concluded the investor could not therefore have anticipated it being imposed.

The timing issues in the above noted arbitration apply more generally to the imposition of any performance requirements. Where an investor is able to make fully informed decisions about an investment in full knowledge of the performance requirements it faces, the decision is then properly informed. Where performance requirements are imposed sometime after the investment is already established, it may be that the costs and profit estimates will be changed. If changed in a significant way (in Canada it was a CAD\$50M/year annual R&D requirement that was imposed), an investor is likely to be more upset than if the requirement was known before the investment was made or results in no significant new costs.

Finally, it is important for governments to note here that even if a specific treaty is silent or permissive of performance requirements, if it has an MFN provision and any particular state has another treaty that does have performance requirement prohibitions, the investor under the first treaty may be able to claim the more favourable treatment under that performance requirement prohibition. Thus, what may seem like a minor treaty may turn out to be a very critical one if investors from other states can access the more favourable treatment via an MFN provision.

4.5.7 Options for Addressing Performance Requirements

A critical step in considering performance requirement provisions in a treaty is a risk assessment: is the government likely to wish to use the types of tools described above? If so, it is clear that the government should not include them in a treaty text. That is clearly the first line of defense.

If they are to be used, will they be imposed before or after an investment is made? Will the investor have the opportunity to make a fully informed decision?

Will the performance requirement used be flexible or highly prescriptive? The more flexibility an investor has to achieve an objective, the less likely there is a risk of a challenge to it.

And what are the costs of the full scope of imposed performance requirements? Can they be justified from an economic perspective? This imposes a market-based discipline on governments as well.

Some of the drafting options available to governments that wish to keep performance requirements as a possible or actual tool include:

- An express provision allowing performance requirements to be imposed, either in general or during the period when decisions relating to making an investment are being made so it can be fully informed.
- An express exclusion from the national treatment and MFN provisions in a treaty, for both the pre-establishment phase if that is included in a treaty, and the post-establishment operational phases when the performance requirement is actually required to be performed. An exclusion from national treatment or MFN must expressly cover both these phases. Even if an express provision allowing performance requirements to be used, the exclusion from national treatment and MFN should be set out.

- An exclusion for the extractive sectors from national treatment and MFN obligations will allow performance requirements to be imposed specifically in that sector on a discriminatory basis against foreign investors. However, it may also have to be extended to an FET provision and an umbrella clause if these are also included in the treaty, as well as any provision limiting the use of performance requirements. Tanzania, DR Congo and Rwanda have achieved some degree of mining sector exclusions in their Canadian and U.S. treaties, thus enabling at least some measure of performance requirements to be implemented.
- Some governments are looking at broader language to exclude any development-related measures from the scope of treaty obligations. This is an option as long as it is not seen to be an open-ended exclusion that swallows up the scope of the investor protections.
- States can exclude all performance requirement issues from the scope of the investor-state dispute settlement provisions as well. This would reduce the risk of arbitrations with investors, while still potentially allowing state-state disputes. It therefore reduces the risk a state would face from investor-state arbitration.
- Finally, there are options to have targeted exclusions for certain types of performance requirements such as best available technology requirements, R&D, or employee training. The specific needs of each state party would have to be factored in here.

The above list flows from the enabling of performance requirements to exclusions that allow them in varying contexts. Several elements could be used in combination. The key point is that an express decision should be made, based on the actual anticipated need of the states. This should reflect modern development economics rather than the type of economic theory that predominated from the mid-1980s to the early 2000s.

5.0 Conclusions

The region's governments face a number of difficult challenges in fostering national champions and, beyond that, making the *Africa Mining Vision* a reality. While the vision itself is clear, the path is complex. It involves finding the right mix of policies to work with each state's unique set of circumstances and actors to ensure that mineral wealth translates more effectively into broad poverty reduction and sustainable development.

An added complication is the suite of legal obligations embedded in the many international investment agreements to which the region's states are party. In some cases these agreements restrict governments' ability to use tools that have been successfully used to achieve the types of goals sought here. With the aim of helping to ease progress, this paper has highlighted where those potential conflicts exist, and explored the ways in which they can be avoided or minimized.

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Annex 1: Bilateral Investment Treaties Signed by Countries Covered by Sub-regional Office for Eastern Africa (SRO-EA)

COUNTRY	PARTNER	DATE OF SIGNATURE	DATE OF ENTRY INTO FORCE
Burundi (7 BITs)	Belgium and Luxemburg	13-Apr-89	12-Sep-93
	Comoros	18-May-01	
	Germany	10-Sept-84	9-Dec-87
	Kenya	1-Apr-09	
	Mauritius	18-May-01	22-Nov-09
	Netherlands	30-May-07	1-Aug-09
	United Kingdom	13-Sept-90	13-Sept-90
Comoros (6 BITs)	Belgium and Luxemburg	18-May-01	
	Burkina Faso	18-May-01	
	Burundi	18-May-01	
	Egypt	13-Nov-94	27-Feb-00
	Mali	18-May-01	
	Mauritius	18-May-01	
DR Congo (15 BITs)	Belgium and Luxemburg	17-Feb-05	
	China	11-Aug-11	
	Egypt	18-Dec-98	
	France	5-Oct-72	1-Mar-75
	Germany	18-Mar-69	22-Jul-71
	Greece	26-Apr-91	
	India	13-Apr-10	
	Israel	14-May-85	
	Italy	13-Sep-06	
	Jordan	23-Jun-04	
	Republic of Korea	17-Mar-05	
	Portugal	3-Mar-11	
	South Africa	31-Aug-04	
	Switzerland	10-Mar-72	10-May-73
	United States	3-Aug-84	28-Jul-89
Djibouti (8 BITs)	China	18-Aug-03	
	Egypt	21-Jul-98	
	France	13-Dec-07	
	India	19-May-03	
	Iran, Islamic Republic	7-Dec-10	
	Italy	8-Feb-06	
	Malaysia	3-Aug-98	
	Switzerland	4-Feb-01	10-Jun-01

COUNTRY	PARTNER	DATE OF SIGNATURE	DATE OF ENTRY INTO FORCE
Eritrea (4 BITs)	Italy	6-Feb-96	14-Jul-03
	Netherlands	2-Dec-03	
	Qatar	7-Aug-00	
	Uganda	30-Jun-01	
Ethiopia (29 BITs)	Algeria	4-Jun-02	1-Nov-05
	Austria	12-Nov-04	1-Nov-05
	Belgium and Luxembourg	26-Oct-06	
	China	11-May-98	1-May-00
	Denmark	24-Apr-01	21-Aug-05
	Egypt	27-Jul-06	27-May-10
	Equatorial Guinea	11-Jun-09	
	Finland	23-Feb-06	3-May-07
	France	25-Jun-03	7-Aug-04
	Germany	19-Jan-04	4-May-06
	India	5-Jul-07	
	Iran, Islamic Republic of	21-Oct-03	15-Dec-04
	Israel	26-Nov-03	22-Mar-04
	Italy	23-Dec-94	8-May-97
	Kuwait	14-Sep-96	12-Nov-98
	Libyan Arab Jamahiriya	27-Jan-04	25-Jun-04
	Malaysia	22-Oct-98	4-Jun-99
	Netherlands	16-May-03	1-Jul-05
	Nigeria	19-Jan-04	
	Russian Federation	10-Feb-00	6-Jun-00
	South Africa	1-Jan-08	
	Spain	17-Mar-09	
	Sudan	7-Mar-00	15-May-01
	Sweden	10-Dec-04	1-Oct-05
	Switzerland	26-Jun-98	7-Dec-98
	Tunisia	14-Dec-00	2-Oct-04
	Turkey	16-Nov-00	10-Mar-05
	United Kingdom	19-Nov-09	
	Yemen	15-Apr-99	15-Apr-00

COUNTRY	PARTNER	DATE OF SIGNATURE	DATE OF ENTRY INTO FORCE
Kenya (12 BITs)	Burundi	1-Apr-09	
	China	16-Jul-01	
	Finland	1-Sep-08	
	France	4-Dec-07	
	Germany	3-May-96	7-Dec-00
	Iran, Islamic Republic of	24-Feb-09	
	Italy	16-Sep-96	4-Aug-99
	Libyan Arab Jamahiriya	5-Jun-07	
	Netherlands	11-Sep-70	11-Jun-79
	Slovakia	14-Dec-11	
	Switzerland	14-Nov-06	10-Jul-09
	United Kingdom	13-Sep-99	
Madagascar (9 BITs)	Belgium and Luxembourg	29-Sep-05	29-Nov-08
	China	21-Nov-05	1-Jul-07
	France	25-Jul-03	17-May-05
	Germany	1-Aug-06	
	Mauritius	6-Apr-04	1-Jun-05
	Norway	13-May-66	28-Sep-67
	South Africa	13-Dec-06	
	Sweden	2-Apr-66	23-Jun-67
	Switzerland	19-Nov-08	
Rwanda (6 BITs)	Belgium and Luxembourg	16-Apr-07	
	Germany	18-May-67	28-Feb-69
	Mauritius	30-Jul-01	
	South Africa	19-Oct-00	
	Switzerland	15-Oct-63	15-Oct-63
	United States	19-Feb-08	1-Jan-12
Seychelles (7 BITs)	Bahrain	24-Apr-10	
	China	10-Feb-07	
	Cyprus	28-May-98	19-Mar-99
	Egypt	22-Jan-02	
	India	2-Jun-10	
	Monaco	4-Jan-10	
	Zambia	7-Dec-10	
Somalia (2 BITs)	Egypt	29-May-82	16-Apr-83
	Germany	27-Nov-81	15-Feb-85
South Sudan	-	-	-

COUNTRY	PARTNER	DATE OF SIGNATURE	DATE OF ENTRY INTO FORCE
Tanzania, United Republic (17 BITs)	Canada	17-May-13	
	Denmark	22-Apr-99	21-Oct-05
	Egypt	30-Apr-97	
	Finland	19-Jun-01	30-Oct-02
	Germany	30-Jan-65	12-Jul-68
	Italy	21-Aug-01	25-Apr-03
	Jordan	8-Oct-09	
	Korea, Republic of	18-Dec-98	
	Mauritius	4-May-09	
	Netherlands	31-Jul-01	1-Apr-04
	Oman	16-Oct-12	
	South Africa	22-Sep-05	
	Sweden	1-Sep-99	1-Mar-02
	Switzerland	8-Apr-04	6-Apr-06
	Turkey	11-Mar-11	
	United Kingdom	7-Jan-94	2-Aug-96
	Zimbabwe	3-Jul-03	
Uganda (15 BITs)	Belgium and Luxembourg	1-Feb-05	
	China	27-May-04	
	Cuba	1-Jan-02	
	Denmark	26-Nov-01	19-Oct-05
	Egypt	4-Nov-95	
	Eritrea	30-Jun-01	
	France	3-Jan-03	20-Dec-04
	Germany	29-Nov-66	19-Aug-68
	Italy	12-Dec-97	24-Sep-99
	Netherlands	30-May-00	1-Jan-03
	Nigeria	15-Jan-03	
	South Africa	8-May-00	
	Switzerland	23-Aug-71	8-May-72
	United Kingdom	24-Apr-98	24-Apr-98
	Zimbabwe	1-Jul-03	

Source: UNCTAD (2013).

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