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To Believe in Black Stars or Red Dragons?: Comparing the Foreign Direct Investment Climates of Ghana and China

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TO BELIEVE IN BLACK STARS OR RED DRAGONS?: COMPARING THE FOREIGN DIRECT INVESTMENT CLIMATES OF GHANA AND CHINA

ABSTRACT

When thinking of overseas business expansion, most think of China. This is for good reason: China commands a lion's share of foreign direct investment money. It would shock readers to know that there are destinations that are far more suitable for overseas investment than China. It would shock readers even more to know that one of these destinations is in sub-Saharan Africa.

Ghana—the Black Star country—has quietly put together a legal regime that is extremely attractive for foreign direct investment. When comparing Ghana's foreign investment policies to China's, Ghana's policies are indisputably more favorable to foreign investors. Ghana offers more incentives, imposes fewer restrictions, and the administrative side is considerably more transparent. This Note will show that the prospective foreign direct investor should look to Ghana as a more hospitable destination for proposed foreign enterprises.

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INTRODUCTION

China provides the world's blueprint of how an impoverished country can fast-track itself into becoming a global economic power. Over the last thirty years, the eastern country has become a hotbed for overseas expansion for multinational enterprises. By contrast, the coastal African country of Ghana is seemingly overlooked as a destination for foreign business expansion.[1]

Both countries have a similar history and timeline. The two countries emerged from their most formative revolutionary periods just seven years apart, immediately adopted policies of isolationism and economic nationalism, and later liberalized in order to attract foreign investment to strengthen their respective economies.[2] Despite the similarities in their beginnings, China emerged as a success story, while Ghana ultimately declined.[3] Are the results of these two developing countries a function of the attractiveness of their respective foreign direct investment policies?

This Note will show that the foreign direct investment policies of Ghana are significantly more attractive than those of China. It will highlight Ghana's Investment Promotion Center Act of 1994 and juxtapose it against comparable Chinese policy. The comparison will show that Ghana offers more incentives, clarity, and transparency, as well as fewer restrictions in tailoring its foreign direct investment policy.

Part I will give the reader an understanding of what foreign direct investment is. After defining the term, this Part will answer the questions of why business entities look to expand abroad, why host countries look to attract foreign direct investment (FDI), what are the dangers to host countries that they seek to avoid with policymaking, what policies attract and deter FDI, and why has FDI not flowed to Africa in significant quantities. Part II will explore the backgrounds of China and Ghana as they relate to investment policy and their history and effectiveness in attracting FDI. Part III will compare Ghana's Investment Promotion Centre Act to the FDI policies fashioned by China. This Part will proceed by first comparing restrictions, then incentives, and finally the level of ambiguity in regulation of FDI. With each of these comparisons, the Note will detail the most attractive types of policy developed with respect to these three areas, explain the rationale behind such policy, and show what the policies enacted by Ghana and China mean to internationally expanding investors. By the conclusion of the Note, the learned reader-investor should be convinced that Ghana is a more viable investment destination than China.

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[1] *See infra* Part II.C.
[2] *See infra* Part II.A–C.
[3] *See infra* Part II.C.

I. WHAT IS FOREIGN DIRECT INVESTMENT (FDI)?

A. Definition of FDI

There is no generally accepted common definition of foreign direct investment. The World Trade Organization defines FDI as "when an investor based in one country (the home country) acquires an asset in another country (the host country) with the intent to manage that asset."[4] The definition used by the United Nations Conference on Trade and Development requires the intent to "acquire a lasting interest" in a foreign enterprise.[5] Still, other definitions place more significance on the aspect of control of a company in a foreign country by way of ownership of a "significant amount" of stock or asset ownership.[6] The United States Department of Commerce establishes a bright line minimum for such a significant amount at ten percent ownership of a company operating abroad.[7]

For the purposes of this Note, FDI will be defined as the possession of a controlling interest of a business operating abroad. This encompasses wholly owned foreign businesses, joint ventures with partners in the foreign country, and, most commonly, mergers and acquisitions of foreign entities.[8] FDI does not encompass a straight portfolio investment because the investor acquires no relevant degree of control over a company.[9] Common examples of portfolio investment would be the purchase of foreign corporate bonds and smaller amounts of foreign stock.[10] The line between portfolio investment and FDI is crossed when the investor moves past profiting from the business of a foreign enterprise and on to actually driving the profit of the foreign-operating business.[11]

B. Impact of FDI on Developing Host Countries

FDI, by itself, has the potential to drive an economy like an overcharged engine. The economies of Singapore and Hong Kong are composed largely

[4] REUVEN S. AVI-YONAH & MARTIN B. TITTLE, INTER-AMERICAN DEVELOPMENT BANK, FOREIGN DIRECT INVESTMENT IN LATIN AMERICA: OVERVIEW AND CURRENT STATUS 3 (2002), *available at* http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35117232.

[5] DAMBISA MOYO, DEAD AID: WHY AID IS NOT WORKING AND HOW THERE IS A BETTER WAY FOR AFRICA 98 (2009).

[6] Richard J. Hunter, Jr., *Legal Considerations in Foreign Direct Investment*, 28 OKLA. CITY U. L. REV. 851, 853 (2003).

[7] *Id.*

[8] *Id.* at 855 (noting that cross-border mergers have been a dominant form of FDI ever since 1999, where cross-border mergers and acquisitions increased by thirty-five percent).

[9] *Id.*

[10] *Id.*

[11] *See id.*

of FDI.[12] FDI inflows can directly benefit the economy of a host country. For one, FDI brings the surplus of wealth of advanced countries into developing ones. Some scholars even argue that FDI is a much more effective means of achieving economic development than more generally used methods, such as foreign aid and International Monetary Fund loans.[13] Economic development is achieved through FDI by the "increased capital flows into countries with limited domestic financial sources...."[14] The increased amount of capital also brings more jobs into the domestic economy, places more money in circulation (allowing for the accrual and formation of capital by local parties), and leads to regional development.[15] Additionally, with a significant amount of FDI being focused toward either exporting products manufactured in the host country, or producing products for the consumption of the host country (that would otherwise be imported), FDI inflows reduce trade deficits in the host country by either increasing exports or reducing imports.[16]

Aside from the direct impact on the economy, FDI proponents also highlight the potential for "spillover" effects on the host country.[17] The most significant and accepted of these spillovers involves the diffusion of competitive information and technology to lesser-developed countries.[18] Naturally, when a multinational corporation (MNC) or other business entity enters into a foreign market, it will bring its proprietary technology and processes that it uses to maintain a competitive advantage.[19] This includes management, organizational, and marketing expertise. Domestic partners (and employees) can learn from the foreign enterprise's capabilities, technology, management expertise, and industry insights.[20]

This diffusion process starts with the introduction of new hardware or processes—and the skills necessary to operate the hardware or conduct those

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[12] FDI is thirty-one percent of Hong Kong's GDP and seventeen percent of Singapore's GDP. *See* U.N. Conference on Trade & Dev., WORLD INVESTMENT REPORT 2011, at 189, U.N. Sales No. E.11.II.D.2 (2011), *available at* http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf (listing each country's GDP); *World Economic Outlook Database*, INT'L MONETARY FUND, http://www.imf.org/external/pubs/ft/weo/2011/02/weodata/index.aspx (last visited Mar. 23, 2013) (providing a database listing each country's GDP).

[13] *See generally* MOYO, *supra* note 5.

[14] Hunter, *supra* note 6, at 851.

[15] *See* MOYO, *supra* note 5, at 101–02; Hunter, *supra* note 6, at 862.

[16] Hunter, *supra* note 6, at 868.

[17] *See, e.g.*, *id.* at 862.

[18] *See id.* at 855.

[19] MAGNUS BLOMSTROM ET AL., FOREIGN DIRECT INVESTMENT: FIRM AND HOST COUNTRY STRATEGIES 103 (2000).

[20] DAVID CONKLIN & DON LECRAW, FOREIGN OWNERSHIP RESTRICTIONS AND LIBERALIZATION REFORMS 70–71 (1997).

processes—to the host country. Potential adopters in the host country come into contact with the innovation, information about it is diffused, uncertainty about it is lessened, and, ultimately, the probability of adoption is increased.[21] The adoption process can consist of duplicating the innovation and hiring workers already trained by the foreign entity.[22] Additionally, the adoption of technology forces the multinational enterprise (MNE) to create more innovations to compete with duplicated processes and technology and also puts internal pressure on host-country domestic enterprises to compete with the new innovations.[23]

FDI can increase the training of a host country's workforce in the same manner that it can bring innovation to a host country.[24] Because education is typically lacking in developing countries, the training brought by MNEs is crucial.[25] MNCs provide much more worker training than do host country domestic businesses.[26] Management expertise, in particular, is improved in the FDI host country.[27] A training diffusion occurs when MNEs train managers, who later move to other firms and dissipate their acquired management expertise.[28] Although it can be hard to lure away managers from MNEs given the typically higher salary, this diffusion has been realized in places like South America, where managers found in domestic firms often start their careers in MNCs.[29]

It is also worth noting that, in addition to helping diffuse innovation and training, MNEs also assist in the advancement of domestic parties within the MNEs' supply chains.[30] When an MNE decides to source locally from the host country, it needs inputs that will meet its quality standards so that it can produce a high-quality output. If the suppliers do not have adequate technology, training, or processes, then they cannot meet the MNE's need. MNEs eliminate this problem by helping suppliers set up production, providing technical information, and providing training.[31] The assisted suppliers can grow from small, local businesses with limited capabilities to larger, nationally or globally competitive firms.

[21] BLOMSTROM ET AL., *supra* note 19, at 105.
[22] *Id.* at 101.
[23] *Id.* at 103.
[24] *Id.* at 116.
[25] *Id.* at 117.
[26] *Id.* at 117–18 (using Hong Kong as an example).
[27] MOYO, *supra* note 5, at 101.
[28] BLOMSTROM ET AL., *supra* note 19, at 117.
[29] *Id.*
[30] Smita Kulkarni et al., *McDonald's Ongoing Marketing Challenge: Social Perception in India*, 1 ONLINE J. OF INT'L. CASE ANALYSIS, Jan. 31, 2009, at 1, 9, http://ojica.fiu.edu/index.php/ojica_journal/article/viewFile/19/18.
[31] BLOMSTROM ET AL., *supra* note 19, at 113.

McDonald's is one of the most widely known practitioners of supplier development.[32] When it entered India, it faced substantial supply chain inadequacies.[33] It trained its supplier of lettuce, Trikaya Agriculture, in advanced irrigation and food storage.[34] Trikaya—once a small, local agribusiness—was able to supply produce to not only all of the India-based McDonald's locations, but also to begin supplying exports from Austria to the Pacific.[35]

Alabama's courtship of major foreign automotive players showcased each of the above benefits of attracting FDI. The once destitute state attracted production from four major foreign car companies from 1993 to 2002—Mercedes-Benz, Toyota, Honda, and Hyundai.[36] The most notable cases were Mercedes-Benz and Hyundai.[37] The state of Alabama offered incentives packages valued at around $253 billion in each case.[38]

While these expenditures did amount to a large investment, the return has more than justified the cost. The Mercedes site created 1500 jobs,[39] while the Hyundai site created 2000.[40] The Montgomery, Alabama Hyundai site alone creates $99 million in earnings for its employees.[41]

The indirect benefits were just as significant. It was estimated that another 6000 indirect jobs would be created (with annual earnings of $180 million) by Hyundai suppliers and "spin-off" enterprises such as maintenance, services, construction, and retail.[42] The same effect was forecasted for the Mercedes-Benz venture.[43] Once these large firms established themselves in Alabama, support firms followed to meet their production demands.[44] For example, Johnson Controls, Inc., a Milwaukee-based manufacturer, set up operations in Alabama to produce car seats for the Tuscaloosa,

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[32] Kulkarni et al., *supra* note 30, at 4.

[33] *Id.* at 12.

[34] *Id.* at 13.

[35] *Id.*

[36] *Foreign Car-Makers Put Once-Poor US State on the Road to Better Times*, THE IRISH TIMES, Apr. 19, 2002, at 63 [hereinafter *Road to Better Times*].

[37] STEPHEN D. COHEN, MULTINATIONAL CORPORATIONS AND FOREIGN DIRECT INVESTMENT 167 (2007).

[38] *Id.*

[39] James Bennet, *Mercedes Selects Alabama Site*, N.Y. TIMES, Sept. 30, 1993, at D1, *available at* LEXIS-NEXIS COMPANY NEWS.

[40] *Road to Better Times*, *supra* note 36.

[41] *Id.*

[42] *Id.*

[43] *See* Bennet, *supra* note 39.

[44] *Mercedes-Benz Project: First-Year in Alabama—Progress Report*, PR NEWSWIRE, Sept. 28, 1994, *available at* LEXIS-NEXIS FINANCIAL NEWS [hereinafter *Mercedes-Benz Project*] ("A number of Mercedes-Benz systems suppliers have decided to locate in Alabama to meet our 'just in time' and 'just in sequence' delivery requirements.").

Alabama Mercedes-Benz facility.[45] Likewise, Rockwell Automotive, based in Michigan, established operations in Alabama to supply the Mercedes-Benz plant with sunroofs.[46]

The indirect benefits of these ventures reached outside of Alabama, as well. Perhaps the most notable example was IBM's multimillion-dollar contract to design the technology blueprint for the Tuscaloosa plant.[47] Albert Kahn Associates, Inc., of Detroit, handled the architectural and engineering design of the facility,[48] Fluor Daniel Inc. of Irvine, California was awarded the construction management contract,[49] and Ohio's Packard Electric was awarded the contract to design electrical distribution for the plant.[50] Even the United States Treasury was touched by the FDI installations, as half of the Mercedes-Benz vehicles produced in Tuscaloosa were intended for export from the United States.[51]

By the installation of the Hyundai plant in 2002, the automotive industry in Alabama had appeared out of nowhere and become a staple of the state's economy.[52] At this point, Alabama had 220 automotive manufacturing companies employing 300,000 workers.[53] By 2006 an estimated 600,000 vehicles would be coming from a state that had produced none just a decade earlier.[54] Hyundai's venture was estimated to generate a positive economic impact of as much as $280 million per year, allowing the state to recuperate its investment by 2011.[55] Additionally, growth prospects are high because DaimlerChrysler—twelve percent owner of Hyundai—has invested another $600 million to double production at Montgomery, raising employment to 4000.[56]

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[45] *Johnson Controls to Supply Headliners 'Just-in-Time' for Mercedes-Benz All Activity Vehicle*, PR NEWSWIRE, Aug. 5, 1994, *available at* LEXIS-NEXIS FINANCIAL NEWS.

[46] *Rockwell to Produce Sunroof Assemblies for New Mercedes-Benz All-Activity Vehicle*, PR NEWSWIRE, Aug. 8, 1994, *available at* LEXIS-NEXIS FINANCIAL NEWS.

[47] *I.B.M. Gets Mercedes-Benz Contract for Alabama Plant*, N.Y. TIMES, Feb. 19, 1994, at p. 39, *available at* LEXIS-NEXIS COMPANY NEWS; *IBM Wins Mercedes-Benz Consulting Contract*, BUSINESS WIRE, Feb. 18, 1994, *available at* LEXIS-NEXIS.

[48] *Mercedes-Benz Awards Construction Management and Architectural/Engineering Design Contracts for New Tuscaloosa Plant*, PR NEWSWIRE, Jan. 11, 1994, *available at* LEXIS-NEXIS FINANCIAL NEWS.

[49] *Id.*

[50] *Packard Electric Is Awarded Mercedes-Benz Project*, PR NEWSWIRE, Aug. 5, 1994, *available at* LEXIS-NEXIS FINANCIAL NEWS.

[51] *Mercedes-Benz Project*, *supra* note 44.

[52] *See Road to Better Times*, *supra* note 36.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

Benefits were bestowed on both sides of these FDI ventures. The companies were able to decrease their production and marketing costs as well as move closer to their customers.[57] Alabama received an injection of jobs, a relocation of established American firms, and the creation of a booming automotive industry. Alabama represents a strong case for the positive side of FDI.

C. Policy and the FDI Climate

The "FDI climate" has been understood by various authors to encompass the economic conditions, infrastructure, social conditions (for example, labor policy conditions), political climate (such as risks associated with hostile or unstable regimes), and FDI policy.[58] Excluding FDI policy and political risk, a country can have an attractive environment for FDI by having cheap labor, yields that are greater than what can be achieved elsewhere, and access to natural resources.[59]

With respect to building an attractive FDI policy regime, the requirements can be more extensive. In general, attractive FDI policy imposes few restrictions, provides for national treatment—or better than national treatment—of foreign enterprises, is backed by sound commercial law, has transparent customs regulations and a fair tax code, and includes an agency that facilitates, rather than hinders, investment.[60] The legal rights of foreign enterprises must be "adequately balanced and protected" and must "guaranty fairness in adjudication."[61]

Incentives that make the FDI climate attractive can be divided into three categories: fiscal incentives, financial incentives, and other incentives. Fiscal incentives are those that reduce tax expenses.[62] These include reductions in the corporate tax rate, tax holidays (deferrals on taxes for a number of years), accelerated depreciation allowances, tax credits for profit that is reinvested in the host country, and exemptions from export or import duties and value-added taxes.[63]

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[57] Robert Schoenberger, *Long-term Relationships Put Alabama 1st, Official Says*, THE CLARION LEDGER, Oct. 20, 2001, at 1C (noting that by producing vehicles in Alabama, these companies would avoid a twenty-five percent import tariff on vehicles); *see* Bennet, *supra* note 39.

[58] *See* LARS H. THUNELL, POLITICAL RISKS IN INTERNATIONAL BUSINESS: INVESTMENT BEHAVIOR OF MULTINATIONAL CORPORATIONS 5–6 (1977).

[59] Hunter, *supra* note 6, at 870–71.

[60] *Id.* at 871–72.

[61] *Id.* at 872.

[62] COHEN, *supra* note 37, at 165.

[63] *Id.*

Financial incentives are typically direct grants of money, such as subsidies for land, labor, training, construction, or low-interest loans.[64] A prevalent example of financial incentive packages would be the two $253 million packages that Alabama gave to Mercedez-Benz and Hyundai to allure the companies into locating manufacturing plants there in 1993 and 2002, respectively.[65] While this type of incentive is effective, it is generally unavailable to the developing country, which does not have large sums of surplus cash to finance such packages. Consequentially, fiscal incentives are easier for developed countries to implement.

Other incentives do not deal directly with finances, but make entry into the host country easier. These include infrastructure development (such as laying communication lines for a proposed production site) and closing the market to foreign competitors.[66] Having an agency that facilitates foreign investment can also be put into this category. Singapore and Ireland feature "one-stop shop" agencies that make the administrative and legal matters of establishing a foreign enterprise relatively painless.[67] Those two countries are behind only Hong Kong in annual FDI inflow per capita.[68]

D. Why Does FDI Not Flow to Sub-Saharan Africa?

Put in perspective, at times, China's annual FDI inflows have been more than five times that of the entire continent of Africa.[69] FDI flows into countries in sub-Saharan Africa seem to be hindered, mostly not by the unattractiveness of their FDI policies, but more by the social, economic, and political factors that make up the FDI climate.[70] MNEs are naturally encouraged to invest where they can make a higher return and where labor costs are low.[71] Since the African markets are not as crowded with MNEs, the potential for return on investment is higher.[72] MNEs in Africa stand to make returns sixty-six percent higher than those in Southeast Asia, Europe, and the Pacific, and fifty percent higher than those in South America.[73] Additionally, the depressed economies of African countries have left their labor costs as low as anywhere else in the world.[74]

[64] *Id.* at 165–66.
[65] *Id.* at 167.
[66] *Id.* at 166.
[67] *Id.* at 159–60.
[68] *Id.* at 160.
[69] MOYO, *supra* note 5, at 99.
[70] *Id.* at 100.
[71] Hunter, *supra* note 6, at 870–71.
[72] MOYO, *supra* note 5, at 102.
[73] *Id.*
[74] *Id.* at 99.

Despite these positives, MNEs still stay away from Africa. Major deterrents include infrastructure and administrative difficulties. In many African countries, the infrastructure is poor, which makes producing and transporting goods much more expensive.[75] Additionally, corruption, bureaucracy, and highly circumscribed regulatory systems scare potential investors away from the continent.[76] Africa does hold some of the world's most complex administrative FDI regimes, such as Cameroon, where the average FDI enterprise takes 426 days and fifteen procedures to obtain all proper licensing.[77]

These obstacles to FDI are substantial in Africa, but are they found in Ghana? If these types of economic and political hurdles are not found in Ghana, then the only issue remaining in analyzing the comparative attractiveness of the FDI climates of Ghana and China will be the FDI policy that each country has enacted. The next Part will compare the backgrounds of Ghana and China and show that the above hurdles are not a factor in comparing the two countries, so that this Note may progress on to evaluating the differences in each country's FDI policy.

II. BACKGROUND

A. Restricted Beginnings

The communist People's Republic of China was founded in 1949, while the Republic of Ghana was the first African country to achieve colonial independence eight years later.[78] Following each country's revolutionary period, both countries adopted major isolationist policies.[79] China, under Mao Zedong, was virtually closed to the outside world and its investors.[80] Ghana similarly sought to limit foreign enterprise ownership and control from the onset of its 1957 independence.[81] Both were motivated by similar sentiments of independence and self-sufficiency.[82] Under the *Great Leap Forward* campaign, China attempted to achieve self-sufficiency by powering its economy completely by communes. The Ghanaians believed that in

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[75] *Id.* at 100.

[76] *Id.*

[77] *Id.* (compared to South Korea, where this only takes seventeen days and ten procedures on average).

[78] Felix Wemheue, *Dealing with Responsibility for the Great Leap Famine in the People's Republic of China*, 201 THE CHINA Q. 176, 179 (Mar 16, 2010); CONKLIN & LECRAW, *supra* note 20, at 53.

[79] *See* CONKLIN & LECRAW, *supra* note 20.

[80] MAURICE MEISNER, MAO ZEDONG 89–91 (2007).

[81] CONKLIN & LECRAW, *supra* note 20, at 53.

[82] *Id.*

order to attain political independence, Ghana needed to achieve economic independence.[83]

B. Collapse

The idea of self-sufficiency did not aid the development of either country's economy, as both had fallen into disrepair by the late 1970s.[84] The shortcomings of the *Great Leap Forward* led to one of history's largest incidents of famine—causing the estimated deaths of 15–40 million people in two years.[85] Ghana had fallen into perpetual economic crisis, marked by currency devaluation, high interest rates, rapid inflation, and massive capital flight.[86]

C. FDI Liberalization

After the 1976 death of Mao Zedong, China began a period known as *Gaige Kaifang* (literally "*opening up and reform*"), which included the liberalization of trade and FDI policy.[87] China enacted its first statute governing foreign investment in 1979.[88] For the next thirty years, China maintained largely open policies to attract high quantities of foreign investment into the country by way of preferential treatment.[89] By 1994, China was offering reduced tax rates for MNEs located in special geographic zones and tax holidays for manufacturing enterprises that were scheduled to operate for more than ten years.[90] China saw immediate success with FDI.[91] The first wave of FDI came in the 1980s, mostly in the form of joint ventures; a second wave came in the 1990s as wholly owned foreign enterprises; and now, China is experiencing a third wave, in the form of mergers and acquisitions.[92] By 2000, China's annual FDI inflow was $41 billion;[93] this figure grew to $80 billion by 2006.[94]

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[83] *Id.*

[84] *Id.*

[85] Wemheue, *supra* note 78, at 176–77.

[86] CONKLIN & LECRAW, *supra* note 20, at 53.

[87] Patrice C. McMahon & Yue Zou, *Thirty Years of Reform and Opening Up: Teaching International Relations in China*, 44 POL. SCI. & POL. 115, 115 (2011).

[88] John Zhengdong Huang, *China on the Horizon: Exploring Current Legal Issues: An Introduction to Foreign Investment Laws in the People's Republic of China*, 28 J. MARSHALL L. REV. 471, 472 (1995) [hereinafter Huang, *China on the Horizon*].

[89] *12th Five-Year Plan Is Off to a Good Start*, CHINA LAW & PRACTICE (May 2011).

[90] Huang, *China on the Horizon*, *supra* note 88, at 483.

[91] *Id.* at 471.

[92] Hui Huang, *China's New Regulation on Foreign M&A: Green Light or Red Flag?*, 30 U. NEW S. WALES L.J. 802, 802 (2007) [hereinafter Huang, *China's New Regulation*].

After amassing $622.4 billion from FDI in the thirty years following 1978, China was able to "afford [being] more selective" with FDI.[95] The Chinese developed fears that foreigners were taking over too many domestic industries.[96] In 2006, foreign investors controlled the top five businesses in all industrial sectors that were open to foreigners.[97] That year, China's National Development and Reform Commission announced a shift in its foreign investment policy that would focus more on the quality than the quantity of incoming FDI.[98] The result was the elimination of tax breaks, the restriction of many industrial sectors, and increased restriction and scrutiny placed upon foreign mergers and acquisitions.[99] Despite the change in policy, China still amassed nearly $100 billion of FDI inflow in 2010.[100]

Ghana did not have the same success with attracting FDI inflows. Ghana began relaxing its FDI restrictions in 1985.[101] The prime motivator was the International Monetary Fund and its Structural Adjustment Program, which advocated liberalized ownership and control practices.[102] Ghana realized that if it were too restrictive, then capital would go to other low-wage countries.[103] Ghana declared the first wave of its "open-door" policies for foreign investors starting in 1985.[104] While Ghana has become West Africa's largest FDI recipient,[105] last year it only logged $2.5 billion in FDI inflows, compared to China's $106 billion.[106]

D. Socioeconomic Comparison

Posed again: does Ghana have the same social and economic obstacles that have deterred FDI flows to the rest of Africa?[107] The answer is no;

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93 Hunter, *supra* note 6, at 852.
94 MOYO, *supra* note 5, at 99.
95 Huang, *China's New Regulation*, *supra* note 92, at 808.
96 *Id.*
97 *Id.*
98 Steven M. Dickinson & Daniel P. Harris, Dickinson and Harris on Changes to Foreign Investment in China, 2008 EMERGING ISSUES 1197 (Lexis 2008).
99 *Id.*
100 *12th Five-Year Plan Is Off to a Good Start*, *supra* note 89.
101 CONKLIN & LECRAW, *supra* note 20, at 54.
102 *See id.*
103 *Id.*
104 *See* Ken Laryea, *Recent Investment Legislation in Ghana*, 39 INT'L. & COMP. L. Q. 197, 197 (1990); *see also* Ghana Investment Act (P.N.D.C. Law No. 116/1985) (Ghana).
105 U.N. Conference on Trade & Dev., WORLD INVESTMENT REPORT 2011, *supra* note 12, at 41.
106 *Id.* at 187, 189.
107 *See* CONKLIN & LECRAW, *supra* note 20, at 17–21.

Ghana is much more developed, socially and economically, than the rest of sub-Saharan Africa.[108] In fact, Ghana's development in these areas is only slightly behind China's.[109] In the socioeconomic context as it relates to FDI, MNEs are attracted by adequate infrastructure, a suitably educated workforce, and cheap labor costs.[110] Ghana is comparable to China in each of these respects.

In terms of infrastructure, China is more developed, but not by a large margin. The World Bank rates China's infrastructure a 3.54 out of 5 (27th in the World), and Ghana's a 2.52 out of 5 (71st in the World).[111] Similarly, the World Economic Forum rates China's infrastructure a 4.4 out of 7 (50th in the world), and Ghana's a 2.9 out of 7 (106th in the world).[112] The difference between infrastructures seems to have a minimal effect on those doing business in each country. When given a list of fifteen common problems of doing business in underdeveloped countries, 12.5% of those doing business in Ghana listed inadequate infrastructure as a top five problem—compared to 8% for those doing business in China.[113]

The Ghanaian workforce has also proved to be just as capable as the Chinese workforce. The World Economic Forum rates Ghana's education and training as 3.3 out of 7 (108th in the world), while rating China's as 4.2 out of 7 (60th in the world).[114] Interestingly enough, inadequacy of education is a bigger problem in China than in Ghana: 7.4% of those doing business in China rank inadequate education as a top five problem, whereas nearly half that figure lists that problem in Ghana.[115] Labor is also considerably cheaper in Ghana, where a manufacturer can compensate workers with as little as $1.65 a day,[116] while the average Chinese worker will make $1.36 in just an hour.[117]

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[108] *See infra* notes 111–15.

[109] *Id.*

[110] *Id.*

[111] *Logistics Performance Index*, THE WORLD BANK (Dec. 2, 2011), http://info.worldbank.org/etools/tradesurvey/Mode1a.asp.

[112] THE WORLD ECON. FORUM, THE GLOBAL COMPETITIVE REPORT (2010–2011), at 128, 166 (2010), *available at* http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *See* Bureau of Democracy, Human Rights, and Labor, *2008 Human Rights Report: Ghana*, U.S. DEPT. OF STATE (Feb. 25, 2009), http://www.state.gov/g/drl/rls/hrrpt/2008/af/119004.htm.

[117] *See International Labor Comparisons*, U.S. BUREAU OF LABOR STATISTICS (Sept. 24, 2012, 10:55 AM), http://www.bls.gov/fls/china.htm.

Because the infrastructure and workforce of Ghana and China are comparably developed, and the cost of labor is cheaper in Ghana, the last issue to analyze in determining which country has the more inviting FDI climate is the attractiveness of the countries' FDI policies themselves. In the next Part, the Note will make this comparison.

III. COMPARISON OF FDI POLICY

Ghana's FDI policy is more attractive than China's for three reasons: it features fewer restrictions, offers more incentives, and has an administrative process that is considerably more transparent and efficient.

A. Restrictions

1. Ownership Restrictions

Ownership restrictions limit the industries in which foreigners can conduct FDI. Some restrictions will prohibit foreign enterprises entirely from dealing in a certain sector; others will require that a domestic party jointly own a foreign enterprise to a specified degree.[118] Ownership restrictions can be the host country's most effective means in protecting itself from the danger of losing control over its own economy if it becomes largely dependent on FDI.[119]

Naturally, foreign-invested entities (FIEs) conduct business for the primary economic benefit of those outside of the host country's borders, who have little attachment to the host country.[120] The interests of FIEs and the host countries conflict in many sets of circumstances resulting in the flight of FIEs to other destinations. One issue is the regulation of wages and labor conditions. Host countries must fear the divestment of FIEs if the country decides to impose higher regulation on labor and wages.[121] Dependence on FDI also means dependence on the MNC's home country. FIEs will leave the host country when the local conditions worsen and the country is in a time of need.[122] Japanese MNEs had been heavy investors in the Asia-Pacific region until the Japanese stock exchange crashed in 1991, causing large-scale FDI pull-outs.[123] FIEs are also loyal to the interests of

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[118] CONKLIN & LECRAW, *supra* note 20, at 64–65.
[119] *Id*. at 66.
[120] *Id*. at 67.
[121] *Id.* at 66.
[122] *Id.*
[123] *Id.*

their home country.[124] Canadian-owned Inco had to reduce jobs due to a low demand for its product, nickel.[125] It was urged by the Canadian government to reduce jobs in Indonesia in order to preserve Canadian jobs, and it ultimately took such action.[126] Requiring some degree of domestic ownership is a way to ensure that a significant portion of the FIE's control is allotted to a party whose interests align with those of the host country.[127]

China operates by categorizing all industries as encouraged, prohibited, or restricted, and then mandating different levels of ownership, accordingly.[128] Investments in "encouraged" areas are simpler and face no ownership restrictions.[129] "Prohibited" areas do not allow foreign investment.[130] "Restricted" areas can be harder to classify as they require extra approval and a degree of domestic ownership.[131] Restricted sectors do not foreclose on foreign investment per se, but proposed investments in this category are sparingly approved, as the delay during the process discourages applications.[132] "The practice in Beijing has been to simply fail to respond to requests for approval."[133]

The major problem in this system is that the categories often change. Categories are laid out in the Catalogue for the Guidance of Foreign Investment in Industries (Catalogue).[134] Since the Catalogue was introduced in 1995, it has been amended three times, most recently in 2007.[135] For example, investment in real estate was specifically encouraged in 2004, but prohibited just three years later.[136] This constant flip-flopping is a manifestation of the volatility of China's underlying FDI policy aims. For example, China's policy had previously supported export-oriented business and allowed related industries to be "encouraged."[137] Now, China discourages investment in

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124 *Id.* at 68.
125 *Id.*
126 *Id.*
127 *Id.*
128 *See* Dickinson & Harrison, *supra* note 98.
129 *See* PRICEWATERHOUSECOOPERS, DOING BUSINESS AND INVESTING IN CHINA 25 (2008), *available at* http://download.pwc.com/ie/pubs/PwC-Doing-Business-and-Investing-in-China.pdf.
130 *See id.* (noting that "'[p]rohibited' investment includes sectors such as exploitation certain precious metals, the media, and other sectors that are not open to foreign investment").
131 *See id.*
132 Dickinson & Harris, *supra* note 98.
133 *Id.*
134 *Id.*
135 *12th Five-Year Plan Is Off to a Good Start*, *supra* note 89.
136 *See* Dickinson & Harris, *supra* note 98.
137 *See id.*

industries in which China has already developed a proficiency including export-oriented businesses.[138]

Ghana, by comparison, has far fewer ownership restrictions. The country only has compulsory domestic partnership requirements in the fishing and mining industries.[139] Even more, the only sectors reserved solely for wholly-owned domestic enterprises are taxis, gambling (excluding soccer), kiosk or market sales, and hair salons.[140] Ghana likely restricts investments in mining and fishing because natural resources such as minerals and land are a part of any nation's wealth and heritage.[141] Bans on foreign kiosk sales, taxis, and hair salons reflect the tendency of countries to discourage foreign investment in areas where foreigners will not bring new technology, processes, or add value past what the domestic industry has already achieved.[142]

2. Currency Exchange Restrictions

Economic considerations motivate countries to limit the outflow of their currency. When outflows of a country's currency increase, the supply of the currency in the international sphere is then increased, which puts downward pressure on the value of the currency. In the case of FIEs, when such a venture removes its earnings from the host country and exchanges the host-country currency for another, the supply of the currency is increased and the value is decreased.

Countries will attempt to limit FDI-related currency outflows at a number of stages. China restricts the ability to be able to have a foreign exchange account.[143] China created the State Administration of Foreign Exchange (SAFE) to implement its exchange policy.[144] SAFE may outright deny the right of an FIE to maintain a foreign exchange account.[145]

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[138] *See id.*

[139] *See* CONKLIN & LECRAW, *supra* note 20, at 55.

[140] Ghana Investment Promotion Centre Act (Act No. 478, Schedule/1994) (Ghana).

[141] *See* CONKLIN & LECRAW, *supra* note 20, at 55.

[142] *See id.* at 116.

[143] *See* JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 483 (A.B.A 3d ed. 2010).

[144] U.S. COMMERCIAL SERV., DEP'T OF COMMERCE, DOING BUSINESS IN CHINA: 2012 COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES 100 (Oct. 1, 2011) [hereinafter CHINA COUNTRY COMMERCIAL GUIDE], *available at* http://export.gov/china/build/groups/public/@eg_cn/documents/webcontent/eg_cn_025684.pdf.

[145] *See* Bureau of Economic, Energy and Business Affairs, *2009 Investment Climate Statement—China*, U.S. DEPARMENT OF ST. (Sept. 24, 2012, 11:09 AM), http://www.state.gov/e/eb/rls/othr/ics/2009/120870.htm.

Additionally, SAFE restricts FIEs that operate in the current account market (imports and exports) to retaining a maximum of fifty percent of their export earnings in a foreign currency.[146] Non-export/import companies are processed on an opaque case-by-case basis.[147]

China also takes things a step further by limiting the amount of foreign loans that an FIE can use to fund its venture. Medium and long-term debt is capped at the difference between an FIE's total investment and registered capital.[148] This measure is not an explicit currency exchange restriction, but it operates with a similar effect. With debt financing being a prevalent means of capitalization, it is likely to be a part of any business venture. Foreign loans mean that a portion of the earnings must be repaid to foreign entities in foreign currency. Domestic loans mean that the same return must be paid to a domestic lender in the domestic currency. These proceeds are thereby kept in the country.

Ghana has a much simpler process that features no exchange regime or restrictions. The country guarantees the "unconditioned [currency] exchange" for dividends, net profits, loan payments, and remittances and proceeds for the sale of assets or interests in the enterprise.[149] These explicit havens of currency exchange encompass any type of investment that an FIE might try to make, and protect any type of return that would be produced in the process.[150]

3. Capital Requirements

A capital requirement is a minimum amount of funding that a proposed venture must have before it can begin operations. This ensures that a venture is adequately capitalized and financially stable. Imposed upon FIEs, it also has the effect of deterring ventures that have more limited funding.

In China, the capital requirement minimum varies by sector and industry with the minimum being RMB30,000—about $47,000.[151] In the service sector, some notable industries that have capital requirements are accounting,[152] advertising,[153] construction,[154] educational institutions,[155] financial

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[146] *Id.*
[147] *See id.* (noting that the effect is to cause most firms to reinvest in the Chinese market).
[148] *Id.*
[149] Ghana Investment Promotion Centre Act (Act No. 478, sec. 27/1994) (Ghana).
[150] *Id.*
[151] *See* ZIMMERMAN, *supra* note 143, at 160.
[152] *Id.* at 160–61.
[153] *Id.* at 162 (RMB30,000 plus annual sales of RMB20 million).
[154] *Id.* at 164–65.
[155] *Id.* at 171 ($350,000).

services,[156] retail/wholesale,[157] freight and transporting,[158] hospitals,[159] and law firms.[160] In the manufacturing sector, the Chinese have restricted such notable industries as automotives,[161] food,[162] and publishing.[163] One would be hard-pressed to find any FDI opportunity in China that would avoid a minimum capital requirement. In an extreme case, China requires investment-type companies (that operate by taking over existing Chinese companies) to have $30 million in registered capital.[164]

Ghana has capital requirements for all FDI ventures, but they are lower and much simpler. Joint ventures with domestic partners are subject to a $10,000 requirement, whereas wholly owned foreign enterprises are subject to a $50,000 requirement.[165] In the most extreme case, trading companies—those that deal only in buying and selling of goods (but not the production)—are subject to a $300,000 minimum.[166]

4. Restrictions Comparison Summary

Compared to China, Ghana has made its FDI restrictions minimally applied, straightforward, and less intrusive. From the outset, China either explicitly or indirectly bans foreign participation in many industries. Also, in China, an area that is unrestricted to foreigners in one year may become completely prohibited four years later. Ghana only bans foreign participation in four specific types of businesses,[167] and only requires a domestic partner for mining and fishing ventures.[168] Ghana also has lower, less deterring capital requirements for a foreign start-up enterprise. Although Ghana still features these restrictions, they are very clear and do not reach the astronomical levels seen in China's FDI regime. After the enterprise has been established, Ghana also places less of a burden on the FIE by allowing for freer currency exchange. The Chinese regime has established an opaque SAFE

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[156] *Id.* at 181.
[157] *Id.*
[158] *Id.* at 188 ($1 million).
[159] *Id.* at 194 (RMB20 million).
[160] *Id.* at 196–97.
[161] *Id.* at 203.
[162] *Id.* at 208.
[163] *Id.* at 213 (RMB30 million for distributors and RMB5 million for retailers).
[164] Nicholas Howson & Hans-Gunther Herrmann, *China Clarifies Rules on Foreign Investment Through Local Subsidiaries*, 19 INT'L FIN. L. REV. 46, 48 (2000).
[165] Ghana Investment Promotion Centre Act (Act No. 478, sec. 19/1994) (Ghana).
[166] *Id.*
[167] *See* Ghana Investment Promotion Centre Act (Act No. 478, Schedule/1994) (gambling, taxi services, hair salons, and kiosk sales).
[168] *See* Dickinson & Harris, *supra* note 98.

administration that mandates how much currency FIEs can exchange on a case-by-case basis with virtually no guidelines for its determination. Ghana, on the other hand, provides for the unconditioned currency exchange of all types of profit, remuneration, proceeds, or payments that an FIE could have.

It is clear that Ghana's FDI climate is significantly less restrictive than China's. As compared to an investor acting within the Chinese FDI climate, the Ghana-minded investor will be able to establish an enterprise remarkably quicker and with near-guaranteed certainty. The costs of doing so will be less and the enterprise will be less encumbered in its continued operation. The Ghanaian FIE will not have to worry about changing policies that jeopardize the standing of its foreign ownership.

B. Incentives

1. Tax and Duty Incentives

In general, tax competition can be the pivotal factor when the other factors in competing host countries are roughly equal.[169] Tax advantages can translate to large yields in savings from operations abroad. A manufacturing firm operating in a lower-income nation will gain a three percent rise in production for every one percent that a tax policy reduces the cost of capital.[170] Common types of FDI tax incentives include reductions in corporate tax rates, tax holidays (deferrals of taxes for a number of years), accelerated depreciation allowances, tax credits for profit that is reinvested in the host country, and exemptions from export duty or value-added taxes.[171]

The tax incentives that China used to ascend to FDI prominence have been largely repealed.[172] Prior to the change, China reduced income tax to as low as fifteen percent for foreigners who invested in special economic zones, coastal cities, or key economic and technological development sectors.[173] Additionally, manufacturing operations scheduled to operate for more than ten years were exempted from taxation during their first two profit-making years.[174] FIEs were even exempt from value-added taxes if they were operating in a "priority industry."[175] Tax breaks for foreign enterprises were virtually eliminated in 2007,[176] along with value-added tax exemptions in 2008.[177]

[169] *See* AVI-YONAH & TITTLE, *supra* note 4, at 3.
[170] *See* JOHN H. MUTTI, FOREIGN DIRECT INVESTMENT AND TAX COMPETITION 5, 68 (2003).
[171] *See* COHEN, *supra* note 37, at 165.
[172] *See* Huang, *China's New Regulation*, *supra* note 92, at 804.
[173] *See* Huang, *China on the Horizon*, *supra* note 88, at 483.
[174] *Id.*
[175] ZIMMERMAN, *supra* note 143, at n.38 and accompanying text.
[176] *See* Dickinson & Harris, *supra* note 98.
[177] *See* ZIMMERMAN, *supra* note 143, at n.38 and accompanying text.

China also scaled back the amount of import duty incentives that it had previously offered. Until 1996, China had given tariff exemptions and preferences for equipment and raw materials imported by newly approved foreign enterprises, as well as equipment imported for major construction projects.[178] Now, China reserves these types of incentives only for FIEs that operate in high technology.[179]

Ghana has not been so picky in giving tax and import duty incentives. Ghana does not give FIEs special tax incentives that are not available to domestic enterprises; rather it gives FIEs national treatment by applying the same tax code that governs Ghanaian businesses.[180] FIEs are eligible to receive the same import duties for capital goods that are given to domestic Ghanaian entities, while also being able to apply for special duty exemptions that would not be available to locals.[181]

2. Other Incentives

Ghana's FDI legislation features a unique provision that allows for discretion and flexibility in attracting FIEs. Under the Ghana Investment Promotion Centre (GIPC) Act, the administration may, "for the purpose of promoting identified strategic or major investments ... negotiate specific incentive packages in addition to the incentive provided under [the GIPC Act]."[182] This discretionary power could allow Ghana to grant incentive packages similar to those where Alabama offered $253 million incentive packages to get a Mercedes-Benz plant in 1993 and a Hyundai plant in 2002.[183] In the Hyundai package, Alabama went as far as to put forward $77 million to train production workers along with offering $158 million in infrastructure improvements and tax abatements, $34 million for the site

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[178] *Id.*; *see also* COHEN, *supra* note 37, at 163.

[179] *See* ZIMMERMAN, *supra* note 143, at n.52 and accompanying text.

[180] Ghana Investment Promotion Centre Act (Act No. 478, sec. 23/1994) (Ghana) ("An enterprise shall be entitled to such benefits and incentive as are applicable to such enterprise under the Income Tax Decree 1975 (S.M.C.D. 5) and under Chapters 82, 84, 85 and 98 of the Customs Harmonized Commodity and Tariff Code scheduled to the Customs, Excise and Preventive Service Law, 1993 (P.N.D.C.L. 330) and any other law for the time being in force.").

[181] Ghana Investment Promotion Centre Act (Act No. 478, sec. 24/1994).

[182] Ghana Investment Promotion Centre Act (Act No. 478, sec. 25/1994).

[183] COHEN, *supra* note 37, at 167; *see also Mercedes-Benz Project*, *supra* note 44; Bennet, *supra* note 39, at D1; *Hyundai Motor Company Announces It Will Build Its First U.S. Manufacturing Plant in Montgomery, Alabama; Facility to Cost $1 Billion, Employ 2,000*, PR NEWSWIRE, Apr. 1, 2002, *available at* LEXIS-NEXIS FINANCIAL NEWS.

purchase, and $10 million in advertising to state employees.[184] It is worth noting that the GIPC Act gives the Ghanaian administration the latitude to afford additional incentives.[185]

Ghana also facilitates the movement of an FIE's workers. The GIPC Act guarantees a simple visa system for FIEs.[186] Enterprises with $10,000–$100,000 in invested capital are entitled to one immigration visa; enterprises with $100,000–$500,000 are entitled to two visas; and enterprises with greater than $500,000 are entitled to four visas.[187] FIEs that need additional visas may petition for them.[188]

3. Incentives Summary and Conclusion

At an earlier point in time, China might have offered a much more enticing package for FDI hopefuls, but now it is evident that Ghana has put out a sweeter pot. China has become a heavy destination for FDI, and thus does not need to go to extremes to offer attractive incentives. It has reached a point where it can be more selective with investors. Now, if China does offer any incentive, then it is offered only to a high priority investor, such as one who imports articles for scientific and educational use.[189]

Ghana has not reached this point of FDI prosperity, and thus has not become as selective. It offers its incentives to all FIEs, regardless of sector or high-end dealings, and is even willing to work with proposed ventures on a case-by-case basis for additional incentives. Ghana even offers a wider base of import duty exemptions to FIEs than it does to its own domestic base. Additionally, the Ghanaian incentive scheme has not changed at all in recent years, whereas the Chinese scheme has constantly constricted since 2007. In addition to being less restrictive, the Ghanaian FDI climate is also more highly incentivized.

C. Administration of FDI Policy

Aside from incentives and restrictions, how administrations implement their FDI policy can have a large effect on the viability of establishing a foreign-invested enterprise within a country's borders. A simpler startup

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[184] *See* Yoo Cheong-mo, *Hyundai picks Montgomery for U.S. Car Plant; Alabama State Prepares $77 Million Bill for Auto Worker Training*, THE KOREA HERALD, Mar. 14, 2002, *available at* LEXIS-NEXIS; *Road to Better Times*, *supra* note 36, at 63.

[185] Ghana Investment Promotion Centre Act (Act. No. 478, sec. 25/1994).

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *See* ZIMMERMAN, *supra* note 143, at 710 n.52.

process required by the host country can allow ventures to be founded quicker and cheaper, whereas more complicated systems stick prospective FIEs with more costs, delays, and uncertainty. The transparency and consistency of a host country's policies can reduce the risk for foreign ventures. Finally, a guaranteed impartial dispute resolution process can also reduce some of the risk that the foreign enterprise will face by investing abroad.

1. Start-Up Process

In general, regulatory hassles in the application process can significantly deter foreign investors, as they create much unpredictability, can triple administrative costs, and can typically be avoided by investing in an alternative destination.[190] Regulatory hassles might include having multiple approval organizations, excessive processing fees, slow approval processes, or seemingly randomly rejection. By contrast, having a more centralized, faster, and more transparent process can make a destination riper for FDI.

China's startup process is more akin to the former situation. The approval process goes through two major bodies: the National Development and Reform Commission (NDRC) and the Ministry of Foreign Commerce (MOFCOM).[191] All proposals must be submitted to the NDRC for approval, which includes compliance with Chinese laws, national security implications, and economic development effects.[192] If approved, investors must then apply to MOFCOM for approval to legally establish a company.[193] Then the investors must apply for a business license from the State Administration of Industry and Commerce (SAIC).[194] After this, the investor needs to register with China's tax and foreign exchange agencies.[195] If the enterprise is a Greenfield operation—a start-up company—it must gain approval from the Environmental Protection Ministry and the Ministry of Land Resources.[196] However, many FDI ventures are through mergers with, or acquisitions of, existing domestic companies.[197] Prospective FDI ventures that seek to start in this manner are subject to an additional level of scrutiny by MOFCOM.[198] Mergers and acquisitions will not be allowed if they involve a "key industry," "famous trademark," or could harm China's "economic security."[199]

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[190] COHEN, *supra* note 37, at 169.
[191] CHINA COUNTRY COMMERCIAL GUIDE, *supra* note 144, at 85.
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.* at 86.
[198] *Id.*
[199] Huang, *China's New Regulation*, *supra* note 92, at 805.

Additionally, any merger or acquisition involving more than $200,000 is subject to automatic antitrust review.[200] Under this rule, in 2009, MOFCOM rejected a $2.4 billion bid by Coca-Cola to buy the Huiyuan Juice Group, China's household name beverage company, which controlled forty-two percent of China's juice market share.[201] MOFCOM feared that the acquisition would harm the competitiveness of the industry.[202] In this same fashion, a bid for China's largest machine manufacturer was also rejected.[203] The difficulty in entering China through a merger or acquisition is that the criteria for rejection are ill-defined. The trend seems to be that the acquisition of larger names or more dominant players in the Chinese market will not be tolerated. Some even go as far as to accuse China of using these rejections to retaliate against Western rejections of some major international bids by Chinese companies.[204] The simplest way to summarize the Chinese standard on foreign mergers and acquisitions might be that "foreigners are permitted to purchase non-majority interests in strong, successful Chinese companies, but only if there is some added benefit, such as transfer of technology, advanced management or access to foreign markets."[205]

Ghana employs a much simpler startup system. It is essentially a "one-stop shop."[206] The process is simple: register with the Ghana Investment Promotion Centre (GIPC), and when the documents are "in order" certification will be issued within three business days, and any additional licensing issues will be handled by the GIPC.[207] This first major advantage of this policy is that it is an extremely quick system, as an FDI hopeful needs to wait only five business days for the application to be processed. The second advantage is that any additional approval or steps that need to be taken will be handled by the GIPC. This can be extremely helpful if a type of venture

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[200] *Id.* at 810.

[201] *See* Don Lee & David Pierson, *Chinese Government Denies Coca-Cola's Bid to Buy Juice Company*, L.A. TIMES, Mar. 19, 2009, http://articles.latimes.com/2009/mar/19/business/fi-china-coke19; Dealbook, *China Rejects Coke Bid for Juice Maker*, N.Y. TIMES (Mar. 18, 2009, 8:18 A.M.), http://dealbook.nytimes.com/2009/03/18/china-rejects-coke-bid-for-juice-maker.

[202] *See* Dealbook, *supra* note 201.

[203] *See* Huang, *China's New Regulation*, *supra* note 92, at 810.

[204] *China Rejects Coke's Bid to Buy Juice Maker*, MSNBC, Mar. 18, 2009, http://www.msnbc.msn.com/id/29753291/ns/business-world_business/t/china-rejects-cokes-bid-buy-juice-maker/ ("China is saying, 'Look, if you reject CNOOC's acquisition of Unocal, I can do the same, so why don't we respect each other?'").

[205] Shaun Rein, *What Coca-Cola Did Wrong, and Right, in China*, FORBES, (Mar. 24, 2009, 6:00 PM), http://www.forbes.com/2009/03/24/coca-cola-china-leadership-citizenship-huiyuan.html.

[206] U.S. COMMERCIAL SERV., DEP'T OF COMMERCE, DOING BUSINESS IN GHANA: 2009 COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES 41 (Oct. 1, 2011), *available at* http://www.buyusainfo.net/docs/x_8523890.pdf.

[207] Ghana Investment Promotion Centre Act (Act No. 478, secs. 21–22/1994) (Ghana).

would require additional steps of approval under domestic law (some examples being obtaining certain business licenses or operating permits). Unlike the Chinese system, the FIE does not to need to worry about being encumbered by the intricacies of the Ghanaian domestic regulation. As long as the proposed FIE meets the GIPC requirements, the remaining details will be taken care of by the Ghanaian authority.

Investors normally react very well to the "one-stop" format. Singapore and Ireland have created investment promotion agencies that act as one-stop shops to help foreign enterprises handle the commercial, administrative, and legal details, and now these countries are behind only Hong Kong in FDI inflows per capita.[208]

2. Transparency

The most attractive policy on paper does not, in itself, create the most attractive FDI climate. A country may have a poor FDI climate because of either the policy itself, or because there is substantial uncertainty or instability in the policy.[209] Opaqueness and volatility can have a damaging effect on the attractiveness of FDI policy.

In China, the regulatory system is "opaque" and administration is largely unaccountable.[210] Chinese regulators have substantial discretion to impose unexplained restrictions and the administrative bodies are not required to publish (with substantial analysis) decisions on foreign investment approvals or denials.[211] U.S. investors have reported to the U.S. Department of Commerce that regulators at times rely on unpublished internal guidelines in making decisions.[212]

Additionally, Chinese regulations can change seemingly overnight and without notice. When China's National Development Reform Commission revised the Catalogue in 2007, no English language version was released and the English website was "strangely silent" on the revision.[213] RWE Thames Water withdrew from a water treatment project in 2004 when the Chinese government changed the rules on rate of return for investments in its class.[214]

The volatility of Chinese policy also raises somewhat of an expropriation issue. Investments in real estate, construction, luxury hotels, and office buildings were encouraged by 2004 policy but restricted in 2007.[215] In an even more extreme case, foreign investment in residential housing was encouraged

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[208] *See* COHEN, *supra* note 37, at 160.
[209] *See* THUNELL, *supra* note 58, at 5.
[210] *See* COHEN, *supra* note 37, at 162.
[211] *See* CHINA COUNTRY COMMERCIAL GUIDE, *supra* note 144, at 86.
[212] *Id.* at 90.
[213] *See* Dickinson & Harris, *supra* note 98.
[214] *See* COHEN, *supra* note 37, at 170.
[215] *See* Dickinson & Harris, *supra* note 98.

in 2004, but absolutely prohibited in 2007.[216] In the first case, the change would have left investors with the option of divesting entirely or selling the required ownership interest to a domestic party. In the second case, the foreign investor would be forced to divest entirely.

The system is fundamentally more transparent and stable in Ghana. For one, the policies do not change. The relevant policies have been laid out in the same act and have stood, without amendment, since 1994.[217] There is no opaque approval process because, unlike China, which bases its approvals around abstract criteria like economic security and key industry analysis, the Ghanaian requirements are all concrete. In Ghana, the FDI venture only needs to supply the required capital and application.[218] Additionally, all of the requirements, incentives, and processes are spelled out in the GIPC Act.[219]

3. Dispute Resolution

The process for dispute resolution can ensure that an FIE's financial interests are protected. Ideally, an FIE would want a process that is impartial, transparent, independent, and relatively expedient.

In China, the court system is not independent from other branches of the government, so the other branches may—and often do—intervene at any time or disregard judgments from courts.[220] Chinese officials urge firms towards Alternative Dispute Resolution,[221] but this might not lead to the fairest result in China. The Chinese party has never lost an FDI-related arbitration dispute in China.[222] A foreign investor in China, thus, has no guarantee of obtaining a fair judgment in China. To the contrary, it seems like an unjust result is more likely.

In Ghana, the GIPC Act assigns FIEs specific dispute resolution rights.[223] Foreign investors have the right to arbitration under the rules of the UN Commission of International Trade Law, any bilateral or multilateral agreement between Ghana and the investor's home country, and any other process agreed to by the investor and the Ghanaian government.[224] If there is a disagreement between the investor and the government regarding the method of dispute settlement, then the investor's choice will prevail.[225] Standing in stark contrast to China, Ghana gives investors notions of fairness by

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[216] *See id.*
[217] *See generally* Ghana Investment Promotion Centre Act (Act No. 478 1994) (Ghana).
[218] *Id.*
[219] *Id.*
[220] *See* CHINA COUNTRY COMMERCIAL GUIDE, *supra* note 144, at 88.
[221] *Id.*
[222] *Id.*
[223] Ghana Investment Promotion Centre Act (Act No. 478, sec. 29/1994) (Ghana).
[224] *Id.*
[225] *Id.*

supplying procedural justice protocol recognized by the international community. Additionally, the FIE has the upper hand in forum selection and method disputes. This system operates to give the FIE a more attainable promise of impartialness and equity.

4. Administration Summary and Conclusion

The administration of Ghanaian FDI policy is much more transparent, stable, convenient, and fair. At the onset of the venture, the Ghanaian-minded enterprise will be approved much quicker than its Chinese-minded counterpart, which will be encumbered by multiple levels of scrutiny and a more opaque approval process. The Ghanaian FIE will feel a higher level of security knowing that the policy that governs it will remain unchanged, but the Chinese FIE will have to assume the risk of sudden changes that might have effects as severe as the effective expropriation of the enterprise's interest. Finally, should any disputes arise, the Ghanaian FIE has a better chance at fair, independent, and impartial adjudication.

CONCLUSION

China is the world's hot button investment locale, but the FDI climate in Ghana merits attention from internationally-vested business entities. Unlike the increasingly restrictive Chinese climate, the Ghanaian climate allows for a wider range of incentives, while hindering FIEs with fewer restrictions. Ghana's FDI policy is also implemented in a clearer, more stable manner. Where China's policy seems to be underscored by the deterrence of FDI that does not deal in high technology or a critical developing industry, the Ghanaian policy is not so selective. With socioeconomic values that are either just as favorable or more favorable to foreign investment as those found in China, Ghana stands as an equally viable destination for FDI. Investors should strongly consider operating in Ghana, as the Black Star country's FDI climate is immensely more favorable than the one found in the land of the Red Dragon.

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[*] J.D. Candidate, 2013, William & Mary Law School; B.S. International Business and Finance, 2010, Ithaca College. First off, I would like to thank my family, close friends, and God. Without the support from these three, I could accomplish nothing. I would like to thank the staff of the *William & Mary Business Law Review*, in particular, those who do the thankless, but arduous, job of cite-checking. I would like to recognize the MLK Scholars Program of Ithaca College for providing me with the opportunity to visit and study Ghana. Finally, I must thank the people of Ghana and China who gave me valuable insight into each of their countries.