

Foreign Direct Investments in African lands: The Chinese and EU different approach

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Abstract: *Gli investimenti diretti esteri nei Paesi africani: il diverso approccio di Cina e Unione europea* – The article focuses on the differences between Chinese and EU investment policies towards African countries and how that policies are influencing land investments. The Chinese investment policy is primarily driven by economical needs and is based on the 2001 Going global policy. The article takes into consideration the BITs between China and African countries and the Chinese Special Economic Zones in Africa. Concerning of the EU policies in Africa, the paper analyses the Economic Partnership Agreements, the envisaged new trade pillar of Africa-EU cooperation, and the EU energy policy that is promoting investments in African lands for biofuels' production. Finally, the article points out possible solutions for fostering sustainable investments in African lands, starting from the promotion of a trilateral cooperation involving not only China and European Union, but also African countries and African Union.

Keywords: Foreign Direct Investment – African lands – Chinese investment policy – EU EPAs – Sustainable development

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1. Foreign direct investments in Africa

During the last few years, Africa has seen the role of foreign direct investment (FDI) as crucial to its development. FDI is, in principle, expected to bring a number of developmental benefits, such as increased employment, technological development, increased trade benefits, new markets, new services and infrastructure. There is now considerable evidence that FDI may affect growth and development by complementing domestic investment and by undertaking trade and transfer of knowledge and technology¹.

It is remarkable to point out that the importance of FDI for developing and less-developed countries is envisioned not only by the World Bank or Developed countries, but also by African countries. In fact, the New Partnership for Africa's

¹ Africa is the world's fastest-growing region for foreign direct investment. In 2015, the region recorded its highest share of continent-wide FDI, at 26.3% of total projects. Southern Africa, however, remained the largest investment region on the continent, despite a 11.6% fall in projects on 2014. In terms of capital investment on the continent, west Africa outpaced southern Africa as the leading recipient on the continent. Its FDI flows overall saw a 16.2% rebound on 2014. North Africa, which has also seen big declines in recent years due to political turbulence and security concerns, saw an 8.5% year-on-year growth in FDI projects. In sub-Saharan Africa however, these projects are increasing at a much faster rate. On this point see the World Bank datas at the the following link: data.worldbank.org/indicator/BX.KLT.DINV.CD.WD

Development (NEPAD), the African Union strategic framework for pan-African socio-economic development², has added a strong emphasis on increasing power flows to Africa as one way to help overcome the region's resource gap³. This is because Africa, like many other developing regions of the world, needs a substantial inflow of external resources.

On the other hand, the recent inflow of FDI has been strongly criticised especially by NGOs and International development organizations⁴ that hint at possible negative impacts for the target countries and especially for the poor. In small economies, large companies can and often abuse their dominant market position and, based on the literature⁵, it is obvious that FDI is not always in the host's country best interest and therefore it should be controlled.

One of the most relevant forms of FDI in Africa is land investment. Foreign direct investments can guarantee benefits to African agriculture, for example, through capital influx, transfer of technology for innovation and for the increase of productivity, expansion of domestic production, improvement of living standards and through job creation⁶.

However, it often happens that intervention by African states for guaranteeing the success of the investment have negative effects on local populations, which are deprived of their lands and of the resources contained in them. In these cases, scholars do not talk about land investments, but they describe the phenomenon as *land grabbing*⁷. The *land grabbing* phenomenon represents a great challenge for African states. In fact, about two thirds of the lands and natural resources, which are the object of foreign investments in these last few years, have been located in Africa and, especially, in Sub-Saharan Africa⁸.

As from 2007-2008, with the beginning of the financial crisis, the interest towards African lands has increased considerably, to the extent that some authors talk about a new colonialism⁹. This is caused mainly by food demand, climate change and the ongoing desertification, and by the demand for energy resources and, especially, for biofuels, which are considered an alternative solution to oil and

² The New Partnership for Africa's Development (NEPAD) is both a vision and a policy framework for Africa in the twenty-first century. NEPAD is a radically new intervention, spearheaded by African leaders, to address critical challenges facing the continent: poverty, development and Africa's marginalisation internationally. See: www.nepad.org/

³ On this point see C. Dupasquier, P.N. Osakwe, *Foreign direct investment in Africa: Performance, Challenges and Responsibilities*, in *Journal of Asian Economies*, Vol. 17, Issue 2, 2006, 241-260.

⁴ Among the NGOs and International Development Organizations see Oxfam, Grain, International Land Coalitions, Action Aid, etc.

⁵ See e.g. L. Cotula, S. Vermeulen, R. Leonard, J. Keeley, *Land grab or development opportunity? - Agricultural investment and international land deals in Africa*, London/Rome, 2009.

⁶ On the benefits of the investments in agricultural lands see the analysis in N. Cuffaro, *The Record of FDI in Developing Country Agriculture*, article presented in Rome on 30th-31st July 2009 during the meeting of the FAO's experts about foreign investments in the agriculture of developing countries.

⁷ See e.g. A. Bonfanti, "Land Dealing" o "Land Grabbing"? *Imprese e investimento agricolo responsabile*, in E. D'Orazio (ed.), *Corporation and global justice: should multinational corporations be agents of justice?*, Milan, 2013, 44-58.

⁸ T. Kachika, *Land Grabbing in Africa A Review of Impacts and the Possible Policy Responses*, Oxfam International, 2010, 15-16.

⁹ L. Cotula, *The great African Land Grab?: Agricultural Investments and the Global Food System*, IIED, London, 2013, 40 ff.

a medium to contribute to the reduction of greenhouse gases. A lot of African lands are used for the farming of jatropha, a plant whose seeds contain about 30-38% oil. The jatropha can be used as common fuel by means of a simple filtration in diesel engines which have been suitably designed, or it can be converted into biodiesel which can be employed in all engines fed by diesel oil without making any specific change in the engine¹⁰.

Analyzing some investment agreements in agricultural lands¹¹, it is possible to see that the object of the contract concerns uncultivated or abandoned acreages, the so-called idle lands or marginal lands. Unfortunately, at present there is not a general and shared legal definition which explains the meaning of uncultivated or infertile land, hence the choice is left to the discretionary power of the states and, in general, to the contracting parties¹². For instance, in Ethiopia, all the contracts registered in the National Investment Promotion Agency are classified as referring to “*unused land without prior users*”¹³. However, this formal classification raises some doubts. In fact, concepts like abandoned land or unused land do not have to be linked to the real presence of rural communities, but to the real productivity of those lands¹⁴.

Therefore, terminology becomes essential, because these definitions are destined to the exploitation of the resources that are evaluated unproductive by the government authorities, but which have a crucial role for the subsistence of the local rural communities. In many cases, this land, which is considered marginal, uncultivated and idle, is actually vital to guarantee survival to people who live on small-scale agriculture or sheep breeding, to women and native populations¹⁵.

According to the majority of the Constitutions of African states¹⁶, non-titled land belongs to the public or to the state. The occupation of lands by people without any official title is admitted but not legally recognized and the state has the legitimate power to dispose of its natural resources.

In Tanzania, for example, lands are state-owned and only a part of them, namely the general lands, can be the object of an investment. In particular, the national legislation on lands defines “*general land as all public and which is not reserved land or village land and includes unoccupied or unused village land*”¹⁷. However, this definition is too vague and it cannot protect local populations, as in the case of

¹⁰ L. Russi, *Hungry Capital: The Financialization of Food*, Alresford, 2013, 120 ff.

¹¹ L. Cotula, *Land Deals in Africa: What is in the contracts?*, IIED, London, 2011, 16 ff.

¹² A. M. Karodia, P. Soni, *African Land Tenure and Foreign Land Ownership: Threat or Opportunity?*, in *International Journal of Economics and Business Studies*, Issue 3, 2013, 4-7.

¹³ The Oakland Institute, *Understanding Land Investment deals in Africa. Country Report: Ethiopia*, Oakland, 2011, 22.

¹⁴ J. von Bernstorff, *Who is entitled to cultivate the Land? Sovereignty, Land Resources and Foreign Investment in Agriculture in International Law*, in F. Romanin Jacur, A. Bonfanti, F. Seatzu (eds.), *Natural resources grabbing, an international law perspective*, Leiden, 2016, 55-74.

¹⁵ See A. M. Karodia, P. Soni, *op. cit.*

¹⁶ On an overview of the principle African Constitution dealing with land rights see L. Cotula, *Property rights, negotiating power and foreign investment: An international and comparative law study on Africa*, Edinburgh, 2009, 154 ff.

¹⁷ Article 2, Land Act Tanzania, 1999, available at the following link: faolex.fao.org/docs/pdf/tan23795.pdf.

the Maasai communities who are constrained to leave their villages to give their land in grant to a foreign multinational corporation¹⁸.

Another important consideration that must be taken into account in the present analysis concerns land regulations in African countries. In a state or in a region, there can exist rights on lands which have a different legal nature: traditional law and common law, government law and tribal law¹⁹. Therefore, in view of a complex and uncertain legal situation, central governments have a predominant role in the distribution of lands, and they often intervene with legislations on lands which aim at transferring all the non-registered lands to the state and this is to foreign investors' advantage too²⁰.

With regard to investors, both the states and the state-owned or state-controlled enterprises invest in Africa, but it is the private sector that prevails. On the one hand, the states provide political support and operate in the diplomacy field in order to facilitate the agreements; on the other hand, private corporations carry on the projects: large public companies for China, joint ventures between the public and the private sectors, or enterprises which are subsidiary companies with sovereign wealth funds for the Western states, especially EU countries²¹.

In the next chapters, what will be examined is the investment and the cooperation policies of two main actors, China and the European Union, in Africa, pointing out the differences and the implications in the development of the African continent.

2. The Chinese developing legal framework for Foreign Direct Investments in Africa

China's presence in Africa can be traced back to the years of decolonization. During the struggle for independence, China has been able to give assistance to African countries through specific agreements to ensure financial and technical support: China's economic activities in Africa were primarily motivated by China's political agenda and were focused on providing economic assistance to newly independent African nations²². The turning point of the Chinese presence in Africa was

¹⁸ The Oakland Institute, *Understanding Land Investment deals in Africa. Country Report: Tanzania*, Oakland, 2011, 32 ff.

¹⁹ See the analysis on the African land regulations in G. Mizzau, *La terra degli antenati. Il regime fondiario tradizionale dei coltivatori africani*, Milan, 2001.

²⁰ In most of the African states, the management of the land is problematical and it generates numerous conflicts. For, instance, the laws that regulate land property in the Senegalese legal system are based on a hybrid system characterized by the presence of juridical pluralism. On this point see J. Faye, *Land and decentralisation in Senegal*, Dakar, 2008.

²¹ A. Goetz, *How different are the UK and China? "Land grabbing" countries in comparative perspective*. Report presented in the "Global Land Grabbing II" international conference of 17th-19th October 2012 organized by Land Deals Politics Initiative (LDPI) and held at the Cornell University, Ithaca, NY.

²² Chinese capital investment into Africa up to July 2016 has increased by 515% from full-year 2015 figures. With more than \$14bn invested in Africa by Chinese companies so far in 2016, investment levels have already surpassed every year of recorded data available for FDI Markets since 2003. In addition, the number of investment projects into Africa from China is set to surpass any previous year since 2003, with 36 projects recorded from January to July 2016. With 38 projects for the whole of 2012, the number of projects recorded during 2016 is certain to reach a new high. Despite a year-on-year decrease in capital expenditure invested in

represented by the *Going Global policy*, formally adopted by the Chinese government in 2001, with the aim of encouraging domestic companies to establish business relationships abroad, in order to consolidate the presence at the international level²³.

China is now one of the main commercial partners of Africa. Its growing population and energy demand is pushing it to forge joint-partnerships with several African states rich in natural resources where China invests capital and develops the country's infrastructure in exchange for employment and favourable terms for extracting raw materials to China²⁴. Moreover, agricultural investment in Africa has been encouraged by the government. Until relatively recently, China's partnership in African agriculture was focused on technical assistance and capacity building. However, in the interest of sustainability, the development of markets and the potential for expanded trade, China has encouraged public-private partnerships and provided incentives for its agribusiness corporations to invest in African agriculture²⁵.

With particular reference to the purchase of arable land, China's interest is based on the need to ensure food at an affordable price for its people and on the production of biofuels. The first known cases of Chinese investment in African agricultural land appeared between 1949 and 2001, when ten investments, with a combined total of 11,000 hectares of land, were realized²⁶. From 2001, many investment agreements have been signed in the field of agricultural cooperation, with the establishment of Chinese state-owned enterprises in Zambia, Zimbabwe,

Africa from China between 2014 and 2015, the number of projects, jobs created and companies investing has increased each year into Africa between January 2013 and July 2016. During this period, the number of projects recorded has increased by 112%, the number of jobs created has increased by 413% and the number of companies investing has more than doubled by 108%.

On this point see: data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS

²³ On the relationship between China and Africa see B. Barton, A. De Bellefroid, *China and the European Union in Sub-Saharan Africa*, in J. Wonters, J.C. Defraigne, M. Burnay (eds.), *China, the European Union and the Developing World. A Triangular Relationship*, Cheltenham/Northampton, 2015, 371-401.

²⁴ B. Kabamba, *China-DRC: a convergence of interests*, in J. Wonters, J.C. Defraigne, M. Burnay (eds.), *op. cit.*, 2015, pp. 414-426.

²⁵ Compared to western multinational companies (MNCs), the role of the Chinese government in the global expansion of Chinese MNCs is significant. China provides its MNCs, mainly state owned, with political and financial support (i.e., involvement of state political and financial agencies in Chinese MNC ventures abroad). Such government support enables Chinese companies to overcome their disadvantaged position resulting from their late arrival in the international market. By going global, they are subject to less competition. They can realize higher profit, due to their price competitiveness, and diplomatic, political and financial support from Beijing's central government. To survive the intense competition in the global market, Chinese companies acquire foreign management skills and new technological skills and develop strong relationships with companies in the countries where they operate. Such relationships often lead to mergers and acquisitions. See D. Bräutigam and T. Xiaoyang, *China's Engagement in African Agriculture: "Down to the Countryside"*, in *The China Quarterly*, Issue 199, 2009, 686-706.

²⁶ There are eight confirmed investments, i.e. five in Zambia (8,807 ha.), one in Guinea Bissau (1,800 ha.); one in Mauritania (638 ha.); one in Mali (500 ha.), and one unconfirmed one in Ghana (size unknown).

Uganda and Tanzania and in the next few years it is expected that new Chinese farmers may be present on the African continent²⁷.

On the one side, the Chinese investments in Africa may be considered as *win-win* solutions and operations, since they promote host countries' development through new capital, infrastructure, technologies, experts, agronomists and seeds supply. On the other side, China's investments in agricultural land may raise many doubts: agricultural projects in biofuels threaten food security and do not allow local people to decide how to cultivate their lands²⁸. Moreover, African workers are often hired to low wage and working conditions, and forced to live with the constant threat of immediate layoff by Chinese enterprises²⁹.

Nonetheless, it is indisputable that Africa is benefiting from Chinese investments. China's aid and investment in Africa has helped to build a structure upon which African countries' economic growth can be built, even in areas where Western countries and agencies are not willing to invest. The impacts of Chinese investments in Africa are more visible in infrastructure development, investment, trade and human capital development. Loans from China have provided African countries with an alternative source for capital, which weakened the position of the World Bank in project financing in Africa³⁰.

In the following paragraphs, the article will examine two legal instruments through which the Chinese government is trying to promote and influence investment in agricultural land and the development of the African continent: Bilateral Investment Treaties and the creation of Special Economic Zones.

2.1. Chinese Investment Agreements in Africa and their legal effects on land deals

The majority of investment contracts, adopted by Chinese investors, are long-term contracts, i.e. contracts to perform work for another over an extended period of time. Many contracts provide long-term rent of land owned (or managed) by African states³¹.

One of the main problems in the long-term contracts is the distribution of economic costs, risks and benefits. Some deals may be mutually beneficial, whilst others may be unbalanced. In these contracts, skewed deals are not sustainable because the party losing out may seek a renegotiation or even renege on the contract altogether³².

²⁷ J. Gu, *China's Private Enterprises in Africa and the Implications for African Development*, in *European Journal of Development Research*, Issue 21, 2009, 570–587.

²⁸ C. Smaller, Q. Wei, L. Yalan, *Farmland and Water: China invests abroad*, Winnipeg, 2012, 1-3.

²⁹ For a detailed analysis see A.Y. Baah, H. Jauch (eds.), *Chinese Investments in Africa: a labour perspective*, Accra-Windhoeck, 2009, 15 ff.

³⁰ On this point see K. Adisu, T. Sharkey, S. C. Okoroafo, *The impact of Chinese Investment in Africa*, in *International Journal of Business and Management*, Vol. 5, Issue 9, 2010, 3-9.

³¹ A. Yilmaz-Vastardis, T. Van Ho, *Integrating Human Rights into the Extractive Industries: How Investment Contracts Can Achieve Protection*, in F. Romanin Jacur, A. Bonfanti, F. Seatzu (eds.), *op.cit.*, 225–244.

³² R.E. Scott, *Conflict and Cooperation in Long-Term Contracts*, in *California Law Review*, Vol. 75, Issue 6, 1987, 2005 ff.

Although the current land contracts usually do not contain guarantees for local people and small producers³³, investment contracts could represent an important legal instrument not only for investors, but also for host countries.

During the investment project's negotiation, local governments often require investors contribution to the development of the region hosting the investment, not only through the provision of jobs or ensuring adequate environmental protection and development, but also through the direct involvement of local farmers in the supply chain³⁴. Optimizing local benefits may require sustainable trade agreements, such as contract farming with small-scale producers or joint ventures with organizations legally recognized in the local community³⁵. For instance, the Chinese state-owned enterprise, *China-Africa Cotton Development Limited*, has a joint venture in Malawi to produce, process and export cotton to China, providing 1,500 jobs for locals and 100,000 farmer families with capital and technological aid³⁶. Further research is needed to examine the impact of this project, but this kind of investment could potentially offer the opportunity to enhance agricultural development in Africa and ensure benefits to local farmers and the economy.

Despite the measures taken by China to encourage investment, there remains a critical issue: there are no specific rules for the stipulation of contracts for agricultural investment. This is a major problem, since it does not allow to discover how the negotiations brought about the conclusion of the contract and in particular whether the content of the contracts is clearly defined³⁷.

The use of *soft law* instruments is likely to enable greater standardization of investment contracts, favouring investments that offer a greater focus on sustainable development and the development of peoples. However, apart from the *soft law* commitments enshrined in the Forum on China and Africa Cooperation (FOCAC) Declarations and Action Plans³⁸, the most important sources of law in China-Africa investment relations are Bilateral Investment Treaties.

China has signed bilateral investment treaties with thirty-five African states³⁹, whose main features are: a broad definition of investments; absolute standards of treatment (for example, fair and equitable treatment) clauses; relative standards of treatment (for example, National Treatment and Most-Favored-Nations) clauses; protection against expropriation; protection against wars, riots, and related civil disturbances; State-State dispute settlement as well as Investor-

³³ L. Cotula, 2011, *op. cit.*, 3 ff.

³⁴ L. Cotula, 2011, *op. cit.*, 16.

³⁵ M. Manfredi, *Land Investments and "Land Grabbing": the Need for a Legal Framework*, in *Diritto del commercio internazionale*, Issue 3, 2013, 815 ff.

³⁶ See J. Gu, *op. cit.*

³⁷ J. Miller, *Contracting in Agriculture: potential problems*, in *Drake journal of agricultural law*, Issue 8, 2003, 70.

³⁸ On this point see Centre for Chinese Study, *Evaluating China's FOCAC commitments to Africa and mapping the way ahead*, 2010, available at: www.ccs.org.za/wp-content/uploads/2010/03/ENGLISH-Evaluating-Chinas-FOCAC-commitments-to-Africa-2010.pdf

³⁹ For a complete list of bilateral investment treaties between China and Africa see: investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu

State dispute settlement procedures; subrogation clauses; and clauses guaranteeing the right of investors to freely transfer funds⁴⁰. There are, however, no clauses on the protection of human rights, labour rights and environment and sustainable development.

As it was pointed out in the previous paragraph and as stated in the 2010 report of the United Nations Conference on Trade and Development⁴¹, China's approach to African lands appears different from that of the EU states, since Chinese investment is not intended to influence the policy choices of the African states. But, if one analyses bilateral investment treaties signed by China with African countries, it will be noticed that the treaties are very similar to those signed by the EU Member states. In particular, it will be evident that all treaties signed by China with African countries contain clauses that almost only protect investors⁴².

In all analysed BITs, both first-generation one as China-Ghana BIT⁴³ and those concluded in recent years as the China-Madagascar BIT⁴⁴, one may find provisions for investment promotion and protection. Concerning of investment promotion, the BITs do not provide details on the pre-conditions and modalities of the investment promotion activities agreed upon, nor do they include any follow-up mechanism that would allow monitoring as to what extent the promotion measures have been put in place and are effective. As far as investment protection is concerned, the BITs include specific levels of protection, such as the guarantee of a fair and equitable treatment to investors, the obligation of non-discrimination and the guarantee of full protection and security⁴⁵.

In the first generation bilateral treaties, such as the Ghana-China BIT, the parties stipulate that investment and related activities are insured “*equitable treatment and shall enjoy protection in the territory of the other Contracting state*”⁴⁶. In the recent investment treaties, instead, the Parties introduce the principle of fair and equitable treatment to investors in a more specific and detailed way, in order to avoid arbitrary and discriminatory decisions⁴⁷. Furthermore, investor's protection is guaranteed by the Most Favoured Nation clause, the principle of National

⁴⁰ See B. Barton, A. De Bellefroid, *op. cit.*, 372-373.

⁴¹ UNCTAD, *Economic Development in Africa. Report 2010, South-South Cooperation: Africa and the New Forms of Development Partnership*, New York, 2010, 24.

⁴² W. Kidane, Z. Weidong, *China-African Investment Treaties: Old Rules, New Challenges*, in *Fordham International Law Journal*, Vol. 35, Issue 1, 2013, 1055-1063.

⁴³ China-Ghana BIT, 12 October 1989, available at: investmentpolicyhub.unctad.org/Download/TreatyFile/737

⁴⁴ China-Madagascar BIT, 21 November 2005, available at: investmentpolicyhub.unctad.org/Download/TreatyFile/758

⁴⁵ See articles 2-3 of China-Ghana BIT and 3-4 of China-Madagascar BIT

⁴⁶ Article 3 par. 1 of China-Ghana BIT.

⁴⁷ See, for instance, article 3 of China-Madagascar BIT, note 43, and in particular paragraph 1: “*chacune des Parties Contractantes s'engage à assurer, sur son territoire défini plus haut, un traitement juste et équitable, conformément aux principes du Droit international, aux investissements des nationaux et sociétés de l'autre Partie Contractante et à faire en sorte que l'exercice d'll droit ainsi reconnu ne soit entravé en droit, ni en fait*”.

Treatment and by the access to infrastructure and goods of the Host countries, including access to water and energy⁴⁸.

With particular regard to land investments, BITs could offer a specific protection to Chinese investors through the clause on the prohibition of expropriation without compensation⁴⁹. This clause provides that expropriation should be justified by a public and non-discriminatory interest and provides just and fair compensation to the affected families whose land has been acquired or proposed to be acquired or are affected by such acquisition. But, it often happens that the local population is recognized as a symbolic compensation or the expropriations are granted in exchange for temporary jobs⁵⁰.

This analysis shows that the main goal of Chinese investment treaties in Africa is to create favourable conditions for foreign investors. In contrast, however, to the model BIT approved by United States in 2012⁵¹, China did not approve a model Treaty as a symbol of its growing bargaining power, but tries to obtain same level of protection for investments as provided in BITs of other capital exporting states⁵².

As indicated above, in face of clauses promoting and protecting foreign investment, there is no evidence in any China-Africa BIT of articles relating to environmental protection and local territories, the right to work and the rights of local populations⁵³. Solutions to this serious gap may be identified in the system of protection of human rights and in particular in the African Convention on Human and People's Rights. But in this article, the writer's aim is to consider if it is possible to insert into bilateral investment treaties clauses promoting sustainable development and host countries obligations to the local communities.

At the moment, there are no examples of specific investment treaties with those clauses, but it could be useful to consider two Treaties: the US model BIT of 2012 and the Economic Partnership Agreement between the EU and the Eastern and Southern African Group signed in June 2016⁵⁴. In both treaties, there is a clear reference to the link between the investment and the development of the host state. This is particularly important in the relations between China and Africa where human rights protection systems and the issues related to sustainable development are not as developed as in the US or in EU countries. The inclusion of these requirements in the China-Africa treaties would be of a great benefit, because it would improve the Chinese legislation, which would apply to foreign investors in

⁴⁸ W. Kidane, Z. Weidong, *op. cit.*, 1063 ff.

⁴⁹ A. Reinisch, *Expropriation*, in P. Muchlinski, F. Ortino (eds.), *The Oxford Handbook of International Investment Law*, Oxford, 410 ff.

⁵⁰ P. Houanye, S. Shen, *Foreign Direct Investment in Africa: securing Chinese's investment for a lasting development in Africa*, in *Global Conference on Business and Finance Proceedings*, Vol. 7, Issue 1, 2012, 143-156.

⁵¹ www.state.gov/documents/organization/188371.pdf

⁵² U. E. Ofodile, *Africa-China Bilateral Investment Treaties: a Critique*, in *Michigan Journal of International Law*, Vol. 35, Issue 1, 2013, 155 ff.

⁵³ *Ibidem*.

⁵⁴ For further informations see paragraph 4.1.

China, and the recognition of the needs and the interests of the African people, often unjustly deprived of their lands⁵⁵.

2.2. The legal impact of Chinese Special Economic Zones on African lands

China's effort to attract foreign investment relied at first on Special Economic Zones (SEZ). SEZs are regions where special economic policies and flexible governmental measures, like tax incentives for foreign investment enterprises, are granted. SEZs are given more independence on international trade actions and economic activities are driven directly by market forces. To date, China has about 330 SEZs, which are considered by many analysts as particularly effective tools to support targeted investments and to promote the development of specific areas. But the establishment of these zones has considerable costs with particular regard to land acquisitions⁵⁶.

Despite their enduring attractiveness and advantages, the Chinese SEZs have to be scrutinized critically with regard to WTO requirements. Each SEZ has its own unique configuration of incentives, which have to be compliant with WTO law⁵⁷. Of greatest concern are export subsidies and requirements to use domestic over imported goods. Here, the WTO agreement on Subsidies and Countervailing Measures (SCM Agreement) comes into play. According to the World Bank's interpretation, SEZ regimes that have specific incentives linked to export performance, such as minimum export requirements, subsidized rent or utilities, or a lower tax on export income, are not compatible with WTO disciplines (Art. 3 of the SCM Agreement) and have to be altered⁵⁸. Particularly the SEZs which focus on export which has to be in line with the SCM Agreement in order not to harm other countries and raise more WTO concerns.

In order to regulate those zones, the Chinese government has provided detailed legislation, identifying characteristics for areas subject to expropriation,

⁵⁵ See B. Barton, A. De Bellefroid, *op. cit.*

⁵⁶ W. Anseeuw, L. Cotula, M. Taylor., *Expectations and implications of the rush for land. Understanding the opportunities and risks at stake in Africa*, in J.A. Allan, M. Keulertz, S. Sojamo, J. Warner (eds.), *Handbook of Land and Water Grabs in Africa. Foreign direct investment and food and water security*, Abingdon / Oxon, 2013, 421-434.

⁵⁷ SEZs differentiate between local areas in a country, treating foreigners there more favorable than in other parts of this country. The installing rules in the countries have to observe WTO law, particularly its rules on non-discrimination (most-favored nation principle in Art. I GATT, national treatment principle in Art. III GATT) and on state subsidies. There are only special rules for SEZ insofar as the exemption of an exported good from duties or taxes is not deemed to be a subsidy. The exemption of import duties is lawful if it makes no difference between other member states. The lawfulness of all these measures may be considered by the trade policy review mechanism of WTO, by the subsidies surveillance, is subject to notification requirements and finally to the WTO dispute settlement procedure. See S. Creskoff, P. Walkenhorst, *Special Economic Zones in Developing Countries*, Policy Research Working Paper 4892, The World Bank, 2009.

⁵⁸ R.A. Torres, *Free Zones and the WTO Agreement on Subsidies and Countervailing Measures*, in *Global Trade and Customs Journal*, Vol. 2, Issue 5, 2007, 217-223.

the criteria for the compensation of local people forced to leave their lands and establishing a minimum level of land for agricultural production⁵⁹.

In 2006, the Chinese government announced that it would establish up to 50 overseas economic and trade cooperation zones in Africa as part of its *Going Global* policy. At present, five zones are at different stages of construction - one each in Ethiopia and Mauritius, and two in Nigeria; the *Chambishi zone* in Zambia is partially operational while the proposed Algerian zone has been suspended. Only Egypt's Suez ETCZ is fully operational⁶⁰.

The first special economic zone in Africa was established in 2007 in Zambia, in the province of Copperbelt; the second in Mauritius, where China planned to build a commercial area open to twenty-one countries of the Common Market for Eastern and Southern Africa⁶¹. For China, in addition to exporting its own model of development, that zones have the function to support internal industrial restructuring, transferring Chinese companies that are less advanced and competitive and require more labour. There is no, however, a single model of SEZ: some focus on the processing of minerals, others on the creation of technology parks, others on the manufacturing sector⁶².

With particular regard to land acquisition, China's interest is linked to the need to guarantee food at an affordable price to its people, but also the supply of raw materials for industry and biofuels. In addition, one of the main benefits that these areas should promote in African states is the creation of new jobs. As reported by various authors⁶³, employment opportunities promised by the Chinese companies in the agribusiness sector, as incentives for local people to give up their lands, fail after a few years. In fact, some authors report that Chinese enterprises hire local workers through occasional or temporary employment contracts, but after a short period those workers are replaced by Chinese ones, as is happening in the Lekki Nigeria SEZ⁶⁴.

The Chinese government, although not directly involved in the creation of SEZs in Africa, provides funds for the construction of those areas and takes action in promoting the projects that are considered of strategic importance for the development of their country⁶⁵. There are cases where local communities are deprived of their land without being consulted and without receiving any

⁵⁹ D. Bräutigam, X. Tang, *China's investment in Africa's special economic zones* in T. Farole, G. Akinci (eds.), *Special economic zones: Progress, emerging challenges, and future directions*, Washington DC, 2011, 69 ff.

⁶⁰ D. Bräutigam, X. Tang, "Going Global in Groups: Structural Transformation and China's Special Economic Zones Overseas, in *World Development*, 2013, 3 ff.

⁶¹ T. Farole, *Special Economic Zones in Africa Comparing Performance and Learning from Global Experiences*, Washington DC, 2011, 61-109.

⁶² On the specific characteristics of each special economic zones, see D. Bräutigam, X. Tang, 2011, *op. cit.*

⁶³ See W. Anseeuw, L. Cotula, M. Taylor, *op. cit.* and D. Bräutigam, X. Tang, 2011, *op. cit.*

⁶⁴ The Lekki Free Zone was established in November 2010 and consists of 3 thousand hectares, with priority given to projects related to electronics, machinery, pharmaceutical and the furnishings. Despite promises by the Chinese investors to promote employment opportunities for local communities, it is experiencing a steady employment of workers from China to the detriment of the local population who were persuaded to give up part of their land in exchange for a job. On this point see D. Bräutigam, X. Tang, 2011, *op. cit.*, 93 ff.

⁶⁵ See T. Farole, *op. cit.*

compensation. For this reason, some authors consider special economic zones as one of the causes of land grabbing in Africa by Chinese investors⁶⁶.

Moreover, as the experience of the Mauritius special economic zone shows⁶⁷, Chinese investors give no guarantee to develop the area. Consequently, African governments are now reluctant in expropriating land for the creation of zones that often deprive local populations of their natural resources and will not promote the country's economy⁶⁸.

Potentially, Chinese SEZs may offer opportunity to contribute to job creation, industrialization and poverty reduction in Africa through investments in a wider range of sectors, spanning agro-industry, manufacturing and services. But, as the experience of the described zones has shown, Chinese SEZs in Africa have, by and large, failed to deliver significant benefits to date. In other words, they have generated low levels of investment, exports or employment⁶⁹. For this reason, it is necessary that Chinese investment agreements in Africa regulate these zones with clear and shared rules, supporting partnership between foreign investors and small farmers and local populations.

3. The EU's developing legal framework for Foreign Direct Investments in Africa

The next paragraphs will focus on how EU policy are influencing investment in agricultural land in Africa.

At first, the new land rush requires an analysis of EU external action, which includes the EU's competence on foreign direct investment. The external action is based on principles and predetermined objectives identified in art. 21 TEU, which includes the founding values of the Union that "*seeks to advance in the wider world*"⁷⁰, and whose aims are: security, independence and integrity of the EU, promotion of peace and international security, sustainable development, integration and progressive liberalization of world economies, solidarity and cooperation⁷¹.

⁶⁶ On this point see H. Cowaloosur, *Land grab in new garb: Chinese special economic zones in Africa*, in *African Identities*, Vol. 12, Issue 1, 2014, 94-109 and O. De Schutter, *How not to think on land grabbing: three critiques of large scale land investment*, in *Journal of Peasant Studies*, Issue 38, 2011, 249-279.

⁶⁷ A Chinese company based in Mauritius and the Mauritian Prime Minister pursued negotiations with the Chinese company for the creation of a Special Economic Zones. The location finalised for the zones was Riche Terre, which was occupied by 106 sugarcane planters. The planters had to leave the area without an adequate compensation. By acquiring the land at Riche Terre at the expense of the farmers, not only has the SEZ contributed to unemployment, but also has aggravated the food security situation, initiated disadvantages and added to the pressure on land on the island. On this point see C. Baissac, *Planned Obsolescence? Export Processing Zones and Structural Reform in Mauritius*, in T. Farole, G. Akinci (eds), *op. cit.*, 227 ff.

⁶⁸ Y.W. Cheung, J. De Haan, X. Quian, S. Yu, *China's investment in Africa*, in Y.W. Cheung, J. De Haan, (eds.), *The evolving role of China in the Global Economy*, Cambridge, 2013, 419 ff.

⁶⁹ On this point see T. Farole, *op. cit.*, 239 ff.

⁷⁰ Principles of art. 21 par. 1 TEU are: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

⁷¹ Art. 21 par. 2 TEU.

Development cooperation is thus set in the context of the principles and objectives of EU external action, which includes fostering “*the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty*”⁷². Since the eradication of poverty is considered as a primary aim of the European Union, it applies to all areas of EU external action⁷³. The need to mainstream the principles and objectives underpinning development cooperation also implies that stress has to be put on policy coherence, not only in development but in EU external actions more generally.

While the European Union has exclusive competence for trade policy, the competence over development policy is shared with member states of the European Union. Through Policy Coherence for Development, the EU seeks to take account of development objectives in all of its policies that are likely to affect developing countries. It aims at minimizing contradictions and building synergies between different EU policies to benefit developing countries and increase the effectiveness of development cooperation⁷⁴.

Moreover, foreign direct investments that significantly reinforce the common commercial policy, eliminate the previous competence division between trade and investments. With the entry into force of the Lisbon Treaty in 2009 the EU has acquired new competences in the area of international investment law and policy. Article 207 TFEU now provides the EU with external treaty-making power in the field of foreign direct investment⁷⁵. The EU is hence expressly entitled to negotiate and conclude international investment agreements or free trade agreements including chapters on investment comparable to those concluded by EU Member States individually before that⁷⁶.

Before taking into consideration the EU policies in Africa, it is worth pointing out that Developing countries benefit from preferential import conditions to the EU, which effectively implies that the EU charges lower taxes at the border on products from developing countries than other suppliers⁷⁷.

There are several schemes for preferential access, most notably the Generalized System of Preferences (GSP). That System is an autonomous trade arrangement through which the EU provides non-reciprocal preferential access to the EU market to 176 developing countries and territories. Furthermore, there is a

⁷² Art. 21 par. 2 lett. d) TEU.

⁷³ M.E. Bartoloni, *La cooperazione allo sviluppo dell'Unione europea con Paesi terzi: da politica contro la povertà a cooperazione globale?*, in *Diritti umani e diritto internazionale*, Vol. 8, Issue 3, 2014, 663-668.

⁷⁴ M. Carbone, *Mission impossible: the European Union and Policy Coherence for Development*, in M. Carbone (ed.), *Policy Coherence and EU Development Policy*, Abingdon, 2009, 1-20.

⁷⁵ Article 207(1) TFEU provides: “*The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.*”

⁷⁶ A. Dimopoulos, *Eu Foreign Investment Law*, Oxford, 305 ff.

⁷⁷ A. R. Young, J. Peterson, ‘*We care about you, but...: the politics of EU trade policy and development*’, in *Cambridge Review of International Affairs*, Vol. 26, Issue 3, 2013, 497-518.

special incentive arrangement for sustainable development and good governance for 15 beneficiary countries, known as GSP+. Moreover, the Everything But Arms (EBA) arrangement provides duty-free and quota-free access for all other products for the 49 Least Developed Countries (LCDs)⁷⁸. In 2011, the Commission put forward a proposal for a revised scheme to focus Standard GSP on those countries that are truly in need, to strengthen GSP+ as an incentive to good governance and sustainable development as well as making the system more transparent, stable and predictable. The EBA scheme should be reinforced, but by re-adjusting the preferences, the Commission hopes to attain a generally higher impact⁷⁹.

As far as the EU policies in Africa are concerned, the European Union has tried to tighten its economic links with African countries by fostering Free Trade Agreements. In order to preserve a special economic link with its former colonies, the EU Member States decided to enhance their commercial interest under the responsibility of the EU⁸⁰. This resulted in the initial signature of the 1963 Yaoundé Agreement, which was subsequently revised and followed by the four Lomé Conventions. The EU's preferential trade regime operated through exceptions to the WTO's Most Favoured Nation treatment rules. The last waiver under the Lomé Convention was extended to 31st December 2007. Given this deadline, and the obligation to replace the waiver with WTO-consistent regional trade agreements, a Council Decision of 17th June 2002 paved the way for negotiations on economic partnership agreements (EPAs)⁸¹. These EPAs will govern the economic relationship between the EU and the African, Caribbean and Pacific (ACP) countries in the future. Unlike the Cotonou or Lomé Conventions, which are to be replaced by the EPAs, these agreements are WTO-compliant, covering substantially all trade in goods (at least 80%) and services, investments and trade-related rules. EPAs may foster ACP integration into the world economy and promote the countries' sustainable development⁸².

After this brief introduction on the European Union investment and development policies, two legal instruments will be considered which, in this writer's opinion, better outline the EU policy in Africa: the Economic Partnership Agreements (EPA) and the EU policy on renewable energies, which is encouraging investment in African lands for cultivation of biofuels.

3.1. The EU Economic Partnership Agreements and land investments in Africa

The Economic Partnership Agreements between the EU and African, Caribbean and Pacific countries and regions were established in the Cotonou Agreement in

⁷⁸ See Regulation No 732/2008, available at: ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/

⁷⁹ B. Wardhaugh, *GSP+ and Human Rights: Is the EU's Approach the Right One?*, in *Journal of International Economic Law*, Issue. 16, 2013, 827-847.

⁸⁰ T. Faia, *Exporting Paradise? EU Development Policy towards Africa since the End of Cold War*, Cambridge, 2012, 1-30.

⁸¹ *Ibidem*, 78 ff.

⁸² L. Bartels, *The Trade and Development Policy of the European Union*, in *European Journal of International Law*, Vol 18, Issue 4, 2007, 715-756.

2000 and they aim at promoting ACP-EU trade and contribute to sustainable development and poverty reduction. These Economic Partnership Agreements (EPAs) are negotiated in six regional groups – four in Sub-Saharan Africa, one in the Pacific, and one in the Caribbean region⁸³.

In the Cotonou Agreement, the EU and ACP states agreed on EPAs coming into force in 2008. This was also to respond to the WTO challenges against the preferences, since the WTO allows for more preferential treatment amongst the member of a free trade area. Hence, in order to maintain their preferences⁸⁴, ACP countries had to enter into reciprocal free trade agreements. A waiver was granted by the WTO members that allowed the preferential treatment of ACP states to be continued until 31st December 2007, by which time the free trade areas would have to be agreed upon⁸⁵.

Typically, an Economic Partnership Agreement provides for the opening of African markets for all imports from the European Union. This could have negative implications on the African production, although it is possible to exclude some products that may be in the list of so-called sensitive products⁸⁶. Moreover, some EPAs include a standstill clause providing that no new customs duties shall be introduced for trade with the EU, nor those already applied be increased, as from the entry into force of the agreement. The main effect of the standstill provision is to prevent EPA states from raising tariffs on those products not scheduled for liberalisation. But it is difficult to understand the reason for the asymmetric treatment. It seems that, more recently, the EU has offered more flexibility in this area, which may help to restore some greater tariff autonomy to ACP signatories of the more restrictive EPAs⁸⁷.

One of the most contested clauses by African countries is the Most Favoured Nation clause, which requires the signatory states to accord to the EU Parties "*any more favourable treatment applicable as a result of the Signatory [...] states becoming party to a free trade agreement with any major trading economy*"⁸⁸. That clause is included in some Interim Partnership Agreements, such as the EU and Western

⁸³ European Commission (EC)/ACP-States: 2000/483/EC: Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.

⁸⁴ A. Di Caprio, S. Trommer, *Bilateral Graduation: The Impact of EPAs on LDC Trade Space*, in *Journal of Development Studies*, Vol. 46, Issue 9, 2010, 1607–1627.

⁸⁵ C. Stevens, *The EU, Africa and Economic Partnership Agreement: unintended consequences of policy leverage*, in *The Journal of Modern African Studies*, Vol. 44, Issue 3, 2006, 441–458.

⁸⁶ S. Karingi, R. Lang, N. Oulmane, R. Perez, M. Sadni Jallab, H.B. Hammouda, *Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements*, African Trade Policy Centre, Work in progress n. 10, Addis Abeba, 2005, 22 ff.

⁸⁷ S. Bilal, C. Stevens (eds.), *The Interim Economic Partnership Agreements between the EU and African States: Contents, challenges and prospects*, Policy Management Report 17, Maastricht, 2009.

⁸⁸ Art. 16 par. 2 of *Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States on the other part*, 2012. eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=OJ:L:2012:111:FULL&from=EN

African countries Agreement, prompting criticism in the negotiations, as it would prevent the development of sub-regional markets for African farmers⁸⁹.

By definition, the Most Favoured Nation is an expression of the principle of non-discrimination in Article 1 of the GATT, whose purpose is to create a situation under which it is forbidden to Member states to differentiate the treatment of assets (or services or citizens) foreigners according to their origin (or citizenship, in the case of individuals)⁹⁰.

Some scholars consider that clause as a tool to allow the European companies to control African markets eroding the system of preferences that in the past was granted to them⁹¹. Furthermore, with particular reference to agriculture, there is a risk that agro-food companies in African countries may control the input of seeds, affecting, in this way, the whole African food system⁹². EU and African states will have to create their new trade relations with special regard to food security issues and their responsibility to respect an essential human right, the right to food for African people.

For the reasons above mentioned, European Commission and ACP negotiators had in most cases not been able to reach a common understanding and approach on the cornerstones of the new trading arrangement, notably, and quite surprisingly, on the development component and regionalism⁹³. There was resistance from many African countries that have failed to sign Partnership Agreements and only nineteen African states (including most non-least developed and some least developed countries) have initialled Interim EPAs⁹⁴. Only in June 2016 was the first EPA signed: the Economic Partnership Agreement between the EU and the Eastern and Southern African Group (SADC EPA)⁹⁵.

This agreement is really important, because it is the first complete EPA signed. The SADC EPA recalls that the agreement is based on the principles of respect for human rights, rule of law, and democracy and it confirms that any new or modified legislation on labour conditions or environmental practices that they may adopt will follow internationally recognised standards⁹⁶. It means also that the Parties cannot weaken labour or environmental protection to encourage trade or investment. To make sure the rules are respected, each participating country will also have a possibility to request consultations on questions of sustainable development, involving representatives of civil society⁹⁷.

⁸⁹ See S. Bilal, C. Stevens, *op. cit.*

⁹⁰ M. Herdegen, *Principles of International Economic Law*, Oxford, 2013, 189 ff.

⁹¹ See F. Pocar, *Diritto dell'Unione europea*, Milan, 2010, 85 ff.

⁹² On this point see J.B. Kanyangoga, *The MFN clause in the EAC-EU EPA negotiations: State of play and related implications*, Bridges Africa, Vol. 3, Issue 2, 2014.

⁹³ H.A. Diouf, *Why the MFN clause should not be included in EPAs*, Bridges Africa, Vol. 9, Issue 8, 2010.

⁹⁴ On the negotiations of the Economic Partnership Agreements between the African countries and the European Union see: trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf.

⁹⁵ trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf

⁹⁶ See article 2 and Chapter 2 of SADC EPA.

⁹⁷ See article 11 of SADC EPA.

SADC EPA and Interim EPAs are based on the Cotonou Agreement of 2000. The provisions of the Cotonou Agreement on human rights, on sustainable development, and on dialogue including parliaments and civil society, continue to apply. As such, the EPA offers some of the most complete protection of human rights and sustainable development available in EU agreements⁹⁸.

Currently, EPA is the only hard law instrument in force that includes a responsibility to the investor states, but it does not rule FDI in agriculture, placing a simple commitment for a future negotiation that affects them. In fact, Article 9 of SADC EPA imposes on EU investors the obligation to actively support the conclusion of direct foreign investment, ensuring at the same time the promotion of active cooperation between investors and local communities. It is also expressly provided in article 68 of the new Agreement the need to ensure the protection of natural resources (and therefore of land)⁹⁹. Furthermore, the agreement contains a state-to-state dispute resolution procedure of consultation, followed by mediation and arbitration¹⁰⁰.

3.2. The EU policy on renewable energies and the legal impact on African lands

Besides the Economic Partnership Agreements, one should consider the EU policy on renewable energies and in particular the Renewable Energy Directive¹⁰¹ (RED) and the Fuel Quality Directive¹⁰² (FQD) and analyze the effects that such a policy can yield on investment in agricultural land. The aim of these directives is to reduce by 2020 the emissions of carbon dioxide generated in the transport sector: the RED stating that 10% of the total fuel consumption must come from renewable sources; the FQD setting at 6% reduction of emissions from fuels. The criteria currently in force on the sustainability of biofuels prevent the direct conversion of forests, wetlands and areas of high biodiversity value into the production of biofuels and require that biofuels emit at least 35% less greenhouse gas than the fossil fuels they replace. This target will increase to 50% in 2017¹⁰³.

This legal framework produces a distorted market and a strong economic incentive to convert agricultural land into the production of biodiesel within the EU and also outside. Moreover, in order that 10% of European transport by 2020 will be from biofuels there will have to be, with the existing technologies (first

⁹⁸ A. Bormann, M. Busse, *The Institutional Challenge of the ACP/EU Economic Partnership Agreements*, Hamburg Institute of International Economics, available at: www.fes.de/aktuell/focus_europa/4/Docs/FES_HWWA_Institutional_Challenge_EPA.pdf

⁹⁹ See articles 9 and 68 of SADC EPA.

¹⁰⁰ See note 95.

¹⁰¹ Renewable Energy Directive -RED 28/2009 / EC

¹⁰² Renewable Energy Directive -RED 28/2009 / EC

¹⁰³ According to the preamble of the RED, (a) “*The control of the European energy consumption and the increased use of energy from renewable resources, together with energy savings and increased use of energy efficiency, constitute important parts of the package of measures needed to reduce greenhouse emissions and comply with the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and with further Community and international greenhouse gas emission reduction commitments beyond 2012*”.

generation)¹⁰⁴ an increase in current production and to utilize a large amount of hectares for the production of agrofuels¹⁰⁵.

In order to achieve the above objectives, the European Commission supplies the necessary subsidies for biofuels production in the EU, but only for those particular biofuels grown and processed that conform to environmental standards and farmland biodiversity. Nonetheless, those biofuels, that do not respect the indicated limits, will not be considered illegal nor banned from the EU market and these biofuels can be imported anyway.

European Union energy policy has some significant implications on investment in land and in particular appears to be, as evidenced by various reports¹⁰⁶, a major cause of land use in developing countries. In fact, the EU territory is not able to fulfil the increase in biofuel demand and consequently more and more companies are gaining control of large plots of land in developing countries, particularly in Africa, for producing raw materials for the biofuel industry.

In 2012, for example, the EU co-financed a project in Tanzania and Mozambique called Sustainable Wood and Charcoal Production in Rural Mozambique and Tanzania, which aimed at increasing access to modern, affordable and sustainable energy services for rural and peri-urban poor by focusing on renewable energy solutions as well as on energy efficiency measures¹⁰⁷. But some authors reported that the villages involved in the project lost part of their lands through lease contracts of 99 years without receiving the benefits and jobs that had been promised¹⁰⁸.

Moreover, the EU policy on biofuels increases the economic value of land, that is therefore considered as any economic asset traded and an object of speculation. In fact, in order to achieve the objectives set out in the directive, by using existing technologies which currently only allow the production of first generation biofuels, will be necessary to use an area equal to 20 or 30 million hectares for their production¹⁰⁹.

¹⁰⁴ The first-generation biofuels are: biodiesel, pure vegetable oils, bioethanol from cereals and from sugar commodities, bio-ETBE (Ethyl Ter Butyl Ether produced from bioethanol) and biogas. Their production and their use are already underway, while now it is necessary to find solution for improvement the reduction of production costs, the optimization of the energy balance, the increase of energy efficiency of engines. On this point see F. Esu, S. Avet, *The European Integration and the 2009 Renewable Energy Directive: A Suitable Framework for the Implementation of the Sustainability Criteria for Biofuel Protection in Third-States?*, in F. Romanin Jacur, A. Bonfanti, F. Seatzu (eds.), *op. cit.*, 199-221.

¹⁰⁵ M. Leon-Moreta, *Biofuels: A Threat to the Environment and Human Rights? An Analysis of the Impact of the Production of Feedstock for Agrofuels on the Rights to Water, Land and Food*, in *European Journal of Legal Studies*, Vol. 4, Issue 1, 2011, 122-143.

¹⁰⁶ M. Harvey, S. Pilgrim, *The new competition for land: Food, energy and climate change*, in *Food Policy*, Vol. 36, Issue 1, 40-51; A. Grahamman, S. Aubry, R. Kunneman, S. Monsalve Suarez, *Land Grab Study*, Fian International, Heidelberg, 2010, 47 ff.

¹⁰⁷ database.energyfacilitymonitoring.eu/acpeu/project/4549/

¹⁰⁸ R.E. Malimbwi, E. Zahabu, *The analysis of sustainable charcoal production systems in Tanzania*, in S. Rose, E. Remedio, M.A. Trossero (eds.), *Criteria and indicators for sustainable woodfuels. Case studies from Brazil, Guyana, Nepal, Philippines and Tanzania*, Rome, 2009, 195-224.

¹⁰⁹ See F. Esu, S. Avet, *op. cit.*

From this brief analysis, it is clear that on the one hand the European Union is committed and is doing its best to adopt appropriate instruments in promoting sustainable investment, like the guidelines of 2004 for promotion of land reforms and policies in developing countries¹¹⁰, and on the other hand, the EU policy on biofuels seems to conflict with the policies of cooperation and development mentioned above¹¹¹.

Analyzing investment projects in European agricultural land and the EU policy on renewable energies, it is possible to affirm that there is a basis to consider EU energy policy in violation of the objectives of development, particularly because it gives an incentive in not recognizing the right to a free prior and informed consent, no guarantees on access to water and food, and raises problems about food safety¹¹². In order to prevent or reduce such negative effects and to promote the sustainable production of biofuels, it will be necessary that a rigid respect of article 21 of the TUE and article 208 of the TFUE be applied. But a claim before a national court or the ECJ for violations of EU Treaties could hardly generate an immediate and long-lasting success¹¹³. For this reason, the writer believes that, to date, a good solution to avoid negative impacts on local populations could be the insertion of specific clauses related to the production of biofuels into investment agreements between the EU and African countries, following the example of the SADC EPA. In this way, cases of dispossession of agricultural land for the production of biofuels will be enforced before the dispute settlement body established by the investment agreements.

4. Final Remarks

The aim of this paper was to examine the legal instruments in African lands adopted by the two main investors: China and the European Union.

Chinese and EU investment agreements in Africa are very different. The European Union provides most of its aid in the form of donations for eradication of poverty, but places increasing political conditions (respect for democratic rules, human rights and the advancement of good governance practices); instead China mainly provides loans on concessional terms, largely aimed at building infrastructure and guaranteed by long-term contracts for the exploitation of natural resources. Moreover, Chinese loans are often linked to the use of Chinese enterprises, goods and sometimes even their native workforce into the realization of the investment project.

The doctrine has highlighted the lack of coherence of European action both horizontal, between policies (as in the case of energy policy and development policy integrating the EU external action) both vertical (between the EU and Member

¹¹⁰ eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52004DC0686&from=EN

¹¹¹ T. Ferrando, *Global Land Grabbing: A European Self-Critique*, in *International Law Journal of London*, Vol. 1, Issue 1, 2014, 137-178.

¹¹² *Ibidem*.

¹¹³ *Ibidem*.

States), in contrast to a more directed and focused Chinese approach¹¹⁴. The Chinese approach, in fact, is generally more acceptable to the African ruling classes, because it is without conditionality and political connotations. It is recognized, however also, that it has had a stimulating effect and change, because the Chinese action led to an acceleration of the modernization of the EU's developing legal framework for FDI in Africa, one that has always been highly fragmented.

Moreover, because of the difficulties and problems that have characterized the negotiation of Economic Partnership Agreements between the EU and African countries and the increasing involvement of China in Africa, the EU has had to rethink its partnership agreements, taking as a model the new EPA signed in June 2016 with South Africa Development Community¹¹⁵.

There are some changes, but not yet able to radically transform relations among investor States and African countries. Nonetheless, it is worth noting that the African Union intends to launch a new Pan-African Investment Code (PAIC) on the basis of which, different states will be encouraged to adopt coherent policies and able to attract foreign investors¹¹⁶. At the same time, changes of recent years, beginning with the new relations between Africa and China and by the high economic growth of African countries, are not enough to overturn the dependence on European financial aid that still binds Africa.

Although the European Union remains the leading investor in Africa, the speed and intensity of Chinese direct investment in Africa has caused some concern in the EU¹¹⁷.

With particular regard to investment in agricultural land, it has shown a steady increase of investment projects in African lands by economic operators from the European Union and China. On the one hand, the article has examined the different strategies of the two actors in Africa, and on the other, it has emphasized one of the main problems of these policies: the lack of protection for the African people, often deprived of their lands.

In order to identify potential solutions in promoting sustainable investment in Africa, one should recognize that the relationships between the EU and China into the African continent will not be necessarily of a competitive nature and it will be admirable to encourage trilateral cooperation involving the two major investors and African countries as well¹¹⁸.

A trilateral cooperation makes sense only if it is effective and equal. The starting point of the asymmetry of the relationship is to be taken seriously: China is only a large country dealing with single African countries, while the EU often

¹¹⁴ On this point see A. Forganni, *L'Unione europea e la Cina*, in A. Lang, M.P. Mariani (eds.), *La politica estera dell'Unione europea. Inquadramento giuridico e prassi applicativa*, Turin, 2014, 107 ff.

¹¹⁵ U. Wissenbach, *The EU's Response to China's Africa Safari: Can Triangular Co-operation Match Needs?*, in *European Journal of Development Research*, Vol. 21, Issue 4, 662–674.

¹¹⁶ See the declaration of 30 October 2014 in: ea.au.int/en/content/pan-african-investment-code-african-independent-legal-experts-kicks-djibouti

¹¹⁷ On this point see the detailed analysis of M. Klaver, M. Trebilcock, *Chinese Investment in Africa: Strengthening the Balance Sheet*, in P. D. Farah, E. Cima (eds.), *China's Influence on Non-Trade Concerns in International Economic Law*, Abingdon – New York, 2017, 113 ff.

¹¹⁸ B. Berger, U. Wissenbach, *Eu-China-Africa Trilateral Development Cooperation. Common Challenges and New Directions*, Bonn, 2007, 16 ff.; B. Barton, A. De Bellefroid, *op. cit.*

struggles to speak with one voice in its relations with the continent. It is necessary, therefore, that the European Union will make further efforts to create unity for its actions, with a long-term geostrategic approach, improving the EU-Africa strategy adopted in Lisbon¹¹⁹.

In addition, it is essential that African countries will be able to identify common investment strategies ensuring greater support and protection to the local population through a Pan-African Investment Code promoted by the African Union (but this solution could be hard to achieve), or through Investment agreements, like the Economic Partnership Agreement between the EU and South Africa Development Community, able to guarantee protection for both investors and for local communities.

If the Africa Union, and more generally African countries, are able to promote sustainable investment agreements with China and to strengthen the human rights and development clauses in the Economic Partnership Agreements, it will lead to the development of shared rules in investments in agricultural land.

¹¹⁹ www.africa-eu-partnership.org/sites/default/files/documents/eas2007_joint_strategy_en.pdf