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CHINA IN AFRICA AND THE LAW

SALVATORE MANCUSO*

I. INTRODUCTION

This paper is based on the enormous amount of Chinese investments in Africa, with the objective of considering the legal aspects involved therein. Under international business law, commercial relations are usually ruled according to the law of the country hosting the investment. This paper will examine the challenges presented by Chinese investments in Africa given that the systems of business law in Africa are generally out of date and enforcement mechanisms under Western rule of law standards are often far from the reality.

This observation is accompanied by the fact that there is presently a wide movement towards legal integration in Africa, and that many African states are already involved in, or considering, legal integration.

For several reasons, business law is the area of most interest in the phenomenon of legal integration in Africa. Business law is currently one of the least addressed areas of native African law. Concurrently, it is the area where up-to-date, user-friendly rules are most necessary. The need for effective legal rules and enforcement in African business law are due to its impact on foreign investors.

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This paper will discuss what is “legal” in the context of trade relations between China and Africa. The paper will also analyze the legal aspects of business relationships between China and Africa and assess the state of legal cooperation among them, with particular focus on the possibility for future developments.

II. TRADE RELATIONS BETWEEN CHINA AND AFRICA

China’s expansion and development have been leading themes of globalization in the modern era. The potential for African transformation from the poorest continent of the world to a major part of the world economy could characterize the future of globalization. Changes within Africa are already evident. For example, the growth rate of sub-Saharan Africa reached its highest level ever in 2007, growing almost 7%, with China playing a large part in the transformation.

There has been a long history of cooperation between China and African countries.¹ In the second half of the twentieth century, relations between China and Africa were primarily shaped around select political issues, and only occasional references were made to the use of trade to promote economic independence.² In 1955, at the Bandung Asia-African Conference, China established ten principles for dealing with international relationships, which were agreed to by the African countries attending the conference. This agreement is considered the foundation of the cooperation between China and African countries,³ including in the legal field.

In the last decade, there has been a radical change in this scenario. From the mid-1990s to 2004, Chinese financial aid to Africa increased from 100 million to 2.7 billion USD per year.⁴ Unlike financial assistance

1. Daniel Large, *As the Beginning Ends: China’s Return to Africa*, in *AFRICAN PERSPECTIVES ON CHINA IN AFRICA* 153, 155 (Firoze Manji & Stephen Marks eds., 2007).

2. At the Bandung Asian-African Conference of 1955, Zhou Enlai gave assurances that “Trade and economic cooperation among us ... should not make one side a mere producer of raw materials or a market for consumers’ goods. In cultural exchanges among us, we should respect the national cultural development of each country, so that we can learn from each other,” Tiejia Wang, *International Law in China: Historical and Contemporary Perspectives*, 221 *Recueil des Cours de l’Académie de Droit International [RCADI]* 195, 304 (1990)(Neth.); see also Luca Castellani, *Economic Development and the Rule of Law: Uniform Trade Law and Africa-China Relations*, in *CHINA OUTSIDE CHINA: CHINA IN AFRICA* (Luca Castellani, Ian Taylor & Pang Zhongying eds., 2008).

3. Yonghong Hong, *Harmonization of Commercial Law in Africa and its Advantages for Chinese Investments in Africa from a Perspective of Legal Cooperation of China and African States*, in *THE HARMONIZATION OF COMMERCIAL LAW IN AFRICA AND ITS ADVANTAGES FOR CHINESE INVESTMENTS IN AFRICA* (Salvatore Mancuso ed., 2008).

4. On financial assistance from China to African countries, see Martyn Davies, *How China Delivers Development Assistance to Africa*, CENTER FOR CHINESE STUDIES, UNIVERSITY OF

from Western countries, Chinese aid is distributed without political conditions.⁵ The only condition attached to the aid is that usually about 70% of each project financed be contracted to Chinese enterprises that use a workforce composed of Chinese laborers brought directly from China. The remaining 30% of the value of each project is normally assigned to companies which are joint ventures between Chinese and local African enterprises.

This approach has resulted in China's influence becoming greater than that of Western countries⁶ and international financial institutions, which traditionally have held major control.⁷ As a result of such influence, summits of the Forum on China–Africa Cooperation have been regularly held. The most recent summit, held in Sharm-el-Sheikh in November 2009, was attended by ministers of foreign affairs and ministers who regulate economic cooperation between China and forty-nine African countries.⁸

The Forum was established in 2000 in an effort to bring together the most influential political leaders of China and Africa. The Forum has since evolved into the official forum where discussions between China and African countries are held. The first conference was held in October 2000 in Beijing, China, where two documents—the Beijing Declaration of the Forum on China-Africa Cooperation and the Program for China-Africa Cooperation in Economic and Social Development—were approved to work as the *grund norm*, to inspire and govern diplomatic and economic China-Africa relations. Since the creation of the Forum,

STELLENBOSCH (2008), available at http://www.ccs.org.za/downloads/DFID_FA_Final.pdf; see also Théophile Dzaka, *L'aide publique au développement de la chine aux pays pétroliers et miniers d'Afrique centrale contribue-t-elle au développement durable des pays récipiendaires?* [Does Chinese Development Aid to Central African Oil and Mining Countries Contribute to Sustainable Development?], BAD-CEA: CONFERENCE ECONOMIQUE AFRICAINE [African Development Bank Group–African Economic Conference] (2008), <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Knowledge/30753773-EN-DZAKA-CONFERENCE-CEA-BAD-TUNIS-NOVEMBRE-2008-VERSION-A-ENVOYER.PDF> (last viewed April 15, 2011); see also *Looking East: A Guide to Engaging China for Africa's Policy-Makers, Vol. II: Key Dimensions of Chinese Engagements in African Countries*, AFRICAN CENTER FOR ECONOMIC TRANSFORMATION (Nov. 2009), available at <http://acetforafrica.org/site/wp-content/uploads/2009/05/lookingeastv2.pdf>.

5. See *Goodwill Cornerstone of Sino-African Ties*, CHINA DAILY (Jan. 13, 2006), <http://www.china.org.cn/english/international/155056.htm>.

6. The amount of total trade between China and Africa has already largely surpassed that of the trade between the EU and Africa.

7. In 2006, China entered into agreements with African countries for an estimated value of 8.1 billion USD, not including the agreements reached during the Beijing FOCAC Summit in November 2006. In the same year, the World Bank granted financial aid for only 2.3 billion USD (source: *Il Sole 24 Ore*).

8. For important documents from the Summit, see the FOCAC website at <http://www.focac.org/engltda/dsjbzjhy/hywj/> (last visited Apr. 04, 2012).

there has been a nearly direct correlation between Chinese and African economic growth rates.⁹

Currently, trade between China and Africa has become market-driven and has increased greatly. According to the *China-Africa Economic and Trade Cooperation* report, the volume of bilateral commerce was 12.14 million USD in 1950, 100 million USD in 1960, and exceeded 1 billion USD in 1980. In 2000, the Sino-African trade maintained an increasing growth rate, reaching 10 billion USD for the first time in history. In 2008, the volume of the bilateral exchanges between China and Africa exceeded 100 billion USD, with a growth rate of 45.1% during 2007. Of the 100 billion USD, 50.8 billion USD represented Chinese exports to Africa and 56 billion USD represented Chinese imports coming from Africa. The average annual growth rate of the Sino-African trade between 2000 and 2008 reached 33.5%. From January to November 2010, the Sino-African commercial volume reached 114.81 billion USD per annum, with annual growth totaling 43.5%.¹⁰ According to the World Trade Organization, the trade between Africa and Asia has been consistent over the past five years, but China's trade volume has been increasing at a significantly faster rate than other Asian countries.¹¹

In 2006, China adopted an official policy regarding its relationship with Africa, stating:

China is devoted, as are African nations, to making the United Nations play a greater role, defending the purposes and principles of the United Nations Charter, establishing a new international political and economic order featuring justice, rationality, equality and mutual benefit, promoting more democratic international relationships and rule of law in international affairs and safeguarding the legitimate rights and interests of developing countries.¹²

9. See Bradley Gardner, *China and the New Africa*, CHINA INTERNATIONAL BUSINESS (June 10, 2009), available at http://www.relooney.info/SI_Oil-Politics/Africa-China_12.pdf.

10. *China-Africa Economic and Trade Cooperation*, XINHUANET NEWS AGENCY (Dec. 23, 2010), http://news.xinhuanet.com/english2010/china/2010-12/23/c_13661632.htm; see also *China-Africa Trade Up 45% in 2008 to \$107 Billion*, XINHUANET NEWS AGENCY (Feb. 11, 2009), http://news.xinhuanet.com/english/2009-02/11/content_10803769.htm.

11. *International Trade Statistics 2006*, WORLD TRADE ORGANIZATION (2006), available at http://www.wto.org/english/res_e/statis_e/its2006_e/its06_toc_e.htm; See also Weidong Zhu, *China-African Trade & Investment and the Exchange of Law*, in *THE HARMONIZATION OF COMMERCIAL LAW IN AFRICA AND ITS ADVANTAGES FOR CHINESE INVESTMENTS IN AFRICA* (Salvatore Mancuso ed., 2008).

12. See generally *China's African Policy*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Jan. 12, 2006), available at <http://www.fmprc.gov.cn/eng/zxxx/t230615.htm>.

One of the most impressive features of this policy is its friendly language and “soft-power” approach.¹³

Notably, the implementation of such a policy has several consequences in the economic sector. With respect to trade, the policy has facilitated the entry of African commodities into the Chinese market. This flow of commodities granted duty free treatment to some goods coming from the least developed African countries, in a process of balanced expansion that may possibly lead to free trade agreements. China’s policy also has supported Chinese investments and business enterprises in Africa, including project financing and lines of credit, in the framework of bilateral investment treaties and double taxation agreements. The policy has further promoted participation of Chinese enterprises in the building of infrastructures in African countries, with the objective of gradually establishing multilateral and bilateral mechanisms related to contractual projects.¹⁴

The 2006 Beijing China-Africa Summit was the first milestone in realizing these policy objectives through the creation of the China-Africa Development Fund to support Chinese investment in Africa.¹⁵ The Fund would also extend the application of zero-tariff import duties to 440 African products to promote African exports to China.¹⁶ Prior to the Fund, only 190 African exports had zero-tariff import duties.

The 2009 Sharm-el-Sheikh Forum worked in the same direction by determining the action plan for the 2010–2012 Sino-African cooperation. At this Forum, the ministers in charge of foreign affairs and economic cooperation between China and 49 African countries, “recognizing that the new type of China-Africa strategic partnership featuring political equality and mutual trust, economic win-win cooperation and cultural exchanges [...] opened broad prospects for deepening China-Africa cooperation.” The Sharm-el-Sheikh Forum fixed the future lines of the cooperation in the main sectors of the Sino-African relations, including political affairs, regional peace and security, cooperation in international affairs, economic cooperation, cooperation

13. On the soft-power approach and its differences with the U.S. hard-power approach, *see generally* ADAMA GAYE, *CHINE-AFRIQUE: LE DRAGON ET L’AUTRUCHE*, PARIS (2006).

14. An example is the participation of some African enterprises in the completion of the Olympic villages in Beijing during the 2008 Olympic games.

15. The China-Africa Development Fund has a first-phase \$1 billion USD funding, provided by the China Development Bank. For further details, *see generally* *China-Africa Development Fund* at <http://www.cadfund.com/en/index.aspx> (last visited Apr. 03, 2011).

16. *See* Hu Jintao, *Eight Measures Will Be Taken to Facilitate China-Africa Cooperation* (Jun. 15, 2009), <http://www.chinaelections.com/NewsInfo.asp?NewsID=97769>.

in the field of development, and cultural and person-to-person exchanges.¹⁷

Despite the benefits, Chinese activities in Africa have also attracted criticism. China has been accused¹⁸ of refusing to adopt the social and environmental standards promoted by Western nations.¹⁹ Additionally, it has been argued that the displacement of locally manufactured goods by Chinese imports²⁰ pushes the poorest African workers deeper into poverty by flooding Africa with cheap goods,²¹ which has a negative impact on local enterprises and employment.²² These negative consequences have given rise to the “theory of the Chinese threat,” which advocates protectionism against Chinese goods.²³ Finally, China has been accused of adopting a cooperation model that favors corruption and negates all efforts made by Western nations and institutions to promote good governance and transparency policies in Africa.²⁴

17. To read the Action Plan, see *Forum on China-Africa Cooperation Sharm el Sheikh Action Plan*, FORUM ON CHINA-AFRICA COOPERATION (Nov. 12, 2009), <http://www.focac.org/eng/dsjbjhy/hywj/t626387.htm>.

18. See e.g., George Parker & Alan Beattie, *EIB Accuses China of Unscrupulous Loans*, FINANCIAL TIMES (Nov. 29, 2006), <http://www.ft.com/cms/s/0/589473b6-7f14-11db-b193-0000779e2340.html#axzz1s3WLODyf> (where Philippe Maystadt, the President of the European Investment Bank, criticized Chinese banks for their lack of concern about social or human rights conditions. The EIB President blamed Chinese banks for snatching projects from under his bank's nose in Africa and Asia, after offering to undercut EIB conditions on labor standards and the environment).

19. China has also been accused, mostly by non-African commentators, of supporting African States with human rights violations and in the export of high quantities of weapons in exchange for oil or mining concessions. However, recent developments seem to depart from previous practice. For a recent analysis of the Chinese position, see generally Barry V. Sautman & Hairong Yan, *The Forest for the Trees: Trade, Investment and the China-in-Africa Discourse*, 81(1) PAC. AFF. 9 (2008); see also Cecilia BRIGHI, Irene Panozzo & Ilaria M. Sala, SAFARI CINESE: PETROLIO, RISORSE, MERCATI: LA CHINA CONQUISTA L'AFRICA [Chinese Safari: Oil, Resources, Markets: China Conquers Africa] (2007).

20. Chinese projects and the import of Chinese casual workers leave the majority of African locals unemployed, although there is an abundance of unskilled labor which could immensely benefit from these projects. The employment of Chinese workforce does not seem to be a negotiable part of Chinese aid packages. Moreblessings Chidaushe, *China's Grand Re-Entrance to Africa – Mirage or Oasis?*, in AFRICAN PERSPECTIVES ON CHINA IN AFRICA 114 (Firoze Manji & Stephen Marks eds., 2007).

21. See e.g., *Patron of African Misgovernment*, NEW YORK TIMES (Feb. 19, 2007); see also Barry V. Sautman, *supra* note 19.

22. Moreblessings Chidaushe, *supra* note 20, at 114.

23. Bartholomäus GRILL, *Die neuen Meister, Die Zeit*; Italian translation: *I nuovi padroni*, in 666 Internazionale, November 3, 2006.

24. Due to its policy of non-interference in the political internal affairs of the country, China has been blamed for indirectly supporting African dictators. These include Omar Al-Bashir in Sudan and Robert Mugabe in Zimbabwe, who do not comply with the basic requirements in terms of democratic standards from the Western world, and who could not maintain their power without Chinese economic and military support.

Aware of all these concerns, China has begun to review its approach toward Africa. China Exim Bank provided an early example of China's effort to adopt stricter environmental guidelines. The bank adopted an environmental policy in November 2004 (made available to the public in April 2007), which purports that "projects that are harmful to the environment or [that] do not gain endorsement or approval from [the] environmental administration will not be funded." The policy further mandates that "once any unacceptable negative environmental impacts result during the project implementation, China Exim Bank will require the implementation unit to take immediate remedial or preventive measures. Otherwise, they will discontinue financial support."²⁵ In August 2007, the same bank issued more specific guidelines on social and environmental impact assessment, requiring projects to comply with the environmental assessment, resettlement and consultation policies of host countries (but not with international standards), reserving for itself the right to cancel a loan if environmental impacts are not adequately addressed.²⁶

Moreover, in October 2006, the State Council, China's highest government body, issued nine principles regulating foreign investments of Chinese companies. The Council called on Chinese investors to "fulfill the necessary social responsibility to protect the legitimate rights and interests of local employees, [to] pay attention to environmental resource protection, [to] care and support the local community and people's livelihood[s]," and to "preserve our good image and a good corporate reputation."²⁷

In 2007, the Chinese government's main international publication printed an article by Fudan University scholar Jian Junbao, reporting on Western charges of "Chinese colonialism" in Africa. Junbao's article purported that "more and more companies from China are entering Africa, but they simply focus on profits regardless of their harmful influences on African society, such as environmental pollution, excessive development and exploitation of local labor."²⁸

25. Peter Bosshard, *China's Environmental Footprint in Africa*, PAMBAZUKA NEWS (May 29, 2008), <http://www.pambazuka.org/en/category/comment/48442>.

26. *Id.*

27. *Id.*

28. Jian Junbo, *China's Role in Africa*, BEIJING REVIEW (Feb. 05, 2007), http://www.bjreview.com.cn/world/txt/2007-02/05/content_55414.htm. However, the author argued that the path taken by China is "consistent with the logic of market capitalism-liberal trade" and makes China not a colonialist, but "a successful capitalist in Africa."

However, several studies have already belied many of the criticisms against China. For example, a 2007 report by the Organization for Economic Co-operation and Development showed that China is making a positive contribution to debt sustainability through GDP growth, exports and governance standards in African countries. Moreover, countries that are more involved with China also have shown a small improvement in the corruption index.²⁹

Additionally, despite the criticism, the current situation indicates a strong mutual interest between China and Africa to further increase trade relations. From the Chinese perspective, interest in African commodities is growing not only in quantity, but also in quality. China is not only interested in African oil and natural resources, but also considers Africa as a future source for agricultural and farming goods.³⁰

Accordingly, China is trying to secure a steady flow of commodities for its future needs through both economic and political means. Evidenced by China's increasing involvement in African affairs, such as by taking a leading role in suggesting and contributing to United Nations peacekeeping operations in Africa, it is clear that China has a long term stake in Africa.³¹ China's increase in bilateral aid to Africa and the constant attention to various measures of capacity building, including debt cancellations, are other signs of such long-term interest.

Conversely, Africa benefits from goods manufactured in China as much as China does from African commodities. For example, there is an increasing presence of African entrepreneurs in China (especially in Guangzhou and Hong Kong) to buy Chinese goods for their domestic markets.³² This presence is due to the fact that African countries might

29. Andrea Goldstein & Giorgio Prodi, *China and Africa Economic Relations: Space for Mutual Benefits?*, in *THE HARMONIZATION OF COMMERCIAL LAW IN AFRICA AND ITS ADVANTAGES FOR CHINESE INVESTMENTS IN AFRICA* 75, 81 (Salvatore Mancuso ed., 2008).

30. Anver Versi, *China's March into Africa*, 322 *AFRICAN BUSINESS* (July 2006).

31. *China's African Policy*, part IV, 4(2), MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Jan. 12, 2006), available at <http://www.fmprc.gov.cn/eng/zxxx/t230615.htm>. During the 2006 Forum on China-Africa Cooperation, Xu Jinghu, Head of the Africa Department of the Chinese Foreign Ministry, stated that "China will actively participate in UN peacekeeping operations in Africa to safeguard regional peace and stability." See also Bates GILL, Chin-hao Huang & J. Stephen Morrison, *Assessing China's Growing Influence in Africa*, 3(3) *CHINA SECURITY* 3 (2007). For the data related to Chinese contributions to the different UN peacekeeping missions, see *Country contributions detailed by mission* (2007), UNITED NATIONS PEACEKEEPING OPERATIONS, available at http://www.un.org/en/peacekeeping/resources/statistics/contributors_archive.shtml (last visited Apr. 15, 2012).

32. For more on this phenomenon, see Adams B. Bodomo, *The African Trade Community in Guangzhou: an Emerging Bridge for China-Africa Relations*, 203 *THE CHINA QUARTERLY* 693 (2010).

not be able to find alternative sources for manufactured goods of comparable quality and price as are available in China.³³

In summary, the current trade relations between Africa and China are solidly based, with both actors clearly interested in further expansion in the future.

III. THE CHINESE MODEL OF ECONOMIC COOPERATION TOWARD AFRICA

The Chinese approach toward Africa follows a clear, unitary, and coherent political and economic strategy, hinged upon three main pillars: acquisition of raw materials, access to new markets for Chinese products, and obtaining African support in international organizations. China has additionally developed an all-inclusive approach to African affairs that puts China in a similar position as Western countries that have maintained relations with African countries over a much longer period.³⁴

China expanded upon the traditional approach developed by Western countries to merely set up diplomatic and economic relations with African countries. Cooperation between Africa and Western countries has always been based on the so-called North-South approach where Western countries, being developed, consider themselves to have the experience to guide African countries to development. This experience brings Western nations to think they have the right to impose conditions on developing countries by granting financial aid. As a result, the grants of financial aid have been conditioned on the implementation of structural, economic and legal reforms. Examples of conditions previously imposed include introduction of a multiparty political system, separation of government powers, environmental protection, privatizations, and adoption of economic policies predetermined by the donors. Following colonialism, this role was initially played by the former colonial powers of which the supranational, international, and financial organizations later joined.

It is undeniable that this model of cooperation is far from being successful. The above-mentioned position of superiority, interpreted by

33. See Andrea Goldstein & Giorgio Prodi, *supra* note 29, at 77; see also Antoine Kernen, *Les stratégies chinoises en Afrique: du pétrole aux bassines en plastique [Chinese Policies in Africa: From Oil to Plastic Bowls]*, 105 *Politique africaine* 163, 171 (2007).

34. While China has developed such a comprehensive approach toward Africa, Africa's approach to China still remains largely ad hoc and closed within each national border, without any coordination at the regional or continental level. The author doubts that the principle of "equal partnership" can find an effective application, due to the different level of development between China and each of the African States. See Moreblessings Chidaushe, *supra* note 20, at 109.

African countries as a sort of new colonialism, has never been digested by African leadership. Moreover, the requested improvement measures have been prepared as a “pre-packed package,” sufficient for implementation everywhere in the world, and neutral with respect to the peculiarities, traditions and realities of the different countries.³⁵ Forty years after the end of the colonial period, sub-Saharan African countries have progressed little from their position at the time of decolonization. Traditional economic relations and partnerships with the West have not helped Africa in overcoming the structural obstacles of eradicating poverty and eliminating economic marginalization.³⁶

Absent rare exceptions that have yielded beneficial results, such as in Senegal and Botswana, the Western model of economic aid has mainly produced corruption, high dependency on foreign aid, uncontrolled exploitation of natural resources, coups, civil wars, scarce consideration for environmental issues, and foreign investments that leave no residual benefit to the African countries. Based on these realities, a new model of political and economic cooperation with African countries seemed necessary.

After the Cold War, a relevant part of which was fought in sub-Saharan Africa (particularly in Central Africa), the Western countries basically abandoned Africa since the threat of communist influence on Africa was no longer considered an issue. This abandonment showed that the Western nations were not ready to establish a new kind of relationship with Africa. China, however, was ready and willing to seize this opportunity by setting up its own model of cooperation with Africa, filling the gap left by the Western countries.

Chinese investments in Africa are sustained by impressive financial strength.³⁷ The Chinese government dedicated two banking institutions to these investments: the China Export-Import Bank (“Exim Bank”), and the China Development Bank. Exim Bank plays a crucial role in managing almost the entirety of the loans granted to developing countries.

35. See JOSEPH E. *STIGLITZ*, *GLOBALIZATION AND ITS DISCONTENTS* (1st ed., 2002).

36. See John Rocha, *A New Frontier in the Exploitation of Africa's Natural Resources: the Emergence of China*, in *AFRICAN PERSPECTIVES ON CHINA IN AFRICA* 153, 155 (Firoze Manji & Stephen Marks eds., 2007).

37. In September 2009, Chinese reserves in foreign currencies hit the record amount of 2.273 trillion USD. See *Foreign Reserves Hit Record High*, *CHINA DAILY* (Oct. 15, 2009), http://www.chinadaily.com.cn/bizchina/2009-10/15/content_8967120.htm.

Furthermore, current Chinese economic initiatives in Africa are accompanied by a political approach which is regarded highly by African leaders. This political approach is based on the concept of “South-South” cooperation, which maintains that China is in a unique position to understand African needs and to assist in addressing them at the global level. Because China is also a developing country, which has only recently become more developed, it has the ability to recognize the needs of African nations.³⁸

The concept of “South-South” cooperation is founded on four pillars: 1) sincerity, friendship and equality; 2) mutual benefit, reciprocity and common prosperity; 3) mutual support and close co-ordination; and 4) learning from each other and seeking common development.³⁹ The Chinese development model, which promotes economic and social development with cautious political reform, is appealing to African countries.⁴⁰ Moreover, Chinese assistance is free from the economic and political conditions attached by other partners,⁴¹ and credits and loans are granted with conditions that are extremely favorable to African countries and their economies.⁴² The conditions attached to these loans have not been publicized, but economic conditions allowing Chinese companies to access African resources, to repatriate profits, and to use a predominantly Chinese workforce are attached to them.⁴³

38. *China's African Policy*, part IV, 2(10), MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Jan. 12, 2006), available at <http://www.fmprc.gov.cn/eng/zxxx/t230615.htm>.

39. *Id.*, part III.

40. Andrea Goldstein & Giorgio Prodi, *supra* note 29.

41. The policy of noninterference in the internal affairs of African countries goes back to a declaration by Zhou Enlai, made during the Bandung Asian-African Conference of 1955, which remains greatly appreciated by African leaders. The only official condition is that the country shall not recognize Taiwan. China's 2006 African Policy clearly sets forth that “[t]he one China principle is the political foundation for the establishment and development of China's relations with African countries and regional organizations. The Chinese Government appreciates the fact that the overwhelming majority of African countries abide by the one China principle, refuse to have official relations and contacts with Taiwan and support China's great cause of reunification. China stands ready to establish and develop state-to-state relations with countries that have not yet established diplomatic ties with China on the basis of the one China principle.” There are some cases where Chinese aid reached countries indirectly that still recognize Taiwan. On December 28, 2007, Malawi officially recognized China, established political relations with China, and ultimately China signed several commercial agreements with Malawi. See *Window of China: China, Malawi Establish Diplomatic Ties* (Jan. 14, 2008), http://news.xinhuanet.com/english/2008-01/14/content_7421153.htm.

42. As noted by U.S. Africanist scholar Deborah Brautigam, China “regularly cancel[s] the loans of African countries, loans that were usually granted at zero interest [and] without the long dance of negotiations and questionable conditions required by the World Bank and IMF.” See Deborah Brautigam & Adama Gaye, *Is Chinese Investment Good for Africa?*, COUNCIL ON FOREIGN RELATIONS (Feb. 20, 2007), <http://www.cfr.org/china/chinese-investment-good-africa/p12622>.

43. Moreblessings Chidaushe, *supra* note 20, at 116.

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In particular, apart from the adherence to the “one-China policy,”⁴⁴ China has not made any claim over the sovereignty of African countries, their economic systems, governance models, political cultures or traditions. Additionally, the Chinese approach is far from imposing any kind of sanctions, clearly separating business from politics in its non-intervention policy.⁴⁵

In order to obtain control of natural resources, Chinese multinational companies play a strategic game in which the government often keeps direct or indirect control over their activities. These companies are used to gain access to natural resources considered to be in their national interest. Therefore, their investments abroad are not considered as simple business relations made by companies who try to profit from business activities abroad, but are made following precise political objectives approved in Beijing. Approvals are made according to the strategic directives related to the orientation of investments and capital. In Africa, these companies are able to obtain work orders by offering conditions that are possible only because such work orders are considered strategic by the Chinese government, who subsidizes the companies with State capital. The companies are then able to offer conditions that are impractical for Western companies because they must take their balance requirements into consideration.⁴⁶

Chinese avoidance of conditional business relations, coupled with the State control over these strategic economic ganglions allows China to offer a “one-stop shop” approach. Under this approach, China receives access to natural resources which are combined with soft loans, infrastructure and other cooperation projects such as training, scholarships, medical aid, and rural development.

Western countries have not been able to react with an organized approach toward African countries like China has been able to. Western companies, which are normally not under public control and are sustained only by their own economic strength, clearly do not possess the instruments which would allow them to have sustainable African business relationships.

44. The “one-China policy” requires that countries acknowledge the existence of only one state known as “China,” despite competing claims from both the People’s Republic of China and the Republic of China.

45. Daniel Large, *supra* note 1.

46. See Chris Alden & Martyn Davies, *A Profile on the Operation of Chinese Companies in Africa*, 13 SOUTH AFRICAN J. OF INT’L AFF. 83, 84 (2006) (discussing China’s willingness to create corporate “champions” that, with the benefit of active and generous support from the State, will be groomed to join the ranks of the Fortune 500).

Such a full, comprehensive approach, based on the premise that Africa is strategic for overall Chinese economic and political interest, together with the impressive economic strength that China possesses today, has brought China into the dominant position in relations with African countries.

IV. CHINA-AFRICA LEGAL COOPERATION

The Chinese government has already partnered with African countries in the area of legal cooperation. In accordance with the Action Plan established at the 2006 Beijing summit, China has increased its research on African legal systems and has discovered the need for a link between the legal institutions of China and Africa.

As a result of this research, the Center for African Laws and Societies was created at Xiangtan University in Hunan province.⁴⁷ The Center's director, Professor Hong Yonghong, officially attended the 2006 Beijing summit as a member of the Chinese delegation. Today, one of the primary focuses of the Center's research is the OHADA (Organization for the Harmonization of Business Law in Africa) law. The Center is also one of the members of the academic network that supports the project on legal harmonization in the region, which was launched by the University Eduardo Mondlane in Mozambique.⁴⁸

Another Chinese institution which supports legal cooperation between China and Africa is the University of Macau. The University of Macau is active in research, especially as it relates to Portuguese-speaking African countries. The institution also held a conference in 2007 on the harmonization of commercial law in Africa and the advantages related to Chinese investments in Africa.⁴⁹

47. The Center has already published several books and papers on the subject of African law.

48. In 2008, the University Eduardo Mondlane in Maputo in Mozambique promoted a project for the study of legal integration in the SADC (Southern African Development Community) area with an International Conference organized in April, followed by the creation in October of a Regional Centre of Studies on Integration and SADC Law. It is extremely significant that one of its first activities has been to open contacts with OHADA to determine how OHADA can contribute to legal integration in the SADC region, considering also that one of the SADC member States, Democratic Republic of Congo, is also an OHADA member. The project is well established and the most recent conference held in Maputo in November 2010 has already determined the methodology for adoption and the legal fields to be the subject of a first harmonization. For more information, *see generally* the *Center of Studies on Regional Integration and Southern African Development Community Law*, www.cedir.uem.mz (last visited Apr. 15, 2012).

49. The conference proceedings were published in 2008, and a Chinese version of those proceedings was published by Xiangtan University in October 2009. *See generally* THE HARMONIZATION OF COMMERCIAL LAW IN AFRICA AND ITS ADVANTAGES FOR CHINESE INVESTMENTS IN AFRICA (Salvatore Mancuso ed., 2008).

China and Africa have also established a permanent Forum on Legal Cooperation, whose second meeting was held in Beijing in September 2010. The objective of this forum is to enhance legal and judicial cooperation between China and Africa, aiming at establishing comprehensive cooperation, including cooperation in the judiciary, and crime prevention and prosecution.

V. CHINA AND THE DEVELOPMENT OF A UNIFORM SYSTEM OF BUSINESS LAWS IN AFRICA

It is commonly accepted that the use of uniform texts in international trade improves the certainty in transactions by enhancing predictability of legal outcomes. A uniform system furthers trade, foreign investment and economic development.⁵⁰ The success of some supranational norms, which often reconcile differences between distinct legal traditions, is undoubtedly increasing. As economic activities become increasingly globalized, there is a strong incentive for the law to follow in suit. The appeal of transnational legal solutions lies in the potential for reduced complexity, greater expertise, substantially reduced transaction costs, and efficiency. This is the reason for the wide consensus on policies supporting the adoption of uniform texts to ensure harmonious regulation of transnational commerce within international trade law.

Africa's history of international trade law is quite complex. At the time of decolonization, commercial law, which was inherited from the colonial powers, had a high degree of uniformity within the continent because of the early influence of uniform sources and the similarity of colonial needs, factors both leading to convergence of legislative texts in the trade field despite different legal traditions.⁵¹ However, the different political experiences of various African countries created a high level of legal diversity from country to country.

The diversity of laws within various African countries has consistently been a major obstacle to African economic development. This issue has not yet been properly taken into consideration by the African states. However, the harmonization of laws in Africa has been addressed as a growing issue since decolonization. Professor of African law Anthony Allott observed that "the move towards integration or unification of laws has been a consequence of independence, of the desire to build a nation,

50. For the African experience, see generally Muna Ndulo, *Harmonization of Trade Laws in the African Economic Community*, 42 INT'L & COMP. L.Q. 101, 101-108 (1993); see also Gbenga Bamodu, *Transnational Law, Unification and Harmonization of International Commercial Law in Africa*, 38(2) J. AFR. L. 125 (1994).

51. Luca Castellani, *supra* note 2.

to guide the different communities with their different laws to a common destiny.”⁵²

Thus, following decolonization, a common opinion emerged that uniformity of commercial law within African countries would pave the way to the broad adoption of uniform texts.⁵³ This adoption would have been consistent with the recurring calls for African political and economic unity. The African experience illustrates the fact that harmonization of commercial laws have been pursued through the establishment of regional and sub-regional organizations. These organizations are entrusted with the promotion of legal uniformity in an attempt to achieve economic integration at the continental or regional level.⁵⁴

The increasing awareness that globalization is widening the economic gap between the North and South⁵⁵ emphasizes the need for a uniform system of transnational commercial law. This gap is also exemplified by issues that undermine development in the South, such as external debt, dependency on foreign loans, and unreliability and unpredictability within the legal and judicial system. These issues may only be addressed through legal reform based on market principles and international standards, which follow the global process of convergence of domestic legal systems, especially in the commercial field.⁵⁶ Accordingly, markets open to fair competition call for this legal reform to be based on modern and uniform texts.

China has an interest in developing long-term, sustainable economic relations with Africa both for protecting its investments within the continent and to ensure a predictable flow of commodities to sustain its increasing needs. Political stability, improved governance, and a stronger rule of law are necessary to achieve this goal. Economic reform is also notably necessary to achieve China’s needs. To be successful, China

52. Anthony N. Allott, *Towards the Unification of Laws in Africa*, 14(2) INT’L COMP. L.Q. 366, 378 (1965).

53. See Keba M’Baye, *L’expérience du droit uniforme dans les pays d’Afrique*, LE DROIT UNIFORME INTERNATIONAL DANS LA PRATIQUE [International Uniform Law in Practice] 48 (International Institute for the Unification of Private Law ed., 1988).

54. An early example is the East African community between Kenya, Uganda, and Tanzania, which was created immediately after the independence of such countries. Despite failure in the early 1970s, there has been a recent re-launch, including Rwanda and Burundi.

55. See, e.g., JAN NEDERVEEN PIETERSE, *GLOBALIZATION AND CULTURE: GLOBAL MELANGE* (2nd ed., 2009); see also Giovanni Arrighi, Beverly J. SILVER and Benjamin D. BREWER, *Industrial Convergence, Globalization, and the Persistence of the North-South Divide*, 38(1) STUD. COMP. INT’L DEV. 3 (2003).

56. Salvatore Mancuso, *Trends on the Harmonization of Contract Law in Africa*, 13 Ann. Surv. Int’l & Comp. L. 157 (2007).

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must move away from State-supported trade and foster private Chinese companies to operate in African markets under competitive rules.

Fortunately, signs of change according to these principles have already been observed. For instance, China has given strong incentives to Chinese investors willing to do business in Africa by offering them financial support through loans, which are granted at a discounted rate. China has also provided tax advantages and other non-financial support at the central and local level to investors who take their business to Africa.⁵⁷

A predictable legal framework is necessary to maintain sustained levels of investment and trade. Furthermore, commercial operators need to rely on modern, uniform laws that are applied as default rules. This is particularly true for small and medium-sized enterprises, which may not be in a position to obtain timely legal advice or to negotiate contracts in detail, but are particularly exposed to commercial disputes due to their limited assets. However, this remains true for larger companies as well, because China's traditionally exported items, namely manufactured goods, are being replaced by more sophisticated products, including large infrastructure projects.⁵⁸

In conclusion, Chinese commercial operations in Africa need an efficient legal framework, which can be a reality only through uniform trade law.⁵⁹ China has a strong interest in promoting and supporting uniform business laws in Africa. The increasing interest by Chinese institutions and universities to study and be familiar with African business laws, and OHADA laws in particular, represent evidence of such interest.⁶⁰ Therefore, in light of its current and future commercial needs, China should take a more proactive role in promoting the adoption of uniform commercial laws by its African partners.

57. Andrea Goldstein & Giorgio Prodi, *supra* note 29, at 77.

58. See Joshua Kurlantzick, *Beijing's Safari: China's Move into Africa and Its Implications for Aid, Development, and Governance*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Apr. 03, 2006), http://www.carnegieendowment.org/files/kurlantzick_outlook_africa2.pdf.

59. For more information on the need for improvement of African legal systems with respect to State interference in private transactions, see *Analysis of Trade Friction between China and Africa* (Jun. 16, 2009), http://www.africa.gov.cn/ArticleView/2005-8-5/Article_View_918.htm, visited at point 7.

60. Apart from the activities of legal cooperation referred to, additional initiatives in this field of interest include the organization of the 2007 Macao Conference on Harmonization of Commercial Law in Africa and its Advantages for Chinese Investments in Africa, the Chinese translation of the related proceedings published in October 2009, the Chinese translation and publication of OHADA books and articles by the referred to Xiangtan University Center, as well as their organization of a conference on African law in October 2009, are mostly dedicated to China-Africa relations and the various aspects of African business and investment law.

VI. THE AFRICAN VIEW TOWARD CHINA: AN APPROPRIATE DEVELOPMENT MODEL?

The reform of Africa's current commercial law faces a major paradox. While there are no major technical or political obstacles to the wider adoption of uniform laws, there have been limited incentives for implementing reform. Specifically, the scarce requests for reform from commercial operators in the area of commercial laws have surely not helped. Local branches of multinational groups that are typically active in the commodities field operate within closely integrated corporate structures, and large government-held companies are shielded from market competition and placed above ordinary commercial rules. Consequently, the small and medium enterprises which would benefit the most from trade law reform are rare and mostly active only in the informal sector.

One benefit Africa could gain from increasingly developed trade relations with China is the growth of small and medium African enterprises in a process akin to the one that took place in ASEAN countries. From the Chinese perspective, entrepreneurs are interested in establishing these increased African networks in order to gain additional access to coveted American and European markets through African preferential trade agreements.⁶¹ To the benefit of African countries, small and medium enterprises may fuel economic development, promote higher levels of employment, and allow for more equitable wealth redistribution. Because small and medium African enterprises are active in various business fields, they are in a position to help diversify African economies outside of the current oil and commodity export-trading pattern.⁶² However, due to their limited contracting power and access to expert legal advice, small and medium enterprises are significantly in need of a modern and efficient framework for trade law.

Both China and Africa share similar histories of exploitation, yet China is currently one of the most rapidly developing counties in the world. China's advancement is due to the aggressive development approach they have taken and their resistance to depending on foreign aid, which Africa has relied on for years.⁶³ Therefore, the necessity for legal reform of African commercial law and the strong relationship between China and Africa suggest that African countries could incorporate the Chinese

61. Anver Versi, *supra* note 30, at 19.

62. *Economic Report on Africa 2007: Accelerating Africa's Development through Diversification*, ECONOMIC COMMISSION FOR AFRICA, AFRICAN UNION (Feb. 2007), available at <http://www.uneca.org/era2007/>.

63. Moreblessings Chidaushe, *supra* note 20, at 112.

model of (economic and) legal reform for their own legal re-organization.

However, the differences between the current African economic and legal conditions and those of China suggest that African countries could not successfully follow the Chinese model of (economic and) legal reform.⁶⁴ African countries cannot yet be regarded as transition economies because they are still developing economies that are highly dependent on external financial aid from international financial institutions. Africa's lack of regional or continental strategy⁶⁵ also has disallowed them from reaching an economic strength comparable to that of the Chinese economy. This lack of financial independence and incoherent unification of strategies restricts Africa from the opportunity to play a role in the international economic arena similar to China's more active role.

Furthermore, the Chinese model of legal development was inspired by combining the principles of a socialist market economy with Chinese characteristics. Such a structure cannot be replicated in Africa or its legal culture due in large part to inconsistencies in the African culture itself. Moreover, this Chinese model has been developed as a result of political stability that, aside from rare exceptions, has never been experienced in African countries.

This does not mean that China has nothing to offer to African countries outside of its commercial relations. Both China and African countries have similar goals of improving the rule of law and good governance. This involves clear political guidance and uniform implementation of economic policies, and in this context, the predictability of the rule of law becomes paramount to efficiently protecting economic rights.

In this field, the Chinese model of making careful economic and legal reforms, accompanied by cautious and well-considered political reforms can be considered a pattern that African countries may utilize if they can be adopted with African characteristics, in light of local cultures and traditions.

The relationship between trade and the rule of law has been generally accepted. A strong rule of law is necessary to ensure predictability in trade and investment protection. This strong rule of law may also, in turn, increase trade and investment through the reliable legal framework,

64. *But see*, Castellani, *supra* note 2.

65. John Rocha, *supra* note 37, at 31.

which may induce a positive spillover effect to the enforcement of the rule of law outside of the commercial sector.

This relationship indicates that the adoption of a reform of commercial law in Africa toward uniform business law would contribute to other initiatives that would potentially improve African stability and would strengthen its overall rule of law. Accordingly, in light of existing African economic and social conditions, it may well prove to be one of the most effective approaches to furthering those goals. Moreover, the adoption of modern legislation in African commercial law would benefit all its commercial partners, not only China. This improved legal system would further fuel African integration into the global economy and significantly aid its economic development. Therefore, China has a strong interest in contributing to legal and economic reform in Africa, and Africa has a similar interest in receiving contributions from China and other countries.