A COMPARATIVE STUDY OF CHINA'S FOREIGN DIRECT INVESTMENT IN AFRICA: REGULATION, POLICY, AND LEGAL COOPERATION

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DECLARATION

I declare that this thesis submitted for the degree of Doctor of Philosophy at the University of Cape Town has not been previously submitted by me for a degree at this or any other university, that it is my work and that all referenced material in it has been duly acknowledged.

Tebogo Lefifi

August 2023

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ABSTRACT

A new era of Africa-China legal cooperation in Foreign Direct Investments (FDI) was inaugurated following the successful founding of The Forum on China Africa Cooperation (FOCAC) in 2000. In 2015, China became a capital exporter and adopted a new global strategy to reverse the hegemony comprising norm-making and advising law reforms in developing countries. Nonetheless, a comprehensive approach is still lacking to determining and understanding the potential impact and influence of China's outbound FDI (OFDI) policy, laws and regulations on Africa's economic development agenda and legal environment. Previous research has interpreted China's increasing OFDI as a by-product of China's market- or resource-seeking agenda and failed to consider the legal aspects of the relationship. Contrarily, this study argues that China's OFDI influence introduces a novel type of south-south legal transplant that will shape prospective African legislative initiatives, ideologies, and norms. By examining China's legal transplant experience and FDI governance model ideology, this research aims to provide a comprehensive understanding of China's influence on Africa's future legal reforms. The analysis explicitly explores Africa's transplant of China's cyber sovereignty governance model. The study utilises a desktop research study methods using a combination of primary and secondary sources. The data is gathered from research from various sources in official government websites, action plans documents, academic literature, and case studies. A comparative analysis of the benefits and drawbacks of China's and Africa's experiences with FDI regulation and legal transplant is a key consideration in this study. The findings of the study reveal and highlight the benefits and challenges of legal cooperation through OFDI and recommendations for the development of laws with Africa-China characteristics are presented. The research will guide Africa's policy response to regulating Chinese investments in the continent and guide lawmakers in transplanting laws from China.

Key Words: China-Africa policy, foreign direct investments law, legal transplant, cyber sovereignty, internet governance, Forum on China Africa Cooperation (FOCAC)

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DEDICATION

This thesis is dedicated to my family, who taught me to honour and follow my true north.

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List of Abbreviations

5th Five Year Plan: (5FYP)

Asian Legal Consultative Committee: (ALCC)
Asian-African Legal Consultative Organization: (ALCCO)

Belt and Road International Lawyers Association: (BRILA)
Bilateral Investment Treaties: (BIT)
Brazil Russia India China and South Africa: BRICS

Centre for African Laws and Society: (CALS)
China Africa Development Fund: (CAD Fund)
China Communist Party: (CCP)
China International Commercial Court: (CICC)
China Law Society: (CLS)
China's Five-Year Plan: (FYP)
China's Ministry of Commerce: (MOFCOM)
China Africa Joint Arbitration Centre: (CAJAC)
Chinese Communist Party Central Committee: (CCPCC)
Collaboration In International ICT Policy: (CIPESA)
Commercial bank of China: (ICBC)
Communist Party Of China: (CPC)
Communist Party of China Central Committee: (CPCCC)
Cooperative Joint Venture: (CJV)
Corporation for Assigned Names and Numbers: (ICANN)
Cyberspace Administration of China: (CAC)

Digital Silk Road: (DSR)

Economic Community of West African States: (ECOWAS)
environmental impact assessments: (EIA)
Equity Joint Venture: (EJV)
European Union: (EU)
Export Import Bank of China: (EXIM)
export-oriented industrialization: (EOI)

Fair Labour Association: (FLA)
Foreign Direct Investment: FDI
Foreign Investment Law: (FIL)
Forum on China Africa Cooperation: FOCAC
Free Trade Agreements: (FTA)

General Administration of Customs in China: (GACC)
General Agreement on Tariffs and Trade: (GATT)
General Data Protection Regulation: (GDPR)
General Principle of Civil Law: (GPCL)

Home Country Measures: (HCMs)

Information and Communications Technology: (ICT)
International Investment Agreements: (IIAs)
International Labour Organization: (ILO)
International Monetary Fund: (IMF)

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International Standardization Organization: (ISO)
International Telecommunications Union: (ITU)
Internet Governance: (IG)
Internet of Things: (IoT)

Johns Hopkins University: (JHU)
Kuomintang: (KMT)

Made In China: (MIC)
Memorandum of Understanding: (MOU)
Mergers and Acquisitions: (M&As)
Ministry of Foreign Economic Relations and Trade: (MOFERT)
Ministry of Foreign Trade and Economic Cooperation: (MOFTEC)
Ministry of Science and Technology: (MOST)
Multi-stakeholder Governance: (MSG)
Multi-Stakeholder Partnership: (MPS)

National Development and Reform Commission: (NDRC)
National People's Congress: (NPC)
National Planning Commission: (NPC)
Non-governmental Organisations: (NGOs)
Non-Market Economy: (NME)

One Belt One Road: (BRI) ; OBOR
Organization for Economic Cooperation and Development: (OECD)
Overseas and Economic and Commercial Cooperation Zones: (OECCZ)
Overseas Foreign Direct Investment: OFDI

People's Republic of China: (PRC)
Pre-establishment of national treatment: (PNT)
Public-Private Partnership: (PPP)

Renminbi: (RMB)
Research and development: (R&D)

Shanghai Cooperation Organization: (SCO)
Special and Differential Treatment: (SDT)
special economic zones: (SEZs)
Special Legal Zone: (SLZ)
State Administration of Foreign Exchange: (SAFE)
State-Owned Enterprises: (SOE)
Supervision and Administration Commission of the State Council: (SASAC)
Sustainable Development Goals: (SDG)

Technical Legal Assistance: (LTA)
The African Continental Free Trade Area: (AfCFTA)
The All-China Federation of Trade Unions: (ACFTU)
The State-owned Assets Supervision and Administration Commission of the State Council: (SASAC)

United Nations: (UN)
United Nations Conference on Trade and Development: (UNCTAD)
United States of America: (USA)

Wholly Foreign-Owned Enterprise: (WFOE)
World Summit of the Information Society : (WSIS)
World Trade Organization: (WTO)

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1 Chapter 1 CHINESE LAW AND INVESTMENT IN AFRICA

1.1 Introduction

This study examines China's outbound foreign direct investment (OFDI)[1] in Africa since jointly establishing the Forum on China Africa Cooperation (FOCAC) in 2000. The research was motivated by the possibility of the influence of the Chinese legal system in African law reforms through foreign direct investment (FDI) and the asymmetric power relations between Africa and China. The disparity between geopolitical platforms and business practices reveals the power asymmetry between the two actors. African governments view China's economic development model and investment-led growth as ideal. As a result, African policymakers are implementing reforms to attract Chinese investment. The researcher undertook this study to develop a framework to investigate the policies and regulations that drive China's OFDI in Africa. Accordingly, this study aims to strengthen Africa's ability to anticipate, direct, and navigate Chinese investment regulations in the continent and to develop a sustainable China inbound investment policy.

The study investigates whether new form of smart power or conventional FDI drivers drive Chinese OFDI in Africa. The study contrasts the Chinese 'win-win' partnership narrative with the African raw resources extraction agenda to comprehend how China uses an investment strategy to manage its relations with Africa and to integrate this strategy into its geopolitical agenda. To economically realise its investments and achieve a win-win outcome, China facilitates legal collaboration with the host country. This new cooperation could result in the transplant of Chinese law and norms into Africa, especially in states that do not have local investment laws or are willing to amend regulations to attract new investors. Therefore, it is essential to understand the broad spectrum of Chinese drivers of FDI.

FDI is the international transfer of capital, technology, management, and marketing expertise. There are as many definitions of investments as there are authors and investments. As per research presented by Juilliard and Carreau, the meaning of ‘investment’ varies based on the objective and

[1] China differentiates foreign direct investment (FDI) into inbound foreign direct investment and outbound foreign direct investment (OFDI).OFDI is also called outward direct investment (ODI).

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purpose of various investment instruments.[2] Nonetheless, regardless of the definition, FDI affects the host country's economic development and poverty,.[3] African nations need FDI to boost local investment, capital formation, technology transfer, and job creation.[4] African governments must attract investment in strategic economic sectors like infrastructure to achieve their 2063 development goals.

Investment begets law

Where capital flows, legal framework follows. Investments, especially FDI, can influence legal structure creation, development, and reforms in both the investing country and the recipient country. In Africa, as a significant recipient of FDI capital, only a few countries have implemented significant legal and policy reforms to attract and protect investment FDI. Other countries on the continent lack key FDI determinants and consequently struggle to attract FDI for strategic infrastructure projects. To protect their investments foreign investors can often demand changes or reforms in local laws, which can lead to changes in the legal systems.[5] Zimbabwe presents an excellent contemporary example of a country undertaking significant reforms to align with FDI.[6]

Despite the 'Africa rising' narrative,[7] the continent struggles to attract FDI for capital formation and regional development due to its 'dark continent' reputation. Notably, China views Africa differently as an investment destination. As a result, China has become a top African investment and trade partner since FOCAC's founding. Beijing provides alternative capital for African projects and has a hands-off policy towards African governments. Contemporary FDI trends in Africa's development cannot be evaluated without considering Chinese investments. Although critics doubt China's ability to build sustainable infrastructure in Africa, African leaders

[2] Shirley Ayangbah and Liu Sun, 'Comparative Study of Foreign Investment Laws: The Case of China and Ghana' (2017) 3 Cogent Social Sciences 1 <http://doi.org/10.1080/23311886.2017.1355631> accessed on 22 May 2019.
[3] Barry P Bosworth, Susan M Collins & Carmen M Reinhart 'Capital flows to developing economies: implications for saving and investment' (1999) 1999 *Brookings papers on economic activity* 143–80. See also Selma Kurtishi-Kastrati, 'The Effects of Foreign Direct Investments for Host Country's Economy.' (2013) 5 European journal of interdisciplinary studies.
[4] Mercy T Magombeyi and Nicholas M Odhiambo, 'Causal Relationship between FDI and Poverty Reduction in South Africa' (2017) 5 *Cogent Economics and Finance* 1 <http://doi.org/10.1080/23322039.2017.1357901>.
[5] DUNIA P ZONGWE, 'T Kondo (ED) "Law and Investment in Africa: The Governance of Foreign Direct Investment In Zimbabwe"' (2022) 25 law, democracy & development 463.
[6] ibid.
[7] Brahima Sangafowa and Coulibaly, 'In Defense of the "Africa Rising" Narrative' (*Africa in focus*, 2017) 2 <https://www.brookings.edu/blog/africa-in-focus/2017/06/27/in-defense-of-the-africa-rising-narrative/>.

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laud its footprint on the continent.[8] Scholarship and thought leadership is thus occupied by two dialectical positions with nuanced perspectives.

Africa–China watchers, with a more nuanced observation, continue to cautiously present a balanced perspective between the binary arguments.[9] From a geopolitical critic's perspective, African countries seem to lack agency, with China dominating the relationship and the narrative.[10] China has used its domestic policies to inform its international relations; therefore, domestic interest and international policies seem to regulate the Africa–China relationship. Its OFDI policies are designed to fulfil China's development model, which Joshua Cooper Ramo terms the 'Beijing consensus'.[11] Private companies follow the Chinese government's mandate to achieve the government's development model domestically and in their international engagements. This is evinced by the sudden increase in Chinese private investment in Africa after official speeches in Beijing encouraged investment. While adopting Beijing's strategy was intended to foster economic development in Africa, the unintended consequences for African relations and investment, influenced legal reforms in host countries.[12]

Private and state-owned Chinese companies are increasing their investment and trade interests to advance national policies and the position of the Middle Kingdom.[13] China's growing investment in Africa is sometimes met with reproach, with China perceived as the new colonial master. This is informed by the nature of the relationship, which is characterised by exports of

8 Ian Taylor, *China and Africa: Engagement and Compromise* (Routledge 2007). Austine Odo 'Africa: Beware of China-Africa Economic Ties, Mbeki Warns', *Daily Trust*, 2006, available at: https://allafrica.com/stories/200612181314.html [accessed on 9 November 2019].; Tukumbi Lumumba-Kasongo, 'China-Africa Relations: A Neo-Imperialism or a Neo-Colonialism? A Reflection' (2011) 10 African and Asian Studies 234. Darius A'Zami, '"China in Africa": From Under-Researched to Under-Theorised?' (2015) 43 Millennium 724. Philip Giannecchini and Ian Taylor, 'The Eastern Industrial Zone in Ethiopia: Catalyst for Development?', vol 88 (2018).

9 A ter Braak, 'Africa: Blessed or Cursed by Chinese FDI?' (2010) <http://thesis.eur.nl/pub/7549/Braak, A. ter 282747 - id thesis7549 .pdf>.Caroline Nutter, 'Africa Up Close Chinese Engagement in Africa : Trends ,Challenges, and Implications' (2017), available at <https://africaupclose.wilsoncenter.org/author/caroline-nutter/> accessed 9 November 2019. Chris Alden, 'New Actors, New Models, New Outcomes? African Countries' Engagement with China and Other Development Partners in Achieving the SDGs and Agenda 2063' (Oxfam 2017).

10 Sanne van der Lugt, 'Exploring Afrian Host Countries' Agency to Strengthen Local FDI Regulations: The Case of Chinese Investments in the Infrastructure Sector of the DRC' (2016) 49 Cornell International Law Journal 179.

11 Joshua Cooper Ramo, *The Beijing Consensus* (Foreign Policy Centre London 2004).

12 Wenwei Guan, 'Beijing Consensus and Development Legitimacy: The Evolution Of China's Foreign Direct Investment (FDI) Regime from a Law & Development Perspective' (2018) 12 Asian Journal of Comparative Law 115 <https://www.cambridge.org/core/terms.https://doi.org/10.1017/asjcl.2017.3 Downloadedfromhttps://www.cambridge.org/core.UCTUniversity> accessed 21 November 2018.

13 The Chinese name in Mandarin is Zhong Guo, which means the Middle Kingdom or middle country. The term was used during the Zhou Dynasty in the 6th century BC.

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raw materials from Africa in exchange for cheap goods imported from China.[14] Officials in Beijing have defended against this accusation and proclaimed that, unlike the West, China's engagement with Africa has been through soft power, not coercion.[15] Even though China asserts that it has only used soft power in its foreign relations, Zhang Wenxian and Joseph Nye identified three types of power in China's international engagements: soft, hard, and smart power.[16] More recently, the National Endowment for Democracy re-introduced sharp power in China's foreign strategy engagements. Joshua Kurlantzick points out that while, this is still a new apparatus for China's strategy, it is increasingly becoming sophisticated.

Nye defines soft power as cultural influence, which China has advocated as the most effective way to improve diplomatic ties and reflects its non-interference stance.[17] Hard power is coercion through economic and military strength, leading China to be called a neo-coloniser.[18] Smart power is China's influence on international rules and structures. Sharp power can be defined as an attempt by one nation to alter the behaviour of other countries through the manipulation of culture, education systems and the media to advance domestic interests.[19] Although African countries are the first frontier of China's smart power, but this new form of power has been underappreciated in the Africa–China relationship. The present research focuses on China's smart power concept.[20] As a result of smart power and diplomatic ties, African nations may adopt Chinese business and legal norms over time. Understanding China's OFDI policy system is crucial as African states modify investment promotion strategies to attract Chinese FDI. It is imperative that decision-makers and businesspeople in Africa understand China's long-term geoeconomic goals and political objectives in Africa to attract Chinese capital. Therefore, African nations must research and evaluate Chinese business practices, rules, and legal frameworks in the same way that China evaluates African laws and the investment climate.

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[14] Fane Madouka Roquia Koumou and Manyi Wang, 'Effects of Chinese Foreign Direct Investment in Africa' (2016) 4 Journal of Finance and Accounting 131 <http://www.sciencepublishinggroup.com/journal/paperinfo?journalid=171&doi=10.11648/j.jfa.20160403.15>.

[15] See K Ampiah and S Naidu, 'Crouching Tiger, Hidden Dragon?: Africa and China.University of Kwazulu Natal, 2008.

[16] Joseph S Nye Jr, 'Hard, Soft, and Smart Power', *The Oxford handbook of modern diplomacy* (2013).

[17] Joseph S Nye, *Soft Power: The Means to Success in World Politics* (2012).

[18] Nye Jr (n 16).

[19] Juan Pablo Cardenal, Cardenal and others, 'Sharp Power: Rising Authoritarian Influence. National Endowment for Democracy.', *International Forum for Democratic Studies* (National Endowment for Democracy 2017).

[20] Zhimin Chen and Lulu Chang, 'The Power Strategy of Chinese Foreign Policy. Bringing Theoretical and Comparative Studies Together' (2013) <www.asianperceptions.eu>.

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The research thus seeks to answer three questions to facilitate the evaluation of Chinese legal systems on African laws through a process of legal transplant facilitated by Chinese companies in foreign direct investment.

1. To what extent does China’s OFDI affect Africa's development agenda and power asymmetry through legal transplant and harmonisation of legal frameworks?
2. How does China strategically utilise FDI initiatives to secure Africa's support for its global strategy and aspirations to shape international law?
3. How should African policy and lawmakers respond to China’s legal harmonisation in FDI regulation to ensure independent and sustainable economic and legal reforms?

China's increasing OFDI in Africa presents a unique south-south legal transplant opportunity, which can significantly influence Africa's legislative initiatives, ideologies, and norms, consequently influencing the continent's economic development agenda and law-making environment. That said, without a comprehensive approach, China's legal transplant experience and FDI governance model ideology may exacerbate existing power asymmetry, potentially compromising sustainable development in Africa. African policymakers and lawmakers face the task of developing a comprehensive approach to regulate Chinese investments in the continent and engage in legal transplant from China. By critically analysing the benefits and drawbacks of China's and Africa's experiences with FDI regulation and legal transplant, Africa can craft strategic responses to safeguard its interests and bolster its position in the era of Africa-China legal cooperation. This study examines the effects of China's OFDI on Africa's development agenda, power dynamics, and legal frameworks. It also investigates how China strategically uses FDI as a soft power tool to gain Africa's support for its global strategy and influences international law. Furthermore, the study provides recommendations for African policymakers and lawmakers on how to respond to China's legal harmonisation in FDI regulation, aiming to promote independent and sustainable economic and legal reforms in Africa.

1.2 Background

Multiple eras can be used to trace and analyse China’s growing relationship with Africa. The first epoch occurred during the Tang dynasty and Sung (618–1279AD), while the second occurred

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during the Ming dynasty (1368–1644).[21] Archaeological evidence exists of Admiral Zheng He's six voyages to East Africa between 1416 and 1440.[22] The African travels of Zheng He have taken on symbolic significance in defining Chinese motives. The Chinese officials frequently emphasise that Zheng He voyages were motivated by commerce and diplomacy, as opposed to the colonial goals of Western voyagers in Africa.[23] Table 1 provides a valuable overview of the significant events and defining features of each phase of China-Africa relations. The table shows the economic ties and defining features of Africa-China relations under the leadership from the Imperial Era until the communist party. Each stage of the trade from Phase 1 to Phase 6 has distinct features that define the economic and diplomatic relations of the trade. Initially, the relationship was characterised by pure trade under the imperial leadership. Each example under defining events contextualises each period and highlights its significance. For example, under the People's Republic of China (PRC), the relationship was institutionalised to include politics and international relations, starting with the Bandung Conference until the most recent formation of the Belt and Road Initiatives.[24]

[21] Serge Michel, Michel Beuret and Paolo Woods, *China Safari: On the Trail of Beijing's Expansion in Africa* (Oxford University Press UK 2009).

[22] Give evidence of this longstanding relationship. Ying Liu, Zhongping Chen and Gregory Blue, *Zheng He's Maritime Voyages (1405-1433) and China's Relations with the Indian Ocean World: A Multilingual Bibliography* (Brill 2014) <https://books.google.com/books?hl=en&lr=&id=IhCJBAAAQBAJ&oi=fnd&pg=PR9&dq=Admiral+Zheng+He's+six+voyages+in+East+Africa&ots=RIZCp7ifq_&sig=IE1KiSBZau1UeZXJZKc3OPihCPI> accessed 9 November 2019. accessed 22 May 2019. Philani Mthembu and others, 'Towards an African Policy on China Cultural Approach to Africa's engagement with China Self-Reliance or Dependency? The Role of China's Development Finance in Enhancing African Agency Continental Summitry and Shuffling Diplomacy: The Case of African Agency in FOCAC and IAFS, The Role of Civil Society in Environmental Protection in the Africa-China Relationship, Reducing Barriers to Enhanced Chinese Trade and Investment with Africa Towards an African Policy on China' available at <*http://www.gov.za/sites/www.gov.za/files/foreignpo*>, accessed 22 May 2019.

[23] Adams Bodomo, 'Africa-China Relations : Strengthening Symmetry with Soft Power' [2009] China Review 1; Bob Wekesa, 'China's Silk Road Economic Belt: African Perspectives and Implications' (2015) 1.

[24] China celebrated its 10 year anniversary of the Belt and Road Initiative (BRI). Some scholars believe that China has diluted the initiative's importance and role in its foreign relations policy. This view is based on the reduced mention of the initiative by Chinese officials and the emergence of the Global Development Initiative (GDI). Nevertheless, scholars need to closely look at the GDI to realise it is not a replacement but an addition to the BRI. The Chinese name yi dai yi lu has maintained its position. The change from using the term initiative to cooperation is for the benefit of the foreign audience. The 10 principles of Belt and Road published by Xi Jinping are still in place. These are 1) Policy coordination 2) Infrastructure connectivity 3) Unimpeded trade 4) Financial integration 5) People-to-people bonds 6) Maritime cooperation7) Enhancing synergy of development strategies 8) Promoting green and sustainable development 9) Pursuing high-standard people-centred development 10) Promoting peace, cooperation, openness, and inclusiveness. Andreea Brînză, 'What Happened to the Belt and Road Initiative?' (2022), available at <https://thediplomat.com/2022/09/what-happened-to-the-belt-and-road-initiative/>.

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Table 1 Phases of China–Africa Relations

Phases	Period	Leadership	Defining Events	Distinct Features
1	618–906	Tang Dynasty	Trade relations and artefacts Archaeological discoveries of Chinese ceramic in East Africa	○ Maritime routes established The Maritime Silk Road ○ Friendly Cooperative Partnership ○ Focus on Trade or Ivory, gold and exotic animals ○ Culture exchange ○ Isolated Diplomatic visits ○ Beginning of Resource exploitation and wildlife environmental damage
	960–1279	Sung dynasty		
	1300	Yuan Dynasty	Diplomatic Visit from Africa to China Sái'd of Mogadishu (1st African Diplomat in China) Ibn Battuta	
2	1368–1644	Ming dynasty	Zheng He diplomatic and trade voyages from 1416 to1423 The Archaeological findings of Ming coins in East Africa Rare animal gifts (e.g. Giraffe)	
	1644–1911	Qing dynasty	Diplomatic hiatus Pre-revolutionary era	
3	1911–1956	Guomindang/ Kuomintang (KMT) Sun Yat-Sen	Less active diplomatic relations Establishment of the Republic of China (ROC)	
4	1949	Communist Party Mao Zedong	Establishment of the People's Republic of China (PRC) Zhou Enlai's visits to Africa in 1963; introduced the five principles of mutual coexistence Revolutionary movements Bandung Conference 1955 New diplomatic relations First African state head visit by Sekou Touré of Guinea Africa supports China's admission to the United Nations	○ Cooperative Partnership ○ Trade increases ○ Increased Diplomatic relations ○ Support of African liberation movements ○ Anti-colonial
5	1979	Opening up: Deng Xiaoping	Focus on domestic reforms and less on international diplomacy until the Tiananmen Square event	○ Comprehensive Strategic Partnership ○ Trade ○ Diplomacy ○ Isolated Investment
6	2000	Jiang Zemin Hu Jin Tao Deng Xiao Ping Xi Jing Ping	Establishment of FOCAC 2000 Global economic downturn Debt trap concept Covid-19 global pandemic Belt and Road Initiative (BRI)	

Source: Author's own construction

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China's relationship with Africa has evolved from friendly cooperation, which prioritises strengthening cooperation on bilateral issues such as trade, to comprehensive strategic partnership. China elevated African countries to the highest level of partnership in 2015. Under this high-level partnership, cooperation is all-dimensional, covering all aspects of economic, political, technological, and cultural spheres.

Although the current relationship is captured in the FOCAC documents, the historical relationship with Africa is deducted from the archaeological finding of Chinese artefacts and coins in East Africa. Until the 1955 Bandung Conference, Sino-African relations were severed for various domestic political and diplomatic reasons following the Ming dynasty in phase three.[25] The conference marked the second phase of Sino-African relations, during which six African nations were represented. At the meeting, Africa and China re-established diplomatic ties based on non-interference in political affairs. Also quickly following this phase were disruptions and diplomatic expulsions. The first institutional establishment of FOCAC marked the beginning of the current era of Africa–China relations in the year 2000. Bräutigam, a leading Africa–China international relations expert, asserts that this phase of the Africa–China relationship altered the global economy, geopolitical competition, and Chinese foreign policy.[26]

With China's new 'one belt one road' initiative (BRI), relations between Africa and China may enter a new phase beyond FOCAC. Based on its economic success, Africa looks to China for standards of development in the economic regulatory sphere. China is the archetypal model for poverty alleviation among developing nations. Since China's 1979 opening-up policy, 700 million Chinese have risen above the poverty line.[27] The policy sought to eradicate poverty; this target was achieved by 2020. Consequently, African nations view China's success as a model and wish to imitate, adapt, and import China's economic development model to alleviate poverty. Africa and China share a history of colonialism and illegal occupation, which serves as the ideological foundation for their relationship. Owing to their shared political history and recent economic

[25] Zhao, S (Ed) (2017). China in Africa: Strategic motives and economic interests. Routledge.
[26] Deborah Bräutigam, 'Close Encounters: Chinese Business Networks as Industrial Catalysts in Sub-Saharan Africa' (2003) 102 *African Affairs* 447.
[27] China Daily, 'Stability, Reforms, People: Focus of China in 2017' *chinadaily.com.cn* (24 December 2017) <http://www.chinadaily.com.cn/business/2016-12/24/content_27763449.htm>; Carike Claassen, 'Chinese Foreign Direct Investment in Africa' (2011). 'China's Economic Rise : History, Trends, Challenges, and Implications for the United States (2019) available at:<https://crsreports.congress.gov>.

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cooperation, China is Africa's preferred trade and investment partner, surpassing the West as a trade partner. This is reflected in trade and investment flow statistics, as discussed in Chapter 2. In return, the continent provides China with international legitimacy, which the Chinese acknowledge in their speeches. China has historically relied on Africa in international politics and views Africa as a critical economic growth and global influence partner. Sidiropoulos points out that Africa represents up to 53 potential votes on multilateral platforms, a fact that China acknowledges.[28] China, on the other hand, represents one vote for African nations, which is sometimes unrequited.

Despite a global economic slowdown, China has maintained a steady flow of FDI since the establishment of FOCAC. At the 2015 and 2018 FOCAC summits held in South Africa and China, President Xi pledged US$60 billion in financial aid for the continent. The European Union only pledged to invest US$54 billion in Africa by 2020 at the European Union–Africa summit in 2017.[29] As China implements the BRI, its investments, loans, and trade with the West will increase and subsequently advance China's global influence.

A legal forum established between China and Africa under FOCAC programmes promotes legal diplomacy and cooperation.[30] To facilitate trade and investment and lower legal risks, China has studied Africa's regulatory environment and FDI regulations. Furthermore, China encouraged legal collaboration with Africa and supported governments with weaker legal systems. While China leads and offers legal backing, African nations must carefully understand and analyse Chinese investments to strengthen their agency in this new collaboration. Africa ought to investigate the laws and organizations in charge of Chinese FDI since state policies are what drive FDI. To promote development, African governments must consider the risks and opportunities presented by the Chinese economic model and the new influence on global regulatory standards. This research interrogates the Chinese investment model in Africa and negotiating tools necessary

[28] Sidiropoulos E 2010. 2000–2020: Macro perspectives (in Gordon Institute of Business Science, The business of Africa 2010: Looking back to 2000, forward to 2020; Conference held in Illovo on 19 October 2010) cited by Claassen (n 27).

[29] Witney Schneidman and Joel Wiegert, 'Competing in Africa: China, the European Union, and the United States' (*Brookings Institute blog*, 2018) 16 available at <https://www.brookings.edu/blog/africa-in-focus/2018/04/16/>.

[30] The first 'Forum on China Africa Cooperation – Legal Forum' was jointly initiated by the Cairo Regional Center for International Commercial Arbitration and the China Law Society, was held in Cairo, Egypt, on 20-21 December 2009. The purpose of actively and promptly implementing the 'Forum on China Africa Cooperation Sharm El Sheikh Action Plan (2010–2012)' (section 2.4.3). available at: http://www.focac.org/eng/dsjbzjhy/hxxd/t648400.htm.

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to engage Chinese officials. This process can build on FOCAC's rhetoric regarding partnerships and seek a framework to develop friendly investment regulation.[31] China's regulation of FDI policy changed from attracting FDI to becoming a net exporter of FDI. Strengthening an understanding of the new China as a capital exporter requires analysis and comparing Chinese regulatory reforms for inbound FDI versus outbound FDI.

Despite the history of growing economic, cultural and diplomatic relations, there have been concerns and scholarly debates about the quality, environmental impact, and debt sustainability of some Chinese-funded projects.

1.3 Preliminary literature review

Beginning with the establishment of FOCAC and continuing up to the most recent forum (2000 to 2018), the study's literature review evaluates significant contributions to the academic literature on the factors that influence China's FDI in Africa. In this section, an analysis of the most critical developments and policies regarding China's FDI in Africa is undertaken. Additionally, conclusions are drawn regarding the significance of the studies by contrasting the dominant positions and highlighting the significance of these positions. Possible effects of China's activities on the African continent, particularly in terms of the continent's geopolitical and legal development.[32] Non-African authors have the propensity to assess how China will have an impact on Western international law interests or to criticise China for practices that have been standard for Western capital operating in Africa.[33] This tendency results from the fact that non-African authors are more likely to be familiar with Western international law interests. On the other hand, academic community members have spent considerable time contrasting the Beijing consensus with the Washington consensus. It is necessary to re-examine the Beijing consensus in the context

[31] Sanne van der Lugt, 'Exploring African Host Countries' Agency to Strengthen Local FDI Regulations: The Case of Chinese Investments in the Infrastructure Sector of the DRC' (2016) 49 Cornell International Law Journal 179.
[32] Daniel Large, 'As the Beginning Ends: China's Return to Africa' (*Pambazuka.org*, 2007) 153 <https://www.pambazuka.org/global-south/beginning-ends-china's-return-africa>. Giles Mohan, 'China in Africa: A Review Essay' (2008) 35 *Review of African Political Economy* 155 , available at <http://www.tandfonline.com/doi/full/10.1080/03056240802011832>.
[33] Preface, Firoze Madatally Manji and Stephen Marks, *Manji, Firoze Madatally, Firoze Manji* (2007).

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of the regional integration vision and its function in contributing to developing international law by emerging economies.[34]

In an interview with the Financial Times, Jeffery Sachs, director of the Earth Institute at Columbia University, referred to China's interest in Africa as 'the single most significant development for Africa in this generation'.[35] On the other hand, those who oppose China, also known as 'dragon-slayers', have voiced their concerns about China's presence on the African continent. Available literature and ongoing investigations both suggest that Africans are comfortable with and, in fact, endorse China's activities on their continent.[36] Those who support China, also known as 'panda-huggers' in Africa, argue that a relationship between the unequal parties will almost certainly result in a situation in which both parties benefit.[37] A survey conducted by Afrobarometer in 2016 found that most respondents (63 per cent) viewed China's influence as being positive in some way.[38]

When determining where to place their FDI, Western nations prioritise a model known as 'democracy first' and consider the country's current state of the macroeconomy and political climate.[39] By contrast, China takes the stance of non-interference in the domestic policies of the nation that hosts its investments. Generally, it evaluates projects' viability without considering the macroeconomy's impact. The amount of debt that Chinese investments bring, which could result in long-term overdependence on one country, is one of the more serious concerns of those who are critical of China. Reliance on this scale will give China an uncomfortably prominent level of leverage and influence in Africa. It may also result in a prolonged financial and non-financial debt burden for the continent.

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[34] Large (n 32). Mohan (n 32).
[35] David Pilling, 'Chinese Investment in Africa: Beijing's Testing Ground' (2017) 13 Financial Times.
[36] Deborah Bräutigam, *The Dragon's Gift: The Real Story of China In Africa* (Oxford University Press UK 2009).
[37] Jack Bermingham and Edwin Clausen, *Sino-African Relations 1949-1976* (California Institute of Technology 1981).
[38] Lerokwe Mogopodi and others, 'China's Growing Presence in Africa Wins Largely Positive Popular Reviews' [2016] Afrobarometer 20475 <http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno122_perceptions_of_china_in_africa1.pdf>.
[39] Yabin Wu and Xiao Bai, 'Plunder or Mutual Gain? On the Ever-Growing Scale of China's Investment in Infrastructure in Africa.' (2017) 6 Bridges, Africa 1.

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1.3.1 Africa China legal cooperation

China presented ten international relations tenets at the Bandung Conference of 1955. These tenets served as the foundation for legal cooperation between Africa and China.[40] Following the conference, the cultural revolution temporarily hindered legal transactions. The FOCAC Sharm El-Sheik action plan of 2009 reinstituted legal cooperation between China and Africa. This fourth FOCAC action plan included the implementation of African and Chinese legal cooperation.[41] Since then, legal safeguards and guarantees have been emphasised in China–Africa relations.[42] In an interview with Business Africa online magazine, Attorney Mbambi, from the Supreme Court of Zambia, pointed out that commercial disputes are unavoidable based on the observation of cases she comes across. To arbitrate fairly and enforce disputes effectively, she recommends an improved understanding and close awareness of one another's legal customs.[43]

At the first FOCAC Legal forum in Cairo in December 2009,[44] key topics included mechanisms for strengthening legal exchanges and promoting African Chinese cooperation in multiple fields. These subjects affect the role of law in cooperation, legal system introduction, and dispute mechanisms in international trade and investment. Delegates agreed that these three areas balance Africa–China trade and investment. The legal cooperation develops mechanisms for Africa and China to pragmatically resolve trade and investment legal issues, reflecting their unique dispute resolution styles. Trade and investment are defining features of the Africa–China relationship. In contrast, before 2009, legal cooperation was inadequately identified, scrutinised, and understood. Chinese leaders and academics recommended that academic research precede

[40] Hong Yonghong, 'Legal Cooperation of China and African States: Past, Present and Future' [2004] journal of African National Affairs, available at <http://www.cctr.ust.hk/materials/conference/china-africa/papers/Hong,Yonghong.pdf> accessed 24 April 2019. Prof Hong Yonghong is the African Law Research Institute Director at Xiangtan University. He writes extensively about trade investment and legal cooperation between China and Africa. He is also the editor of a national academic publication West Asia-Africa, a member of the African legal System Branch of China, a member of Asia-Africa Society. His main research direction is African law.

[41] The action plans for each FOCAC session included legal collaboration. The first legal collaboration was detailed in the FOCAC I Action Plan. Given the importance of law in international relations, the extent of legal cooperation was somewhat limited. The action plan for the legal forum was refined at the fourth forum, which was held in Egypt. Forum on China–Africa Cooperation Sharm El Sheikh Action Plan (2010–2012) (section 2.4.3).

[42] Hong Yonghong and others, '50 Years of China-Africa Legal Exchange: History and Prospects' [2010] West Asia and Africa 11.

[43] Ruth Lumbongo Mbambi, a senior research advocate at the Supreme Court of Zambia interviewed by African Business Magazine available at https://africanbusinessmagazine.com/african-banker/china-targets-african-support-in-Western-institutions/#sthash.RIbNM1aP.dpuf.

[44] The establishment of the FOCAC Legal Forum was included in the fourth Sharm El FOCAC Action plan 2.4.3. The legal forum as was held in December, a month after the ministerial forum.

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legal cooperation to close the knowledge gap.[45] The Chinese government has subsequently established several think tanks and has taken additional measures to introduce African law to Chinese academics. For instance, volumes of African investment and customary laws are being researched and translated into Mandarin. But African governments have not yet introduced studies of the effects of Chinese laws on Chinese business practices in Africa or on sustainable investments.[46]

Scholars can introduce Chinese and African laws to each other and the broader community through research.[47] The Central Committee of the Communist Party of China (CPC) established an African legal system research office and an African law research institute to promote exchanges. The China Law Society created China–Africa legal professionals to introduce Chinese law to Africa.[48] Xiangtan University (XTU) founded the first African Studies institution in 1979.[49] The Institute of African Law became the Centre for African Laws and Society in 2005. Although they intend to help other scholars to understand Chinese law, these programmes are presented from a Chinese propaganda perspective. African societies and their development agendas need to invest and prioritize African-led capacity building for sustainable progress.[50]

Western (European and American) laws dominate African and Chinese law, but Indigenous cultural practices still influence them.[51] McConaughey cited Professor Kidane's observation of China and Africa's legal dualism. China's legal dualism arose from Western occupation and

[45] FOCAC newsletter (2009) 'Strengthening China-Africa Legal Exchanges and Promoting All-round Development of China-Africa Relations', available at http://www.fmprc.gov.cn/zflt/eng/xnyfgk/t648400.htm. Gu Zhaomin's Closing Speech at the third FOCAC legal forum (2009) available at http://www.fmprc.gov.cn/zflt/eng/ltda/dwjbzjjhys/hxxd/t1006745.htm.

[46] The University of Cape Town offers a course in Chinese Law and Investments in Africa. Other universities in the continent offer the study of Chinese business or policy as part of international relations or business school teaching. In 2019 the University of Dar es Salaam signed a memorandum of understanding (MOU) with China's Beijing University of China to cooperate on legal matters and launched the Centre for legal studies under the China Sponsored Confucius institute, available at https://www.ippmedia.com/en/news/udsm-and-beijing-university-sign-mou-legal-matters, The centre is still not in operation.

[47] Hong Yonghong, 'Legal Cooperation of China and African States: Past, Present and Future' [2004] journal of African National Affairs 1 <http://www.cctr.ust.hk/materials/conference/china-africa/papers/Hong,Yonghong.pdf>.

[48] Sarkar Sudeshna, 'China Targets African Support in Western Institutions' [2015] *African Business Magazine* <http://africanbusinessmagazine.com/african-banker/china-targets-african-support-in--institutions/#sthash.RIbNM1aP.dpuf>.

[49] Li Anshan, 'African Studies in China in the Twentieth Century: A Historiographical Survey' (2005) 48 African Studies Review 59 <https://www.cambridge.org/core/product/identifier/S0002020600026494/type/journal_article>.

[50] Yonghong (n 44).

[51] Won Kidane, 'China-Africa Dispute Settlement : The Law, Economics and Culture of Arbitration' xiv.

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China's own legal culture,[52] while Africa's originated from colonial and customary law. China's legal reforms preserved Chinese-derived system features. African policymakers view these legal reforms as a strategy to develop future legal systems more aligned with Africa's development needs, reversing law-making hegemony.[53] Zhaomin, the China Law Society's Director-General of Overseas Liaison, states that some developing-world laws are unfair to developing nations.[54] Developed countries direct and shape international law.[55] Zhaomin emphasises that laws need to be reformed to reflect the reality and needs of developing countries[56] and that laws must be revised to reflect developing nations' needs. African countries can adopt China's aspects of model to strengthen developing nations' voices and contributions to international law.

As China continues to move production to Africa, cooperation between the two will likely increase and affect fields such as labour law and technology regulation. China aims to become a global nation brand by 2025, a nation brand that is not synonymous with cheap goods and factories but with the Chinese industry's development. China's industry chain continues to move up, creating new opportunities for African labour-intensive sectors. The escalating costs of Chinese labor due to ongoing modernization initiatives stand in contrast to the comparatively lower expenses associated with African labor, attributed to a youthful and less skilled workforce. In a comparative analysis, Johnston draws parallels between the present circumstances of African nations and those of China two to three decades ago, particularly in relation to the prevalence of low-wage employment.[57] Furthermore, Johnson asserts that Chinese enterprises are contemplating the emulation of their established business models in economically more affordable nations poised to emerge as the world's forthcoming economic powerhouses.[58] More Chinese businesses will

[52] In this paper, the term 'legal culture' alludes to the complex interplay of legal principles, institutions, and societal attitudes that contribute to the functioning of the legal system within a given society.
[53] Sudeshna (n 48).
[54]'Legal Forum Seeks to Boost China-Africa Cooperation' *Xinhua* (2018) <https://www.chinadaily.com.cn/world/XiattendsParisclimateconference/2015-11/27/content_22522952.htm>. Samuli Seppänen, 'Chinese Legal Development Assistance : Which Rule of Law ? Whose Pragmatism ?' (2018) 51 Vanderbilt Journal of Transnational Law 101.
[55] 'Legal Forum Seeks to Boost China-Africa Cooperation' (n 54).
[56] ibid.
[57]Melanie Hart and Blaine Johnson, 'Mapping China's Global Governance Ambitions. Democracies Still Have Leverage to Shape Beijing's Reform Agenda' (2019) <https://www.americanprogress.org/issues/security/reports/2019/02/28/466768/mapping-chinas-global-governance-ambitions/>.
[58] An extract from The University of Melbourne Up Close podcast interview with Dr Lauren Johnston and an economist hosted by Peter Clarke. 2 June 2017. Available at https://pursuit.unimelb.edu.au/podcasts/china-in-africa-who-benefits.

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establish manufacturing facilities in Africa. The second issue is whether these Chinese companies will influence manufacturing in Africa by importing legal standards in Africa.

Economic reports observe that China's trade with Africa is growing at an alarming rate. The General Administration of Customs in China reports that China and Africa trade in 2017 amounted to US$169.75 billion.[59] China's FDI in Africa started at a relatively low base compared to trade. China's FDI during this period accounted for only five per cent of total FDI in the continent. China's FDI rose from 2 per cent of United States levels to 55 per cent between 2000 and 2014.[60] China's African investment grew faster than the developed nations. Still, overall, it did not exceed FDI from developing nations into the continent. Notably, despite being lower than developed nations' FDI in Africa, in the wake of the global economic downturn, China maintained its commitment while Western investments declined. China's FDI in Africa grew by 20.5 per cent annually between 2009 and 2012, while United States FDI fell by US$8 billion.[61] In addition, at each FOCAC meeting, China doubled its government-backed FDI commitment. China's FDI in Africa has grown by 40 per cent annually, excluding informal flows estimated at 15 per cent.[62] Given its current growth rate and new policy initiative, the BRI, China will likely become Africa's top source of FDI in the next decade.[63]

The West criticises China for investing in countries with abundant raw materials and a weak legal system. The international media narrative holds that China only wants Africa's resources. Drawing on the research findings, one could reasonably conclude that, China's investments in Africa are paying off.[64] Statistical reports from the 2017 United Nations Conference on Trade and Development (UNCTAD) world investment and Ministry of Commerce (MOFCOM) show that China has diversified its interests with investments in manufacturing, agriculture, transportation,

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[59] Angang Hu, 'Creating and Grasping Strategic Opportunities for China', *Report of Strategic Studies in China (2019)* (Springer 2021).
[60] Wenjie Chen, David Dollar and Heiwai Tang, 'How Similar Is Chinese Investment in Africa to the West's?' (*Brookings*, 2015) 6, available at <https://www.brookings.edu/blog/order-from-chaos/2015/08/18/how-similar-is-chinese-investment-in-africa-to-the-/>.
[61] SAIS-CARI POLICY BRIEF | NO. 18 | APRIL 2017.
[62] International Trade Centre (ITC) Trade Map, United Nations Conference on Trade and Development (UNCTAD). The 2015 Statistical Bulletin of China's outward foreign direct investment, MOFCOM, National Bureau of Statistics (NBS) of the People's Republic of China, and the State Administration of Foreign Exchange (SAFE).
[63] K, Kassiri, O, and Sun, I Y (2017) Dance of the Lion and the Dragons. Mckinsey & Company Quarterly June 2017, available at https://www.mckinsey.com/featured-insights/middle-East-and-africa/the-closest-look-yet-at-chinese-economic-engagement-in-africa.
[64] Bräutigam (n 26); Chen, Dollar and Tang (n 60).

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finance and more. For example, in 2018, the top ten Chinese mega-infrastructure projects in Africa were primarily railways and special economic zones (SEZ) in East Africa.[65] China's FDI in three African countries that are not resource-rich, namely Kenya, Ethiopia, and Tanzania, has largely focused on infrastructure, contradicting the view that Chinese FDI in the continent is resource driven.[66] China's infrastructure investments in these countries have had a wide-reaching effect on regional connectivity. To achieve the continental objectives of regional integration and sustainable development, Africa needs massive infrastructure investment. A 2017 World Bank report estimated that closing Africa's infrastructure gap would boost Gross Domestic Product (GDP) per capita growth by 2.6 per cent.[67] The African Development Bank (AFDB) estimates that Africa needs US$130 billion annually to close the infrastructure development gap. Drawing on the Oxford Economic Report, one could estimate that based on 2016 trends Africa will only attract US$174 billion per year in infrastructure investment, rather than the required US$240 billion per year.[68]

Chinese leaders are committed to helping Africa's infrastructure. As Africa's largest bilateral infrastructure financier, China invested US$86 billion in 3000 infrastructure projects in Africa between 2000 and 2014, contributing 10 per cent of annual infrastructure development. Europe and the United States have focused on energy and power, while China has invested in infrastructure. Chinese investment infrastructure projects have been spread between railways, highways, ports, telecommunication and oil and gas fields. In contrast, the pandemic introduced digital technology as a critical sector in economic connectivity and productivity. China has contributed significant assistance and financing to African countries with digital and cyber development infrastructures.

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[65] Top 10: Africa Infrastructure Projects, available at https://www.thebusinessyear.com/top-10-china-infrastructure-projects-in-africa-2018/focus.

[66] In Ethopia, China has invested in agro-processing, infrastructure and manufacturing. In Kenay, China has invested in mega infrastructure such as the Lamu Ports. In Tanzania, China has planned to invest in Bagamoro port. Frangton Chiyemura, Elisa Gambino and Tim Zajontz, 'Infrastructure and the Politics of African State Agency: Shaping the Belt and Road Initiative in East Africa' [2022] Chinese Political Science Review <https://doi.org/10.1007/s41111-022-00214-8>.

[67] The World Bank, 'Why We Need to Close the Infrastructure Gap in Sub-Saharan Africa' (2017) <https://www.worldbank.org/en/region/afr/publication/why-we-need-to-close-the-infrastructure-gap-in-sub-saharan-africa>.

[68] Trends based on 2015 prices and exchange rate as provided by Oxford Economics as See also Oxford Economics (2017, 56) Global Infrastructure Outlook, Infrastructure Investment needs, 50 countries.

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In addition to market-seeking and resource-seeking as a motivation for Chinese investments, some critics point to a preference for lawlessness. China is criticised for investing in countries with weak political systems and poor governance, especially regarding property rights and the rule of law. In fact, the opposite is more accurate. For instance, Corkin's study shows political elites, poor investment, climate, and oil corruption prevented China from investing in Angola.[69] While studies point out that Chinese companies prefer lawlessness, Chen et al. point out that Chinese companies tend to disregard some local laws and property rights in the host country.[70] However, Chinese investors prefer host countries with stable political environments. Chinese investment's positive correlation to political stability is linked by research. China prefers politically stable environments, while Western investments prioritise law and property rights.[71]

1.4 Research questions

Given the background information presented, the primary concerns of this study regarding Africa China FDI flows relate to an apparent policy of having no conditions, a power imbalance, relationship challenges regarding sustainable investment, and a governing legal framework and policy influence that determine FDI flows. The following are the three primary research questions that have arisen as a consequence of these concerns:

1. To what extent does China's OFDI affect Africa's development agenda and power asymmetry through legal transplant and harmonisation of legal frameworks?
2. How does China strategically utilise FDI initiatives to secure Africa's support for its global strategy and aspirations to shape international law?
3. How should African policy and lawmakers respond to China's legal harmonisation in FDI regulation to ensure independent and sustainable economic and legal reforms?

The research delves into the non-economic factors driving China's growing interest in Africa as a new area of influence, characterized by a rapid expansion of China's outbound FDI. It

[69] Lucy Corkin, *Uncovering African Agency: Angola's Management of China's Credit Lines* (Routledge 2016).
[70] Chen, Dollar and Tang (n 60).
[71] Wu and Bai (n 39).

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specifically examines the policies, laws, and regulations that shape China's OFDI in diverse African countries, aiming to answer these pressing questions.

1.5 Theoretical framework

Several hypotheses have been advanced to explain China's expanding presence in Africa. In a new and developing relationship, China's presence in Africa offers a fresh opportunity to test Watson's ground-breaking 'legal transplant' concept.[72] Watson argues that historically, laws have been transplanted from one country to another without any inherent relationship between the transplanted laws and the society. The key question is, once the laws have been transplanted, will legal professionals adapt them to local conditions?[73] Legal transplant remains a focus of discussions in comparative law as the study of law extends beyond comparison between legal families (e.g. Common law vs Civil Law).[74] Legal transplant in comparative law can be used to gain knowledge about what has been done and what can be done in developing a country's legal system through legal transplant.[75] Watson and other academics cited and investigated legal transplants between various legal systems and nations. Historically, legal transplants have occurred between developed and developing nations, with the latter serving as the host. The legal cooperation between Africa and China is novel and necessitates consideration of the possibility of a legal transplant between two developing nations devoid of colonial ties, comparable legal systems, or prestige. The new relationship between the Chinese government and China's State-Owned Enterprises (SOEs) in Africa necessitates a new perspective on how states can use FDI as a vehicle to export and implement their policies and transplant their legal norms into host countries. Therefore, this study investigates three aspects of Africa–China investment relations, namely knowledge gaps, asymmetric power, and legal cooperation. Many aspects of Chinese FDI motivation and state regulation in African countries have implications for the sustainable development of Africa and its geopolitical influence. This study contends that current responses, knowledge, and projections regarding these consequences are inadequate. It contends that a

[72] Alan Watson, *Legal Transplants: An Approach to Comparative Law*, vol 27 (JSTOR 1975).
[73] Alan Watson, *Society and Legal Change*, vol 6 (Temple University Press ed, 2 ed, 1979), available at <https://www.jstor.org/stable/j.ctt14bszw6>.
[74] George Rodrigo Bandeira Galindo, 'Legal Transplants between Time and Space' [2014] Entanglements in Legal History: Conceptual Approaches 3. See also Irma Mosquera Valderrama, 'Legal Transplants and Comparative Law' [2004] International Law Journal 261.
[75] Watson, *Legal Transplants: An Approach to Comparative Law* (n 72).

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comprehensive awareness of China's development strategy and its demands on African resources is required. As outlined in its various policies, a better apprehension of China's agenda could lead to a more balanced exchange and a more nuanced understanding.

Building a comprehensive knowledge base on the motivations of foreign investors is crucial to assisting host countries in balancing domestic and foreign interests while formulating regulations that can attract and manage FDI.[76] The study's first goal is to find knowledge gaps regarding Chinese FDI policies and how they influence OFDI in Africa. From this foundation, the research identifies leverage points for Africa when negotiating engagement terms with China. Chinese authors have argued that African nations should be responsible for their FDI regulation rather than relying on sponsor nations.[77] There are currently no institutional structures or research upon which policymakers and scholars on the continent can build a Chinese legal knowledge base.

Consequently, this paper will contribute research knowledge on international legal cooperation, guidelines, and investment policy rules to enhance and protect shared African interests. For a balanced perspective on Chinese FDI in Africa, the African stakeholders must have a firm grasp and orientation of Chinese investments. Africa should investigate the policies and government agencies governing the financing of various projects. However, China's rise is relatively recent, which means there is limited research on its growing influence in developing nations, and there is room for expansion of knowledge in several key areas. Few African scholars have studied Chinese law outside the context of Africa–China relations.[78]

1.6 Relevance of the study

Several arguments defend the study's significance. Problematising China's emergence in Africa reflects Western concerns more than the actual challenges between China and Africa. As a result,

[76] Lugt (n 10).
[77] Koumou and Wang (n 14).Linda Calabrese, Stephen Gelb and Jun How, 'What Drives Chinese Outward Manufacturing Investment? A Review of Enabling Factors in Africa and Asia'.
78 See: Jacobs, F (2015) 'Concept and Evolvement of Chinese Contract law' Masters Dissertation, University of Cape Town (2015), https://open.uct.ac.za/bitstream/handle/11427/19740/thesis_law_2015_jacobs _faizel.pdf?sequence=1; Irnsperger, E. M. (2014). Enforcement of the law in the People's Republic of China-with focus on international civil litigation and arbitration (Doctoral dissertation, University of Cape Town). Ayangbah, S., & Sun, L. (2017). Comparative study of foreign investment laws: The case of China and Ghana. Cogent Social Sciences, 3(1), 1355631. https://doi.org/10.1080/23311886.2017.1355631.

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non-traditional factors and motivations were ignored or undervalued in earlier research on FDI between China and Africa research focused on challenges from a Western lens. Literature focused on drivers of interest in Africa based on former colonial interests such as resource extraction for domestic infrastructure development. This study focuses on non-traditional factors and motives that are extensive and expand beyond China's requirements to build infrastructure. Zweig and Jianhai point out that a national development strategy drives China's pursuit of energy resources.[79] Additionally, China is driven by geopolitical influence to expand its soft power strategy in the continent.[80] The research examines how China's FDI contributes to a power asymmetry on the continent and influences the law development in new industries.

Throughout history, China's relations with Africa have developed differently and exhibited distinct features characterised by a complex asymmetry. China and African nations began on equal footing when they re-establish diplomatic relations during the Bandung Conference.[81] Shared ideologies were the driving force behind the relationship, but economic strength has changed the power dynamic, resulting in glaring disparities.[82] The West frequently emphasises the power disparity between Africa and China.[83] Based on his interviews and anecdotal research on the continent, Howard French has suggested that China benefits more than Africa from the current cooperation. Senior Chinese government officials frequently describe the relationship with the continent on diplomatic platforms as mutually beneficial. Observers and media outlets such as Aljazeera and The Economists have labelled this empty rhetoric.[84] This study explores the

[79] David Zweig and Bi Jianhai, 'China's Global Hunt for Energy' [2005] Foreign affairs 25. See also Kinfu Adisu, Thomas Sharkey and Sam C Okoroafo, 'The Impact of Chinese Investment in Africa' (2010) 5 International Journal of Business and Management 3 <http://www.ccsenet.org/journal/index.php/ijbm/article/view/7301>.

[80] Chris Van Der Merwe, Here's Why China Is Betting on Africa, available at https://www.news24.com /MyNews24/heres-why-china-is-betting-on-africa-20170810.

[81] Amitav Acharya, 'Who Are the Norm Makers? The Asian-African Conference in Bandung and the Evolution of Norms' (2014) 20 Global Governance 405.

[82] Nico Olivier, 'Between Contradiction and Cooperation: An Analysis of China's Evolving Engagement with Africa' [2014] Insight on Africa. See also Mulonda Munalula and Kaliba Matildah, 'Chinese Foreign Direct Investment in Africa's Natural Resources and the Impacts on Local Communities' (2016) 2 World Journal of Social Sciences and Humanities 102.

[83] Munalula and Matildah (n 82).

[84] Address by Jiang Zemin during his sixth African tour in 1996. In his 2015 FOCAC summit speech, H.E Xi Jinping proposed opening a new era of China–Africa 'Win-Win Cooperation and Common Development'. Thierry Bangui, a development consultant and a native of the Central African Republic, and Feeley Diangitukua, a Congolese economist, believe that the mutual benefit (win-win situation) is a hoax (InfoSud 2010). Beuret and Michel also raised concerns about the lack of creation of employment opportunities by Chinese megaprojects (Beuret and Michel 2008).

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relationship between China and Africa's balance of power and determines whether it is mutually beneficial.[85]

During the reign of Mao Zedong, Sino-African relations were revitalised by a shared ideology.[86] During this period, China opposed American imperialism led by the Soviet Union, and it partnered with developing African nations.[87] They were supported by the dominant political ideology of the time. China supported African countries' liberalisation. In the 1970s, China's opposition to the Soviet Union strained African-Soviet relations, marking the emergence of political asymmetry. Early in the 1990s, the relationship moved beyond the ideological phase. China reduced its aid to developing nations and shifted its focus and strategy to economic cooperation. Multiple African countries supported China on global issues, and a power symmetry existed for several years. The power dynamics shifted as China gained economic power and transitioned from a political command economy to a market-based economy. This has led to a dramatic shift in trade, investment, policy, and ideology.

Since 1975, beginning with Deng Xiaoping's leadership, China has emphasized domestic economic development and its role in international politics. Africa has not adjusted to the new reality of a more complex relationship with China driven by market economy reforms,[88] owing to the emotional weight of its historical ties to China. African states still hold the old revolutionary view of China as a friend who will support them in opposition to traditional Western powers and provide ideologically motivated aid. This view, which has political expediency and economic effectiveness, is rooted in revolutionary ideology.[89] Consequently, African states are unable to develop a suitable strategy and policy response to the power asymmetry. Presently, China has diversified its engagement with African countries beyond resources-seeking to a market-

[85] Mulonda Munalula and Kaliba Matilda, 'Chinese Foreign Direct Investment in Africa ' s Natural Resources and the Impacts on Local Communities' (2016) 2 World Journal of Social Sciences and Humanities 102.
[86] Zhang Qingmin and Qingmin Zhang, 'Complex Asymmetry: A Comparative Perspective on China's Relations with Africa and Latin America', *Tempo do Mundo/IPEA* (2016) <http://repositorio.ipea.gov.br/bitstream/11058/6544/1/TdM_v2_n2_Complex.pdf> accessed 30 April 2019.
[87] ibid.
[88] Ian Taylor, *China's New Role in Africa* (Lynne Rienner Publishers Boulder, CO 2009).
[89] Qingmin Zhang, 'Complex Asymmetry: A Comparative Perspective on China's Relations with Africa and Latin America', *Tempo do Mundo/IPEA* (2016) <http://repositorio.ipea.gov.br/bitstream/11058/6544/1/TdM_v2_n2_Complex.pdf> accessed 30 April 2019.

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orientated approach, placing emphasis on aid, trade, and investments that yield advantages for the Chinese economy.[90]

China adopts a position of non-interference and non-attachment towards Africa's domestic policies regarding investment and aid. This non-interference policy has received much applause from African politicians. In return, China has leveraged its ongoing relationship with Africa to export its economic development model internationally and exert global influence with Chinese characteristics through soft power. Subsequently African nations have pledged political loyalty to China and even permitted circumvention of local laws for fear of losing Chinese investments.[91] Pledges from the African governments with diplomatic ties to China mainly include the 'One China policy'.[92] Other forms of support involve endorsing the internationalisation of the Renminbi (RMB).[93] African countries have also agreed to create alternative legal institutions leading to establishing a parallel arbitration framework in conjunction with setting up the China–Africa Joint Arbitration Centre (CAJAC).[94]

[90] Chiyemura, Gambino and Zajontz (n 66); Fredrik Utesch-Xiong and Uma Sarada Kambhampati, 'Determinants of Chinese Foreign Direct Investment in Africa' (2021) 00 Journal of African Business 1 <https://doi.org/10.1080/15228916.2021.1954446>; Benedict Simon K Kipeja, 'Key Determinants of China's Outward FDI to Africa' (2015) 6 Journal of Economics and Sustainable Development 201.

[91] Clever Mapaure, 'Chinese Investments in Zimbabwe and Namibia: A Comparative Legal Analysis' (2014) 46 <http://www0.sun.ac.za/ccs/wp-content/uploads/2014/10/CCS_PhanW_Clever_2014.pdf>.

[92] The One China policy states that China is one single sovereign state with two governments. The two governments are China (People's Republic of China (PRC) and the Taiwan Republic of China. Under this policy, China considers the Taiwan island nation an integral part of its territory. Currently, only one country in Africa, Eswatini (former Swaziland), has diplomatic ties with Taiwan. The PRC made it a requirement for any government to establish diplomatic relations with China to sever diplomatic relations with Taiwan. China has used its financial support to Africa to coerce African countries to sever ties with Taiwan.

[93] The official currency of China is called the Reniminbi (RMB), the Principal Unit as per ISO 4217 of the RMB is called the Chinese Yuan (CNY). The Offshore RMB is also referred to as CNH Collugually the CNY is also referred to as the Yuan or Kuai. Kuai literally means a piece.In spoken language Chinese people use the word Kuai or in a formal environment it is referred to as the Yuan.Internationalisation of RMB: After the United States sub-prime economic crisis. China sought to include its national currency in the basket of multi reserve currencies. Besides the revenue accrual from an internationalised RMB, China will also gain the power to weigh in at the international financial forums. African countries were at the forefront of supporting the internationalisation of RMB and adopting the Chinese currency as a reserve in place of the US dollar. Nigeria was the first country in Africa to enter into a currency swap with (China May 2018). The Naira/yuan will eliminate the need to use a third currency, usually the dollar, for the two nations to enter into trade and investment transactions.

[94] The China–Africa Joint Arbitration Centre was established in August 2015 to resolve commercial disputes between Chinese and African parties (http://www.dentons/). The Centre was established under the Johannesburg consensus action plan, as an alternative dispute settlement forum for Chinese and African nationals. Sarkar suggested that the Centre would sidestep international courts (Kariuki). Notwithstanding, the Centre is governed by an international guiding committee consisting of representatives of the Shanghai International Arbitration Centre and the Arbitration Foundation of South Africa.

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Finally, as both Africa and China undertake substantial legal reforms, there is a significant opportunity for Africa to leverage emerging legal cooperation to achieve a power balance. During the 2012 inaugural launch of the China–Africa Legal Centre in Beijing, Ren Jisheng proposed a template for Chinese-African legal risk management in trade and investments.[95] In the form of 'three levels, five aspects, and six types', Jisheng outlined a legal services framework for future investment and prosperous relations between China and Africa.[96] The advancement of China–Africa legal research is essential for advising institutions and authorities on how to enhance pertinent provisions in law and multilateral action plans.[97]

The literature review throughout the research should be of interest to academics and researchers because it adds new insights, perspectives, and value to the current discourse on Chinese international investment law in Africa. It may also be relevant to policymakers in contributing to the current understanding of the relationship between investment regulatory frameworks and the actual achievement of national objectives. In addition, the study investigates the various facets of power asymmetries and comprehend the potential future balance of power using Professor Brantly Womack's new paradigm asymmetry theory.[98] The researcher offers a uniquely African perspective in examining Chinese investment laws, policies, and regulations and their influence on the development of investment regulation in Africa.

The research conceptually expands on the existing idea of legal transplant in comparative law by extending it from global north countries to a transplant between developing nations. Furthermore, the research reviews the legal transplant concept through FDI as a tool of China's smart power in Africa carried through the private sector.

1.7 Methodology and scope of study

In addition to being exploratory, the study is primarily qualitative in nature and consists of desk research. A combination of research methods and data sources is used in a qualitative manner to

[95] Ren Jisheng was the honorary Director at King and Capital. Ren Jisheng, 'China Business Law Journal : Leading Lawyers Set Template for African Trade and Investment' (2012) <http://en.king-capital.com/content/details10_11777.html>.
[96] ibid.
[97] ibid.
[98] Brantly Womack, 'Asymmetry Theory and China's Concept of Multipolarity' (2004) 13 Journal of Contemporary China 351.

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increase understanding of the China to Africa investment flows phenomenon. The research will reveal new theoretical perspectives on China–Africa FDI in legal, policy, and regulatory frameworks. This technique effectively brings new insights into the topic and a comprehensive understanding of recent Chinese OFDI in Africa. Moreover, Chinese case studies in Chapter 4 and Chapter 6 support the theoretical framework.

The comparative research methodology investigates the flow of Chinese FDI in various African nations and industries. The research also examines adherence to or violations of laws by Chinese companies in various countries and the extent to which legal cooperation has advanced to aid the development of new regulations and laws in Africa. The comparative research methodology is frequently useful in testing hypotheses and developing theories. In this study, it was assumed that traditional FDI theories may not adequately explain the trends in China's OFDI in Africa; consequently, a new theory is necessary to determine Chinese motivations. China in Africa is a relatively new topic, and there are few case studies to assess trends in legal exchanges and cooperation. Therefore, a comparative research method was considered appropriate, as it permits analysis with limited data and research with few variables.[99]

The researcher drew meaningful conclusions about the Chinese legal framework and policies that drive Chinese OFDI in Africa by analysing both primary and secondary sources. The primary sources included data available from China's Ministry of Foreign Affairs, MOFCOM, the state-owned State Assets Supervision and Administration Commission (SASAC), the African Investment Promotion Agencies Centre, the African Ministries of Trade and Investment, Chinese national economic and international relations policies as well as case reports, historical records, official speeches, treaties, and various regulatory framework reports. Secondary data consisted of information from books, articles, journals, and reports from relevant stakeholders. Some library-based research has been offered in Mandarin and translated into English (although translated content sometimes loses the spirit of the original work). Some content from universities hosting China–Africa legal 'think tanks' was only available in China. Some materials were acquired through travel to China, with the cost of travel sponsored by the China Law Society under China's Learning and Visiting programmes for legal cooperation. Annually, the Chinese government

[99] David Collier, 'The Comparative Method' in Ada W Finifter (ed), *Political Science: The State of the iscipline II* (American Political Science Association 1993).

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invites African scholars to China on full scholarships to study Chinese law and development. The study relies heavily on analysed data from the United Nations Conference on Trade and Development (UNCTAD) and supplements missing information with MOFCOM data. While UNCTAD is a reliable and accurate source of information regarding China's FDI, it has sectoral and geographical limitations.[100]

When national data is unavailable UNCTAD compiles data from national and international sources, such as the International Monetary Fund (IMF) and the Organization for Economic Cooperation and Development (OECD). Chinese firms that invest abroad are required to register with MOFCOM, but they are not required to disclose the size of their investments. As the official custodian of Chinese official reports, MOFCOM provides the most frequently cited statistical evidence for China's FDI activity in academic research. But, this data is only as detailed as Chinese corporations opt to make it available.

The research uses literature reviews, national policy reviews, official statements, and published stakeholder interviews regarding the Chinese government-funded Africa–China project. Other projects in various regions of Africa are evaluated through the lens of legal transplant and comparative law.

The study's scope covers the following areas:

1. Existing literature on China Africa relations with a focus on China's policy towards Africa and the impact of Chinese FDI in Africa.
2. Legal transplant theory's contemporary application in comparative law and legal systems of developing countries.
3. Conceptual ideologies supporting China's development goals; A detailed examination of the alignment between China's African policy and broader African development policies.
4. Interpretation of China's outbound strategy and policy through case studies to determine how Chinese law (outbound business law and policies) is reflected in Chinese businesses and investments in Africa.
5. Legal developments resulting from FOCAC legal cooperation forums.

[100] I Kolstad & A Wiig (2012) What determines Chinese outward FDI? *Journal of World Business*, *47*(1), 26–34. https://doi.org/10.1016/j.jwb.2010.10.017.

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6. The relationship between law and practice in the context of legal transplants.
7. An application of policy and concepts in a specific sector of cyber law.

1.8 Study limitations

First, the lack of a comprehensive database of Chinese investments in Africa makes it challenging to analyse FDI trends and patterns. There is generally a lack of uniformity and consistency in China's laws and policies. China has a complex legal system that is constantly evolving, and there is often a lack of clarity and consistency in how laws and regulations are applied. This presents a challenge for a researcher to understand the full scope and implications of China's laws and investments in the continent. Additionally, any statistical data on Chinese investments is relatively recent. China's OFDI in different regions, as reported in the Statistical Bulletin of China's OFDI, was only available beginning in 2003. Before 2002, the data provided by MOFCOM was subject to approval. A potential underestimation of actual OFDI volumes may result from enterprises bypassing the formal approval process (OECD, 2008). Since 2003, MOFCOM's data has come from a balance of payments, which is more accurate and trustworthy.

Second, bilateral agreements between China and African nations are confidential, and most state officials are unwilling to discuss or publish information pertaining to state-to-state projects. Chinese policy banks such as EXIM and the China Development Bank, in addition to African recipients, do not publish FDI project financing agreements. The limited information that is available is also frequently inaccurate.

The media tends to be biased and occasionally publishes under-researched content for political value. The content provides a snapshot of society's position. Emerging sinologists then cite journalists' articles as empirical evidence in their writings to support a biased viewpoint without data.[101] China's yearbook and Statistical Bulletin only provide information for the years preceding and following 2007, with varying definitions of OFDI. Therefore, reported numbers may be understated. FDI statistics do not account for Chinese flows in offshore financial centres

[101] See Wenjie Chen (2015) China's Direct Investment in Africa; Reality vs myth, Brookings Institute Africa in Focus Report https://www.brookings.edu/blog/africa-in-focus/2015/09/03/chinas-direct-investment-in-africa-reality-versus-myth/, Deborah Brautigam (2015), 5 Myths about China Investment in Africa , Foreign Policy.com https://foreignpolicy.com/2015/12/04/5-myths-about-chinese-investment-in-africa/. Statement on the false report of Hong Kong's 'South China Morning Post 2013 http://www.eximbank.gov.cn/tm/medialist/index_23_23380.html, accessed 5 August 2018.

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such as the British Virgin Islands, Cayman Islands, and Hong Kong, most of which are destined for third countries.[102]

China often views criticism of its actions in Africa with suspicion and reacts harshly regardless of the source. Owing to the subject's sensitivity, most African critics, especially government officials, prefer to remain anonymous, speak indirectly or not respond at all. For these reasons, interviews with officials were excluded. The research relies on publicly available interviews with Chinese and African government officials and thought leaders.

Language barriers can also be a limitation for researchers. Many Chinese laws, documents, announcements, and official speeches are published in Chinese, making them difficult to access. Translated works can also lose the spirit of the law or context. This limits the researcher's ability to fully explore and analyse the published texts.

1.9 Thesis Chapter outline

The research consists of seven Chapters organised logically to answer the questions, concluding with a recommendation for policymakers, China watchers, and China strategists.

1.9.1 The evolution of China–Africa relations

The introductory Chapter's purpose is to introduce the research endeavour. After determining the research topic, the next step is to investigate the data collection and analysis procedures and the study's objectives, guiding research questions, and significance. This Chapter provides background information and explains the rationale for the research on the recent history of Africa and Chinese relations. In addition, the Chapter sets out the research methodology and delimitation of the scope of the study. The research is intended to address the power asymmetry caused by FDI flows and the legal framework and cooperation that govern and harmonise FDI engagements.

1.9.2 Impact of Chinese FDI in Africa

The second Chapter examines the current literature on the China–Africa relationship to evaluate and summarise interdisciplinary and legal experts' various perspectives and findings. From 2000

[102] Xiaoxi Zhang and Kevin Daly, 'The Determinants of China's Outward Foreign Direct Investment' (2011) 12 Emerging Markets Review 389 <http://dx.doi.org/10.1016/j.ememar.2011.06.001>. David Shambaugh, *China Goes Global* (Oxford University Press UK 2013).

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to 2021, a literature review of China–Africa cooperation and FDI in Africa is presented. This Chapter focuses on regulation, discussing existing international measures for regulating FDI and its fundamental concepts. The researcher identifies and investigates the policies and action plans underlying China's goals in Africa. Concurrently, the African viewpoint on FDI legislative frameworks is presented. Current regional and multilateral agreements are evaluated to establish institutional frameworks and conduct research on Chinese FDI management.

1.9.3 Legal transplant, A theoretical concept

The third chapter proposes legal transplant as a conceptual framework for evaluating China–Africa legal cooperation. The concept of legal transplant is employed to examine the transfer of legal concepts, institutions, and practices between China and Africa. This Chapter examines the history and present state of transplants in law as a theory and concept in comparative law. The literature on legal transplants presents a variety of perspectives in terms of the optimal conditions for transplantation and the circumstances that determine whether a transplant is successful or unsuccessful. This chapter explores the diverse perspectives on legal transplants held by legal professionals. Chapter 3 examines the arguments for and against legal transplant, the operation of legal transplants, and the possibility of a legal transplant.

This Chapter explores legal transplantation as a method of examining Africa China legal cooperation. The legal literature on transplantation provides multiple perspectives on the concept. Legal transplantation is a theory that attempts to explain the evolution and transformation of legal systems. It is frequently used to examine the influence of legal reform on society or to compare various legal systems. In this instance, it is used to investigate the impact on a host nation.

1.9.4 The nature of Chinese law and its application in FDI

Chapter 4 examines China's legal reforms and the country's history with legal transplants. This Chapter traces the way in which China borrowed from various legal systems to create a one-of-a-kind legal system: a socialist legal system with Chinese characteristics. The Chapter then establishes a connection between the characteristics of China's inbound FDI and its outbound investments, both of which are intended to serve China's national and international interests. Beyond traditional international laws, the researcher identifies key Chinese policies that govern

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Chinese outbound investment and the institutions that administer OFDI. The remainder of the Chapter examines how these national interests shape China's OFDI policies towards Africa.

Foreign investments are intertwined with multinational corporations, SOEs, and entrepreneurs in a way that is unique to China. Therefore, it is challenging to distinguish between the rights and independence of investors to participate in FDI and the interests of the state. This is China's primary motivation, preceding profit and market-seeking. While private investors and state interests may be in conflict in other regions, in China, they are well aligned, with Chinese companies frequently preferring to adhere to state policy regarding location selection. The researcher investigates the relationship between Chinese investment promotion laws and national policies, as well as the impact of these laws on investment location and project selection beyond business considerations.

1.9.5 China–Africa legal cooperation and legal initiatives

This Chapter explores the nature of legal cooperation between Africa and China under the FOCAC action plan. The Chapter begins by examining the historical context of Africa's transplant experience. This is followed by a review of China's investments in Africa and their evolution over time. The report then analyses the legal regime governing FDI in Africa and examines how China's investments have affected it. This section discusses how Chinese firms with investments in Africa comply with Chinese and African laws. In addition, the Chapter assesses the FDI legal regime and how it interacts with Chinese and African FDI law reforms. It examines the nature of the connection between China's international legal development assistance and its role in promoting or impeding legal reforms in Africa.

In addition, the following pertinent issues and questions will be examined in depth: How does China's legal aid contribute to the ongoing legal reform process in Africa? Does China aid nations with inadequate legal enforcement, or does it exploit them? How do Chinese companies' routine legal violations affect Africa's ability to maintain economic viability?

1.9.6 Critical evaluation of Africa's strategic response to China

Africa has a long tradition of borrowing legislation. The Roman Empire, and Islamic and European colonialism transplanted African laws. This Chapter examines the history of legal transplants in Africa and how they have shaped economic law. Because the legal transplant in Africa has been

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understudied, this Chapter provides an overview of relevant types of transplants to the continent, including Western law influenced by Christian Europe, English common law mixed with Roman law, and Islamic economic law implemented before colonisation. Owing to foreign economic interest in Africa, these diverse legal systems have had long-lasting repercussions, even after the independence of African nations.

China presents new potential for FDI and legal collaboration as a new economic partner. The impact of China on Africa's FDI policy and judicial cooperation is examined in this Chapter. Through FDI and trade agreements, policymakers have established new legal cooperation instruments, institutions, and frameworks with China. Further research in Chapter 6 presents the unprecedented direct and indirect legal cooperation between China and Africa in multilateral forums and between individual nations.

To assess the legal ramifications of Chinese investments in Africa and their influence on the regulatory landscape of the continent, this chapter is dedicated. Cyber law is a new area of law that did not exist during the colonial period. The focus of China's involvement in this area is on cyber sovereignty and data protection laws. Together China and African nations are developing cybersecurity infrastructure. From Huawei to Alibaba, big technology companies have invested in Africa.[103] The issue of FDI and cyber law from Chapter 4 of the China–Africa legal transplant is also expanded on in this Chapter. The study reveals a new generation of legal transplants in Africa from north to south, and from government to government.

The research seeks cyber legal fundamentals in China. The study examines legal documents, political speeches, and philosophical papers. These ideologies may assist researchers in comprehending China's cyber law approach and its influence on cyberspace policies, legislation, and regulation of Africa. The Chapter investigates case studies of Chinese FDI in Africa to determine how Chinese investments have affected policy, law, and regulation. The Chapter concludes by examining a new legal framework for China–African investment that balances competing interests.

[103] The four largest Chinese technology companies in China- Baidu, Alibaba, Tencents and Xiaomi, with the acronym (BATX) are often compared with America's largest four technology companies, Google, Amazon, Meta and Apple (GAMA).

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1.9.7 Findings, observations and conclusions

The results, conclusions, and suggested implementation are outlined in this concluding Chapter. The researcher attempts to answer specific strategic but non-economic questions regarding China's FDI in Africa. In addition, the findings contribute to the body of knowledge used to predict the future policy and legal framework impact of Chinese FDI.

In order formulate a robust response to Chinese investment in Africa, emphasis should be placed on options to leverage Chinese policy for the benefit of continent. A framework and strategy for Africa should ensure that China follows and supports investment policies that promote the continent's long-term economic growth.

1.10 Chapter conclusion

This introductory Chapter of this research provides an overview summary of the current state of understanding regarding the relationship between Africa and China, specifically as it pertains to trade and investment. The role of China as an increasingly significant alternative partner in Africa has garnered a great deal of attention, with many experts holding contradictory opinions on the impact of Chinese trade and investment in Africa. The background described in this Chapter demonstrates that African nations and China have a long history of cooperation. As China's economy grew, the growth of Africa became increasingly intertwined with Chinese interests as a political and economic partner. The China–Africa connection has piqued international interest, with specialists in international relations and economists leading the charge. The behaviour of Chinese corporations in Africa has raised concerns regarding China's regulation of FDI. Legal scholars have devoted little attention to the regulatory and legal aspects of the connection, even though there is considerable interest in the study of Chinese trade and investment in Africa. The study of Chinese law, legal procedures, and culture can reveal the attitudes of Chinese corporations toward African statutes and legal guidelines. It is essential to investigate Chinese policies, laws, and regulations governing OFDI.

It is reasonable to assume that African nations will borrow or adopt some of China's legal standards due to FDI from China, given the growing number of Chinese investments in the continent and the declared support of African leaders for the Chinese model. Legal borrowing will be used to either encourage or harmonise Chinese and African FDI regulatory interests.

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This Chapter explains why research is necessary and identifies several information-gathering obstacles. In the Chapters that follow, the concept of legal transplant will serve as a lens through which to view the expanding possibilities of legal exchange through investments. In order to identify priority areas for controlling Chinese investment in Africa and formulating a China policy stance, it is necessary to investigate key issues arising from Chinese investment.

This study aims to learn from China how to regulate inbound and outbound FDI to achieve domestic economic objectives. China's experience with the legal transplant theory is examined to comprehend how China has utilised legal pluralism to create a new legal system that attracts investments while retaining Chinese characteristics. This analysis will contribute to developing a legal framework to enhance the attraction and regulation of higher-quality FDI for sustainable economic growth in Africa.

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Chapter 2 TRENDS IN FOCAC INVESTMENTS

2.1 Introduction

The first chapter provided an overview of how regulation and the role of Chinese FDI influence the power dynamics between China and Africa. The perspectives of scholars and policymakers on the role of Chinese FDI in Africa were identified in the previous chapter.

The researcher posed the following three questions to evaluate these perspectives.

- To what extent does China's OFDI affect Africa's development agenda and power asymmetry through legal transplant and harmonisation of legal frameworks?
- How does China strategically utilise FDI initiatives to secure Africa's support for its global strategy and aspirations to shape international law?
- How should African policy and lawmakers respond to China's legal harmonisation in FDI regulation to ensure independent and sustainable economic and legal reforms?

Several critical issues which were highlighted in the first Chapter are explored in greater detail in subsequent Chapters. Before delving into the three fundamental questions mentioned above, this second Chapter examines the most significant issues, policies, and practices affecting Chinese OFDI in Africa. To address these issues, the researcher maps and identifies relevant literature results regarding the factors influencing Chinese investments in Africa. Current challenges and the impact of Chinese OFDI policies and legal business with African host nations are also discussed in this Chapter.

Scholarship is essential for bridging the knowledge gap and fostering an equitable dialogue between strategists and policymakers from Africa and China. Chinese leaders have increased their knowledge of Africans' needs, aspirations, and social mindset, while Chinese academics are determining the optimal strategy for promoting the Chinese economic model and fostering African cooperation. Likewise, African researchers must identify the continent's long-term objectives in relation to China and evaluate and compare China's foreign investment law procedures and

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practices. Formulating and pursuing the correct policies for a genuine south-south relationship is impossible without cutting-edge research.[104]

Current, albeit limited, research has examined China's motivations for investing in Africa to determine whether the interest is benign and will contribute to Africa's sustainable economic development. Some nations have researched China's global economic goals to develop an investment attraction policy that will attract Chinese capital.[105] Accordingly, certain notable media articles discuss how African governments intend to implement the China model and the impact of FDI on labour standards. However, scholarly research in this field is lacking.

This Chapter is subdivided into four main sections. Section 2.2 begins with a brief history of China and Africa prior to establishing the FOCAC in 2000. Section 2.3 describes the relationship between the two regions. Section 2.4 focuses on significant economic patterns that have emerged since the first FOCAC summit. Section 2.5 also examines and evaluates the conclusions drawn by academics, policymakers, and practitioners in their attempts to ascertain China's investment objectives in Africa. The development of Chinese camps in Africa is subsequently identified and discussed.

Sections 2.3 to 2.5 identify and discuss the primary drivers of China's interest in Africa and other developing countries based on China's domestic policies and global presence. The third section evaluates Africa's ability to respond to China and its agencies. Thereafter, the fourth section, further examines knowledge gaps regarding Chinese FDI laws in Africa. The literature review is constructed based on multiple recommendations from field experts. The concluding section identifies additional barriers to developing China's policy research in Africa.

2.2 FDI trends under FOCAC

A brief historical overview of Africa–China relations, beginning with the founding of the FOCAC in 2000, establishes the research context. FOCAC was established as a platform for consulting between Africa and China. No official positions are taken at the forum, but each session sets a tone

[104] Mulugeta Gebrehiwot Berhe and Liu Hongwu (eds), *CHINA-AFRICA RELATIONS, Governance, Peace and Security* (Addis Ababa University, 2013).
[105] Andrew G Ross, 'An Empirical Analysis of Chinese Outward Foreign Direct Investment in Africa' (2015) 8 Journal of Chinese Economic and Foreign Trade Studies 4.

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regarding policy in a multilateral dialogue between China and every African nation other than Eswatini.[106] Since its inception in 2000, eight ministerial conferences have been held every three years. Three of the meetings were elevated to Presidential summits due to the growing significance of African relations. Considering China's rivalry with France to dominate the Francophone region of Africa, it was widely anticipated that the Dakar meeting would also be elevated to summit status; however, the meeting was held as a ministerial meeting.[107]

The meetings remained at the ministerial level owing to the Covid-19 pandemic outbreak. However, Johnston rejects Yun Sun's assertion that reverting the status of the meeting to ministerial implies a demotion to FOCAC.[108] In view of China's growing African investments strategically aligned with its BRI, Johnston argues that the Dakar summit is not a downgrade of the BRI relationship. Since 2015, China has enshrined the BRI in FOCAC, and in 2018, it became more prominent in FOCAC's action plans.[109] In addition, China upgraded its relationship status with all African nations to a 'comprehensive strategic partnership relationship'.[110] Before 2015, South Africa was the only country in Africa with this diplomatic status.[111] China added BRI to the FOCAC agenda in addition to the diplomatic status upgrade, making African nations a priority partner in the initiative.[112] However, China has not increased its financial commitment to Africa since 2015. Scholars should probe whether China is pulling back its commitment to Africa or if a different indicator should be applied to measure this growing relationship.[113]

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[106] eSwatini, formerly known as Swaziland, is the only African country as of 2018 that does not have diplomatic relations with China. eSwatini has maintained official diplomatic relations with Taiwan.
[107] China–France–Africa have complex relations.
[108] Lauren A Johnston, 'FOCAC 2021 as Ministerial Does Not Signal a China-Africa Downgrade' (*Soas China Institute*, 2021); Yun Sun, 'FOCAC 2021: China's Retrenchment from Africa?' (2021) <https://www.brookings.edu/blog/africa-in-focus/2021/12/06/focac-2021-chinas-retrenchment-from-africa/> accessed 1 February 2022.
[109] Kenneth King, 'China–Africa Education Cooperation: From FOCAC to Belt and Road' (2019) 3 ECNU Review of Education 221 <https://journals.sagepub.com/doi/full/10.1177/2096531119889874>.;Umar Muhammad Gummi and others, 'China-Africa Economic Ties: Where Agenda 2063 and Belt and Road Initiative Converged and Diverged?' (2020) 11 Modern Economy 1026.
[110] Chris Alden, 'NEW ACTORS , NEW MODELS , NEW OUTCOMES ?'Hongyi Lai and Yiyi Lu, *China's Soft Power and International Relations* (2012).
[111] Lai and Lu (n 110).
[112] Michael Mitchell Omoruyi Ehizuelen and Hodan Osman Abdi, 'Sustaining China-Africa Relations: Slotting Africa into China's One Belt, One Road Initiative Makes Economic Sense' (2018) 3 Asian Journal of Comparative Politics 285.
[113] Johnston (n 108).

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Following the 2015 FOCAC summit in Johannesburg, South Africa, the discourse on Chinese presence in Africa heated up. In response to concerns about the vagueness and ongoing nature of China's continued investment pledges to Africa, President Xi explained that the funds were targeted at key areas affecting Africa's development, namely 'inadequate infrastructure, lack of professional and skilled personnel and funding shortage'.[114] At Johannesburg FOCAC 6 in 2015, the Chinese President pledged an investment package worth US$60 billion (see Figure 2-1). China, for the first time, did not increase its commitment, and the contribution was made without specifying country or sector distribution. The financial package comprised loans, credit lines, grants, development financing, and private investments. President Xi specified that the allocation would include US$15 billion in grants, interest-free loans, and concessional loans; a US$20 billion credit line; US$10 billion for 'development financing'; and US$5 billion for the purchase of imports from the continent.[115] The most recent Dakar FOCAC 8 action plan in 2021 also had less focus on the financial pledge to the continent and focused more on the global health crisis caused by the Covid-19 pandemic. The action plan was more responsive to and concentrated on emerging health and economic issues. In contrast to earlier plans that concentrated on broad, long-term strategic goals, such as infrastructure, which seem too enormous to complete in a three-year time frame, the Dakar approach was less nebulous and more pragmatic. The decreasing China financial pledges to Africa are not an indicator of decreasing importance of Africa-China relations; analysts need to identify other indicators to evaluate and identify new developments under FOCAC.

[114] Jinping Xi, 'President Xi Jinping Delivers Speech at FOCAC Summit: Full Text' [2015] China Radio International.
[115] David Pilling & Lucy Hornby 'China pledges $60bn for Africa as Xi rejects 'debt trap' claims' *Financial Times*, available at: https://www.ft.com/content/e46bf2e2-af90-11e8-99ca-68cf89602132.

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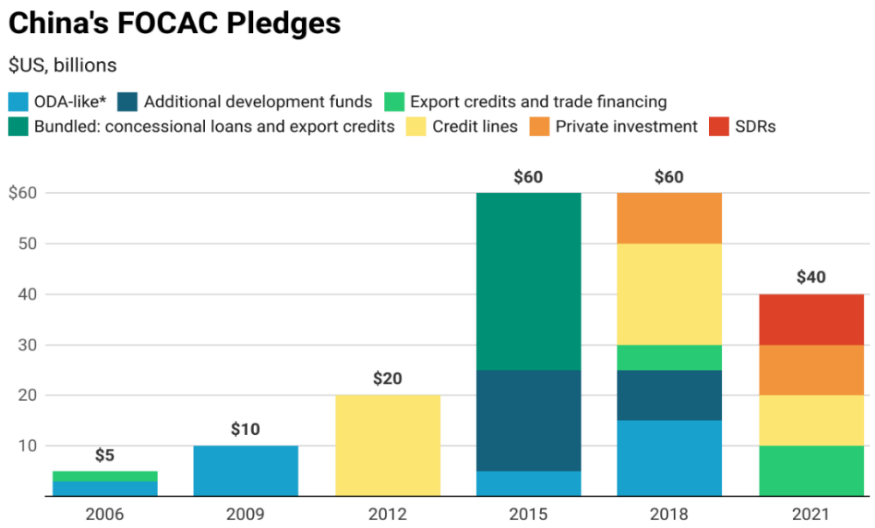

Figure 2-1: China's FOCAC pledges 2006–2021

Note: Adapted from Beata Cichocka & Mikaela Gavas report 'Europe, Take Note: A New Course for China Africa Relations Set Out at FOCAC 2021', *Center for Global Development*, 2021[116]

The pledges, considering academic analysis, seem to be made in a unilateral manner, which raises questions about Africa's dependence on China and its potential lack of agency to participate on an equal footing.[117] Africa offers China policy support in return for the resources China has promised. Compared to global FDI levels, China's investment in Africa is significantly lower. The economic interdependence between Africa and China is primarily supported by trade. There is limited research in this area because FDI between China and Africa is significantly lower than from other leading economies. Despite being relatively low, Ross notes that China's OFDI in Africa has increased considerably over a ten-year period from US$491 million in 2003 to US$21.7 billion in 2012. African sinologists should particularly pay attention to China's rapid increase in FDI in Africa.[118]

[116] Beata Cichocka and Mikaela Gavas, 'Europe, Take Note: A New Course for China-Africa Relations Set Out at FOCAC 2021' (*Center for Global Development*, 2021) <https://www.cgdev.org/blog/europe-take-note-new-course-china-africa-relations-set-out-focac-2021#:~:text=FOCAC by The Numbers: Is The Great Chinese Funding Bonanza Over?>.

[117] Bob Wekesa, 'FOCAC, African Agency and Africa's China Policy' [2017] L dialogue 2; Sanusha Naidu, 'Continental Summitry and Shuffling Diplomacy: The Case of African Agency in FOCAC and IAFS' (*L dialogue*, 2017) 15; Zhang Yanqiu and Simon Matingwina, 'African Media Representation of FOCAC VI: Towards Balanced Reporting for Effective Narratives on China-Africa Relationships' (2017) 9 Journal of African Media Studies 451.

[118] Ross (n 105).

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2.2.1 FOCAC financial investments

China's investment in Africa is significantly lower than global FDI; trade is the primary driver of Africa–China growth.[119] Although China's OFDI flows in Africa have been relatively low, FDI to Sub-Saharan Africa (SSA) grew significantly in the decade after the formation of FOCAC in 2000 up until 2009 (Figure 2.2). China's FDI flows to Africa reached US$1.45 trillion by 2013 from a low base of US$13.5 billion in 1970.[120]

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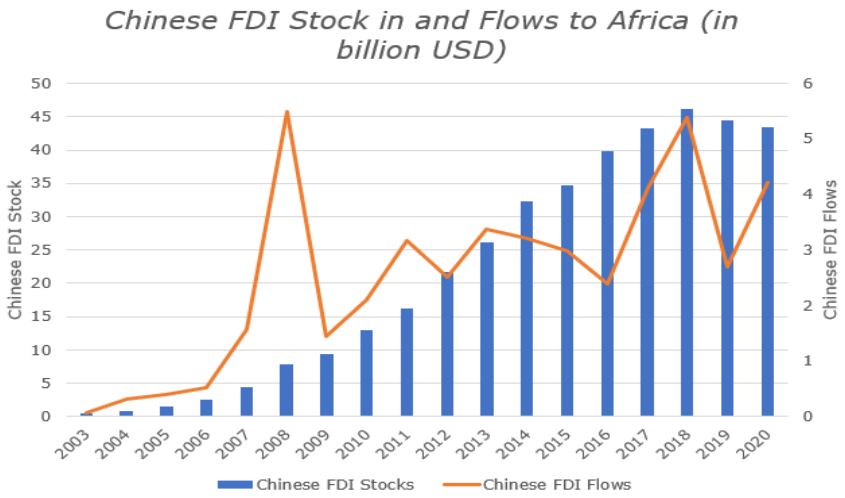

Figure 2-2: China's FDI stock and FDI flows to AFRICA
Source:The Diplomat: https://thediplomat.com/2021/11/the-quiet-china-africa-revolution-chinese-investment/

Notes: Adapted from Chen, Wenjie, and Roger Nord. "China and Africa: Crouching Lion, Retreating Dragon?" *Foresight Africa: Top Priorities for the continent in* (2018).

The thesis's focus period, which begins in 2000, sees a significant increase in Chinese FDI in Africa. Based on data compiled by the AEI China tracker, Chinese investments and contracts totalled US$299.66 billion and US$1414.43 billion, respectively, between 2015 and 2018.[122] This trend of increasing Chinese investments in Africa has been consistent over the past few decades with China's investment growing annually by 40 per cent from 2003 to 2014. In fact, Chinese FDI into Africa increased drastically, reaching a peak in 2008 when China's African FDI stock rose

[119] Schneidman and Wiegert (n 29).
[120] Ross (n 105). See also UNCTAD, 'World Investment Report' (2014).
[121] Babette Zoumara and others, 'All My Papers' (2019) 53 Journal of Chemical Information and Modeling 1 <papers://e7e999bd-f851-4d7a-bd09-0a594888c470/Paper/p495> accessed 19 November 2018.
[122] 'Add China and See Where the Part Takes' (Australian Governement 2017) available at <https://aei.gov.au/addchina/Documents/AddChinaUndergradToolkit.pdf>.

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from US$491 million to US$32.4 billion.[123] The surge was also due to the acquisition of 20 per cent shares in Standard Bank Group (SBG) by the Industrial and Commercial Bank of China (ICBC). [124] Chinese FDI towards Africa remained stable even during the global economic downturn. The 2017 McKinsey & Company report on China Africa reflects a steady growth of 40 per cent per annum, with an increase between 2004 and 2015 of US$1 billion to US$35 billion [125] As per the research presented in the EY 2019 Attractiveness Report: Africa, geopolitical events and activities such as the Trump administration and Brexit have exacerbated uncertainty, requiring China to increase its development stability.[126]

Even though China and Asia's FDI project numbers did not surpass those of the United States during the economic recession, the region outperformed the global north in several important ways. However, the Asia-Pacific region contributed the most jobs and participated in various FDI-funded projects. EY confirms that the United States continues to be the leading source of FDI projects. The online publication, Quartz, adds that 130 of Africa's 718 projects originated in the United States in 2017. The United States prioritises acquisitions and other financial services, whereas China focuses on infrastructure projects. These infrastructure investments have increasingly prioritised strategic impact projects. Moreover, most Chinese projects are executed as government-to-government (G2G) deals, which are not accounted for in McKinsey and EY's key corporate research.

In addition to infrastructure and natural resources, Chinese FDI in other industries has matched that of the United States. China has expanded its investment in Africa beyond primary sectors. The ICBC acquisition was in the same year China's outbound FDI surpassed that of the United States.

China's investment figures have neither exceeded those of the United States nor deviated significantly from Western trends. However, investment trends between China and Africa have

[123] Dhruv Gandhi, 'Figures of the Week: Trends and Determinants in Chinese FDI in Africa' (*Africa in focus*, 2019) 3 <https://www.brookings.edu/blog/africa-in-focus/2018/07/25/figures-of-the-week-trends-and-determinants-in-chinese-fdi-in-africa/> accessed 4 March 2019.
[124] 'Implementation of the Follow-up Actions of the Beijing Summit of the Forum on China-Africa Cooperation' (*Focac.org*, 2009) 1 <http://www.focac.org/eng/ltda/dsjbzjhy/hywj/t627504.htm>.
[125] According to Dhruv Gandhi, FDI stock measures the total amount of investment at the end of a given period, while FDI flows measure investment within a specified time range, typically one year, as stated in his report (Gandhi, n 123).
[126] EY, 'EY Attractiveness Report: Africa' (2019) <https://www.ey.com/en_za/attractiveness>.

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attracted the attention of academics and commentators with divergent views on Western investments. In this field, scholarly research is limited, the addition of Chinese investments have injected a new dynamic into Africa's development. How does China utilise its newly acquired status as an exporter of capital to manage power dynamics in south–south relations? This is part of the initial question addressed by the present research. A review of the last two decades of modern Africa–China studies reveals contradictory and divergent viewpoints on China in Africa. Commentators have characterised China's impact on Africa as either negative or positive. The African perspective has been addressed through polls, media articles, and political declarations.[127] Western or Chinese scholars have mainly led Africa–China research, with very few African sinologists contributing to scholarship. The narrative from the African side has been expressed through surveys, media articles and political statements. In the past two decades, Africa–China analysis has been framed by recurring themes. These subjects demand a deeper examination than the frequently occurring event-based, sensationalised, partisan coverage and manoeuvring that frequently takes place.

2.2.2 Chinese OFDI drivers

Chinese investments in Africa are a major concern because they alter traditional geopolitical influence.[128] They influence the West, traditional masters of capital, and newly independent African nations. Current and emerging trends in China–Africa investment flows and corporations have sparked a heated debate about their long-term effects on the continent's economy, environment, and politics. China has evolved from a capital-importing emerging economy to a prominent and influential global policymaker. As a new capital exporter emerging from the global south, China is poised to export its development model.[129]

After 30 years of economic success, African nations began to endorse the Chinese development model.[130] Observers of China and Africa have paid special attention to how accepting

[127] Bodomo (n 19); 'crouching tiger , hidden dragon? China and Africa: Engaging the World's Next Super Power', *Policy Seminar Report* (2007).
[128] Edited by Durand-Ochoa Ursula, 'Powers in Africa' (2013).
[129] Deborah Bräutigam and Tang Xiaoyang 'African Shenzhen: China's Special Economic Zones in Africa' (2011) 49 *Journal of Modern African Studies* 27.
[130] ES Ansah 'Close encounters between Africa and Asia: Ghana's look East policy and'; Percyslage Chigora & Taderera Hebert Chisi 'The Eight Years of Interaction: Lessons from Zimbabwe's Look East Policy and the Future of African Countries and Asia-Pacific Region' (2009) 10 *Journal of Sustainable Development in Africa* 147–61;

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China's new model affects Africa and the rest of the world. Although Africa has been the origin of China's influence outside Asia, it is anticipated that the effects will be felt globally as China's power grows. Meunier questions whether the novelty of Chinese FDI has the potential to influence European, inter-European, and international politics.[131] In addition to China's encroachment on former colonies, the primary concern is that, with wider support, China's models will influence global politics and reverse Western hegemony. The reality is that China has shown a keen interest in both Africa and Asia, as evidenced by its Belt and Road Initiative (BRI), a revival of the silk road trade initiative.[132] China has also engaged in a 'shopping spree' in acquisitions of major American and European multinational corporations.[133] Unpacking China's global penetration is critical, not only for Africa's future but also for international policymakers and investors. The rise of Africa and the reorganisation of development in the global north support the adoption of the Chinese model on the international stage.[134] Perhaps the global north or developed nations assume that if it curbs the approaching Chinese-influence tsunami in Africa, the massive catastrophic wave will not reach its shores.

Analysts of Sino-African transactions have questioned the legitimacy of the Chinese model. This objective has been met by asking whether the Chinese presence in Africa will positively or negatively affect the continent. At the macro level, the question is whether China will alter the

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Jeremy Youde 'Why look East? Zimbabwean foreign policy and China' (2007) *Africa Today* 3–19; Jacinta Mwende Maweu 'Journalists' and Public Perceptions of the Politics of China's Soft Power in Kenya under the 'Look East' Foreign Policy' *China's Media and Soft Power in Africa* (2016) 123–34.

[131] Sophie Meunier, Brian Burgoon and Wade Jacoby, 'The Politics of Hosting Chinese Investment in Europe-an Introduction' (2014) 12 Asia Europe Journal 109.

[132] One Belt One Road Initiative is also known by the acronym OBOR but recently more commonly referred to in China as Belt Road Initiative (BRI), available at https://eng.yidaiyilu.gov.cn/. The initiative has been less referenced in chinese Government officials speeches in the english versions targeted for the Western or global north audience due to the criticism China faced from America on the initiative. However its prominence in Chinese foreing policy remains as the chinese version Yidaiyilu continues to be referenced

[133] China acquired famous international brands in America and Europe through mergers and acquisitions. After the Opening Up policy, the value of Chinese M&A increased from US$1.6 to US$ 18.2 billion from 2003 to 2006, respectively. China now owns famous Western household names and companies like VOLVO, Phillips, Maersk Container Industry , General Electric's home appliance division,and the Waldorf-Astoria. Most acquisitions were aligned with China's Made in China 2025 strategyto upgrade and enhance China's domestic manufacturing ability and innovation through ownership of key technologies. Hinrich Voss and others, 'Thirty Years of Chinese Outward Foreign Direct Investment'; 'International Brand Acquisition by Chinese Companies' (*China Brain*) <http://www.china-brain.com/Resources/International-brand-acquisition-by-Chinese-companies/357.html#.Y7_5v3ZByyJ>. Gokhan Ergocun, 'Chinese Companies ' Acquisitions in Europe up Related News Japan Begins Construction Of' (2022) <https://www.aa.com.tr/en/asia-pacific/chinese-companies-acquisitions-in-europe-up-eight-fold-in-2021/2543546#>.

[134] Mamoudou Gazibo and Olivier Mbabia, 'Reordering International Affairs: The Forum on China-Africa Cooperation' (2012) 1 Austral: Brazilian Journal of Strategy and International Relations 51.

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development of domestic policies and assist Africa in achieving its regional development goals for 2063 or whether it will cause Africa to regress in terms of development.[135] Nonetheless, common research themes regarding China's emergence as a superpower inspire fear and hope.

International business research utilises economic internationalisation models and theories to explain the forces behind China's OFDI investment in Africa but excludes political and policy motives.[136] The Dunning Eclectic model identifies three primary factors that influence the location decisions of investors, namely market-seeking, resource-seeking, and efficiency-seeking.[137] However, the eclectic model has limitations in explaining China's investment in Africa, primarily because it was developed based on private sector observations and investment considerations of firms in developed economies seeking to invest in other developed markets.[138] The model may not be suitable for identifying key motivations, evaluating FDI flows between developing countries, or for investment decisions driven by government or political motivations. While Ross's study has categorically identified the initial limitations of the Dunning Eclectic framework, it still remains a useful tool for determining China's incentives for investing in Africa when considering the three factors mentioned earlier.[139] It is important to note that while the framework primarily focuses on firm-level motivations for China's investments in Africa, it may not fully capture the influence of China's political agenda on investment decisions. This could potentially limit the framework's ability to accurately model causal relationships between China's political motivations and firm-level investment decisions.

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[135] Cobus Van Staden, Chris Alden and Yu-Shan Wu, 'In the Driver's Seat? African Agency and Chinese Power at FOCAC, the AU and the BRI' 32 <www.saiia.org.za>; Alden, 'NEW ACTORS , NEW MODELS , NEW OUTCOMES ?' (n 110).

[136] Ziyi Wei 'The Literature on Chinese Outward FDI' (2010) 18 *Multinational Business Review* 73–112; Ivar Kolstad & Arne Wiig 'What determines Chinese outward FDI?' (2012) 47 *Journal of World Business* 26–34; Zhang & Daly, supra n 91; Jeremy Clegg et al 'The OFDI patterns and firm performance of Chinese firms: The moderating effects of multinationality strategy and external factors' (2016) *International Business Review*; Sigli M Mumuni & Shelly Ann Murphy 'China's 'Going Global' Policy in Africa: An Exploratory Overview of an Evolving Policy Framework' (2018) 2 *Journal of Asian Research* 11.

[137] Carmen Stoian, 'Extending Dunning's Investment Development Path: The Role of Home Country Institutional Determinants in Explaining Outward Foreign Direct Investment' (2013) 22 International Business Review 615; Luke Hurst, 'Comparative Analysis of the Determinants of China's State-owned Outward Direct Investment in OECD and Non-OECD Countries' (2011) 19 China & World Economy 74; Andrew G Ross and others, 'An Empirical Analysis of Chinese Outward Foreign Direct Investment in Africa' (2015) 8 Journal of Chinese Economic and Foreign Trade Studies 4 <http://dx.doi.org/10.1108/JCEFTS-12-2014-0025> accessed 21 April 2019.

[138] Ross (n 105).Yuanfei Kang and Yulong Liu, 'Natural Resource-Seeking Intent and Regulatory Forces: Location Choice of Chinese Outward Foreign Direct Investment in Asia' (2016) 39 Management Research Review 1313.

[139] Ross (n 105).

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Considering the limitations of FDI theories in explaining Chinese government policy, it is necessary to investigate policy motivation and China's historical development path. Researchers Asongu and Ssozi have identified eight policy syndromes to explain China's interest in Africa,[140] which they contrast the so-called China model of China with that of Washington.

The categories are:

- Resource-grabbing
- Poor governance and human rights
- Local employment,
- Environmental and social standards violation
- Lack of local integration
- Crowding out
- Low-quality exports
- Lower standard of living.

Their paper, nonetheless, examines only the negative impact and makes no mention of the positive aspects of this relationship. When it was written, recent challenges to China's policies were not imminent. These include the narrative of the debt trap and some of the criticisms of the BRI. Asongu and Ssozi both emphasis micro-level and event-specific concerns rather than macro-level concepts.[141]

The eight policy challenges were a step in the right direction towards classifying key negative themes surrounding the impact of Chinese investment in Africa; however, for research purposes, additional contemporary themes can be added to delve deeper into key and broad motivations for Chinese policy motivation.[142] Although they ignored several themes about the positive impact of Chinese investment on African investment, they identified three China-related schools of thought: pro-China, anti-China, and accommodating. Pro-China advocates view China's presence in Africa as positively affecting Africa's economy. The anti-China camp believes China will impoverish Africa. A more accommodating perspective adopts a business-orientated approach and focuses on China's domestic policy. The latter has taken the position that China behaves similarly to all

[140] Simplice Asongu and John Ssozi, 'Sino-African Relations: Some Solutions and Strategies to the Policy Syndromes' (2016) 17 *Journal of African Business* 33, available at <http://dx.doi.org/10.1080/15228916.2015.1089614>.
[141] ibid.
[142] ibid.

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foreign investors in Africa and that it is Africa's responsibility to maximise its new source of FDI.[143]

2.3 Emerging China–Africa schools of thought

Negative and positive themes currently dominate the Africa China FDI nexus.[144] The media, geopolitical strategists, and eminent scholars have supported two distinct and dominant groups. Government representatives and decision-makers refrain from discussing Africa China relations outside official discussions owing to the sensitivity of the relationship and the confidentiality of bilateral agreements. The problems have become more prominent, affecting the way in which people view relations between China and Africa. Numerous nations, industry heads, and scholars have studied new themes and arguments regarding China's interest in Africa. The literature review in Chapter 2 examines three dominant views: those of the 'panda-huggers', the 'dragon-slayers', and nuanced perception. These categories allow for examining dominant narratives owing to the study's constrained scope. These themes predominate in literature and guide contemporary research on China, Africa, and international relations. In subsequent Chapters, the legal aspects of these topics are examined in detail. Table 2 introduces and categorises the major topics for this study.They are divided into three themes focusing on economics, politics, and legal influence.

Table 2 China–Africa legal cooperation Researchers' Camps and Arguments

	Camps and arguments		
Key themes	Anti-China	Pro-China	Pragmatic
2.4 Economic drivers	Neo-colonial Resource-grabbing	Economic development Infrastructure development Job creation Made in Africa brand	Win-win New markets Insignificant partnership
2.5 Geopolitical influence	Power asymmetry African agency	A new alternative partner: African agency	Reversing hegemony Global south sovereignty Internationalisation of global south systems and standards and culture.

[143] Simplice Asongu, Jacinta Nwachukwu and Gilbert Aminkeng, 'China's Strategies in Economic Diplomacy: A Survey of Updated Lessons for Africa, the West and China' [2014] Working Papers of the African Governance and Development Institute. <http://aidwatchers.com/2010/02/china-in-africa-myths-and-realities/>.
[144] Simplice Asongu, 'Sino-African Relations: A Review and Reconciliation of Dominant Schools of Thought' (2016) 44 *Politics and Policy*. Marco Sanfilippo, 'Chinese FDI to Africa: What Is the Nexus with Foreign Economic Cooperation?' (2010) 22 *African Development Review* 599.

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2.6 Legal influence	Non-compliance in the host/sponsor country	Investment attraction policies New legal transplant	China Africa legal cooperation

Source: Author's own construction

2.4 Panda-huggers v dragon-slayers

Chinese academics, analysts, and political parties have engaged in polarising debates over the issues. The opposing groups are known as panda-huggers and dragon-slayers.[145] Dragon-slayers view China as a competitor and threat to African nations, whereas panda-huggers view China as a benefactor and supporter of African nations.[146]

This section's scholarly articles examine debates and locate pertinent literature on both sides. Dragon-slayers have provided numerous reasons to question Chinese FDI in Africa. They disagree that mutual respect is the foundation of African relations. Critics consider China's growing presence in Africa exploitative and motivated solely by self-interest.[147] Several researchers, including Deborah Bräutigam and Robert I. Rotberg, have asserted that China's participation in Africa has not always been detrimental and has benefited several African countries.[148]

Numerous panda-huggers and dragon-slayers exist among foreign policymakers, businesspeople, academics, and state officials.[149] There does not appear to be a consensus among these thinkers, and some hold moderate views. Africa-China relations are viewed in a nuanced manner by influential non-academic panda-huggers and dragon-slayers. Their arguments are not always supported by substantial academic research. In any case, they affect the general perspective and lens through which China's interests are evaluated. Table 3 displays notable panda-huggers,

[145] The nomenclatures are derived from China's two symbolic animals, the panda and the dragon. China enjoyed a decade-long 'honeymoon' relationship with the West after adopting economic reforms in the late 1970s and was often regarded as a calm 'cute panda'. The 1989 Tiananmen Square incident shattered this image, and the 'evil dragon' image of China resurfaced. In the years thereafter, these two extreme viewpoints have coexisted in the United States, with China watchers dubbed 'panda-huggers' or 'dragon-slayers' (Gifford 2010).
Peter Hays Gries, *China's New Nationalism* (University of California Press 2004).; Rob Gifford, 'Panda-Huggers and Dragon-Slayers: How to View Modern China Today' (2010) 74 Social Education 9. Xiongwei Cao, 'Cute Panda or Evil Dragon? Market Economy, Conflict Behaviour and China's Peaceful Rise' (2020).
[146] Gifford (n 145); Cao (n 145).Barry Sautman and Yan Hairong, 'Trade, Investment, Power and the China-in-Africa Discourse' 1.Martin Jacques, *When China Rules The World: The Rise of the Middle Kingdom and the End of the Western World [Greatly Updated and Expanded]* (Penguin UK 2012).
[147] Ampiah and Naidu (n 15).
[148] Robert I Rotberg, *China into Africa: Trade, Aid, and Influence* (Brookings Institution Press 2009).
[149] Matthew T Page, 'About the Report About the Author The Intersection of China's Commercial Interests and Nigeria's Conflict Landscape' (2018) <www.usip.org> accessed 22 May 2019. Chen, Dollar and Tang (n 60).

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dragon-slayers, and other moderates. The list is not exhaustive but indicates influential China–Africa perspective thought leaders.

Table 3 Influential panda-huggers and dragon-slayers

	Panda-huggers	Dragon-slayers
Academia	Calestous Juma Ayo Obe Adam Bodomo Deborah Bräutigam	Niall Ferguson William Easterly John Mearsheimer
International leaders	Barak Obama (USA) Winston Churchill (Britain) Henry Kissinger (USA) Paul Krugman (USA)	Donald Trump (USA) Shinzo Abe (Japan) Moon Jae-in (South Korea) Tsai Ing-wen (Taiwan)
African leaders	Abdurrahman Mohammed Babu (former Foreign Minister of Zanzibar and Tanzanian Minister of Economic Planning) Olusegun Obasanjo Paul Kagame, President of Rwanda Yoweri Museveni, President of Uganda Uhuru Kenyatta, President of Kenya Salva Kiir Mayardit, President of South Sudan Edgar Lungu, President of Zambia Felix Tshisekedi, President of the Democratic Republic of Congo Andry Rajoelina, President of Madagascar João Lourenço, President of Angola Cyril Ramaphosa, President of South Africa Abdel Fattah el-Sisi, President of Egypt	Thabo Mbeki (former President of South Africa) Michael Sata, during the Presidential campaign Nelson Chamisa, MDC party leader in Zimbabwe John Magufuli (Former President of Tanzania) Muhammad Buhari (President of Nigeria)
Opinion leaders	Bono Bob Geldof Dambisa Moyo	Max Boot Niall Ferguson

Source: Author's own construction

Extracts from African leaders' speeches demonstrate their support for the Chinese presence in Africa.

> Paul Kagame, President of Rwanda: 'China is a great partner in our development journey. The Beijing Summit of the FOCAC provides an opportunity for us to deepen our already strong cooperation.
>
> Yoweri Museveni, President of Uganda: 'The FOCAC is very important because it helps us to know what the Chinese are doing all over Africa and how we can benefit from that.'

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> Uhuru Kenyatta, President of Kenya: 'The FOCAC is a good platform for sharing best practices on how we can work together to accelerate Africa's development.

2.4.1 Economic drivers

China's investments in Africa are motivated by various factors. China must first find new markets for its industrial products and resources for modernisation. Conversely, others have labelled China's actions as neo-colonialism, arguing that China is only interested in exploiting Africa's resources for its own gain, even though some have hailed China's investment in Africa as a 'new era of dragon-slaying.' There are many questions about China's motivations and contribution to investing in Africa beyond the construction of hard infrastructure and resource extraction.

Drawing from contemporary literature, it is difficult to prevent China from pursuing resource-rich African nations. Several scholarly perspectives on the topic suggest that, like other Western nations, China's foreign policy is influenced by ideological, social, political, and commercial factors.[150] Nonetheless, China and Africa's economic growth is a major impetus for a mutually beneficial relationship.[151]

2.4.1.1 Economic development

Africa is just as interested in and in need of Chinese investment as China is interested in investing in the continent, according to the proponents of Chinese investment in Africa. Chinese investments in Africa are cited to improve the standard of living for African citizens.[152] The Chinese government has supported African countries' efforts to develop their economies in response to the

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[150]Simplice A Asongu and Gilbert Aminkeng, 'The Economic Consequences of China–Africa Relations: Debunking Myths in the Debate' (2013) 11 Journal of Chinese Economic and Business Studies 261. Laura Freschi, 'China in Africa Myths and Realities' [2010] AIDWATCH (accessed on: 16/08/2012). http://aidwatchers. com/2010/02/china-in-africa-myths-and-realities.Yun Schüler-Zhou and Margot Schüller, 'The Internationalization of Chinese Companies: What Do Official Statistics Tell Us about Chinese Outward Foreign Direct Investment?' (2009) 3 Chinese Management Studies 25. Mario Biggeri and Marco Sanfilippo, 'Understanding China's Move into Africa: An Empirical Analysis' (2009) 7 Journal of Chinese Economic and Business Studies 31. Helmut Asche and Margot Schüller, *China's Engagement in Africa: Opportunities and Risks for Development* (Deutsche Gesellschaft fur Technische Zusammenarbeit (GTZ) GmbH 2008). Denis M Tull, 'China's Engagement in Africa: Scope, Significance and Consequences' (2006) 44 The Journal of Modern African Studies 459 <https://www.cambridge.org/core/product/identifier/S0022278X06001856/type/journal_article> accessed 26 April 2019. Cited in Asongu, Nwachukwu and Aminkeng (n 143).

[151] Miria Pigato and Wenxia Tang, 'China and Africa: Expanding Economic Ties in an Evolving Global Context' (2015) 2 1.

[152] Ministry of Foreign Affairs, 'Forum on China-Africa Cooperation Beijing Action Plan (2019-2021)' (2019) <https://www.tralac.org/documents/resources/external-relations/china-africa/2165-forum-on-china-africa-cooperation-beijing-action-plan-2019-2021/file.html> accessed 11 May 2019. Olayiwola Abegunrin and Charity Manyeruke, *China's Power in Africa: A New Global Order (*Palgrave Macmillan 2020).

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continent's economic growth. China is a vital partner in bridging Africa's infrastructure and industrial development gap and helping to unlock the continent's energy and resource potential.[153] The country has also provided financial and technical assistance to African nations to grow industrial capacity by establishing domestic special economic zones (SEZs).[154] Furthermore, China has contributed significantly to developing African infrastructure, particularly in the energy sector. In 2018, China pledged US$60 billion to finance infrastructure projects in Africa. The amount was raised to US$100 billion at the 2021 FOCAC summit.[155]

The following are some of the most frequently cited economic benefits of Chinese investment in Africa:

A. This trend is anticipated to continue as Chinese investment in Africa increases.

B. Chinese companies in Africa have created thousands of jobs, particularly in the construction and manufacturing industries.

C. China has made significant infrastructure investments in Africa, including roads, railways, ports, and power plants. These infrastructure projects have improved connectivity within Africa and between Africa and the rest of the world. This has made it easier for African businesses to trade with companies in other regions.

D. Chinese banks and other financial institutions have provided funding in the billions to African businesses and governments. This has stimulated economic activity and contributed to the creation of jobs. Whereas some African nations are ineligible for international funding or do not accept the terms of the loans, China offers unrestricted financing and has expanded access to development funding. China, therefore, provides an alternative funding partner for Africa.

E. China's investments have helped reduce poverty in Africa by creating jobs and fostering economic growth.

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[153] Africa Development Bank, 'Africa's Infrastructure: Great Potential but Little Impact on Inclusive Growth' (2018) <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/2018AEO/African_Economic_Outlook_2018_-_EN_Chapter3.pdf>.

[154] UNDP, 'Comparative Study on Special Economic Zones in Africa and China' 82.

[155] Sheriff Ghali Ibrahim, Ahmet Arabaci and Ibeh Doris Chinelo, 'ASSESSMENT OF THE FORUM ON CHINA-AFRICA COOPERATION (FOCAC) AND THE SIGNIFICANCE OF THE FIRST BEIJING SUMMIT (2000) TO AFRICA' (2021) 1 ASSESSMENT 18.

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Under FOCAC, China has agreed to increase its investments on the continent. African leaders have embraced Chinese investments because they have contributed to economic growth and job creation.[156] In addition to the amount pledged by Xi Jinping at FOCAC, China invests billions of dollars through FDI in African projects. However, researchers question Chinese motivations and the impact of Chinese FDI on Africa's economy. Dragon-slayers assert that Chinese investments in Africa are a method of colonisation and resource appropriation.

Every FOCAC action plan has prioritised economic cooperation since the first ministerial meeting in Beijing in 2000.[157] China has increased or doubled its economic commitment to Africa at each FOCAC meeting, and Beijing has reported meeting its economic obligations. Numerous financial institutions, including the China Africa Development Fund (CAD Fund), were established to finance Chinese companies that invested in Africa and implemented economic action plans.[158] For example, the Dakar action plan has eight pillars of economic cooperation. The digital economy, which grew substantially during the pandemic and is an area where policy, law, and regulation are rapidly evolving, is a new addition.[159] This is a relatively new industry that lacks a regulatory framework. Cooperation between China and Africa presents a unique opportunity for the global south to chart a new regulatory course. FOCAC demonstrates China's commitment to economic development through south-south cooperation; However, China is a considerably more developed developing nation than African states. The power disparity has supported the claim that China is colonising Africa with its newly acquired economic strength.

2.4.1.2 Neo-coloniser

China's economic commitment to Africa through FOCAC has led to unprecedented investment and trade growth in the past two decades.[160] This rapid growth has prompted accusations of 'neo-colonialism' and 'resource-grabbing' against China's interests.[161] Concerns have been raised about

[156] Ilana Botha, 'China in Africa : Friend or Foe ? China's Contemporary Political and Economic Relations with Africa Supervisor' (2006); Karl P Sauvant and Michael D Nolan, *China's Outward Foreign Direct Investment and International Investment Law*, vol 18 (2015).
[157] Each year the China Ministry of Commerce published the 'implementation of the follow-up report from the FOCAC Ministerial conferences', available at http://focac.org.cn/ljhy/index_12330.htm.
[158] Elizabeth Schickerling, 'The Role of the China- Africa Development Fund in China's Africa Policy'.
[159] Ministry of Foreign Affairs of the People's Republic of China, 'Forum on China–Africa Cooperation Dakar Action Plan (2022–2025)', *The Eighth The Second Ministerial Conference of the Forum On China-Africa Cooperation* (2021).
[160] Yuan Wang and Simon Zadek, 'Sustainability Impacts of Chinese Outward Direct Investment : A Review of the Literature'.
[161] ibid.

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China's human rights record and its role in fostering corruption in oppressive nations in light of its support for authoritarian African governments.[162] Several studies have analysed the terms and nature of China's investment in Africa to determine whether the investment is consistent with neo-colonialism.[163] The majority of arguments support neo-colonial claims.[164] For instance, Lumumba-Kasongo evaluates all three aspects of trade, investment, and legality, utilising empirical research and introspection.[165] In his paper, the author questions why China's presence in Africa has been labelled neo-imperialist and neo-colonialist when, based on oil exports, it lags far behind Europe and the United States.[166]

Some researchers have examined sectoral investment trends to determine whether the trends support the neo-colonial classification of this relationship and the China 'resource grabber' brand.[167] The argument that a country is resource-hungry is not supported by research examining the sectoral allocation of FDI. According to research,[168] Chinese investments have diversified into other industries, primarily infrastructure.[169] However, the trade imbalance shows that China exports more raw materials out of the continent. Research by Yao and Wang reveals that Chinese FDI in Africa displaced the investments of OECD countries on the continent, with the exception

[162] Deborah Brautigam et al 'Many reports have described Chinese engagement in Africa as 'neo-imperialism' and 'authoritarian capitalism', exploiting resources and local labour while undermining democracy. Key Insights PEDL Policy Insight Series † | No. 3 Chinese Investment in Africa'.Chris Alden, *China in Africa* (David Philip 2010).
[163] Maiga Aly 'The China-Africa Relations: Between the Development Cooperation and Economic Diplomacy' (2019) 09 *Open Journal of Political Science* 291–8; Phineas Bbaala 'Emerging questions on the shifting Sino-Africa relations: 'win-win' or 'win-lose'?' (2015) 40 *Africa Development* 97–119; Bhaso Ndzendze & David Monyae 'China's belt and road initiative: linkages with the African Union's Agenda 2063 in historical perspective' (2019) 11 *Transnational Corporations Review* 38–49; Ursula, supra n 115; Herbert Jauch *Chinese Investments in Africa* (2011) vol 20.
[164] Asongu and Ssozi (n 140). TL Deych 'China in Africa: Neo-Colonial Power or 'Win-Win' Strategy?' (2018) 11 *Outlines of global transformations: politics, economics, law* 119–41. Suisheng Zhao, 'A Neo-Colonialist Predator or Development Partner? China's Engagement and Rebalance in Africa' (2014) 23 Journal of Contemporary China 1033. Magnus Ericsson, Olof Löf and Anton Löf, 'Chinese Control over African and Global Mining—Past, Present and Future' (2020) 33 Mineral Economics 153. Utesch-Xiong and Kambhampati (n 90); Kang and Liu (n 138); Horace Campbell, 'China in Africa: Challenging US Global Hegemony' (2008) 29 Third World Quarterly 89.
[165] Lumumba-Kasongo (n 8).
[166] ibid.
[167] Ivar Kolstad and Arne Wiig, 'Better the Devil You Know? Chinese Foreign Direct Investment in Africa' (2011) 12 Journal of African Business 31.Ficawoyi Donou-Adonsou and Sokchea Lim, 'On the Importance of Chinese Investment in Africa' (2018) 8 Review of Development Finance 63.
[168] Ebenezer Megbowon, Courage Mlambo and Babatunde Adekunle, 'Impact of China's Outward Fdi on Sub-Saharan Africa's Industrialization: Evidence from 26 Countries' (2019) 7 Cogent Economics and Finance 1 <https://doi.org/10.1080/23322039.2019.1681054>.
[169] Deborah Brautigam and others, 'Chinese Investment in Africa: How Much Do We Know?' (2014) 2 PEDL Synthesis Series 43.

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of resource-rich nations. The results of the studies are inconclusive, and Chen asserts that, depending on the stakeholder in question, both sides of the argument are valid.[170]

In terms of government policy, Chen argues that China's presence in Africa has no colonial traces, whereas Chinese business engagements on the continent exhibit neo-colonial traits.[171] Ericsson et al. argue that utilising control of raw material resources as an indicator of African Chinese authority is oversimplified. China can exert control in Africa through other means. [172]

Western and prominent African leaders have criticised China's 'new colonialism' in public. In contrast to senior government officials in the West, such as Hillary Clinton (former Secretary of State of the United States) and Jack Straw (former British Foreign Secretary), influential African leaders have divergent opinions.[173] Former South African Presidents Thabo Mbeki, Michael Sata, and Lamido Sanusi have made statements cautioning Africans against forming a colonial relationship with China even though they all had positive engagements with China at some stage.[174] In 2014, the former governor of Nigeria's Central Bank, Sanusi Lamido, stated that Africa should 'recognise that China is in Africa not for African interests, but for its own'. Zimbabwean Finance Minister Tendai Biti urged African governments to adopt policies that allow China to make money while helping to develop the continent.[175] In addition, Biti cautioned that Chinese companies are not in Africa to establish charitable relationships but to conduct business as any other company would.

Other leaders have rejected the notion that China is a neo-coloniser and have welcomed China as a new partner for Africa. While facing major criticism of the China infrastructure projects in their countries, President Nana Akufo-Addo of Ghana and President Kenyatta continue to laud the China model and welcome Chinese investments. Abdoulaye Wade (former President) of Senegal

[170] Shujie Yao and Pan Wang, 'Has China Displaced the Outward Investments of OECD Countries?' (2014) 28 China Economic Review 55.
[171] Chien-Kai Chen, 'China in Africa: A Threat to African Countries?' (2016) 38 The Strategic Review for Southern Africa 100. ibid.
[172] Ericsson, Löf and Löf (n 164).
[173] Giles Mohan and Marcus Power, 'New African Choices? The Politics of Chinese Engagement' (2008) 35 Review of African Political Economy 23. Zhao (n 164).cited in Chen, 'China in Africa: A Threat to African Countries?' (n 171).
[174] BBC NEWS, 'Mbeki warns on China-Africa ties,' (12/14/2006), available at http://news.bbc.co.uk/go /pr/fr/-/2/hi/business/6178897.stm, accessed 30 March 2019.
[175] Lauren Johnston, 'China's Road to Growth in Africa' (*East Asia Forum*, 2015) 1, available at <http://www.Eastasiaforum.org/2015/02/07/chinas-road-to-growth-in-africa/>.

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praised China's presence in his country and contrasted their contract language to the West with their colonial hangover.[176] Abdurrahman Mohammed Babu (former Foreign Minister of Zanzibar and Tanzanian Minister of Economic Planning) promoted China's presence as a new economic partner in the continent. He was also one of the key negotiators in the first China–Africa strategic investment, the Tazara railway.[177] Furthermore, President Ramaphosa's 2018 remarks at the FOCAC opening ceremony represent a position of China as a non-colonial partner:

> In the values that it promotes, in the manner that it operates, and in the impact that it has on African countries, FOCAC refutes the view that a new colonialism is taking in Africa, as our detractors would have us believe.

The Chinese communist party insists that they do not have 'colonial DNA.' China insists that its relationship with Africa is founded on the five principles of mutual respect for sovereignty and territorial integrity, mutual nonaggression, mutual non-interference in internal affairs, equal rights and reciprocal benefits, and peaceful coexistence.[178] However, critics affirm that Africa's economic relationship with China has hampered the continent's development potential, which is the characterisation of neo-colonisation. Nonetheless, some African leaders such as Kwame Nkrumah, Zambia's Prof. Patrick Lumumba and Jacob Zuma have cautioned that, based on Africa's experience with European colonisation, the continent needs to be more cautious with new investors.[179] Furthermore, the Chinese government has been accused of deliberately undercutting Africans' efforts to develop their regulatory regimes by offering loans and aid, which is conditional on using Chinese contractors and suppliers. This has led to accusations that China is seeking to create a 'neo-colonial' relationship with Africa, in which African countries are forced to adopt legal and regulatory frameworks that are not in their best interests.

China's ongoing trade with corrupt leaders, sometimes perceived as facilitating corruption, raises the question of whether China intends to support a stable continent or exacerbate corruption. According to Pan et al., Chinese investments have enhanced the institutional quality of host

[176] Madison Condon, 'China in Africa: What the Policy of Nonintervention Adds to the Western Development Dilemma' (2012) 27 Fletcher Journal of Human Security 5 <http://fletcher.tufts.edu/Praxis/~/media/Fletcher/Microsites/praxis/xxvii/2CondonChinaAfrica.pdf>.
[177] The Tazara Railway is the first significant investment project between China-Africa. The Investment was different from the colonial investment in Africa, which focused on extractive industries.
[178] L Songtian, 'South Africa and China Are Beneficial Partners' [2018] Iol <https://www.iol.co.za/pretoria-news/south-africa-and-china-are-beneficial-partners-13508542>.
[179]Kwame Nkrumah, 'Neo-Colonialism: The Last Stage of Imperialiam' 316 <http://books.google.co.uk/books?id=xoO5AAAAIAAJ>. Lumumba-Kasongo (n 8).

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nations, reduced corruption and bolstered the rule of law.[180] A more accommodating viewpoint identifies three motives for China's economic influence: acquiring natural resources, expanding China's geopolitical influence, and gaining new markets for Chinese goods. China's desire to enter the African market is undeniable, but the truth likely lies somewhere in the middle. Some academics believe that, unlike its former colonial master, China is using debt traps as a diplomatic tool to gain control over Africa.[181] African countries have become more vocal and asserted their interests in China–Africa relations in response to these criticisms. They increasingly view China as a development partner and ally while pushing for a more equitable and balanced relationship.

2.4.1.3 Debt-trap diplomacy

The debt trap narrative has recently been a prominent theme in China's Africa nexus. Indian geostrategist Brahma Chellaney coined the term 'debt-trap diplomacy' in his 2017 article.[182] Chellaney argues that China extended loans to the governments of developing nations to support strategically located infrastructure.[183] Moreover, he suggests that the projects are financed primarily to gain access to the host country's assets rather than to promote economic growth.[184] Mike Pence (former United States Vice President) and Mike Pompeo (former Secretary of State) frequently referred to the debt trap in public speeches, intending to use Africa as an example to criticise the BRI.[185]

Since Africa–China relations have been on the rise, so has the amount of debt China lent to African countries. There is no doubt that China has provided much-needed infrastructure development in Africa. However, some experts are concerned that China may be using debt as a tool for statecraft to gain control over African countries.[186] The concern is that China would trap African countries in a debt cycle from which they will be unable to escape and will be able to extract concessions such as natural resources, market access in those countries, and ownership of important national infrastructure assets. These alarms over China's lending risk in the continent

[180] Chunyang Pan and others, 'Does China's Outward Direct Investment Improve the Institutional Quality of the Belt and Road Countries?' (2020) 12 Sustainability (Switzerland) 415.
[181] Brahma Chellaney, 'China's Debt-Trap Diplomacy' (*Project Syndicate*, 2017) 2017.
[182] Jonas Fallenius & Bachelor Thesis 'Chinese FDI and Debt-Trap Diplomacy in Sub-Saharan Africa'; Pradumna B Rana & Ji Xianbai 'BRI's 'Debt Trap Diplomacy': Reality or Myth?'
[183] Chellaney (n 181).
[184] ibid.
[185] Honghua Men and Xi Xiao, *Report of Strategic Studies in China (2019)* (Honghua Men ed, 2021).
[186] Hisham Aidi, 'China's Economic Statecraft in Africa' (2018) <https://www.africaportal.org/publications/chinas-economic-statecraft-africa/>.

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stem from the Sri Lankan case and the lesser-mentioned Ecuador loan and Venezuela loan.[187] Ferchen's in-depth research concluded that Venezuela's loan default after the collapse of oil prices in 2014 left China in a more vulnerable position.[188] In prioritising its geostrategic economic interests, China was left in a lending trap and did not enforce repayments or coerce oil shipments.[189]

Debt trap proponents argue that China's loans are frequently granted unfavourable conditions, with little consideration for the recipient country's capacity to repay.[190] They further claim that China often utilises its loans to seize control of vital infrastructures like ports and railways. China has a history of using loans to obtain control of natural resources, which can subsequently be sold to China at below-market prices. The supporters conclude that China intends to extend its political and economic influence on the African economy and render it bankrupt through large loans, putting policymakers in a vulnerable position. African leaders will ultimately have no choice but to meet the Chinese demands, even if those choices violate national sovereignty.[191]

A few African countries have been identified as vulnerable to China's debt trap. The most recent example is China's refusal to renegotiate payment terms with Uganda for the US$200 million Entebbe Airport expansion. China's denial fueled apprehensions that China might seize control of the airport. In a 2018 speech, former United States National Security Adviser John Bolton warned that China 'is now prepared to take over Zambia's national power and utilities firm in order to collect Zambia's financial obligations.'[192] Bräutigam et al. demonstrated that the contract was designed for sustainability and minimal sovereign risk, utilising international law and commercial project finance.[193] For instance, Angola, Nigeria, Kenya, and Ethiopia owe China

[187] Ibrahim Anoba, 'Africa Should Think Twice about Accepting China's Aid' (2018) 15 RealClearWorld, January <https://www.realclearworld.com/articles/2018/01/15/africa_should_think_twice_about_accepting_chinas_aid_112681.html> accessed 29 January 2023. Cited in Abel Kinyondo, 'Is China Recolonizing Africa? Some Views from Tanzania' (2019) 182 World Affairs 128.
[188] Matt Ferchen, 'China , Venezuela , and the Illusion of Debt-Trap Diplomacy' (*Asian Perspective*, 2018).
[189] ibid.
[190] Chellaney (n 181).
[191] Czirjak Ráhel 'China's 'debt trap diplomacy' in Africa: false accusation or reality' (2019) *PAGEO Geopolitical*.
[192] 'How Africa Borrows From China: And Why Mombasa Port Is Not Collateral for Kenya's Standard Gauge' (*China Africa Research Initiative*, 2022). Ian Taylor, 'Kenya's New Lunatic Express: The Standard Gauge Railway.' (2020) 19 African Studies Quarterly.
[193] Deborah Brautigam and others, 'How Africa Borrows From China: And Why Mombasa Port Is Not Collateral for Railway'.

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more than 50 per cent of their foreign debt.[194] The risk exposure is alarming, but it does not support the argument that China uses its debt to influence host-country policy or acquire state assets. According to an analysis by the Rhodium Group, China has routinely forgiven debts or permitted debt deferment.[195] When developing nations were bracing themselves for a Covid-19 triggered recession in 2020, new arguments against the China Africa debt trap began to emerge.[196] The concerns were exacerbated when African nations began borrowing billions of dollars from international organizations and other countries to fund domestic economic stimulus packages aimed at stimulating their domestic economies and providing distress social grants during the pandemic. The fear is that additional borrowing could further contribute to the debt distress many countries were already facing and put these countries at risk of defaulting on their loans.[197]

Some scholars conclude that China is not using debt to trap African countries, even during a vulnerable period, but rather is giving much-needed development funding.[198] They refute the notion that China is attempting to gain control of African countries through its loan activities.[199] The notion is supported by a number of infrastructure developments sponsored by China, as well as debt waived off by China to Africa's least developed countries and the extra support, termed 'mask diplomacy', during the Covid-19 outbreak.[200]

In light of a recent study by Johns Hopkins University from the China–Africa workshop, China has played a pivotal role in assisting African governments with debt management. In ten

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[194] D.R Chaudhury, 'Africa's Rising Debt: Chinese Loans to Continent Exceeds $140 Billion' *The Economic Times* (2021).
[195] Marques Clara, Ferreira, 'China in Africa Is More than a Land Grab' *The Japan Times* (2020).
[196] Daniel D Bradlow and Magalie L Masamba, *COVID-19 and Sovereign Debt: The Case of SADC* (Pretoria University Law Press 2022).
[197] Sherillyn Raga and Bouba Housseini, 'The Evolving Fiscal and Liquidity Stimulus Packages in Response to COVID-19 in Sub-Saharan Africa Key Messages' 1.
[198] Lee Jones & Shahar Hameiri 'Debunking the myth of 'debt-trap diplomacy' (2020) *London: Chatham House*; Deborah Brautigam 'A critical look at Chinese 'debt-trap diplomacy': the rise of a meme' (2020) 5 *Area Development and Policy* 1–14; Deborah Brautigam & Meg Rithmire 'The Chinese 'Debt Trap' Is a Myth'; Ajit Singh 'The myth of 'debt-trap diplomacy'and realities of Chinese development finance' (2020) *Third World Quarterly* 1–15.Czirják Ráhel 'China's 'debt trap diplomacy' in Africa: false accusation or reality?'
[199] Jones and Hameiri (n 198).Singh (n 198). ; ibid.
[200] Wayne Chavulimu Kalika, 'African Agency in China–Africa Relations: An Analysis of Engagements under the Forum on China-Africa Cooperation Framework' [2019] Thesis of United States International University-Africa; Deborah Brautigam, Kevin Acker and Yufan Huang, 'Debt Relief with Chinese Characteristics' (Working Paper 2020); Yu Sun, 'China' 2018 Financial Commitment to Africa: Adjustment and Recalibration' (2019) <https://www.brookings.edu/blog/africa-in-focus/2018/09/05/chinas-2018-financial-commitments-to-africa-adjustment-and-recalibration/> accessed 2 April 2019; Ministry of Foreign Affairs, 'Forum on China-Africa Cooperation Beijing Action Plan (2019-2021)' (n 152).

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African nations, researchers identified sixteen debt restructuring cases totalling US$7.5 billion between 2000 and 2019.[201] According to workshop reports, China wrote off the arrears of at least 94 interest-free loans totalling over US$3.4 billion.[202] The Chinese government has not filed lawsuits or seized assets in debt default cases. However, the research also revealed that loan-free debt accounted for only 5 to 8 per cent of Africa's debt exposure to China.[203] However, the loan write-off and lack of legal action provide a sliver of evidence against the debt trap argument.

Before and during the coronavirus outbreak, Chinese banks restructured a significant amount of debt within and outside the G-20 framework.[204] When multiple Chinese institutions and ministries are involved in resolving debt, the process is more time-consuming.[205] Even though asset seizure is not imminent for African governments, there are still concerns that the continent's debt exposure to China weakens its negotiating position and makes it a tool for China's geopolitical goals. The heavily indebted nations continue relying on China for development financing, which alters the global financial landscape. China's growing influence and popularity in Africa threaten Western dominance in the region and alter the global balance of power.

2.4.2 Geopolitical Impact

Since its Opening Up policy was affected in the late 1970s, China has prioritised economic development and expansion. Having developed its economy, China is now seeking a larger role in international affairs. Numerous factors have influenced China's increased geopolitical involvement. First, as China's economy has expanded, its reliance on foreign trade and investment has grown. This means that it has a vested interest in maintaining the international system's stability and openness. Second, China is increasingly aware of its status as a global superpower and seeks to be regarded as a responsible global leader. In an effort to reduce the likelihood of

[201] Brautigam, Acker and Huang (n 200).
[202] ibid.
[203] Yun Sun, 'China and Africa's Debt: Yes to Relief, No to Blanket Forgiveness' (*Brookings*, 2020) <https://www.brookings.edu/blog/africa-in-focus/2020/04/20/china-and-africas-debt-yes-to-relief-no-to-blanket-forgiveness/#:~:text=Among the %2460 billion China,funding in zero-interest loans.> accessed 1 August 2021; Deborah Brautigam, Yufan Huang and Kevin Acker, 'Risky Business: New Data on Chinese Loans and Africa's Debt Problem' (Briefing paper 2020).
[204] Kevin Acker, Deborah Brautigam and Yufan Huang, 'The Pandemic Has Worsened Africa's Debt Crisis. China and Other Countries Are Stepping In' *Washington Post* (2021) <https://www.washingtonpost.com/politics/2021/02/26/pandemic-has-worsened-africas-debt-crisis-china-other-countries-are-stepping/>.
[205] ibid.

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conflict, China's leaders are eager to improve relations with other countries. This shift in viewpoint is most pronounced in Africa. China has a long history of involvement in Africa, but its involvement has been primarily economic rather than political. In recent years, China has become more politically active, seeking to build relationships with African nations and increase its influence on the continent.

2.4.2.1 Reverse hegemony

During the scramble for Africa, Otto von Bismarck coldly remarked, 'He who controls Africa controls Europe.'[206] As a pragmatic politician who was initially uninterested in colonisation, Bismarck recognised the significant role Africa played in European politics as he set the parameters for the division of the continent.[207] Africa remains central in the economic competition for geopolitical control.

Inter-imperialist competition led to the United States' dominance following the end of the Cold War, displacing the Europeans by forging military and commercial ties with several African states under the guise of promoting 'growth and development'.[208] In response to the challenge posed by the United States, the European Union created the Development of Partnership for Peace and Security and outlined the 'European Union Strategy for Africa'.[209] However, the emergence of China as a player in Africa has complicated the debate between the European Union and the United States over 'who governs Africa'.[210]

For millennia, the global north has dominated the global south. This is most apparent in Africa, where Western nations have long dominated and plundered the continent's resources. This is gradually changing as China asserts its position in Africa. This change in power dynamics is progressively eroding the hegemony of the West in Africa.[211] China is on the verge of becoming the world's largest producer of goods and services and currently dominates international affairs. America's long-held position of pre-eminence is being steadily but gradually eroded by China's

[206] Herbert Paul Meritt, 'Bismarck and the German Interest in East Africa, 1884–1885' (1978) 21 *The Historical Journal* 97.
[207] ibid.
[208] M Luke Herrington, 'Why the Rise of China Will Not Lead to Global Hegemony' (*E-International Relations Students*, 2011) 1 <http://www.e-ir.info/2011/07/15/why-the-precarious-rise-of-china-will-not-lead-to-global-hegemony/>.
[209] ibid.
[210] ibid.
[211] Campbell (n 164).

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growing influence on the continent. In the future, as the two global superpowers compete for power and resources, Africa will become an increasingly vital battlefield. Dragon-slayers are concerned that China is attempting to establish global hegemony by starting with developing nations.[212]

Within the academic discourse, Western scholars have underscored the Africa China asymmetry, positing that Africa lacks agency, thereby suggesting that Western representation of African interests in global affairs should persist. However, the author contends that addressing this asymmetry is imperative to enhance Africa's autonomy, as the continent indeed possesses agency and the capacity to assert its interests independently.

Similar to the Chinese official's argument about neo-colonisation in the continent, Chen argues that China is not interested in being a hegemon in the continent.[213] In his first speech to the United Nations, Deng Xiaoping declared that China would never pursue hegemony or participate in military expansion, no matter how developed it grew.[214] However, since becoming a net capital exporter, China's activities indicate that the Middle Kingdom is intent on reordering geopolitical systems through various significant efforts aimed at reversing America's status as the world's leader.[215] African states have used their agency to support China's geopolitical international aspirations.[216] The new relationship with Africa has added a new major player to the battle between Europe and China for dominance of the continent.

Cooperation between China and Africa has been mutually beneficial and has contributed to a more balanced global order. China is restructuring international legal systems to accommodate developing nations' interests.[217] President Xi Jinping has expressed China's desire to internationalise the global south's systems. The BRI is the most notable example of this initiative

[212] Muhammad Azeem, 'Theoretical Challenges to TWAIL with the Rise of China: Labor Conditions Under Chinese Investment in Pakistan' (2019) 20 Oregon Review of International Law 395.
[213] Chen, 'China in Africa: A Threat to African Countries?' (n 171).
[214] Xiaoping Deng, 'Speech By Chairman of the Delegation of the People's Republic of China, Deng Xiaoping, At the Special Session of the U.N. General Assembly' (1974) 15, available at <https://www.marxists.org/reference/archive/deng-xiaoping/1974/04/10.htm>.
[215] Shaun Breslin, 'China and the Global Order: Signalling Threat or Friendship?' (2013) 89 International Affairs 615. Ravi Arvind Palat, 'A New Bandung?: Economic Growth vs. Distributive Justice among Emerging Powers' (2008) 40 Futures 721.
[216] Justin van der Merwe, 'The One Belt One Road Initiative: Reintegrating Africa and the Middle East into China's System of Accumulation', *Mapping China's 'One Belt One Road' Initiative* (Springer 2019).
[217] Pádraig R Carmody and Francis Y Owusu, 'Competing Hegemons? Chinese versus American Geo-Economic Strategies in Africa' (2007) 26 Political Geography 504, available at <https://www.sciencedirect.com/science/article/pii/S0962629807000406>.

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to date,[218] as a development strategy that aims to improve Eurasian connectivity via infrastructure projects, trade, and investment.[219] Many developing nations have embraced it as an alternative to the Washington-led global order. The BRI is the signature foreign policy of President Xi Jinping, who personally supervises its infrastructure plans and issues policy statements.[220]

Since China became a net recipient of FDI at the beginning of the 21st century, Chinese policymakers have taken a more active role in shaping the international investment regime.[221] China joined the International Centre for Settlement of Investment Disputes (ICSID) Convention in 2009 and ratified the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration in 2012.[222] As the first comprehensive legislation regulating foreign investment in China, the foreign investment law is significant. This law provides foreign investors operating in China with a high legal certainty, which investors have welcomed. China has exerted influence in international affairs by utilising its robust diplomatic ties with Africa. Herrington argues that while the United States' global hegemony is declining, China cannot replace the United States.[223] He argues that Chinese hegemony lacks theoretical support and is practically impossible.[224] Nonetheless, China appears to exert some influence over Africa.

2.4.2.2 Power Asymmetry

When their relationship began, China and Africa were developing economies dealing with colonialism and illegal occupation.[225] China has surpassed Africa as a superpower as a result of its phenomenal growth. China's access to capital has grown over time, whereas Africa has gained independence and has been rich in natural resources since its independence. At first glance, the

[218] Merwe (n 216).
[219] Nadège Rolland, 'A Concise Guide to the Belt and Road Initiative' [2019] The National Bureau of Asian Research 13 <https://www.nbr.org/publication/a-guide-to-the-belt-and-road-initiative/>.
[220] Merwe (n 216). Gang Jin, Kunrong Shen and Yue Jiang, 'Does the Belt and Road Initiative Cause More Troubled Chinese Overseas Investments?' (2021) 72 International Review of Economics & Finance 217 <https://www.sciencedirect.com/science/article/pii/S1059056020302847>; Zhexin Zhang, 'The Belt and Road Initiative in the Global Trade, Investment and Finance Landscape' (2018) <https://www.nortonrosefulbright.com/en/knowledge/publications/d2e05e9f/the-belt-road-initiative---a-modern-day-silk-road>.
[221] Shan Wenhua, *The Legal Framework of Eu-China Investment* (Wenhua Shan, Qing Zhang and Xin Zhang eds, Hart Publishing 2005).
[222] ibid.
[223] Herrington (n 208).
[224] ibid.
[225] Kalika (n 200).

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new dynamic delivers what appears to be a 'win-win' situation.[226] However, Africa's ability to exploit its natural resources has been hampered by a lack of cash, corruption, wars, and inadequate institutional capacity. China's capital could be used to leverage resources, and the Chinese development model could help Africa build institutional capacity.[227] The country and the rest of the world have yet to resolve this.[228] The contradiction of being a leading economy while still growing has complicated power and economic ties inside China.

As the Middle Kingdom ascends economically to a position of economic dominance, it is expected to take the lead in developing nations' geopolitical affairs. China has begun to advocate for developing countries in numerous multilateral organisations and on numerous global issues.[229] China, for instance, produced a policy paper on United Nations reform to explain its strategy, which asserts that United Nations reform should fully address the concerns and interests of developing nations, pay greater attention to their voices, and increase their representation at the United Nations.[230] China prefers, However, to lead from behind and only on domestic issues. Beijing has refused to lead developing nations, citing a policy of non-intervention. If intervention is required to maintain or restore stability, this strategy does not bode well with global powers or Africa. Emerging African researchers such as Mabasa and Mqolomba have questioned the role that Africa–China ties would play in ensuring that Africa capitalises on its natural resources in light of the partnership's unequal power balance.[231]

China has used its developing status to determine its speed to reform to meet World Trade Organization (WTO) regulations and ensure the reforms suit Chinese conditions.[232] On the other hand, it has used its newfound power to enter negotiations in Africa. China has criticised the West for interfering and placing conditions through their loans to interfere in African politics.[233] Chinese

[226] Chen, 'China in Africa: A Threat to African Countries?' (n 171).
[227] Pan and others (n 180).
[228] Martin King Whyte, 'Paradoxes of China's Economic Boom' (2009) 35 Annual Review of Sociology 371.
[229] Zhang, 'Complex Asymmetry: A Comparative Perspective on China's Relations with Africa and Latin America' (n 89).
[230] Francois Godement, 'China , the Reluctant Wto Reformer China and Wto Reform : Minimal Changes'.
[231] Khwezi Mabasa and Zukiswa Mqolomba, 'Revisiting China ' S Developmental State :' (2016) 38 Strategic Review for Southern Africa 69 <https://www.google.com/search?q=REVISITING+CHINA%27S+DEVELOPMENTAL+STATE%3A+LESSONS+FOR+AFRICA&rlz=1C1GCEA_enLR779LR779&oq=REVISITING+CHINA>.
[232] Hart and Johnson (n 57).
[233] David H Shinn and Joshua Eisenman, 'Evolving Principles and Guiding Concepts: How China Gains African Support for Its Core National Interests' (2020) 64 Orbis 271 <https://doi.org/10.1016/j.orbis.2020.02.009>.

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loans may not have the same political agenda in Africa, but they have been used to prioritise China's economic and geopolitical interests.[234] Economically, China maintains influence in the application of its funds. Chinese conditions force African countries to procure goods and services from China, which can ultimately undermine domestic policies on employment creation, crowd out local businesses and impact domestic political manifestos.[235] Politically, African countries are strongly encouraged to support or be silent about China's domestic policies publicly.[236] There are main issues that China is criticised for internationally, and Beijing perceives them as attacking China's sovereignty or its core national interests.[237] While China advocates non-interference on Africa's domestic issues, coercing Africa to support China's position internationally as a condition of Chinese loans introduces asymmetry and has become a feature in the relationship.

Many African nations struggle with economic development, whereas China has become a leading economic power. Therefore, China has greater economic influence and power than African nations. There are numerous reasons for this asymmetry in power. Africa has been historically marginalised in the global economy. As a result, African nations have had less access to capital and technology, hindering their ability to develop their economies. Second, China's economy is significantly larger than all African economies combined. This improves China's negotiating position in economic negotiations. Thirdly, China is less reliant on Africa for trade and investment than Africa is on China. Africa will likely make concessions during economic negotiations to preserve a good economic relationship with China. However, the reciprocity of African leaders' non-intervention has significant international consequences. China has steered African discourse towards its core national interests, which are not limited to domestic issues and have the potential to influence global economic laws.

The power disparity between China and Africa will likely persist in the future. Alternatively, if African nations' economies continue to expand, they may become more equal partners in the economic partnership. Researchers on the Chinese side have maintained that rebalancing the power

[234] ibid.
[235] Ann Sofie Isaksson and Andreas Kotsadam, 'Racing to the Bottom? Chinese Development Projects and Trade Union Involvement in Africa' (2018) 106 World Development 284 <https://doi.org/10.1016/j.worlddev.2018.02.003>.
[236] Africa has endorsed China's position on contentious geopolitical issues. Issues that threatened China's territory or the One China Policy. African states have supported the Chinese government in conflicts between China and Taiwan, Tibet, Hongkong and Other Asian countries.
[237] Shinn and Eisenman (n 233).

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and relationship with China is Africa's responsibility, not China's. As African nations' economies continue to expand, they may become more equal partners in the economic partnership. Several authors have urged African nations to study how Latin America has dealt with power dynamics. Qingming examines the similarities and differences in China's policy and relationship policies between China and Africa and China and Latin America. [238] African nations have complained that they do not receive adequate returns from China's investments, and China has been accused of exploiting Africa's natural resources. The power disparity between China and Africa has strained their economic ties. According to African experts, African nations require autonomy to combat the effects of China's capital-driven expansion.

Defining African Agency

Less emphasised is the significance of the African agency in Africa–China relations. [239] This dichotomy oversimplifies the reality of Africa–China relations; It is necessary to acknowledge the agency of African actors in these relationships.[240] This relates to the independence and capacity of African nations to pursue their own interests. Scholars have discussed Africa's lack of agency in its relationship with China, largely attributable to China's dominating influence in the region. [241] China has effectively exported its growth model to Africa, causing the continent to abandon international legal norms and adopt unknown Chinese commercial practices and values. [242] This thesis investigates the concept and aspect of African agency in China–Africa relations and how Africans can regain agency in the relationship. There is an emphasis on regulatory and policymaking processes. Chapter 5 also argues that despite China's great economic strength and

[238] Zhang, 'Complex Asymmetry: A Comparative Perspective on China's Relations with Africa and Latin America' (n 89).
[239] Jin Ding, Christoph Ratz and Manfred Max Bergman, 'What Do We See When Looking at China's Engagements in Africa? An Analysis of Mainstream Academic Perspectives' [2021] Journal of Contemporary China 1.
[240] Olivier (n 82).
[241] Kalika (n 200); Carlos Lopes, 'REINSERTING AFRICAN AGENCY INTO SINO-AFRICA RELATIONS' 38 Strategic Review for Southern Africa, available at <https://www.up.ac.za/media/shared/85/Strategic Review/Vol 38(1)/lopes-pp-50-68.zp89610.pdf> accessed 24 April 2019; Corkin (n 69); Wekesa (n 117).
[242] Rahul Gupta Choudhury, 'An Overview of the Belt and Road Initiative (BRI): Implications in Geo-Strategy and Geo-Politics' (2021) 09 International Journal of Business & Economic Development 64. Chris Alden and Daniel Large, 'On Becoming a Norms Maker: Chinese Foreign Policy, Norms Evolution and the Challenges of Security in Africa' (2015) 221 China Quarterly 123.

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presence in Africa, Africa has agency within the relationship that can be utilised to build a more equitable and balanced alliance.

Most scholars agree that African agency refers to the capacity of African nations to act independently and in their best interests.[243] This is the case in contrast to Africa's historical status as a colony or dependent on European powers. A number of factors have influenced Africa's lack of initiative in China–Africa relations. First, the legacy of colonialism has left Africa with fragile states, making it difficult for African nations to negotiate from a position of strength with China or any other external actor.[244] Second, the dependence of African nations on China for investments, trade, and representation on global platforms such as the United Nations gives China substantial leverage over African nations.[245] China's development model is based on state-led economic expansion and export-oriented industrialisation (EOI).[246] This model contrasts with the neoliberal Washington consensus, which has largely guided Africa's economic development since the 1980s.[247]

Therefore, China's development model is frequently viewed as an alternative to Africa's failed neoliberal policies.[248] Finally, China's rise as a global power has been relatively recent, and it is still seeking to establish itself as a legitimate actor on the international stage.[249] In contrast, Africa

[243] Adekeye Adebajo, *The Curse of Berlin;Africa After The Cold War* (Oxford University Press UK 2010). Frangton Chiyemura, 'The Winds of Change in Africa-China Relations? Contextualising African Agency in Ethiopia-China Engagement in Wind Energy Infrastructure Financing and Development'' (Open University (United Kingdom) 2019).Ronald Chipaike and Matarutse H Knowledge, 'The Question of African Agency in International Relations' (2018) 4 Cogent Social Sciences 1487257.

[244] Robert H Jackson and Carl G Rosberg, 'Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood' (1982) 35 World politics 1.

[245] Adriana Erthal Abdenur, 'China and the BRICS Development Bank: Legitimacy and Multilateralism in South–South Cooperation' (2014) 45 IDS Bulletin 85.

[246] Lisa Li and Gerald Vinten, 'An Overview of the Experiences of Chinese Industrialization Strategies and Development' [1997] Managerial Auditing Journal.Victor FS Sit 'Hong Kong's' transferred' industrialization and industrial geography' (1998) *Asian Survey* 880–904.Chun Yang, 'Market Rebalancing of Global Production Networks in the Post-Washington Consensus Globalizing Era: Transformation of Export-Oriented Development in China' (2014) 21 Review of International Political Economy 130.

[247] Robert T Sataloff, Michael M Johns and Karen M Kost, 'China in Africa A Strategic Overview'.

[248] Lina Benabdallah, 'Contesting the International Order by Integrating It: The Case of China's Belt and Road Initiative' (2018) 0 Third World Quarterly 1 <https://www.tandfonline.com/doi/full/10.1080/01436597.2018.1529539>.

[249] Wenwei Guan, 'Beijing Consensus and Development Legitimacy: The Evolution OfChina's Foreign Direct Investment (FDI) Regime from a Law & Development Perspective' (2018) 12 Asian Journal of Comparative Law 115<https://www.cambridge.org/core/terms.https://doi.org/10.1017/asjcl.2017.3, available at https://www.cambridge.org/core.UCTUniversity> accessed 21 November 2018. James L Zhaojie 'Commentary on 'China and the international legal system: Challenges of participation'' (2007) *China Quarterly* 716–9.

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has long been marginalised in international relations, and its voice has been largely absent from global governance.

These factors have led to a power asymmetry between China and Africa, with China holding the upper hand. China has been accused of exploiting the natural resources of African nations and imposing its values. This has led to concerns that Africa is losing its independence and becoming increasingly dependent on China. China's imposition of its values on Africa is illustrated by the 'China model' of development, which emphasises authoritarianism and state control. Several factors may contribute to the perception that Africa has less influence on relations between Africa and China. First, Africa relies heavily on China for trade and investment due to the economic disparity between China and Africa. This gives China significant sway in the relationship. Second, China's political and economic model is notably dissimilar to that of the majority of African nations. In an attempt to maintain good relations with China, African countries may feel pressure to conform to Chinese norms and values.

However, while some Africans may view China's engagement with suspicion, many African leaders and academics view it as an opportunity for the continent to assert its authority on the international stage. In a 2016 interview, Rwandan President Paul Kagame stated, 'Africa must define its own interests, and China is one of the countries with which we can do business on that basis.' Some authors, such as Corkin and Wekesa, argue that Africa has a distinct capacity for agency and is distinctly capable of actively shaping its own growth trajectory.[250] This observation was echoed by Calabrese and Tang, who noted that political elites in developing nations facilitate and leverage Chinese business transactions. Chinese policymakers insist that Africa has agency, and African leaders initiated the majority of engagements with China under FOCAC and BRI. African nations have consequently become more proactive in engaging with China on their terms. FOCAC has been a crucial mechanism for Africa to assert its independence in China–Africa relations. In addition, many African countries are currently adopting China's BRI. In doing so, they adopt China's perspective on global economic development.

Relations between China and Africa are inherently unequal, as China possesses more economic power than any individual African nation. This does not, however, imply that Africa

[250] Corkin (n 69).

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does not influence the relationship. African nations are independent and able to pursue their interests in China–Africa relations. Some African countries have successfully negotiated loan terms with China, while others have leveraged their status as key trading partners to extract concessions on investment and trade. The China–Congo cooperation agreement, under which China provided Congo with a US$6 billion loan in exchange for oil rights, is an example of a successful loan negotiation between China and an African nation. China's decision[251] to exempt 400 of Africa's exports to China from tariffs was viewed as a significant concession by China and a victory for African nations. [252] Africa does not merely receive China's economic and diplomatic engagement; rather, it actively influences the nature of China–Africa relations. China has exerted considerable influence on African governance, but with the exception of capital funding, this influence is bidirectional.[253]

Current China-centric strategies have resulted in a dichotomous view of China and Africa. Studies suggest that China's footprint in Africa is either a cautionary tale or a win-win partnership. [254] Additionally, research has only been published from a weak and powerless African standpoint. Case studies on countries that have successfully negotiated with China and research demonstrating a successful triangular interaction between China, Africa, and the West are essential. South Africa, Angola, Nigeria, and Egypt will likely play a larger role in maintaining the balance of power. These nations, according to Bodomo, should employ a China policy.[255]

China and Africa have a complex and dynamic relationship characterised by cooperation and competition. On the one hand, China's increasingly assertive role in international affairs shapes China–Africa relations. On the other hand, African nations are increasingly asserting their autonomy in this relationship. This tension between cooperation and competition will likely continue to characterise future China–Africa relations. When it experiences a surge in Chinese OFDI, Africa faces the same dilemma as Europe: determining the optimal balance between

[251] Vivien Foster, *Building Bridges: China's Growing Role as Infrastructure Financier for Sub-Saharan Africa*, vol 5 (World Bank Publications 2009).
[252] Ministry of Foreign Affairs, 'Forum on China-Africa Cooperation Beijing Action Plan (2007-2009)', *Focac* (2006) <http://www.focac.org/eng/ltda/dscbzjhy/DOC32009/t280369.htm>.
[253] Gisela Grieger, 'China's Growing Role as a Security Actor in Africa' [2019] The European Parliamentary Research Service <http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642232/EPRS_BRI(2019)642232_EN.pdf>.
[254] Laura Koran, 'Why China's Footprint in Africa Worries the US' (2018) 10 CNN, March. Deych (n 164).
[255] Bodomo (n 23).

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ensuring the benefits of Chinese FDI, such as job creation and productivity gains, and protecting against its negative effects.[256]

2.5 FDI impact: A legal perspective

The impact of Chinese OFDI in Africa has been extensively discussed. Scholars are divided on whether Chinese investment has influenced FDI policy, legislation, and regulation in host nations. African governments have modified their restrictions on foreign investment to take advantage of Chinese investment inflows and to mitigate any associated risks. In some cases, this has resulted in investment restrictions being loosened and FDI regimes being liberalised.[257] Overall, this has increased regulatory scrutiny of Chinese investments in host nations.[258] African nations have been modifying their foreign investment regulations to capitalise on Chinese investment inflows.[259] When countries have relaxed their regulation, scholars warn that Chinese OFDI in Africa will result in a race to the bottom for Africa's FDI regulation and a loss of sovereignty for African countries.[260]

Although there have been some positive effects such as job creation and improved infrastructure, there have also been negative effects, such as environmental degradation and increased corruption.[261] This is primarily because China is indifferent to the rule of law in domestic countries or chooses not to enforce the Chinese version of the rule of law.[262] China also invests in countries with a history of corruption or repressive state tactics. As discussed further in Chapter 6 of this thesis, China has played an active role in providing cyber capabilities to certain regimes.[263]

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[256] Sophie Meunier, 'Political Impact of Chinese Foreign Direct Investment in the European Union on Transatlantic Relations' [2012] European Parliament Briefing Paper 18.
[257] Loksan Harley, 'African Countries Relax Short-Term Visa Policies for Chinese in Sign of Increased Openness to China' (*MPI Migration Policy Institute*, 2019).
[258] Ming Du, 'The Regulation of Chinese State-Owned Enterprises in National Foreign Investment Laws: A Comparative Analysis' (2016) 5 Global Journal of Comparative Law 118.
[259] Calabrese Linda and Tang Xiaoyang, 'Africa's Economic Transformation: The Role of Chinese Investment - DEGRP' (2020) <https://degrp.odi.org/publication/africas-economic-transformation-the-role-of-chinese-investment/>.
[260] Isaksson and Kotsadam (n 235); Anthony Yaw Baah and Herbert Jauch (eds), *Chinese Investments in Africa: A Labour Perspective*, vol 35 (African Labour Research Network 2009); Ozay Mehmet and Akbar Tavakoli, 'DOES FOREIGN DIRECT INVESTMENT CAUSE A RACE TO THE BOTTOM?' (2003) 8 Journal of the Asia Pacific Economy 133 <https://doi.org/10.1080/1354786032000074712>.
[261] Meunier (n 256); Honglie Zhang and Niway Tesfaye, 'Alignment of Belt and Road Initiative with Africa Agenda 2063' (2018) 58 127; Ann Sofie Isaksson and Andreas Kotsadam, 'Chinese Aid and Local Corruption' (2018) 159 Journal of Public Economics.
[262] Seppänen (n 54).
[263] Nutter (n 9).

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In other Asian countries, China has indirectly contributed to the breakdown of democracy through its massive investments, as argued by Goldrick.[264] Concerns exist that Chinese investments in African nations may weaken investor regulation and the rule of law.

2.5.1 The rule of law

In the lead-up to becoming a capital exporter, China received aid from the global north, but only on the condition that it espoused democratic principles. China has labelled these aid conditions as meddling and has harshly criticised Western human rights and the rule of law advocacy.[265] It therefore advocates a different approach of 'value-free' diplomacy, which is the third development for many poor countries. China's plan to strengthen the rule of law in China (2020–2025) comprises a legal idea that differs in important ways from the existing United Nations definition of the rule of law, and runs counter to the interests of both the European Union and the United States.[266] China has suggested that it will implement 'a socialist rule of law with Chinese characteristics',[267] which dragon-slayers have suggested means rule by law.[268] The primary grounds of contention include a firm denial of the separation of powers and the judiciary's independence, and a fundamentally different understanding of human rights, data and privacy protection, and democracy.[269] On the contrary, after surveying African governments, Greg Mills et al. affirmed that true democracy- not just regular elections but also the rule of law, separation of powers, checks and balances, and leadership in government and civil society-empirically correlates with greater economic growth and development.[270]

Western diplomacy, which includes good governance, democracy, transparency, the rule of law, and respect for human rights among its multiple foreign policy goals, contrasts with China's

[264] Emma Goldrick, 'Sino-Cambodia 2010 - 2018 : To What Extent Has the Chinese Government Contributed to the Decline of Multiparty Democracy in Cambodia ?' (2020).
[265] Samuli Seppänen and others, 'Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism?', vol 51, available at <https://perma.cc/YJ4L-A87T]> accessed 9 May 2019.
[266] Daniel Kempken, 'The Rule of Law Concept of the People's Republic of China: A Great Challenge' (2021).
[267] 'The fundamental feature of socialism with Chinese characteristics is the leadership of the CPC', according to Article 1 of the Chinese Constitution. This is where the phrase 'socialist law with Chinese elements' comes in. The CPC leadership is promoted as the most fundamental guarantee of the rule of law of the People's Republic of China (PRC).
[268] According to Marxist legal tradition, Beijing views law as primarily a tool of the CPC. Mortiz Rudolf, 'Xi Jinping Thought on the Rule of Law' (*SWP Comment*, 2021), available at <https://sinocism.com/p/xi-jinping-thought-on-the-rule-of>.
[269] Kempken (n 266).
[270] Greg Mills and others, *Democracy Works: Re-Wiring Politics to Africa's Advantage* (Oxford University Press 2019).

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diplomacy, which is primarily driven by economic and geopolitical interests. As a result, China has developed friendly, unconditional relationships with some developing nations. Consequently, China does not require African countries to adhere to the rule of law to attract FDI.[271] This has resulted in negative perceptions of China's investments in Africa.[272]

Except for voice and accountability, Pan et al. contend that OFDI has better corruption control, government effectiveness, political stability, regulatory soundness, and rule of law.[273] This indicates that China's OFDI has a greater institutional impact on enhancing the regulatory quality and the rule of law in resource-rich host countries. In other words, absorbing China's OFDI can help these countries to avoid the 'resource curse'.[274] For instance, China has pursued transactions with countries that are off-limits to Western corporations owing to sanctions and the risk of negative press. Beijing has used non-interference in domestic affairs to justify this approach.[275]

China is increasingly concerned with the rule of law and good governance in Africa. However, neither democracy nor development is a material issue of concern. China has already established itself as a major investor on the continent and now seeks to defend its investments[276] by using international cooperation through participation in the United Nations and China-led multilateral platforms such as the BRI and FOCAC to achieve this goal.[277] However, any judicial cooperation and legal operation which African countries enter into with China, especially in cyber security, should be approached with caution. African states should pay close attention to the Chinese leadership's legal philosophy regarding the socialist rule of law.[278] To appreciate the strategic consequences of China's legal policy, it is necessary to comprehend the Chinese legal tradition and rationale behind its actions and to respond accordingly. Chapter 4 of the present thesis provides an in-depth analysis of China's conception of the rule of law and its impact on investment law.

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[271] Zhao Suisheng, 'The China Model: Can It Replace the Western Model of Modernization?' (2010) 19 Journal of Contemporary China 419.
[272] Nutter (n 9).
[273] Pan and others (n 180).
[274] ibid.
[275] Suisheng (n 271). Ronald TP Alcala, Eugene John Gregory and Shane Reeves, 'China and the Rule of Law : A Cautionary Tale for the International Community' 1.
[276] Kempken (n 266).
[277] ibid.
[278] China's socialist rule of law can be defined as a system of law that blends socialist and traditional Chinese values together. This system is based on the Constitution, which was enacted in 1982 and has been amended several times since then. The constitution has five system-derived Chinese characteristics which are discussed in Chapter 4.

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Existing literature examines how China's OFDI disregard for and export of the rule of law affects corruption in Africa. Taking a pragmatic stance Berhe and Hongwu contend that although Western governments and companies from the global north claim to adhere to strict regulatory frameworks in Africa, these foreign investors frequently flout local laws in the continent.[279] These authors add that such disregard of local regulations is particularly evident in situations involving natural resources exploration and rights.[280] They propose that China should not be held to higher standards than its competitors in Africa.[281] Chinese officials view conditionality as means to promote good governance in contradiction to their values non-interference principles. [282]

While foreign investors disregard the rule of law in Africa, it is clear that African state institutions must improve the rule of law to moderate foreign investments and enforce domestic regulation compliance to secure sustainable investments.

2.5.2 Domestic regulation compliance

Domestic compliance at the business level continues to be a major concern for Chinese firms operating in Africa.[283] Although the Chinese government recommends compliance with local laws (article 2, Guiding Policy on Outward Investment Industries), a review of the relevant literature reveals that there is room for improvement.

2.5.2.1 Labour relations and technology transfer

It is well established that foreign investment can significantly influence the development of domestic labour law and industrial relations. For instance, multinational corporations operating in developing countries have often been found to exert a 'race to the bottom' influence on labour standards. They seek to minimise costs by using lower-paid workers with fewer employment rights.[284] In addition, foreign investors may bring innovative ideas and practices that can challenge existing labour norms and lead to changes in the law.[285]

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[279] Berhe and Hongwu (n 104).
[280] ibid.
[281] ibid.
[282] ibid.
[283] Baah and Jauch (n 260).
[284] Ibid; Isaksson & Kotsadam, supra n 221; Maryam Asghari 'What is 'Race-to-the-Bottom' Effect on FDI Inflow?' (2012) 17 *What is 'Race-to-the-Bottom' Effect on FDI Inflow?* 76–93.
[285] Asghari (n 284); Baomin Dong, Jiong Gong and Xin Zhao, 'FDI and Environmental Regulation: Pollution Haven or a Race to the Top?' (2012) 41 Journal of Regulatory Economics 216, available at <https://doi.org/10.1007/s11149-011-9162-3>; Mehmet and Tavakoli (n 260).

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For instance, the attitude of Chinese investors towards labour practices has altered the way in which labour disputes are resolved.[286] In several African nations, such disputes are currently resolved through traditional processes or local labour regulations such as mediation, arbitration, or trade union representation. As the number of Chinese firms operating in Africa increases, it is likely that more disputes will be resolved through the Chinese legal system or corporate culture.[287] The All-China Federation of Trade Unions is often viewed as a government extension and 'relief agency' because it does not support militant workers' movements.[288] As a result, this federation opposes employee strike action and collective bargaining. Chinese businesspeople and managers have brought their unique understanding of the significance of labour unions to their African workplaces. African personnel in Chinese enterprises lack collective bargaining agreements and union representation.[289] Adapting to Chinese labour standards and drawing on Chinese law to resolve disputes is likely to result in lower standards and levels of worker protection. This could have significant implications for the rights of African workers.

Duggan reminds us that China's competitive advantage stems from its ability to violate environmental and social standards.[290] This is corroborated by several incidents of labour relations issues that have occurred since the establishment of FOCAC.[291] In the FOCAC Johannesburg action plan of 2015, China pledged to assist African nations with various labour issues. China vowed to increase production capacity in labour-intensive industries and strengthen collaboration with labour unions.[292] However, contrary to agreements made at high level, there are widespread allegations that, Chinese enterprises abroad offer substandard working conditions, which has led to widespread complaints.[293] China's human rights practices have always garnered significant

[286] Baah and Jauch (n 260).
[287] ibid.
[288] ibid.
[289] ibid; Herbert Jauch, 'Chinese Investments in Africa: Twenty-First Century Colonialism?', *New Labor Forum* (SAGE Publications 2011).
[290] Niall Duggan, *Competition and Compromise among Chinese Actors in Africa Policy Actors* (Palgrave Macmillan); DH Shinn, 'China in Africa: Environmental Implications and the Law' (2015) 18 International Policy Digest 1; Asongu and Ssozi (n 140).
[291] IreneYuan Sun, Kartik Jayaram and Omid Kassiri, 'Dance of the Lions and Dragons' (2017), available at <https://www.mckinsey.com/~/media/McKinsey/Featured Insights/Middle East and Africa/The closest look yet at Chinese economic engagement in Africa/Dance-of-the-lions-and-dragons.ashx>.
[292] Ministry of Foreign Affairs of the People Republic of China, 'The Forum on China-Africa Cooperation Johannesburg Action Plan(2016-2018)', *The 6th Ministerial Conference of the Forum On China-Africa Cooperation* (2015).
[293] Wang and Zadek (n 160).

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attention, particularly in the areas of labour relations and labour law. It is, therefore, a cause for concern if Chinese labour practices and attitudes toward labour laws result in a race to the bottom in African labour relations. Consequently, Chinese businesses in Africa are hostile and confused about the role of unions in supporting their members during labour strikes or negotiations.

Cheap labour in China is cited as a factor in the success of the opening policy and industrialisation.[294] African leaders seeking to emulate China's industrialisation model wish to capitalise on Africa's youthful and low-skilled labour market, which is also inexpensive. However, in contrast to labour laws in Africa, Chinese labour law is based on the constitution. It is supplemented by many laws governing individual labour relations with less emphasis on collective labour relations.[295] Employees are granted more rights in accordance with international labour rights in African states.

With the advent of Chinese investment in Africa, China's human rights reputation, labour abuses, inadequate health and safety standards, and anti-union operations have been reported at Chinese production facilities in Africa.[296] A particularly heinous example of breaches of worker rights was the 'locking-in' of workers during working hours, which resulted in deaths during fires in Nigeria, Kenya, and South Africa.[297] As a result of weak legal cooperation and guiding frameworks, Chinese investors take advantage of poor and non-enforced labour laws on the continent.[298] Chinese companies are condescending regarding local laws, even in countries with strong labour law adherence, such as South Africa. A few such incidents have been recorded. However, as Strange et al. point out, there is a lack of statistical evidence and empirical studies to support these charges on a larger scale.[299]

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[294] Hongbin Li and others, 'The End of Cheap Chinese Labor' (2012) 26 Journal of Economic Perspectives 57.
[295] David Ziskind, 'Labor Provisions in Asian Constitutions' (1984) 6 Comp. Lab. L. 117. Xiang Li, 'Collective Labour Rights and Collective Labour Relations of China' (Leiden University 2018).
[296] Herbert Jauch and Iipumbu Sakaria, *Chinese Investments in Namibia: A Labour Perspective* (Labour Resource and Research Institute 2009). Angela Dziedzom Akorsu and Fang Lee Cooke, 'Labour Standards Application among Chinese and Indian Firms in Ghana: Typical or Atypical?' (2011) 22 The International Journal of Human Resource Management 2730. Ching Kwan Lee, 'Raw Encounters: Chinese Managers, African Workers and the Politics of Casualization in Africa's Chinese Enclaves' (2009) 199 China Quarterly 647.
[297] Baah and Jauch (n 260).
[298] Jauch (n 163); Socrates Mbamalu, 'Plight of African Workers Under Chinese Employers' (*African Liberty*, 2018) 1, available at <https://www.africanliberty.org/2018/09/27/plight-of-african-workers-under-chinese-employers/>.
[299] Austin Strange and others, 'China's Development Finance to Africa: A Media-Based Approach to Data Collection' [2013] Center for Global Development working paper. cited in Isaksson and Kotsadam (n 235).

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One of the characteristics of Chinese investment is the visible impact of infrastructure and job creation. Chinese investments are not significantly larger than those from the global north, but they provide a unique set of tangible benefits not seen in Western infrastructure support. From 2014 to 2018, Chinese investments accounted for 16 per cent of the continent's assets, with a sizable portion originating in the global north. China, however, created 137 000 jobs through FDI, while the United States created less than half of that number at 6204.[300] The Chinese government has actively supported its investors in Africa. Overall, the high level of government support and intervention has made it difficult for countries such as South Africa, with strong legal systems, to openly rein in the misconduct of Chinese corporations and promote civil society and acceptable labour standards.[301] Furthermore, research by the International Institute for Sustainability Development (IISD) contrasting Chinese and OECD companies revealed no significant differences in working conditions.[302] African nations are incapable of enforcing international labour standards.

2.5.2.2 Environmental degradation

According to the literature, Chinese enterprises operating abroad may disregard social and environmental repercussions so as to remain competitive and profitable.[303] China's significantly lower environmental and social standards in foreign countries are generally welcomed by the host government, particularly governments in underdeveloped countries.[304] Numerous incidents of China's breach of environmental norms in Africa have been documented throughout the last few decades. Most reports emanate from the environmental advocacy community, which by definition stresses the issues, problems, and negative effects on the environment regardless of the responsible country.[305] Some scholars questioned whether African countries are incentivised to have lax environmental regulations that would make it possible to attract FDI from China, which is a major

[300] EY (n 126).
[301] Wang and Zadek (n 160).
[302] ibid.
[303] ibid.
[304] ibid.
[305] DH Shinn, 'China in Africa: Environmental Implications and the Law' (2015) 18 International Policy Digest.

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funder of large-scale infrastructure projects in the region. China's action may corroborate the pollution hypothesis in Africa. [306]

Environmental impact assessments done by Chinese corporations in other countries are frequently unsatisfactory.[307] In an ideal world, social impact evaluations would be performed to analyse and reduce the negative effects on the local community. However, in fact, these are frequently lacking or else inadequately conducted.[308] Chinese officials also need to take cognisance of this problem rather than minimise community voices or point fingers at the host country.[309] On the other hand, in building China's reputation, positive projects should equally be highlighted to show that Chinese aid can indeed improve environmental regulator standards in Africa. [310]

In 2006, environmental cooperation was added to the FOCAC action plan.[311] The most recent action plan, FOCAC 8, refers to the environment and includes a new section on green development. It is proposed that more action be taken to establish the China Africa Environmental Cooperation Centre (FOCAC 7.1.2).[312] Although steps have been taken to mitigate and manage environmental risks associated with China–Africa cooperation, additional measures should be taken to mitigate and manage environmental risks. Shinn recommends that non-governmental organisations use environmental standards introduced by China, such as EXIM (the Export–Import Bank), to manage Chinese investors.[313] China's exit from funding the Musina Makhado coal power project has paved the way for China's new contribution to improving global environmental governance

[306] The pollution haven hypothesis is an economic theory which states that pollution-intensive countries such as China export their pollution to destinations like Africa with lax environmental regulations.The hypothesis suggestes that countries with more lax environmental regulations may attract businesses that seek to relocate or outsource their operations to avoid stricter environmental regulations in their home countries. See Bernards Chidiebele, 'Foreign Direct Investments, Location, Lax Regulations in Sub-Saharan Africa' (2021) 9 87,Vincent Konadu Tawiah, Abdulrasheed Zakari and Irfan Khan, 'The Environmental Footprint of China-Africa Engagement: An Analysis of the Effect of China–Africa Partnership on Carbon Emissions' (2021) 756 *Science of the Total Environment* 143603.
[307] Wang and Zadek (n 160).
[308] Bryan Tilt, Yvonne Braun and Daming He, 'Social Impacts of Large Dam Projects: A Comparison of International Case Studies and Implications for Best Practice' (2009) 90 *Journal of environmental management* S249.
[309] Shinn (n 305).
[310] ibid.
[311] Corkin (n 69).
[312] Ministry of Foreign Affairs of the People Republic of China, 'Forum on China–Africa Cooperation Dakar Action Plan (2022–2025)' (n 159).
[313] In 2004 , Export Import Bank (EXIM) of China introduced environmental standards in its lending practice , which applies to all outbound foreign direct investment Sven Grimm 'Sustainability in China-Africa relations – 'Greening' FOCAC' (2013) 71 *African East-Asian Affairs* 4–11.

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on the African continent.[314] Following protests by non-governmental organisations, China has issued a statement that it will no longer fund coal-fired projects abroad. Again, in Kenya, the government cancelled the first Chinese-backed coal-powered project after strong community opposition. China must also adjust OFDI regulations for Africa. The lack of technical and managerial expertise to implement sustainable development practices is a significant factor in Chinese businesses' violation of local laws. The Chinese government can intervene by providing incentives more assistance to companies that engage in sustainable business practises overseas.

The effects of China's environmental degradation on Africa's major economies foreshadows trends for the remainder of the continent. Clearly, African citizens can ensure that Chinese investments adhere to local environmental regulations and standards through non-governmental organisations. On the other hand, China takes criticism from its Western and African counterparts very seriously. The nation is clearly interested in appearing to have good intentions in Africa, unlike the former colonisers. African governments may also benefit from China's growing awareness of how the international community perceives its respect for social and environmental rights.[315]

2.5.3 Chinese legal transplants in Africa

In recent years, the literature on Chinese investment in Africa has proliferated. The majority of this literature has come from economists and has focused on the economic impact of Chinese investment. However, legal scholars have begun to examine the effects of Chinese investment on African regulatory, legal, and policy development in a growing body of literature. Legal scholars who have studied China's investment in Africa have typically adopted a comparative law perspective and have sought to comprehend how Chinese investment affects African legal systems. While it is too early to draw definitive conclusions about the impact of Chinese investment on the African legal system, the existing literature provides numerous insights into this crucial and understudied topic.

[314] Deng Yaowen, 'Musina Makhado: South Africa's Budding Carbon Emitter' [2021] China Dialogue, available at <https://chinadialogue.net/en/business/musina-makhado-south-africa-budding-carbon-emitter/>; Deng Yaowen, 'How Can China Help South Africa Achieve a Just Transition ?' (*China Dialogue*, 2021).
[315] Asongu and Ssozi (n 140).

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African law and governance is one area that has been significantly altered by Chinese investment. Several studies have examined the extent to which China influences the development of African law and government. These studies indicate that Africa increasingly views China as a legal and regulatory reform model. Under the FOCAC, BRICS, and BRI multilateral cooperation platforms, China has committed to enhancing legal cooperation. These platforms enable China to increasingly provide legal and institutional protections for cooperation-related initiatives. The majority of BRI projects invest in regions where other countries and international financial institutions have been reluctant to invest.[316] Some BRI nations have been criticised for their lack of 'the rule of law'. Numerous BRI legal issues are not addressed by WTO regulations, free trade agreements, or bilateral investment treaties (BITs). The primary FOCAC, BRI, and FOCAC agreements generally call for enhanced legal cooperation that promotes regulatory and standard harmonisation. The agreements[317] with BRI countries do not address the primary concerns of host countries, such as labour and environmental issues.[318] Policy coordination is one of the five BRI priorities for cooperation. These include currency coordination, dispute resolution, mediation, and the internet. Owing to its economic strength and status as a rising global power, China is in a strong position to influence the development of African regulatory, legal, and policy frameworks. Moreover, under BRI, China's influence on soft law is more coordinated than on international law.

The impact of Chinese investment on the development of African frameworks is complex and multifaceted. There is evidence that China is exporting its norms and standards to Africa, which could be detrimental to local development efforts. Compared to their Western counterparts, Chinese companies operating in Africa are less compliant with environmental and social standards. There are numerous plausible causes for this phenomenon. The first is that SOEs frequently invest in Africa. These SOEs are governed by Chinese law, so they may be more likely to comply with Chinese legal standards. Moreover, many African nations have weak institutions and are unable to

[316] Jacques DeLisle and Avery Goldstein, *China's Global Engagement: Cooperation, Competition, and Influence in the 21st Century* (Brookings Institution Press 2017) cited in .Heng Wang, 'The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges' [2021] World Trade Review 1.

[317] Primary agreements in BRI refer to memorundums of understanding (MOUs), and letters of intent. Primary agreements are more accessible than the secondary performance agreements. Primary agreements have a greater impact on subsequent accords. Because they make some quasi-legal guarantees, the BRI principal agreements might be considered soft law.

[318] Wang, 'The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges' (n 316).

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enforce their laws. This makes it simpler for Chinese businesses to operate in violation of local regulations.

Given the potential benefits and challenges of importing Chinese legal transplants into Africa, it is crucial to evaluate their impact within a comparative legal framework. A close literature review in this research on the effects of Chinese investment in Africa indicates the emergence of a standard legal transplantation framework. The present thesis examines how Africa-China investment has been conceptualized in the literature and evaluates the aforementioned assertion. It provides a more nuanced understanding of how and why such transplants occur and what their potential consequences may be. This literature review of China–Africa legal transplants reveals an absence of comparative transplant analysis. A comparative study would be beneficial in shedding light on the pros and cons of importing legal Chinese norms and attitudes into the African context. A new framework could be developed to include both China and Africa in an effort to harmonise their legal relations.[319] This study will focus primarily on the impact of Chinese norms and legal transplants on African nations. It is also essential to undertake a comparative analysis of the benefits and challenges of such transplants. This would help provide a more nuanced understanding of the complex issues involved.[320]

A study of Chinese policies should not necessarily lead to Africa blindly transplanting the Chinese model. Chinese leaders have repeatedly called for Africa to come up with its policies. Zhang (2006) cites Deng Xiaoping's plea to Ghanaian President Jerry Rawlings in September 1985: 'Please don't copy our model. If there is any experience on our part, it is to formulate policies in light of one's national conditions.' The Chinese development policies have proven effective at attracting FDI with skills and technology transfer.

Before examining the transplantability of Chinese legal norms to Africa, the third Chapter of this thesis elucidates the term 'legal transplant' as associated with legal historian Alan Watson.[321] However, many scholars have disagreed with Watson's understanding of legal transplant as a phenomenon, and have questioned his knowledge of comparative methodology, and his accuracy in using technical terms, including the term 'legal transplant' itself.

[319] Weidong Zhu, 'China-African Trade & Investment and the Exchange of Law' [2013] SSRN Electronic Journal 1.
[320] Du (n 258).
[321] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993).

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2.6 Conclusion: Literature analysis

The development impact of China's OFDI regulation in Africa has been mixed. On the one hand, there have been several successful cases where African countries have benefitted from Chinese investment. On the other hand, there have been several instances where African countries have been negatively affected by Chinese investment.

A comparative analysis of the above literature suggests that China's OFDI has had a differential impact on African countries. The extant literature on the effects of China's OFDI regulation in Africa is inconclusive. While some studies have found that Chinese investment has led to positive outcomes such as job creation, technology transfer and infrastructure development, other studies have shown that it has also had negative consequences such as environmental degradation and displacement of local businesses and people, engaging in corrupt practices.

This ambiguity could be attributed to several factors, such as different research methodologies and data sources used, and varying levels of impact at the national and local levels. These mixed findings suggest that future research is needed to understand the complex and nuanced relationship between China and Africa regarding OFDI. Such an understanding would be critical for making informed policy decisions that could maximise the developmental benefits of Chinese investment in African countries. In light of this, future research needs to adopt a more nuanced perspective to capture the complexities involved. More emphasis should be placed on learning how China developed Africa[322] so as to understand what drives China's interest in Africa and how the adoption of the China policy framework can lead to a Sino-African relationship that is mutually beneficial.[323]

The Chinese presence in Africa will continue to grow. Chinese investments in Africa still lag behind traditional investors and China's trade. However, legal cooperation between the continent and China is expected to grow due to the increasing pledges and the intention to reverse Western hegemony. The new legal cooperation could influence the diffusion of legal norms and standards and ultimately influence new laws on the continent. It is essential to acknowledge the complex and

[322] Olusanya Ajakaiye and Raphael Kaplinsky, 'China in Africa: A Relationship in Transition' (2009) 21 The European Journal of Development Research 479.
[323] Mohan and Power (n 173); Asongu and Ssozi (n 140).

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multi-layered nature of Sino-African relations. A cautious approach is needed when evaluating the polarising debate on China as a neo-colonial power devoted to resource-grabbing and exploitation. China exhibits some neo-colonial tendencies and can potentially undermine African states' sovereignty. However, African states have also enjoyed some degree of agency and have, to some extent, benefitted from economic and infrastructural development.

Nevertheless, China's growing influence on the African continent seems inevitable. It is safe to advance that China will always play the geopolitical game of maximising its national interests and defying other states. In this regard, China is acting like any additional emerging power would act. On the other hand, African states have displayed their preference for exporting China's economic model. The next Chapter will examine FDI as a vehicle by which Africa will diffuse Chinese policy, norms, and regulations in its economic development.

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Chapter 3 LEGAL TRANSPLANT: A THEORETICAL CONCEPT

The earlier Chapters looked at key themes defining contemporary discussion in Africa China FDI policy, law and regulatory environment. Chapter 2 specifically discussed scholarship on drivers of Africa–China FDI. Chapter 2 further outlined the theoretical perspectives and conclusions made by researchers on the motivations and drivers of Chinese investment in Africa is provided. Findings in the previous Chapter also highlighted the possible impact of China's FDI on Africa's economic and policy developments. The growing economic relationship between Africa and China has been more visible in trade trends, with limited research on the role of FDI. Although China's OFDI in Africa has been smaller than developed economies, Chinese leaders have leveraged their OFDI as a mechanism for policy influence and a tool of China's smart power.[324] The present Chapter introduces the concept of a legal transplant to examine the Africa China legal cooperation in regulating outbound investments. Legal transplantation can be seen as a theory, technique, methodology, and concept. The concepts discussed in this Chapter provide a foundation for the analysis of the foreign regulatory environment discussed in Chapters 4 and 5 and are pertinent to the research problem described in Chapter 1. The legal transplant concept can thus be used to study the transfer of legal ideas, norms, institutions and practices between Africa and China. The concept can also be used to study the impact of Chinese investments on African legal systems.

This Chapter is divided into six sections. The first section provides a background of legal transplant as a conceptual lens to study Africa-China relations. The second section discusses the origins of legal transplanting as it relates to comparative law and summarises significant scholarly arguments. The third section looks at three broad aspects of legal transplant to be considered when examining legal transplant. The fourth section outlines factors that legal scholars believe contribute to a successful transplant. Various legal transplant types and procedures are distinguished as measures of a successful transplant. The process that various countries employ to transplant laws and other unconventional methods of legal transplant are examined in this section of the Chapter. The fifth section identifies and analyses different forms of legal transplant and delves into various systematic processes through which transplant can successfully occur.

[324] See Annexure A for definition of smart power concept. Marco Antonio Batista Martins, 'The Perception of Smart Power and Public Diplomacy of the People's Republic of China'.

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3.1 Background

The effects of Chinese outward direct investment in Africa have been studied extensively since the establishment of FOCAC in 2000. As a result of fast-growing business relations, a number of legal issues developed related to business transactions and practices, including commercial laws and labour practices, environmental laws, taxes and other legal matters. If legal issues pertaining to Africa-China investment are not innovatively resolved to achieve sustainable development, as discussed in Chapter 2, both sides stand to suffer significantly politically and socioeconomically. Only recently has knowledge of both Chinese and African legal systems become crucial to this cooperation. Governments have admitted that a legal cooperation path specific to Sino-African relations needs to be defined politically. It is anticipated that this new partnership will bring the Chinese legal system, a new legal family, to Africa. The theoretical and conceptual framework in this Chapter serves as a basis for understanding how FDI could be used as a vehicle to introduce Chinese policy, law, and regulation to Africa.

The legal transplant theory is studied by comparative law scholars to explore in depth the ideological background of law, legal practice and culture in context.[325] The concept is used to analyse the role of FDI policy, laws, and regulations in the growth of Africa China relations in comparison to developed economies and nations. As African leaders search for a new development model, the theory is used to analyse the possibility that African states will adopt legal reforms and procedures using China as a benchmark. The legal reforms in China have contributed to the country's economic growth and integration of global geopolitics, making it a role model for other developing nations looking to reform their legal environment to attract FDI.

The accession of China to the WTO was preceded by a series of legal reforms to comply with WTO rules. Once accepted by the WTO, China continued to reform. However, Beijing remained stoic about retaining Chinese characteristics in its legal reforms to ensure that its national interests remain a priority in the process of adopting international standards. Leaders in Africa see China's reforms as a model to emulate.[326] In addition, China is now Africa's top trading partner, surpassing

[325] Valderrama (n 74).
[326] See Chapter 2 section 2.2. Mubiana Luhila, Lydia A Koranteng and Alain Godonou, *New Directions in Africa*, vol 47 (1995). Arkebe Oqubay and Justin Yifu Lin, *China-Africa and an Economic Transformation*, vol 53 (Arkebe Oqubay and Justin Yifu Lin eds, 2019). Ursula (n 128).S Philip Hsu, Suisheng Zhao and Yushan Wu, *In Search of*

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Europe, Japan and America. With increased interaction, China's business characteristics—however nebulous they may be—must be negotiated and understood by both Africa and the West. The concept of law with Chinese characteristics will become more important and relevant in international business as practised and applied by Chinese multinationals and SOEs globally.

China's relationship with Africa has raised concerns about the influence that it will have on the continent. In view of the criticism that China is following in the West's colonial footsteps, it is anticipated that China will also transplant some of its laws into Africa, as the West has previously done. An early wave of large-scale legal transplants into Africa was driven by colonialism, whereby colonists used legal transplants to control their colonies. However, as the world becomes more globalised, legal transplanting takes place more frequently in an effort to harmonise international laws and reduce transaction costs.[327] Africa–China trade has surpassed that of the global West. Continuing to apply legal systems from developed nations that are foreign to Africa-China increases costs and deters south-south legal systems harmonisation. With the move for Africa and China seeking to reimagine a new development mode that is suitable for south-south cooperation without exogenous influences of the West, the important question asked by Chen-Wishart is: 'Is harmonisation and convergence possible across jurisdictions demonstrating a high degree of pluralism?' This question is relevant considering the complex legal systems currently in place.[328]

3.2 Origins and arguments of the legal transplant

In simple legal language, a transplant can be simply defined as the transfer of laws or legislation across jurisdictions. The coining of the term 'legal transplant' is attributed to the esteemed Scottish legal historian, positivist, and comparativist Alan Watson when he first mentioned it in his seminal work *Legal Transplants: An Approach to Comparative Law* in 1974. Watson described a legal transplant as the "moving of a rule or a system of law from one country to another, or from one

China's Development Model: Beyond the Beijing Consensus (Routledge 2011).Weitseng Chen (ed), *The Beijing Consensus?: How China Has Changed Western Ideas of Law and Economic Development* (Cambridge University Press 2017).

[327] Li-wen Lin, 'Legal Transplants through Private Contracting : Codes of Vendor Conduct in Global Supply Chains as an Example' (2009) 57 Commercial Law in East Asia 187.

[328] Mindy Chen-Wishart, 'Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding' (2013) 62 International and Comparative Law Quarterly 1.

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people to another".[329] However, as he also pointed out in his work, the term and the phrase predate his publication. Professor Otto Kahn-Freund, a British jurist, used the term in June 1973 in his lecture 'On uses and misuses of comparative law' at the London School of Economics.[330] The renowned scholars held opposing views: Watson supported the possibility of a legal transplant, while Kahn-Freund took a more pessimistic view.[331] Interestingly, they both used the medical metaphor of an organ transplant to describe the legal transplant phenomenon.

Since Watson's publication, many arguments and debates have emanated, accompanied by variations on transplant metaphors.[332] Some academics have debated whether the term 'legal transplant' should be used at all. Rudolfo Sacco, head of the Italian Guild of Comparative Law, prefers the term 'legal formants', while leading German legal sociologist Gunther suggests that 'legal irritants' is more fitting considering the uncontrollable unpredictability and unintended consequences of legal transplants in society.[333] Scholars have used different vocabulary to capture its social, economic and political aspects. Terms like borrowing, transfers, and transposition have been used to refer to legal transplants.[334] For the purposes of this research, the term legal transplant is accepted and employed as used by Alan Watson and the majority of comparatists.

3.2.1 Watson's legal transplant theory

When he authored his first article, Watson did not set off to establish a theory of legal transplant. His article intended to fill the theoretical gap in Montesquieu's mid-1700s and German theorist Friedrich Karl von Savigny's mirror theory.[335] According to Watson, the goal of comparative law

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[329] Watson, *Legal Transplants: An Approach to Comparative Law* (n 72).
[330] Kahn-freund, 'On Uses and Misuses of Comparative Law' (1938) 2 The University of Toronto Law Journal 365.
[331] Zhaoxing Liu, Jinyuan Suy and Jinyuan Su, 'Comparative Law in China: Over 30 Years'development and Paradigmshift in Research' (2013) 1 Chinese Journal of Comparative Law 158 <https://academic.oup.com/cjcl/article-lookup/doi/10.1093/cjcl/cxt004> accessed 31 October 2019.
[332] Legal transplant has also been referred to as: borrowing, implantation, cross-fertilization, grafting, export/import, reception, imposed reception, transfer, translation, crypto-reception and inoculation, repotting, cross pollination, engulfment, emulation, infiltration, infusion, digestion, salad bowl, melting pot, transportation, collective colonisation, contaminants, legal irritants, layered law, hyphenated law and competition of legal systems. Tatiana Kyselova, 'The Concept of Legal Transplant: Literature Review' (2013) 53 An Approach to Comparative Law 1689.
[333] Laura-Cristiana Pătaru-Negură, 'Exporting Law or the Use of Legal Transplants' [2012] Challenges of the Knowledge Society 812. Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' [2003] The Modern Law Review.
[334] Esin Orucu, 'Law as Transposition' (2002) 51 Int'l & Comp. LQ 205. Carlos F Rosenkrantz, 'Against Borrowings and Other Nonauthoritative Uses of Foreign Law' (2003) 1 Int'l J. Const. L. 269.
[335] Charles Louis de Secondat Baron de Montesquieu, *The Complete Works of M. de Montesquieu*, vol 2/4 (v2 edn, Liberty Fund, Inc 1748) <http://oll.libertyfund.org/title/838>; Watson, *Legal Transplants: An Approach to*

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as a field of study is to explore and analyse how different legal systems relate to one another. In contrast to the mirror theory, Watson argued that there was no necessary or close relationship between laws and the society in which they were applied. Mirror theorists postulated that the law is a close mirror of society, reflecting every process that happens in society, be it political, economic or social, before the transplant occurs.[336] The unique characteristics of a nation, which can be non-legal, including but not limited to geography, religion, temperature and more, shape the development of the law. Pierre Legrand argues that legal transplant is consequently impossible because every law is culturally determined and does not have an autonomous existence.[337] The mirror theorist, therefore, considered the idea of one nation's laws fitting into another's legal system to be a great coincidence. Mirror theories highlight the role society plays in the lawmaking process but fail to consider the possibility of laws travelling between jurisdictions.[338] Watson's stance developed from observing European legal history, excluding the American, Asian and African continent experiences. Watson, however, argues that from his research and observation, the development of civil law is the result of 'purely legal history' and can be explained 'without reference to social, political or economic factors'.[339] Although the legal transplant theory set off to question the then-existing mirror theories, it remained a similarly inadequate theory at the foundation level to be considered as a full-blown theory of law and society.[340] Comparative law scholars have continued to develop and criticise the theory, further identifying shortcomings from both sides.

Watson's paper sparked considerable debate on the notion of legal transplant among legal comparativists. The debate continues between the legal historian approach of Watson and the

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Comparative Law (n 321).William Ewald, 'Comparative Jurisprudence (II):The Logic of Legal Transplants' (2016) 43 The American Journal of Comparative Law 489 <https://www.jstor.org/stable/840604>. Kyselova (n 332). Toby S Goldbach, 'Why Legal Transplants?' (2019) 15 Annual Review of Law and Social Science 583.

[336] Ewald uses the term 'mirror theory' to refer to the theories of Montesquieu and his followers; Edward M. Wise 'The Transplant of Legal Patterns' (1990) 38 *The American Journal of Comparative Law* 1–22.

[337] Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 Maastricht journal of European and comparative law 111.Ewald (n 335).

[338] Sean Whittaker, 'The Right of Access to Environmental Information and Legal Transplant Theory: Lessons from London and Beijing' (2019) 6 Transnational Environmental Law 509, available at <https://www-cambridge-org.ezproxy.uct.ac.za/core/services/aop-cambridge-core/content/view/4D560FDAA1C11646EDE00C5C27AC0F19/S2047102517000115a.pdf/right_of_access_to_environmental_information_and_legal_transplant_theory_lessons_from_london_and_beijing.pdf> accessed 30 October 2019.

[339] Watson, *Legal Transplants: An Approach to Comparative Law* (n 321).

[340] Ewald (n 335).Watson, *Legal Transplants: An Approach to Comparative Law* (n 72).

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socio-legal approach of Legrand and Kahn-Freund. Watson supporters examine transplant success through the lens of judicial precedent. Followers of Legrand believe that transplantation is impossible because the law blends with society and reflects the community in which it is implemented. Foster classifies this dispute as transferist vs culturalist.[341] The present research adopts the same nomenclature to refer to both sides of the debate. The transferist supports transplant, while the culturalist opposes its possibility.[342] The core argument about the doctrine of the legal transplant is over its determinants and the ability of the transplanted laws and institutions to succeed in the host country's environment. In Watson's view, laws had been transplanted from one country to another for thousands of years and over an extended period and continue to do so.[343] He contends that law is not the natural outgrowth of a particular society but is the intellectual creation of smart lawyers, easily adaptable to local use by other talented lawyers elsewhere on the globe. Using the organ transplant metaphor, he stated that a human organ would grow in its new body and become part of that body just as the rule or institution would have continued to develop in its parent system.[344]

Transferists use three arguments to advance their position. The first argument is that transplanting is the most fertile source of law development, affirming that most legal systems have developed out of borrowing from other legal systems. Second, most legal systems are not aligned with society's needs and desires; therefore, theories supporting legal transplant and the relationship between law and society are improbable. Third, the regulations drafted by educated and elite members of society reflect their own needs rather than those of the society they serve. Accordingly, Watson concludes that legal transplant is independent of economics, sociology and politics. Therefore, the development of law is not an organic evolution responding to societal needs but is rather a creation of intellectual elites from which legal transplants are borrowed by other elites in other countries. The transferist recommends that the relationship between law and society be studied on a case-by-case basis.

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[341] Kyselova (n 332).
[342] ibid. N Foster 'Company Theory in Comparative Perspective: England and France' 48 Am. J. Comp. L. 573 (2000) 611; R Small 'Towards a Theory of Contextual Transplants' 19 Emory Int'l L. Rev. 1431 (2005) 1431
[343] Watson, *Legal Transplants: An Approach to Comparative Law* (n 321); Watson, *Society and Legal Change* (n 73); John W Cairns, 'WATSON, WALTON, AND THE HISTORY OF LEGAL TRANSPLANTS John' (2013) 41 Journal of International and Comparative Law 637.
[344] Watson, *Legal Transplants: An Approach to Comparative Law* (n 72).

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The alternative argument by culturalists and socio-legal advocates contesting Watson's position on legal transplant is that it does not exist because everyday law is culturally determined, and the everyday rule of law has nuances that are unique and intricately woven into its environment.[345] Therefore, to transplant a law or regulation into another environment would be to strip it of meaning. The rule would be different in a new culture; consequently, transplant is impossible. The culturalist asserts that unique cultural and economic nuances will obliterate the possibility of a transplant. Watson points out that the assumption of rejection made by the culturalists is flawed. He points out that when a rule is adopted, it may develop differently from the sponsor country in its new host system, and this, according to Watson, should not be confused with rejection.

Both sides have taken an extreme approach to legal transplant with some contradictions and weaknesses.[346] The limitation of the transferist theory is that it does not consider transplant after the time of enactment or examine whether the transplant had the intended effect or any unintended consequences. Secondly, the approach focuses mainly on Western legal tradition and applies narrow and situational examples in history, which can create a bias. Thirdly, Watson emphasises that a legal transplant is not a complex process because it is undertaken by legal professionals or lawyers who have expert knowledge of their local legal traditions and can aptly reflect particular legal traditions of the host country.[347] Watson's methods are based on developing countries and only look at successful historical cases, making his theory ethnocentric and ahistorical.[348]

This research aligns with Watson's perspective on the transplant of law, which affirms that transplant does happen. This phenomenon is new in Africa China relations in which there is a notable dearth of knowledge and limited advocacy regarding legal transplant issues. Chapter 5 sheds light on the stringent regulations imposed in these regions, which stifle dissenting voices. Those who dare to oppose the government often face immediate investigation, dismissal, or even imprisonment. It is still too early in the research to evaluate the success of the transplant.

[345]Kyselova (n 332). ibid.
[346] ibid.
[347] Kryger cited in ibid.
[348] Able cited in ibid.

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3.3 Aspects of transplant

There are three broad aspects to consider when examining the legal transplant: codification, legislation, and litigation.

Codification: The most obvious form of transplant is the adoption of a foreign legal system in its entirety. This was the case with Japan, which adopted the German civil code in 1896.[349] More usually, However, codification involves the selective borrowing of particular elements from a foreign legal system. For example, many African countries have borrowed from the French civil code and common law legal system in drafting their own codes.[350]

Legislation: When drafting their own legislation after colonial rule, many African countries have borrowed liberally from foreign legal systems. For example, the Kenyan constitution is based largely on the Indian constitution, the Ugandan constitution was heavily influenced by the British Westminster system, and the Nigerian constitution was modelled on the American constitution.[351] Similarly, many African countries have enacted laws modelled on European or American legislation, such as copyright law and patent law.

Litigation: There are two main types of litigation in legal transplants: adjudication and arbitration. Adjudication involves the resolution of disputes by judges, either through the regular court system or through special courts set up for the purpose. Arbitration, on the other hand, involves the resolution of disputes by a third party, typically an expert in the relevant field. Many African countries have used both adjudication and arbitration to resolve disputes, often with mixed results.

[349] Jonathan Miller 'A Typology of Legal Transplants : Using Sociology , Legal History and Argentine Examples to Explain the Transplant Process' (2017) 51 *American Journal of Comparative Law* 839–85.
[350] Julie Paquin, 'Business Law Transplants and Economic Development: An Empirical Study of Contract Enforcement in Dakar,Senegal' (2010).
[351] Allison Schnable, *Resources, Relationships, and Accountability* (Oxford University Press UK 2021).Mercy Muendo, 'Kenyans Are Still Oppressed by Archaic Colonial Laws' (2017).Andrew Harding, 'The 'Westminster Model'Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States' (2004) 4 Oxford University Commonwealth Law Journal 143.

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3.4 Conditions for successful legal transplants

Watson and many comparative law scholars have sought to explain the conditions that shape the viability of legal transplants and to systematise the different types of transplants.[352] A comparativist must take note of the parallels and divergences in academic viewpoints regarding the feasibility of legal transplant and attempt to explain the rationale behind the conclusions.[353] While comparativists took contradictory approaches and extreme positions, the different schools of thought identified vital factors that would influence the transplantation process and make it possible.

Watson, representing a transferist view, developed nine factors: source of law, pressure force, opposition force, transplant bias, law-shaping lawyers, discretion factor, and generality factor. These factors influence the process, not the selection of which laws are transplanted. Comparativist Jonathan Miller refined Watson's model of identified factors that determine which laws are transplanted as being authority, prestige and imposition, chance and necessity, expected efficacy of the law, and political, economic and reputation.[354]

The culturalists identified three environmental factors to consider: geographical, economic, and sociological factors, and cultural and political factors.[355] These factors were first developed in the 1700s, during Montesquieu's time. Kahn-Freud, a strong proponent of Montesquieu's theory, argues that globalisation has since increased the prominent position that political influence has in transplantation, reducing the influence of other factors. Kahn-Freud suggests new factors, namely macro-political structure, distribution of power and the role of organised interest groups.

While both sides agree on the possibility of a transplant, the scholars emphasise different factors for a successful transplant. Table 4 presents a comprehensive overview of the key factors for a successful legal transplant, as identified by prominent scholars in the field. The table

[352] Eric Gillman, 'Legal Transplant In Trade and Investment Agreement : Understanding The Exportation of U.S Law to Latin America' (2009) 41 Georgetown Journal of International Law 8.
[353] Valderrama (n 74).
[354] Jonathan .M Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 American Journal of Comparative Law 839, available at <https://www.uscc.gov/research/overseas-chinese-students-and-scholars-chinas-drive-innovation>.
[355] Environmental factors include geographical factors (climate, fertility of soil, the size and geographical position of the country), economic and sociological factors (the wealth of people, density of population, their occupations), cultural (religion and moral standards) and political factors (principles of government, degree of constitutional freedoms).

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distinguishes between two major schools of thought the culturalist and the transferist perspectives and highlights the unique contributions of each. The culturalist approach emphasizes the significance of cultural compatibility in ensuring the effectiveness of legal transplantation, while the transferist view focuses on the technical aspects of the transfer, such as the choice of legal model and the process of implementation

Table 4 Conditions for a successful transplant

	Culturalist	Transferist	
Prominent scholar	Montesquieu Kahn-Freud Legrand	Watson	Miller
Factors	Geographical and economic Sociological Cultural and political	Pressure force Opposition force Transplant bias Law-shaping lawyers Discretion Generality	Authority Prestige and imposition Chance and necessity Expected efficacy of the law Political, economic and reputation

Chen-Wishart, a legal scholar, proposes that a binary approach should be replaced with a spectrum on which legal transplant can occur, with one point being faithful replication and the other end of the spectrum an outright rejection.[356] Chen-Wishart's proposal offers a more flexible approach which can accommodate arguments on a wider spectrum rather than a rigid approach of a "yes-no" debate between the transferist and the culturalist.[357] Chen-Wishart proposes a case-by-case consideration of the relationship between law and society in the context of examining legal transplant.[358]

3.4.1 Authority

Authority is one of the key conditions for a successful legal transplant. The concept of authority can be understood from different perspectives. In general, it may be seen as a source of power or legitimacy. From the perspective of law, authority is the legal principle that gives a person or institution the right to exercise power.

[356] Chen-Wishart (n 328).
[357] ibid.
[358] ibid.

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Authority in relation to a legal transplant refers to the legitimacy or legality of the transplantation process. The transplanted law must have legitimate authority in order to be accepted and applied by the receiving legal system. Watson suggests that the legal elites turn to legal traditions, which are very traditional in seeking authority, precedence and legal justification.[359] Edward West suggests that in areas with a low level of legal development, authority probably be sought elsewhere, outside the existing legal system.[360] For instance, legitimacy can come from different sources, such as an international treaty or agreement, a United Nations resolution, or a decision of a regional court.

Law, according to Watson, is essentially the domain of attorneys.[361] Attorneys have played a significant role in lawmaking, whether as lawmakers, legislative consultants, or legal interpreters.[362] This is especially true in private law. Legislators are often uninterested in the content of private law.[363] Its evolution has been mostly the work of interpreters: judges and jurists, almost always attorneys. Even in modern times, when legislation has become the primary form of lawmaking, statute law is often structured to fit within the framework of an existing legal tradition. According to this argument, authority does not always reside in the hands of the central government.

3.4.2 Prestige and imposition

Prestige is another important determinant of transplant success.[364] A transplanted law is more likely to be accepted and applied if it is seen as prestigious or modern. This is because the receiving legal system will want to be seen as up-to-date and progressive.[365] Prestige can also be imposed by the donor's legal system. This happens when the donor country is much more powerful than the receiving country, for example, when a developed country imposes its laws on a developing country.[366] This type of transplant characterised the colonial era, such as when Japan imposed its legal system on Korea in the 1900s.

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[359] Patrick Glenn 'A Concept of Legal Tradition (2008–2009)' 34 *Queen's LJ* 427-at.
[360] Wise (n 336).
[361] ibid.
[362] ibid.
[363] ibid.
[364] Gianmaria Ajani, 'By Chance and Prestige : Legal Transplants in Russia and Eastern Europe' (2018) 43 The American Journal of Comparative Law 93.
[365] Ewald (n 335).
[366] Miller (n 354).

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Sacco developed the concept of prestige and imposition as factors determining which laws will be transplanted from the sponsor country.[367] He pointed out that cultures (sponsors) with confidence in their legal system tend to impose their institutions on other cultures (hosts). Sacco expressed that, However, when transplant is done with pure force, the reception is reversible and ends when the force is removed. This view proved to contradict the legal transplant that took place under colonisation. Colonial laws transplanted during colonization remain dominant in Africa's legal system post-colonial era. However, some laws are retained by the host country because they are considered prestigious. Ajani suggests that the source of prestige can come from economic efficacy.[368] Ugo Mattei strongly opposes economic efficacy as a source of prestige; However, he does not offer an alternative motivation for lawmakers to perceive foreign law as prestigious.[369]

Post-colonial period common law and civil laws, although initially imposed, they retained a degree of prestige. The perception was promoted by African jurists whose legal training was based on Western education. Watson suggests that lawmakers, to gain more authority, prefer to refer to the prestige authority and solutions of normative rule, that to be new rule-makers.[370] Additionally, economic opportunities were based on the common law system. This is a common attribution in areas of human rights law in nations transforming in ideology from repressive governments. Western liberal democratic laws can be seen as prestigious. The fall of the Berlin Wall presents a classic example.[371] Many Latin American countries, in search of a civil code, transplanted the French civil code.[372]

3.4.3 Chance and necessity

Janka defined chance and necessity as a transplant that can come about as a result of lack knowledge of other systems and assuming the only law known to the leader is superior. For instance, Emperor Zara Jacob approved the Fetha Negesta in Ethiopia to remove the country's

[367] Valderrama (n 74).
[368] Miller (n 354).
[369] ibid.
[370] Antonina Bakardjieva Engelbrekt, 'Legal and Economic Discourses on Legal Transplants : Lost in Translation?' (2015) 60 Scandinavian Studies in Law 111. See also Watson, *Legal Transplants: An Approach to Comparative Law* (n 321).m
[371] Antonina Bakardjieva Engelbrekt, 'Legal and Economic Discourses on Legal Transplants : Lost in Translation ?'. See also Francis Fukuyama, 'The End of History?' [1989] The national interest 3.
[372] The french civil code was perceived as an outcome of the Great Revolution and rooted in ideologies that the Latin American had frequently drawn from to justify their own struggle with independence movements.

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amorphous customary laws.[373] At the time (1432-1468), the only other legal system he knew was the codified Fetha Nesta. A transplanted law is more likely to be accepted and applied if it is seen as necessary to solve a particular problem or meet a specific need. During this period, the Ethiopian customary laws were undefined. In times, a new law may be necessary in order to comply with an international treaty or agreement or compete in the international market. [374] Regulatory competition may necessitate the adoption of foreign rules, even if it is not suitable for the domestic system, in order to improve the country's position in a regulatory, competitive position internationally.[375] China's compliance with WTO, as discussed in-depth Chapter 4, was seen as a necessary move to enable to China to improve its regulatory system to be on par with international laws. Many countries have faced this requirement to be a member of an international organization. Eastern European countries transplanted laws in order to be a member of the European Union.[376] The former socialist countries in East Europe adopted the Dutch Civil Code.

Orucu explains that this type of legal transplant is not a matter of choice. While it may lead to success in membership compliance to meet a singular objective, this type of transplant may be without a thorough appreciation of the institutional mechanism of the sponsor country/organization or a thorough analysis of the content of the law being transplanted.[377] The Fetha Negesta equally failed in Ethiopia because it did not meet the local legal needs. With enhanced knowledge, Emperor Zara introduced and studied new laws and adopted Egyptian laws, which were more suitable to the Ethiopian legal environment at the time. Historical experience suggests transplant by chance and necessity succeeds if there is a clear understanding and legal expectation of the effect of the new legal rule and the effort from the host country to ensure the effects are catered for.[378]

[373] Dejene Girma Janka, 'The Impact of Transplanting Environmental Impact Assessment Lawinto the Ethiopian Legal System' (2013) 5 Jimma University Journal of Law 75.
[374] Esin Örücü, 'Law as Transposition' (2002) 51 International and Comparative Law Quarterly 205.
[375] Jean Frédéric Morin and Edward Richard Gold, 'An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries' (2014) 58 International Studies Quarterly 781.
[376] Örücü (n 374).
[377] Irma Mosquera Valderrama, 'Legal Transplants and Comparative Law' [2003] International Law: Revista Colombiana de Derecho Internacional 361.
[378] Juliana Latifi, 'The Phenomenon of Legal Transplants and Subsequent Interaction between the Legal Framework and Judicial Practice: Some Unifying Decisions of the Albanian High Court' 161.

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3.4.4 *Expected efficacy of the law*

A transplanted law is more likely to be accepted and applied if it is seen as likely to achieve its desired objectives.[379] For example, a new law may be expected to improve public safety or protect the environment.

The theory of legal transplant as an expected efficacy of the law follows the research conducted by Berkowitz et al. on cross-national legal transplants.[380] These authors proposed that the law was effective in circumstances where the lawmaking had internally undergone a process of trial and error, innovation, and correction, with the participation and involvement of users of the law, legal professionals, and other interested parties. Legal institutions are substantially weaker when foreign law is imposed, and legal progress is external rather than internal.

3.4.5 *Politics, economy and reputation*

A transplanted law is more likely to be accepted and applied if it is seen as politically or economically desirable or if it has a good reputation. For example, a new law may be seen as politically desirable because it is consistent with the government's ideology or policy agenda. Alternatively, a new law may be seen as economically desirable because it is likely to attract foreign investment or create jobs. Finally, a new law may have a good reputation because it has been successful in other countries.

Schauer proposes that the transnational and cross-border spread of law and legal ideas may be heavily reliant on political and symbolic factors on both the supply and demand sides, which may have more explanatory power than factors relating to the intrinsic or instrumental value of the migrating ideas themselves.[381] In this sense, economic ties may influence transplantation. Comparative legal transplant research goes beyond standard studies of common law and civil law legal families. Legal cultivation, cross-fertilisation, and transplantation are all considered.[382] Taking these criteria into consideration, governments are driven to participate in transplantation or borrowing for reasons related to political or governmental activities. Regulation of a new

[379] Wise (n 336).
[380] Valderrama (n 74).
[381] Frederick Schauer, 'Legal Transplantation Working Papers'.
[382] Ibid.

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national problem, pursuit of foreign policy interests, or acquiring governmental legitimacy are examples of these.

3.5 Forms of legal transplant: Miller's typology

A legal transplant can happen in a variety of systematic ways. Culturalists have identified four forms of transplant, these being cost-saving, externally dictated, entrepreneurial, and legitimacy-generating transplants.[383] Many systems have shown a mixture of forms rather than a single form. Using the various form of transplant to identify transplant forms in Chinese and African communities may not be beneficial in forecasting how legal transplants between Africa and China will occur but may help in identifying possible motivations for future transplants. Jonathan Miller uniquely applies a combination of sociology, legal history and a developing nation case study on the transplant of international laws to create transnational law. The typology is a useful tool for understanding motivations for transplant and the transplant process.[384] Miller's typology tries to describe all forms of legal transplant using the following four different types of transplants:

3.5.1 Cost-saving transplant

A cost-saving transplant typically happens when a country wants to save on the costs of running its own legal system. For example, many African countries have adopted English common law because it is cheaper than maintaining their own separate legal systems.

The motivation in this case for countries to transplant laws is to save money and time. This method is used when the jurist in one nation is faced with a problem but does not have time for a creative solution. However, the cost-saving transplant does not have the luxury of adapting the new solution to local circumstances.[385] This form of transplant is common in smaller and developing countries with limited resources. They tend to borrow laws from advanced economies. This form has a considerable risk of rejection if the rule of law does not closely fit the borrowing country's social practices and needs.

[383] Miller (n 349).
[384] ibid.
[385] ibid.

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The cost-saving transplant can be applied to practically any regulation that makes it easier for people to start businesses, make investments, or navigate the tax system.[386] The foreign investment law in China is cited by Chenguang Wang as an example of a cost-saving transplant.[387]

3.5.2 Externally dictated and legitimising transplant

When a country is forced to adopt a particular legal system by another country or international organisation, this is an externally dictated transplant. For example, many countries in the European Union have had to adopt the acquis communautaire, which includes all the laws and regulations that member states must implement.

This form of transplant is common in Africa. The transplant is set as a condition by a dominant donor country for doing business with or having political autonomy in the weaker country. In other parts of the world, an example of an externally dictated transplant is the post-Japanese constitution imposed by General Douglas McArthur.[388]

Legal transplants can also happen voluntarily to appease foreign partners or international institutions. Many post-colonial smaller economies have adopted American financial laws to attract investors. International institutions such as the World Bank have also included legal reforms as conditions of loans. Most countries have made legal reforms to enable membership into the WTO or to avoid United States sanctions if they do not comply.[389] The benefits of compliance may include economic, security, and political benefits offered by the foreign country or multilateral organisation.

3.5.3 The entrepreneurial transplant

A legal transplant is entrepreneurial when a country tries to improve its chances of attracting foreign investment by adopting the legal system of a developed country. For example, many developing countries have adopted American-style corporate law in an attempt to attract foreign investment.

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[386] Kacper Van Wallendael, 'Legal Transplants' [2018] Encyclopedia of Law and Economics 1.
[387] ibid; Chenguang Wang, 'Legal Transplantation and LegalDevelopment in Transitional China' (2012) 17 The World Bank Legal Review 161.
[388] Miller (n 354).
[389] Miller (n 349).

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Dezelay and Garth propose this form of transplant as underpinned by the host country, with the sponsor country being able to gain domestically by operating internally.[390] A pure form of entrepreneurial transplant is usually one promoted by an individual who goes overseas to learn foreign laws and brings back that knowledge to their home country.[391] Motivation may be in the form of grants and incorporated legal training by the sponsor country. The shortcoming with support ends with training the reform facilitators team and does not support the adoption of the law in the host country.

3.5.4 Legitimacy-generating transplants

Legitimacy-generating transplants occur when countries want to show that they are committed to international norms and standards.[392] For example, many countries have ratified the United Nations Convention on the Rights of the Child even though they are not required to do so by any international organisation.

Sometimes foreign legal models are perceived to have the prestige or efficacy that an adopting country needs.[393] This happens when less developed countries look at developed economies and adopt policies that appear most economically efficient. Watson, however, suggests that the prestige of a foreign law offers a domestic jurists the authority that they often need for their decisions to be accepted by others.

3.6 Selective vs wholesale transplantation

The practice of transplanting laws from one system (sponsor) to another (host) is evidently a common practice for legal modernisation and institutional capacity development.[394] Potter defines selective transplantation as a selective adoption of particular laws in the transplant process by mixing international rules with local norms.[395] Chinese legal reforms have followed their own model of transplantation rather than adopting a wholesale transplant of the English law after a

[390] Dezelay Yves and Bryant G Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (University of Chicago Press 2002). Cited in Miller (n 349).
[391] Miller (n 349).
[392] Miller (n 354).
[393] Ajani (n 364).
[394] Jaakko Husa, 'Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law' (2018) 6 Chinese Journal of Comparative Law 129.
[395] Pitman B Potter, *The Chinese Legal System: Globalization and Local Legal Culture* (Routledge 2001), available at <http://books.google.com/books?hl=en%7B&%7Dlr=%7B&%7Did=fQarsd38OeMC%7B&%7Dpgis=1>.

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century of occupation.[396] With the opening up of its economy, China took the bold step of replacing the English law and engaging in a benchmark study to identify a legal system closer to China's own. In its accession to the WTO, the country introduced numerous reforms, but it has done so at an incremental rate and followed a 'piecemeal' path which is a form or a selective transplant. In the last four decades, China has experimented with economic development and the process of legal transplant.[397] In so doing, it has consistently borrowed laws to tackle particular problems or issues.

China's experience veers slightly from Watson's position regarding legal transplant from other countries as a critical source of development. China has shown that legal transplant requires innovation in the ways in which it is applied to ensure that the law fits into the recipient country's system. In addition, China has transplanted laws to ensure the social development of its people. By actively retaining Chinese characteristics, China has built a fail-safe model to ensure that Chinese society accepts the transplanted laws.[398] Referring to thinkers and philosophers like Confucius, the CPC has skilfully and pragmatically incorporated traditional legal expertise and imperial legal practices into the transplanted laws.[399]

There are distinct factors that enable legal transplantation or that determine which laws to transplant. These factors were developed by scholars examining legal transplants between developed economies or those from developing to developed economies. The application and importance of the reasons may differ when applied in different circumstances. The present study looks at the possibility of legal transplant or borrowing between developing economies. Therefore, it is vital to understand the factors that influence transplant in Chinese and African environments to predict how the new form of legal borrowing will occur between them.

Legal historians and legal sociologists agree that legal transplants happen. However, it is the differences in the conditions and definitions of what makes the transplant successful that separate the different schools of thought on transplant. Both take the position that a legal transplant is a process undertaken by a government, government agencies, or multilateral organisations. Multilateral agencies like the WTO have used membership conditions to effect legal reforms. Governments have used trade and investment agreements as vehicles for the transfer of laws and

[396] Wang, 'Legal Transplantation and LegalDevelopment in Transitional China' (n 387).
[397] Ibid.
[398] Ibid.
[399] Michael Ng, *Legal Transplantation in Early Twentieth-Century China* (Routledge 2014).

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legal procedures. Trade and investment agreements have served as conduits for the transfer of legal norms from one system to another. The United States has used bilateral investment treaties and free trade agreements to promote its own laws and exclude the partner countries' norms, especially in Latin America.[400] In addition, International financial reporting regulations and systems have been developed and transplanted by American non-profit organisations in private sectors through government legislation processes.[401]

3.7 Private legal transplants

In addition to trade agreements, private sector multinationals through FDI have, during the past few decades, transplanted laws or legal practices. Most analysts and critics agree that legal transplant is affected by the government and, in turn, have a blind spot to the role that the private sector plays.[402] Ferrado and Lin-wen put a spotlight on the concept of private legal transplants to draw attention to its role.[403] Ferrado continues to present an example of how transplant can occur through direct investment with the case of the FIFA World Cup, Foxconn (Apple's manufacturing partner), and HP practices.[404] For their business operations, these transnational organisations and enterprises violated labour laws, imposed new laws on local governments, and undermined local laws. Both FIFA world cup and Foxconn signed confidential contracts, which in essence, created an enclosed area of privately shaped law, which Ferrado terms the 'special legal zone'. When criticised by the media for violating labour practices in China, Foxconn invited the Fair Labour Association (FLA) to investigate. The association also agreed to conduct an ongoing assessment to ensure that Foxconn met FLA standards.[405] However, the FLA is an American institution operating in a different legal, political, and economic framework. On the other hand, FIFA required the Brazilian government to put a suspension on the ban on alcohol sales at stadiums to satisfy the

[400] Gillman (n 352).
[401] The International Accounting Standards Board (IASB) develops international standards for financial reporting. The International Organization of Securities Commissions (IOSCO) develops international principles of securities regulation.
[402] Tomaso Ferrando, 'Private Legal Transplant: Multinational Enterprises as Proxies of Legal Homogenisation' (2014) 5 Transnational Legal Theory 20. Lin (n 327).
[403] Ferrando (n 402).
[404] Ari Kokko, 'The Development Dimention of FDI: Policy and Rule-Making Perspective', *United Nations conference on Trade and Development* (2002), available at <http://unctad.org/en/Docs/iteiia20034_en.pdf>.
[405] Ferrando (n 402).

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economic needs of FIFA.[406] Additionally, at FIFA's request, the Brazilian government agreed to spend 11.3 billion dollars in preparation, to change laws to meet FIFA's demands, and to provide extensive tax breaks to FIFA and entities involved in hosting the event. Brazil had an obligation to meet FIFA's demands to make legal amendments.[407]

Ferrado conceptualises private agreements with multinational or non-state actors as special legal zones which operate autonomously, separate from the rest of the legal order in a country. Private enterprises have, in the last few decades, transplanted a variety of private and public laws across jurisdictions through private contracts with governments and local suppliers.[408] As multinationals expand, they retain codes of conduct or procurements, which usually reflect their home-country law and legal culture. Multinationals prefer to retain codes of conduct and implement them in a host country for the purposes of productivity and a smooth global supply chain rather than political motives.[409] Although most multinationals subscribe to and implement international laws, some developing countries may also apply these laws or not become signatories. Multinationals, therefore transplant international laws by incorporating them in their codes of conduct and vendor codes and apply them in developing countries. Chinese companies comply with Chinese law and therefore are in a position to apply the same codes in African states with less developed legal systems. The limitation of private transplants comes from the confidential nature of legal contracts.

The advantage of enabling legal transplant through private sectors is the opportunity to test the law on a smaller scale and avoid the 'grand hazard' caveat Legrand described as a consequence of legal transplants. The disadvantage is the lack of transparency of the laws being transplanted, limiting the government's ability to intervene or society at large to comment on the said transplanted corporate codes. Multinationals then become their own regulators. To determine what shapes the codes of conduct selected by multinationals and transplanted to new territories requires a significant conceptual reformulation of legal transplant theories.[410] Ferrado recommends a new

[406] Tomaso Ferrando, 'Codes of Conduct as Private Legal Transplant: The Case of European Extractive MNEs' (2013) 19 European Law Journal 799.
[407] Sarah M Kazadi, 'Protests Linger, Excitement High as World Cup Begins in Brazil' (*CBS sports*, 2014) <http://www.cbssports.com/world-cup/eye-on-world-cup/24586494/protests-linger-excitement-high-as-world-cup-begins-in-brazil>.
[408] Lin (n 327).
[409] ibid.
[410] Ferrando (n 402).

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theoretical lens to understand legal transplant by non-state actors. However, with regard to China, there is a shared common interest between non-state private companies and Chinese state companies. A hybrid theory may be needed to explain how Chinese companies use FDI for legal transplants.

Africa-China's contemporary legal exchanges and cooperation can be accurately described according to historical successes necessary to explore how Africa and China can strike a balance in the globalisation and indigenisation of the law.[411] Studies of private legal transplants are limited. Investment lawyers and legal futures have not engaged in the debate or in studies on the impact of legal transplant and the role of law in the development of investment laws and mobility of FDI.

3.8 Chapter conclusion

In conclusion, legal transplantation is the process whereby a legal system is adopted by another country or international organisation. This can take many forms and happen under a variety of circumstances. There are endless debates on the conditions, effects, forms, functions, and compatibility of transplant. The most prominent theory of legal transplant is functionalism, which holds that countries should only borrow the legal institutions that are best suited to their needs. However, each country is unique, and no single theory can be said to be universally applicable. Each country must carefully consider its own needs and history before deciding which legal institutions to borrow from other cultures. The future of legal transplant is likely to be shaped by a number of factors, including globalisation, the increasing importance of international organisations, and the rise of new forms of transnational law.

This Chapter has looked at various legal transplant concepts, examining arguments from two extreme schools of thought — those of Alan Watson and Pierre Legrand — and from contemporary literature, which provides a middle ground between these two poles. The growing arguments have demonstrated how legal systems are constantly interacting with each other and borrowing from each other. In some cases, legal transplantation can be successful and lead to positive outcomes. In other circumstances, it might fall short and have detrimental effects or unintended

[411] Pătaru-Negură (n 333).

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consequences. The Chapter discussed various aspects of legal transplants, including their historical development, various forms and categories, and conditions for a successful transplant. Each of these aspects provides a different perspective and interpretation of the theory of legal transplant and contributes to a growing understanding of how legal systems change, develop over time, and interact with one another.

In the past, legal transplant in the global south has largely been a top-down process whereby developed countries have imposed their legal systems on less developed countries. However, in recent years there has been a growing trend of legal transplant in the global south, being a bottom-up process in which developing countries are increasingly adopting the legal systems of other developing countries. This trend is likely to continue in the future as developing countries increasingly look to each other for inspiration in the development of their own legal systems.

The role of China and Africa in legal transplants is likely to be significant in the future. Both China and Africa are rapidly developing regions with a growing need for effective legal systems. They are likely to play a vital role in the future of legal transplants. China is already occupying a leading role in the development of new forms of transnational law and is likely to continue to do so in the future. Africa, meanwhile, is home to a number of developing countries with a growing need for effective legal systems. Therefore, it is likely to play a significant role in the future of legal transplantation. The next two Chapters examine China and Africa's experience with legal transplants and how China is now using FDI to transplant laws. The Chapters seek to identify the conditions of this new form of transplants in developing economies.

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Chapter 4 THE DEVELOPMENT AND NATURE OF CHINESE LAW, FDI REGULATION AND ATTRACTION

4.1 Introduction

Chapter 2 discussed the circumstances under which China's policies would affect Africa's investment practices and economic growth. In Chapter 3, the concepts and theories of legal transplant were studied, illuminating the underlying 'logical' conditions under which one country's laws influence those of another country. The research seeks to review and understand how China's OFDI regulations, policies and legal cooperation affect Africa's legal culture and development trajectory.

China's influence on African development policies and laws results from the widespread practice of nations adapting, borrowing, and bending laws from other nations to create their own domestic laws. The growing influence and exposure of Chinese investment in Africa support the argument that, in time, African countries will borrow from China for their legal reforms. China and Africa share a common history of colonisation by the West but have had different paths in developing their legal systems. The legal transplant theory is discussed and applied to both China and Africa to establish how they have dealt with exogenous influences on their legal developments and to establish how they would probably continue to engage each other, given their recent past.

This Chapter examines the evolution of China's FDI regulation to assess how China borrowed from other legal systems and how it will use its experience as a new norm-maker in international law. The study shows how China's legal system and regulatory framework for both inbound and outbound direct investments have evolved. The legal framework of a source country is examined in this Chapter, along with how it affects the choice of a host country and related investment projects. The way in which China has shaped its policy to be consistent with Africa's domestic policies and geopolitical ambitions by using its companies to export the China model[412] is also

[412] Sufficient dialogue exists regarding what constitutes or defines the 'China model'. For the purposes of this research, the China model refers to the governance of China, and China's economic development model. A key element of the Chinese model is leadership by one party, the CPC; the second element is capitalising on operations of Chinese companies. Chinese company law (art 17) makes provision for the CPC to carry out party activities in the company in line with the CPC's constitution.

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examined. The research investigates how Chinese laws and practices have been applied to choose investment location, project choice, and political influence. It is essential to clarify the approach and the scope of this Chapter in examining China's FDI regulation to determine the limitations of this study. Several studies have been conducted on the determinants of Chinese OFDI and China's inbound FDI regulation.[413] However, most studies examine the economic and business strategy aspects of Chinese investment in terms of country and sectors to determine trends and drivers of FDI. This study takes a different approach and focuses on the regulatory aspects of OFDI and its influence on host country regulations and legal developments.

The Chapter is divided into four sections. The first section reviews the development of Chinese law through legal transplants. The second section reviews contemporary Chinese laws and regulations to understand the China development model more clearly. This section looks at Chinese domestic policies and rules relating to China and FDI and identifies institutions that have regulated Chinese FDI since its opening up in 1979. A brief historical overview in the second section further examines how China directed inbound FDI to support its internationalisation and domestic reforms while retaining core socialist market economy priorities. The third section discusses China as a capital exporter and explores the way in which China is now influencing international investment laws. The section studies China's interaction with international laws and regional legal influences to serve Chinese interests. Finally, the study examines how China regulates outbound international investments to serve domestic interests and comply with international regulations.

4.2 The development of Chinese law and the legal transplant

FDI has been instrumental in driving Chinese growth, ensuring that China meets its development agenda. The Chinese command economy puts the government at the centre of directing all economic activities in the country. The Chinese government developed policies, laws, and regulations to ensure that inbound FDI was always aligned with the government and the CPC's political interests. However, China looked to other countries for expertise and believed in using foreign resources, including intelligence, to build a system that benefits China. This section looks

[413] Ross (n 105); Claassen (n 27); Peter J Buckley and others, 'A Retrospective and Agenda for Future Research on Chinese Outward Foreign Direct Investment' (2018) 49 Journal of International Business Studies 4, available at <https://doi.org/10.1057/s41267-017-0129-1>.

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at how China has borrowed and bent policies from other systems and nations to regulate FDI and ensure a high return on its economy and success with its political agendas.

4.2.1 Legal transplants in China's civil system

In 2013, President Xi Jinping proposed two major economic initiatives: the Silk Road Economic Belt and the 21st Century Maritime Silk Road, which came to be referred to collectively as 'the BRI'. The BRI is China's global mega-infrastructure project, the largest infrastructure project in world history that China will coordinate globally.[414] The sheer scale of both projects abroad puts it in a powerful position to establish its technical and financing standards as 'global defaults' in several fields and countries.[415] Under the BRI, China will be exporting capital and coordinating mega-projects internationally, inevitably exporting some Chinese characteristics for interpreting international laws, legal practices, business practices and culture. The mega project will be carried out by selected Chinese private companies, such as Huawei in telecommunication, which received investment protection from the Chinese government and host countries.[416] Vice Foreign Minister Luo Zhao stresses that China has therefore taken the lead in coordinating legal cooperation with countries involved in the BRI.[417] This cooperation could lead to legal convergence with other legal systems but with a more substantial influence on the Chinese legal system. In 2019 Xi Jinping promised to provide the world with a different emphasis, including understanding Chinese foreign policy and diplomacy in terms of Chinese characteristics.[418] While the intention is to do so for common international development, global policy developments should consider the economic strength China wields with the BRI.

To understand the current legal policies governing Chinese outbound investment and its amazing story, it is crucial to take a historical account of how China reformed domestic laws and borrowed from other legal systems in the past. China's traditional legal system has long been

[414] Chinese Government, available at https://eng.yidaiyilu.gov.cn/zchj/qwfb/12731.htm.
[415] Zhexin Zhang 'The Belt and Road Initiative in the Global Trade, Investment and Finance Landscape' (2018) available at <https://www.nortonrosefulbright.com/en/knowledge/publications/d2e05e9f/the-belt-road-initiative---a-modern-day-silk-ro*ad*>.
[416] Zhou Jin (2019) 'China to enhance legal exchanges, build cooperation platforms with BRI countries', *China Daily online,* available at http://www.chinadaily.com.cn/a/201910/15/WS5da57390a310cf3e355709c7.html.
[417] Luo Zhao opening speech at China Forum on International Legal Cooperation, available at https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zygy_663314/gyhd_663338/202011/t20201118_493596.html.
[418] Fourth Plenum of the 19th CPC Central Committee (2019). Communique of the Fourth Plenary Session of the 19th Central Committee of the Communist Party of China (pp. 13-14). People's Publishing House.

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replaced by grand-scale legal transplants while retaining its nationalist and social characteristics.[419] If African states use China as a development reform benchmark, it is necessary to learn how China succeeded in keeping these inherently Chinese characteristics. To borrow effectively from the China economic development model, policymakers should understand how Chinese FDI law, regulation, and legal practices control outbound Chinese FDI in Africa.

China is criticised for bringing its own legal and business practices which undermine sustainable development in Africa. Policymakers often respond by saying they are interested in helping Africa to test the same policies, laws, and legal reforms they applied when China opened up. The assistance from China has come in the form of financial aid, including technical legal assistance.[420] Understanding the Chinese approach to legal cooperation and how the state has used legal reform and collaboration in its foreign relations will provide incisive answers to difficult questions about the composition and objectives of China's aid.

This section examines how China used legal transplants to develop its legal system as a capital importer and then shape its policies as a capital exporter in Asia to support and sustain its record-high growth. A new legal transplant model for Africa may be generated by studying the legal development in China. As a foundation for imagining future technical legal assistance and cooperation between China and Africa, this section carefully examines how China, as a capital exporter, transplanted laws through FDI to its neighbouring countries.

It is generally accepted that the Chinese legal system acquired its substance in civil law tradition[421] with a long history of legal exchanges, transplants, or transfers. Chinese civil law tradition, defined by Chinese officials as the socialist legal system, can be traced back to the late Qing dynasty (1902–1911).[422] Although the Chinese legal system is generally acknowledged as a

[419] Chenguang Wang, 'Legal Transplantation and Legal Development in Transitional China' (2014) 51 *The World Bank Legal Review* 161.
[420] China is a non-development assistance country. Therefore, its definition of aid differs from the definition provided by the OECD adopted definition of official development assistance. The non-development assistance country status makes it difficult to measure, understand and define China's development aid assistance in global terms, creating an anomaly in China–Africa aid flows and programmes.
[421] Chen Lei 'The Historical Development of the Civil Law Tradition in China: A Private Law Perspective' (2010) 78 Legal *History Review* 159.
[422] ibid.

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civil code system, its law occupies a *sui generis* position.[423] China reflects a combination of legal reforms and Chinese socialist tradition to deliver a triumphant story of economic development, internationalisation, and modernisation.

It is essential, to begin with the historical development of modern Chinese law from the Qing dynasty era to understand Chinese characteristics in law. African leaders can also use this experience as a guideline when borrowing from the Chinese development model and reforming domestic laws to attract FDI. China experimented with importing foreign laws to develop its domestic laws to international standards, aiming to attract and protect foreign investments. After the Mao era and in the recent past, China's key motivation for joining the WTO was to borrow from international trade laws to improve and reform Chinese laws while retaining some aspects of the laws and legal practices most suitable to the Chinese economic development model.

4.3 The Chinese civil legal system development phases

Before the current development of the civil legal system, China had experienced extensive legal transplants,[424] the first being recorded in the Tang dynasty with the development of the Tang code, promulgated in AD 652 (1644–1911).[425] The Tang code was China's first engagement in transplanting when it introduced the fused Confucian philosophy and legalism system to Japan in the fourteenth century, with China as a sponsor country and Japan as the recipient country.[426] In 700 AD, Japan adopted a large number of Tang dynasty laws. Over time, both Japan and China adopted Western-style legal codes to foster economic growth and international trade.[427] However, the legal systems of both countries still preserved the Confucian principles underpinning their legal system and culture.

[423] The expression "sui generis state" requires particular attention.In this research paper, it suggests that China's legal culture possesses distinct and unique characteristics, setting it apart from other legal systems globally. It implies that China's legal development is not easily classifiable within existing legal paradigms or comparative frameworks. Ibid.
[424] ibid.
[425] Jianzhong Dai 'On Several Problems in Legal Transplantation' (2009) 2 *Journal of Politics and Law* 107.
[426] Confucianism believes morality can be taught and lays the foundation of an ideal social order, while legalism emphasises severe punishment to maintain social order.
[427] Percy R Luney 'Traditions and Foreign Influences: Systems of Law in China And Japan' (1989) <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3994&context=lcp> accessed 12 April 2019.

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The Confucian philosophy prioritises social harmony and social order.[428] Principles of conciliation and compromise were applied by the imperial courts as the ideal goals of justice in resolving disputes. The philosophy elevated morality above the law and then merged them both. The Confucian system, however, did not develop a general legal framework independent of the state, lacking citizens' rights and a body of civil law distinguished from criminal law. Lei's study explores the reasons for and the significance of China's success in adopting the civil law tradition.[429] Although his research is limited to private law, it successfully explains the choice of civil code versus common law traditions in reforming the Chinese legal system.

The evolution of the Chinese legal system after the imperial system can be traced through five separate phases. The first phase of the development was during the imperial era ending with the Qing dynasty. The second phase followed the Qing dynasty when the National Republic took over. During the cultural revolution, the third phase was when Mao Zedong's People's Republic of China (PRC) government repealed all the Western-styled laws and replaced them with the Soviet Union legal system. The fourth phase derives from China's opening up, a period in which China underwent substantial reforms in preparation for joining the WTO. The nature of future reforms can be projected from historical trends.

4.3.1 Phase 1: Imperial era Qing dynasty

China has a long history of traditional legal systems throughout the various dynasties, which ended with the Qing dynasty. When the Qing government lost the war against Japan and Britain, the Chinese legal system collapsed.[430] British and Japanese losses resulted in more imports than exports and capital outflows being controlled by foreign companies. Trade terms and legal practices were governed by foreign practices, with the support of the new Chinese elites. They profited from the new trade arrangements and considered the Confucian philosophies obsolete.[431]

With the occupation, foreign governments developed extraterritorial jurisdiction in some of the Chinese ports involving concessions to foreign governments managed under foreign laws and governance. China still refers to the time following the occupation of its ports as 'a century of

[428] ibid.
[429] Lei (n 421).
[430] Lei (n 10) Opium war (1939-1842) and Sino-Japan War (1894-1895).
[431] ibid.

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humiliation' and frequently compares it to the history of colonisation in Africa. To manage this occupation and avoid being overthrown, the Qing government looked to Japan's model of legal development and success in abolishing the system of extraterritorial jurisdiction.[432]

The Qing dynasty established a law codification commission in 1902 under a government-led commission led by Shen Jiaben and Wu Tingfan in response to the pressing need to update its laws to deal with external occupation during a period of escalating domestic civil revolution.[433] Together with Japanese scholars, the commission drafted a new civil code influenced by German and Japanese civil codes.[434] Although the civil code never took effect because of the Qing dynasty's collapse, it influenced future civil codes in China. It also served as the foundation for the Chinese custom of appropriating and enforcing foreign laws through legal scholarships and comparative studies of those laws.

The first turning point in recent Chinese legal history and evidence of transplant practice happened in 1911, after the collapse of the Qing dynasty. During the Kuomintang era, legal development moved away from the traditionalist Chinese society and Confucian philosophy and developed legal systems by borrowing from German and Swiss laws.[435] The Nationalist Republic created a constitution containing an American-style bill of rights. From the European system, China developed the six codes of the Guomindang. The codes were essentially developed by foreign-trained Chinese legal scholars with Western support.[436]

4.3.2 Phase 2: Kuomintang era

After the Qing dynasty, during the Kuomintang (KMT) era, China experienced a period of conflict. Even though the Qing dynasty codes were not directly followed, the republican government did not interfere with the development of the civil codes, which, with some exceptions, bore a strong resemblance to the German code. During the same period, China studied the legal systems of

[432] ibid.
[433] ibid.
[434] Tsung-Fu Chen 'Transplant of Civil Code in Japan, Taiwan, and China: With the Focus of Legal Evolution' (2011) 6 *National Taiwan University Law Review* 389 <*http://lawdata.com.tw/tw/detail.aspx?*no=*67246*>.
[435] This was a significant shift in the Chinese legal system, which had previously been based on Confucianism and traditional Chinese culture. The adoption of German and Swiss laws allowed China to modernize its legal system and move towards a more Western-style legal system. This change was part of a broader effort to modernize China and bring it into the modern world.
[436] Ng (n 399).

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Japan, Switzerland, and France.[437] However, some of the distinct differences were the unification of civil and commercial law by the republican government. Besides, unlike the Qing dynasty period, the KMT reformers moved away from statutory borrowing to jurisprudential borrowing, by which legal experts considered the underlying principles and legal values of the laws borrowed.[438] The KMT carefully considered, examined, and balanced civil customs and new civil codes in implementing the new civil code. However, the ongoing conflict in China during this period made enforcement impossible as the KMT civil code failed to reach the rural areas of China.

4.3.3 Phase 3: The Mao era

When the new PRC, led by Mao Zedong, took power over the Nationalist Republic led by the KMT, they repealed the Guomindang's codes and introduced the Soviet Union's legal system. The legal transplant of the Soviet legal system ended in 1960 when China broke away from the Soviet Union.[439] China began to dismantle the Soviet system during the cultural revolution. Immediately after establishing the Law of the PRC in 1949, the Central Committee of the Communist Party of China abolished the nationalistic republican civil code. The PRC established the judicial principles in the areas liberated from the KMT.[440] In the early Mao days, China introduced 148 laws without a specific civil code. Thereafter, an effort to draft a new civil code borrowed from the Soviet Union's socialist system began. It had four parts: general principles, ownership, obligations, and inheritance.

The drafting process was aborted when the relationship with the Soviet Union fell apart. After that failed transplant, China tried to develop its independent civil code with Chinese characteristics. This effort failed dismally. Lei contends that the failure demonstrated that creating laws without drawing on experiences from abroad could prove fruitless, impractical, and nothing

[437] Jianzhong Dai 'On Several Problems in Legal Transplantation' (2009) 2 *Journal of Politics and Law* 107 The 'constitutional framework', published in 1908, is the first constitutional document in Chinese history. It provided the rights and obligations of citizenship. The first of these two stated that: 'subject to the principle of all speeches, all press, all assembly, all association, all quasi, are all free.' Article 3 provided that: 'according to the law of penalty there was non-custodial punishment.' This Constitutional outline had utterly absorbed the spirit of the Japanese Constitution. Hsiao, Taiwan scholars, pointed out that: 'The constitutional framework [was] purely constituted by copying the Japanese Constitution'.

[438] Lei (n 10).

[439] Wang, 'Legal Transplantation and Legal Development in Transitional China', supra n 390.

[440] Lei (n 10) liberated an area that was previously controlled by the China Communist party before the Chinese civil war.

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more than an exercise in blind legislative parochialism.[441] Some academics assert that although the effort failed, the Chinese code created a third family of law distinct from common and civil law. By contrast, the socialist civil code preserved Germanic civil law.

The Chinese legal characteristics of civil law gave the Communist Party (CCP) a prominent role and more authority than mere normative regulation. Some scholars argue, however, that the socialist law still retained substantial features of the civil code. The CCP rejected republican civil law, favouring Soviet law, which had been influenced by Roman-Germanic law and which preserved the civil law tradition in socialist law. Overall, the CCP failed twice to enact the civil codes.[442]

4.3.4 Phase 4: Opening up era

After the Mao era, the new Chinese government led by Deng Xiaoping pursued reforms, thereby strengthening the Chinese legal system to improve its international standing. China sought to accede to the WTO while retaining a socialist legal system with Chinese characteristics.[443] Chinese leaders understood that accession to WTO was essential to China's development plan, and in 1978 Deng announced the adoption of the market economy and, in a third attempt to develop the civil code, began a process of initiating structural reforms. In these endeavours, China introduced the opening-up policy.

The opening-up policy was introduced to address economic problems and drive economic growth.[444] The success of opening up China's economy to foreign investment depended on China having a reliable and trustworthy legal system. China needed to improve and reform its legal system to draw FDI. In 1978, the CCP established the third civil code drafting group since the PRC's founding.[445] Both attempts at developing a civil code — the first, modelled after the Soviet Union's model, and the second, which sought to create a Chinese civil code — failed. China issued economic laws distinct from civil laws following a series of consultations. The General Principle of Civil Law, which China enacted in 1986, was a turning point in developing and framing Chinese

[441] Lei, Chen. 'The historical development of the Civil Law tradition in China: a private law perspective.' *Tijdschrift voor Rechtsgeschiedenis/Revue d'Histoire du Droit/The Legal History Review* 78, 1–2 (2010): 159–181.
[442] Chen (n 23).
[443] Luney (n 16).
[444] See glossary of concept definitions.
[445] Lei (n 10).

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civil law[446] and marked a distinct starting point for China. Although there were gaps in other areas of law to protect foreign investments, China was now able to enter into contracts with foreign partners.

An agreement on trade relations between China and the United States of America was signed in July 1979. Before creating its own domestic intellectual property protection laws, China agreed to a reciprocal clause in the agreement on the protection of copyright, patents, and trademarks to foster economic development and attract foreign investment. However, only in 1984 did China adopt its first patent law, which was followed by the introduction of its first trademark law in 1985. From a policy standpoint, China took a restrictive approach to OFDI. The State Council permitted businesses to establish firms abroad during this phase (the first one in 1979).[447] The Ministry of Foreign Trade and Economic Cooperation, the predecessor of MOFCOM, was designated as the approving authority for companies wanting to invest overseas.[448] The government kept tight control over more significant outbound investments. The approval process was initially onerous, prohibitive, and expensive but has since been streamlined.

4.3.5 Phase 5: Legal borrowing after WTO membership

China joined the WTO in 2001 to gain access to the international market and modernise its domestic legal system to meet international standards. One type of legal transplant was China's reform process, which was influenced by the WTO's requirements. But China did not fully adopt the laws as the WTO had demanded. Even though the reform process began in 1986, after China's WTO accession in 2001, thousands of laws were further changed, amended, and promulgated.[449] China joined the WTO after laborious negotiations that lasted 15 years.[450] Furthermore, China signed the most stringent agreement ever reached by any developed or developing country at the end of the negotiation, which was the longest in the history of WTO membership applications.

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[446] China promulgated Economic Contract law, Foreign Contract law, Patent Law, Trademark Law and Succession law.

[447] Huang Wenbin and Andreas Wilkes, *Analysis of China's Overseas Investment Policies* (Cifor 2012), available at <http://en.people.cn/n3/2017/1018/c90000-9281415.html>.

[448] ibid.

[449] Since China acceding to the WTO, it has reviewed and revised relevant law and regulations related to trade, Investment and IPR protection, involving 2 300 laws, regulations and departmental rules and 290 000 policies and regulations at sub-central levels.

[450] Rui Pan 'China's WTO Membership and the Non-Market Economy Status: Discrimination and Impediment to China's Foreign Trade' (2015) 24 *Journal of Contemporary China 742*, available at <https://doi.org/10.1080/10670564.2014.978158>.

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The substantial regulatory, institutional, and normative changes, coupled with legal reforms in preparation for joining the WTO, significantly influenced China's domestic market.[451] China's commitment to WTO regulations led to a more liberalised and less opaque legal system than when it first joined. China considered itself 'opened up' and had a system that could be characterised as liberal and encouraging of private enterprises.[452] China was the sixth-largest exporter of goods when it joined the WTO, and within nine years, it overtook the United States as the world's top exporter.[453] When the transition ended in 2016, China was also the world's largest trading nation.[454] In a short time, China had risen to a position of influence.

The primary driver of the reform- opening up the economy- necessitated modifications to the legislation governing the private sector and FDI rules for inbound investment. The second purpose was to get China ready to join the WTO. China agreed to the stringent terms of the agreement, but the WTO expressed concerns about China's ability to implement the necessary conditions quickly. China decided that, while agreeing to implement reforms as part of its WTO commitment, it would only do so to serve the interests of the Chinese socialist market economy.[455] Beijing had not given up a planned economy on the grounds that, as a developing country with a large population, a planned economy was necessary to modernise the whole country and raise its people out of poverty. Recent engagements regarding China's developing country status suggest that the unintended consequences of China's membership are its impact on global market regulations and the WTO. While the WTO rules were intended to reform Chinese law, in fact, the Chinese legal culture and governmental system have also resulted in significant WTO reforms. The WTO will change according to current trade negotiations, which will also affect how the organisation adopts the next generation of investment and trade rules considering its trade relations with developing nations.

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451. Qin, J 'Trade, Investment and beyond: The Impact of WTO Accession on China's Legal System' (2007) 191 *The China Quarterly* 720-741. Available at http://www.jstor.org.ezproxy.uct.ac.za/stable/20192817.

452 Hinrich Voss and others, 'Thirty Years of Chinese Outward Foreign Direct Investment'; Wenbin and Wilkes. (n37)

453 Petros C Mavroidis and André Sapir, 'China and the World Trade Organisation: Towards a Better Fit' (2019) Bruegel.

454 Godement (n 230). Available at https://www.institutmontaigne.org/en/series/china-trends-1-china-reluctant-wto-reformer

455 China's WTO Ambassador Xiangchen Zhang remarked: 'If someone wishes, in the name of reform, to put China in a tailor-made straitjacket of trade rules to constrain China's development, I think they will be very much disappointed.'

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China's stern rejection of WTO requirements is primarily motivated by its status as a developing country. Wei Jianguo, the former Vice-Minister of Commerce and Vice Secretary-General at the Chinese Centre for International Economic Exchanges referred to the special and differential treatment given to developing countries by the WTO as the cornerstone of WTO reform, affirming China's fundamental right to categorise itself as a developing nation. In line with Xi Jin Ping's report to the Nineteenth Party Congress and the special differential WTO treatment, Chinese experts agree that China's status as a developing country is undeniable. While China's economy has developed rapidly, China still considers itself a developing country because of lagging development in some sectors of the population and in the Western region of China. Despite continuous pressure from former United States President Donald Trump, China is unwilling to give up its right to special and differential treatment as a developing country, which it considers a fundamental right.[456] Gao Fei also highlights China's willingness to collaborate with other developing members to adamantly defend their rights. India, South Africa, and Venezuela submitted a paper to the WTO in support of China, stating that the long-standing practice of self-classification of development member status serves WTO objectives.[457]

Over time, China's engagement has defied traditional international relations theory on compliance with international law. As China's economy grew at an unprecedented pace, Beijing became more skilled and powerful in its WTO negotiations. However, Beijing has been resolute in reforming at its own pace to suit Chinese interests, affirming that this does not imply that China will shy away from its international responsibilities and assumed obligations in compliance with the WTO. In a media interview, Gao Feng from the Ministry of Commerce affirmed that China would honour its commitments compatible with its economic development and capabilities. China's unwavering determination to protect its interests has become representative of emerging markets' stance in multilateral negotiation, positioning China as an example for African governments. China has, in turn, used the developing nations' interests to support its stand on issues in the WTO.[458]

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[456] Viviana Zhu 'China and WTO: Minimal Changes Only, Please' (2019) *China Trends.* *<https://www.institutmontaigne.org/en/blog/china-trends-1-china-and-wto-reform-minimal-changes-only-please>*.
[457] Amanda Lee 'The World ' s Emerging Economies' 3004873 *<https://www.scmp.com/economy/china-economy/article/3004873/china-refuses-give-developing-country-status-wto-despite-us>*.
[458] Zhu (n 47).

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Among the extraordinary WTO membership conditions to which China committed is the non-market economy (NME) provision, which specifies that China is treated as an NME for 15 years after accession (2001–2016).[459] Chinese scholars consider these conditions discriminatory and contradictory to WTO principles,[460] especially because other WTO member countries with similar development status do not have this requirement in their agreements. This NME status meant that importing countries could impose discriminatory restrictions on China. The NME status exposes China to the risk and costs of anti-dumping and countervailing lawsuits. African governments have not only supported China on this issue but have also given China a market economy status (MES).[461] The WTO has justified the additional conditions placed on China, arguing that other members from Central Europe and Asia with similar economies to China were easier to deal with and, in any event, had much smaller economies than China. Other 'outlier' economies which joined the WTO embraced or aligned with the Western liberal regulatory regime, thereby avoiding major conflict.[462] Contrary to other developing nations, India, Brazil, and China did not adopt the market economy designation as their economies grew substantially.[463]

China sees its membership as serving its national interests and those of the international community, especially developing nations. In addition, China acknowledges the need for and benefits of the domestic market and legal reform to compete globally and undo Western hegemony.[464] Conversely, China's economic model and those of other developing economies differ significantly from the WTO's prominent incumbent members.[465]

While it may have joined the WTO to reform its legal system to align with international reforms, China is unwilling to reform the one-party system, viewing the pressure to reform as a forced institutional transplant by the West. In response to pressure from the United States for China

[459] The non-market economy refers to countries with public ownership and a planned economy the term 'non-market economy country' came from the US Trade Act of 1974, which acknowledges that the general provisions of the Act shall not apply to 'Communist Countries' with public ownership. Communist countries included the former Soviet Union, Eastern Europe, and China because the governments of these countries seek to direct all economic activity, deciding what needs to be manufactured, to whom it should be distributed and at what price. Pu Wenbin, 'The debate on NME: a game played by China, the US and the EU' (2005) 5 *International Business (Guoji Shangwu)* 68–72. See Rui Pan (n40) 92015)

[460] J Rui, J (2015). *China's WTO Membership and the Non-Market Economy Status: discrimination and impediment to China's foreign trade, Journal of Contemporary China*, 24:94, 742-757, DOI: 10.1080/10670564.2014.978158

[461] Lauren A Johnston & Cheng Yuan 'China's Africa trade and investment policies: review of a 'Noodle Bowl''.

[462] Mavroidis and Sapir (n 44).

[463] ibid.

[464] Jiang Xiaojuan 'Prepared Remarks: China's Interests and Position in WTO Reform' 1.

[465] Mavroidis and Sapir (n 44).

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to give up its 'state-led, mercantilist trade and investment regime', Beijing argues that the WTO's role is to accommodate its members' diversity.[466] Rodrick further reasons that the WTO should not be restrictive and allow for a policy space that enables countries to design their own economic and social models.[467] Mavroids and Sapir take a more centrist approach to the arguments between China and the United States,[468] advocating reform of the WTO but not favouring either side. The United States has pressed for China to comply with the WTO system but does not want to give up the privileges it receives from the system.[469] The United States and other industrialised nations requested safeguarding mechanisms when China applied to join the WTO out of concern for their national interests. The United States negotiated a cap on China's special and differential grants to developing nations, while other developed countries pushed for faster reforms in China and a shorter grace period for China to make domestic adjustments.[470] Pan asserts that the conditions were, nevertheless, imposed to take advantage of China's desperate need to join the WTO, which resulted in China being subjected to extraordinarily burdensome membership terms. However, despite its many benefits, the WTO's extraordinary conditions for China's membership have also been criticised. Some argue that these conditions are unfair and create an uneven playing field. Others believe they must ensure that China abides by international trade rules. One could argue that the extreme requirements the WTO set for China's legal reform amount to a forced legal transplant on the part of multilateral organisations.

4.4 China as the new lawmaker

The process of Chinese civil development began with borrowing elements from the continental civil code. The colonial transplant should have been the most viable form of transplant for China following the occupation by Britain and its common law system. However, the concept and doctrine of continental civil law were more comparable to Chinese feudal law.[471]

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[466] ibid.
[467] Dani Rodrik, 'The WTO Has Become Dysfunctional' (2018) *Financial Times 7*, available at *<https://www.ft.com/content/c2beedfe-964d-11e8-95f8-8640db9060a7>*.
[468] Mavroidis and Sapir (n 44).
[469] Kristen Hopewell *Breaking the WTO : How Emerging Powers Disrupted the Neoliberal Project* (2016).
[470] Rui Pan 'China's WTO Membership and the Non-Market Economy Status: discrimination and impediment to China's foreign trade', (2015) *Journal of Contemporary China*, 24:94, 742–757, DOI: 10.1080/10670564.2014.978158.
[471] Lei (n 421).

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China and Japan had closer trade, culture, language, political culture, and history,[472] and Japan presented a more convenient point of reference for legal development.[473] All the same, contrary to more typical historical precedents, China did not adopt the civil code out of reverence for the civil law system or as a result of colonisation. China's deliberate desire to elude foreign control led to legal reforms and the adoption of new foreign law policies. The central government also commissioned scholars to study the legal system most suited to China, and, arising from the process, and civil law was adopted.

China and Africa do not have a colonial relationship, nor the proximity that China shares with Japan. Africa has expressed its admiration for China as an alternative development model to the models of its former colonial rulers. With China developing legal assistance programmes for African countries, the borrowed foreign law on the continent is bound to change. A benchmark for the continent on the potential effects of China's legal system on other developing countries is provided by an analysis of legal cooperation between China and neighbouring Asian countries.

From 1902, China crafted its model of civil law according to its economic and social needs, leading to what is loosely termed the Beijing Consensus.[474] In so doing, China succeeded in retaining Chinese characteristics in its legal development.[475] China insisted on using its historical know-how as the cornerstone of its reforms while viewing Western education and systems as more useful in practical terms. For this reason, its legal development differed from other developing nations (Asia, Africa, and Latin America) during the first legal shifts and development in the 1960s. China applied 'selective transplantation', which prioritised national needs and purposes. Its selective transplant method has minimised the possibility of rejection, proving the deficiency in the theories of Kahn-Freund and Legrand that transplant is impossible owing to inherent differences. The Chinese experience has been unique in safeguarding its policy space regarding when, where, and how to adopt foreign ideas.

Looking at the process of private legal transplant through the agency of multilateral organisations, it can be concluded that multilateral agreements do not sufficiently regulate

[472] ibid.
[473] ibid.
[474] The 'Beijing Consensus' is a term coined by Joshua Cooper Ramo with reference to China's economic development model as an alternative for developing countries in juxtapositon to the Washington Consensus. Guan (n 12).
[475] Chinese characteristics are defined in the Chinese constitution preamble.

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investment agreements.[476] China's fast-growing investment and influence elevate the importance of investment regulation in host countries. Until the new foreign investment law in 2020, the Chinese government was forced to adopt technology transfer from inbound FDI. This requirement became a source of contention between China and the global north, but for China, it was a fast way to acquire technology for development. On the other hand, one of the main concerns for the dragon-slayer regarding Chinese investments in Africa has been the lack of technology transfer from those companies.[477] Although China insists that developing nations should receive technology transfer, it appears to have different standards when dealing with the continent's less developed nations. The Chinese government can demand technology transfer from developed countries without having a similar obligation toward less-developed nations, due largely to China's economic standing as an emerging superpower. The wealthiest countries in the world will not allow China's technology transfer policies to harm their economy. For developing nations in Africa to receive any assistance from Chinese companies, they must agree on more strict terms than what is currently being offered.

4.5 China's FDI policies and institutions

The modern growth of China has been studied as a phenomenon dating back to the opening up under the leadership of Deng Xiaoping. Literature on FDI from emerging markets emphasises state ownership.[478] It is often assumed that the state influences only its own assets in ownership while excluding other state instruments used to drive and direct OFDI choices. Political influence, policy support, and subsidies are additional tools.

An essential aspect of any Chinese company's behaviour that affects the economy, society, and environment both at home and in the host country is influenced by government policies. China understands the value of joining the global economy to promote domestic development.[479] The country's exceptional growth has been attributed to the Chinese government's vision and policy,

[476] Mavroidis and Sapir (n 44). Robert I Rotberg, *China's Quest for Resources, Opportunities, and Influence in Africa* (Brookings Cambridge 2008).Alden, 'NEW ACTORS , NEW MODELS , NEW OUTCOMES ?' (n 110).
[477] Alden, 'NEW ACTORS , NEW MODELS , NEW OUTCOMES ?' (n 110).
[478] Florian Becker-Ritterspach and others, 'Home-Country Measures to Support Outward Foreign Direct Investment: Variation and Consequences' (2019) 26 Transnational Corporations 61.
[479]Axel Berger *China and the Global Governance of Foreign Direct Investment* (2008).Min Ye, 'Policy Learning or Diffusion: How China Opened to Foreign Direct Investment' (2009) 9 *Journal of East Asian Studies* 399.

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conceptualised as the China development model. China has developed a very sophisticated regulatory framework to support FDI in just a few decades.[480]

Several new concepts, policies and measures have emerged to define how the Chinese government influences its economic development. These include the Beijing consensus, the opening policy and the going out policy, which is discussed in the next section. A historical overview of Chinese development can clarify the institutional developments and normative reforms undertaken to leverage and direct FDI to suit national interests.[481] Such background can also help to position the study of China's OFDI policy and regulation in the international context.

4.6 Chinese polices for FDI

The legal environment of a country plays a crucial role in attracting investment. As outlined earlier in this Chapter, the Chinese legal system evolved by borrowing from various legal systems. China eventually developed a civil legal system resembling the civil codes of Japan, France, and Germany. Since the opening-up policy, China reformed a series of commercial laws to build a legal system to regulate its new market economy. Once China's legal system was established in 1978, China began to study United States laws. For this reason, some of the laws related to foreign investment, such as intellectual property law, reflect the influence of the United States' legal system. The legal borrowing process involved the transplant of many Western laws. Ultimately, most Chinese commercial laws have achieved a level of harmony with international laws.

After an evaluation of China's bilateral investments and treaty agreements, Berger concludes that the policy change resulted from the Chinese government's proactive decision to introduce liberal treaty provisions, particularly with developing countries, which were the primary recipients of Chinese OFDI.[482] When China opened, it was still a poor developing country with regulations more focused on incoming FDI than on outbound. Officially beginning in 1979, the process of opening up was gradual and occurred in four key stages, as presented in Table 5. China

[480] Karl P Sauvant and Michael D Nolan, *China's Outward Foreign Direct Investment and International Investment Law* vol 18 (2015).
[481] Zitian Chen Victor, Li Yuanyuan and Hambright Sara, 'Regulatory Institutions and Chinese Outward FDI: An Empirical Review' (2016) 24 Multinational Business Review 302, available at <https://doi.org/10.1108/MBR-09-2015-0044>.
[482] Berger (n 66).

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displayed a pattern of approaching new initiatives with a restrictive approach to eventually encouraging beneficial initiatives.

Table 5 Stages of China's OFDI

Stage	Period	Reforms
1	1979–1985	Opening up and moving from a restrictive approach. Only two ministries could undertake OFDI: the Ministry of Foreign Economic Relations and Trade (MOFERT)[483] and the Commission for Foreign Economic Relations and Trade. China is aided by Japan and follows Japan's strategic industrial planning. International investments require technology and equipment transfer.
2	1986–1991	More liberalisation steps for OFDI by MOFERT. The private sector is allowed to invest overseas.
3	1992–1997	After the Asian crisis. Introduce policy and activities to promote OFDI coupled with a strict approval process and monitoring.
4	1998–current	Introduction of going global strategy. Africa has become a new strategic partner. OFDI moves from regulation to encouragement.[484]

Notes: Information obtained from [485]Bijun Wang & Kailin Gao 'Forty Years Development of China's Outward Foreign Direct Investment: Retrospect and the Challenges Ahead' (2019) 27 *China and World Economy* 1–24,

Since the initial move to open up in stage 1, China has improved its OFDI regulation. The National Development and Reform Commission pronounced that the government had closed many regulatory loopholes and strengthened the supervision of all OFDI loopholes.[486] However, this regulation only guards against and imposes disciplinary measures on violations in China and not in the host country, making it a weak regulatory instrument for outbound FDI and the going-out policy. The lack of monitoring of Chinese business behaviour overseas has led to Chinese companies ignoring host country laws. China's interests in the international relations agenda only serve Chinese interests, as evidenced by the National Development and Reform Commission

[483] MOFERT is the predecessor of the current Ministry of Commerce (MOFCOM).
[484] Berger (n 66).
[485] Huang Wenbin and Andreas Wilkes, 'Stages in China's Overseas Investment Policy Development', *Analysis of China's overseas investment policies* (2011), available at <https://www.jstor.org/stable/resrep02313.8>.
[486] Bijun Wang and Kailin Gao, 'Forty Years Development of China's Outward Foreign Direct Investment: Retrospect and the Challenges Ahead' (2019) 27 China and World Economy 1. See NDRC (National Development and Reform Commission), 2017b, Administrative Measures for Overseas Investment by Enterprises [online; cited November 2017]. Available at http:// www.ndrc.gov.cn/zcfb/zcfbl/201712/t20171226_871560.html (in Chinese).

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(NDRC)'s inability to monitor outbound investments. A closer look at the opening up and the going out policies can provide a deeper understanding of China's FDI regulation ambition. Furthermore, the Chinese five-year plans outline specific targets for how China intends to meet such bold ambitions.

4.6.1 Opening up policy

In 1978 China announced its reform and opening up policy.[487] The policy was introduced to attract foreign companies to invest in China.[488] President Xi Jinping described the reform and opening up as a great revolution in the history of the Chinese people and the Chinese nation. Although China had opened up, it still exercised some caution towards FDI. Under the planned economic system, the CPC disdained the notion of private ownership of property. During this period, China sought self-reliance, avoided attracting foreign capital, and did not sign any international investment agreements.[489]

Min Ye, a China scholar, argues that while other researchers assert that a liberal FDI position was a central government policy, it was driven by local governments.[490] However, Min Ye fails to draw the causal relationship between the opening up policy and local government lobbying. When China opened, the government did not have the capital to incentivise local businesses and local governments to attract investment. Chinese leadership provided policy incentives to empower local governments to attract and regulate FDI from Asian investors. The Chinese government provided an important contextual variable for FDI.[491] China liberalised slowly in the opening up process to protect its national interest. Each policy was adopted and first tested in SEZs.

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[487] The opening up policy is accredited to Deng Xiaoping's visionary wisdom Nevertheless, it was a pragmatic solution introduced to Deng Xiaoping at a military commission meeting in Guangzhou. Local officials proposed the openness strategy to him. They asked Deng's permission to build Bao'an (today's Shenzhen) and Zhuhai as export zones to Hong Kong and Macao. See Min Ye 'Policy Learning or Diffusion: How China Opened to Foreign Direct Investment' (2009) 9 *Journal of East Asian Studies* 399.

[488] Marc Fetscherin, Hinrich Voss and Philippe Gugler, '30 years of foreign direct investment to China: an interdisciplinary literature review' (2010) 19(3) *International Business Review*. 235–246 (cited in Yuefang Si, 'The Development of Outward FDI Regulation and the Internationalization of Chinese Firms' (2014) 23 *Journal of Contemporary China* 804.

[489] Leon E Trakman, 'China's Regulation of Foreign Direct Investment', *Asia's Changing International Investment Regime* (2017).

[490] Ye (n 479).

[491] Simplice A Asongu 'Knowledge Economy Gaps, Policy Syndromes, and Catch-Up Strategies: Fresh South Korean Lessons to Africa' (2017) 8 *Journal of the Knowledge Economy* 211.

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When China opened up, there were no regulations to control FDI coming into the country or to protect foreign investments. The opening up policy was mentioned in the Third Plenum of the Eleventh National People's Congress, expressing the government's desire to reform, but failed to provide regulatory procedures or mechanisms for reform. When the economic reforms started, the State Council played a regulatory role with the authority to approve all overseas projects.

Once China opened up, its position on FDI changed as the government realised the critical role FDI could have on economic growth,[492] and in 1982 the Chinese constitution included foreign investment.[493] A formal policy was introduced in 1984 when the MOFCOM issued the Circular Concerning the Approval Authorities and Principles for Opening Non-trade Overseas as well as in Hong Kong and Macao. Over time, with the introduction of various approval and regulation institutions, China developed from a process of approving investments case-by-case to a more standardised procedure, allowing it to gradually control the allocation of inbound FDI in terms of amount, destination, and industrial allocation. As a poor country, China avoided currency outflow and foreign exchange earnings accumulation. The only projects approved for FDI in this period had to provide access to and transfer technology, increase exports and develop domestic labour skills. Many African countries are currently in the same position as China was when it opened up. African countries may want to adopt China's gradual opening model to force greater technology and skill transfers and to address the current trade imbalance, particularly with China.

The distinctive characteristic of China's changing international entry mode can be linked to government policy support. Since opening up, China has seen the highest rates of inbound FDI compared to other developing economies. By 2016, China had become the world's second-largest FDI recipient, with a total value of FDI reaching US$126 billion. Concerning outbound FDI, Chinese regulation was gradually relaxed as the economy was integrated with international standards.

[492] Article 18 of the Constitution stipulates that 'foreign enterprises and other economic organizations or individuals are allowed to invest in China in accordance with the laws and regulations of the People's Republic of China and carry out various forms of economic cooperation with Chinese enterprises or other economic organizations', available at http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm. 23.
[493] Si (n 73).

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4.6.2 Going out policy

China first announced the going out policy (also referred to as the going global strategy) in 1998 and officially introduced the policy in 1990. Scholars divide the development of China's OFDI policy into distinct phases: restricted, relaxed, and regulated.[494] China started with a very restrictive policy, with the state being the only body allowed to invest overseas.[495] Before 2000, China had severe foreign exchange shortages, which restricted capital outflows, and policies encouraging capital inflow.[496] In the first phase of relaxation, private enterprises required permission to invest through an arduous application and approval process.[497] The restriction of OFDI was outlined in the most important document of the time, The Opinions on Strengthening the Management of Overseas Investment Projects, issued by the State Planning Commission, referred to as 'The Opinions'. Following its opening up, China occasionally released regulations tested in SEZs before being broadly applied nationwide. On average, China published four policies annually between 1979 and 2001.[498]

In 2001, the opening up policy was incorporated into China's key planning document, the eleventh five-year plan of 2001 for National Economy and Social Development.[499] Although it took three years for the rules and implementation guidelines to be published, the announcement sent a signal for companies to start looking for international opportunities. After the going out policy announcement, China's OFDI increased by an average of 35.8 per cent a year.[500] The policy fostered a more positive opportunity for domestic companies to invest overseas, leveraging domestic and overseas markets.[501] This policy played a key role in stimulating China's OFDI.[502]

When the Chinese government relaxed some restrictions and increased approvals for domestic companies investing in Africa, on the other hand, Africa's expanding consumer markets provided Chinese companies with an opportunity for outward investment. Cain suggests that the

[494] Berger (n 66); Bijun Wang and Kailin Gao, 'Forty Years Development of China's Outward Foreign Direct Investment: Retrospect and the Challenges Ahead' (2019) 27 *China and World Economy* 1; Wenbin and Wilkes (n 37).
[495] Berger (n 66).
[496] Wang Gao (n 78).
[497] Berger (n 66).
[498] Wenbin and Wilkes (n 447).
[499] See glossary of concepts on definition and background on China's 5-year plans.
[500] Wang and Gao (n 78).
[501] Si (n 73).
[502] Wenbin and Wilkes (n 37).

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introduction of the going out policy led to the emergence and increase of independent OFDI by Chinese companies with less stimulation and support from the government.[503] After the opening up policy, China's OFDI flows exceeded FDI in 2014, and OFDI stock exceeded FDI in 2016.[504] In 2016, China's OFDI stock in developing economies was 84.2 per cent, with 14.1 per cent in developed economies and another 1.7 per cent in transition economies. This indicated a shift in China's interactions with the world outside its borders as a new foreign investor.

After joining the WTO, China implemented several legal changes that changed the state's role from approval to greater supervision. This was done to promote the private sector OFDI and bring China closer to WTO standards. China's need for outbound FDI (OFDI or outward direct investment) rather than inbound FDI served as another driving force behind the reforms. Businesses that made international investments could import expertise from those ventures and export China's excess production capacity. The government encouraged light industrial manufacturers to set up overseas factories to process raw material exports from China in line with the State Council's circular.[505] This meant China's OFDI focused on developing countries more than developed economies as they became the launching pad for going global business strategy. In 2005, China issued regulations that provided preferential treatment for research and development and mergers and acquisitions, with the perception that mergers and acquisitions were the best vehicle for technology and skills transfer.[506] As a result of policy support, in just three years, mergers and acquisitions transactions by the Chinese grew from US$1.6 billion in 2003 to US$18.2 billion by 2006.[507]

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[503] Berger (n 66).

[504] Songping Zhu and Azhong Ye 'Does the Impact of China's Outward Foreign Direct Investment on Reverse Green Technology Process Differ across Countries?' (2018) 10 *Sustainability* (Switzerland) 1.

[505] Circular issued by the former Ministry of Foreign Trade and Economic Cooperation (now Ministry of Commerce-MOFCOM)
translated from the Chinese: 'Simplifying the Foreign Exchange Regulation over Processing and Assembling Business with Self-bringing Materials Conducted Overseas' issued in 1999, available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=22912 See Buckley and others (n 413).

[506] Michael Brown and Pavneet Singh, 'China's Technology Transfer Strategy: How Chinese Investments in Emerging Technology' [2018] Washington Post 49 <https://www.diu.mil/download/datasets/1758/DIUx Study on China's Technology Transfer Strategy - Jan 2018.pdf%0Ahttps://admin.govexec.com/media/diux_chinatechnologytransferstudy_jan_2018_(1).pdf%0Ahttps://new.reorg-research.com/data/documents/20170928/59cc>. Ping Deng, 'Why Do Chinese Firms Tend to Acquire Strategic Assets in International Expansion?' (2009) 44 Journal of World Business 74.

[507] Peter J Williamson and Anand P Raman, 'The Globe: How China Reset Its Global Acquisition Agenda' (2011) 89 Harvard Business Review.

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As Chinese companies expanded, the government issued more circulars to support outbound investment.[508] In 1999, when China introduced its going out policy, Beijing's attitude towards FDI changed further, bringing about landmark reforms on FDI as outlined in Table 6.[509] In less than a decade, China's OFDI increased by 2 000 per cent, from US$2.5 billion in 2002 to US$56.5 billion. By the end of 2013, China's OFDI of non-SOEs accounted for 44.8 per cent of China's total accumulated outward FDI value, and their outflow comprised 56.1 per cent of the total outflow of 2013.[510] According to China's Ministry of Foreign Affairs, at US$120 billion, China's OFDI overtook inbound direct investment in 2014. At the same time, there was a broad convergence in national foreign investment laws on how to regulate Chinese SOEs when making cross-border investments.[511] Government policy and initiatives for going global became the critical determinant of companies investing abroad. Over time, however, the commercial motives have become more assertive.

Table 6 FDI Policy measures after the going out strategy

Policy	Year	Ministry / Institute
Decision on reforming the investment system	2004	State Council[512]
Provide Credit support policy	2004	NDRC and EXIM
The approval threshold was raised to US$300 million for resource development and over US$100 million for other projects	2009	MOFCOM and NDRC
Decentralised approval authority	2011	NDRC
The threshold was raised to US$1 billion Established Chinese overseas enterprises are exempt from the approval and registration procedures	2014	MOFCOM

[508] In 2006, SAFE issued the 'Circular on Revision of Certain Foreign Control Policies Relating to Overseas Investments to Lift Restrictions on the Amount of Foreign Exchange Annually Available to Domestic Investors' Outbound Investments', 47 and the 'Regulation of Investments to Lift Restrictions on the Amount of Foreign Exchange Annually Available to Domestic Investors' Outbound Investments. MOFCOM issued the Regulation of the People's Republic of China on Foreign Exchange Administration.

[509] Si (n 73).

[510] Ming Du 'The Regulation of Chinese State-Owned Enterprises in National Foreign Investment Laws: A Comparative Analysis' (2016) 5 *Global Journal of Comparative Law* 118.

[512] The State Council is the highest-ranking organ in the central government. It is responsible for drafting and developing policies, law, and regulations as well as for coordinating national economic development. The State Council makes major economic strategy and policy decisions, although the specific policy measures may be issued by subordinate organs such as SAFE or MOFCOM.

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Measures for the administration of approval and filing of outbound investment projects	2014	NDRC
Administrative Measures for Overseas Investments by Enterprises	2017	NDRC
Administration of Outbound Investment by Enterprises (Regulation 11)	2017	State Council
Circular on Forwarding the Guidance Opinion of the National Development and Reform Commission	2017	State Council

Sources: Author's own construction

The essence of the going out strategy is to promote the international operations of leading Chinese firms through OFDI to enhance their international competitiveness.[513] The Chinese state considers the policy remarkably successful to date.[514] China's going-out policy, as Howson notes, marks a new stage in the country's developing engagement with foreign and international legal requirements. In fact, its desire to uphold global governance and commercial norms has affected how Chinese businesses conduct themselves domestically.[515] The going out policy has identified many ways the Chinese government could encourage foreign investment, including fostering a favourable business environment through governance frameworks, legislation, and regulations. At the Sixteenth National Congress of the CPC, China introduced a set of policies to reform its system of overseas investment and strengthened its regulatory activities to improve the profitability of its overseas companies.[516]

The Chinese government faced two significant risks from the new wave of investors: financial and reputation risks. Companies typically made investments with insufficient market knowledge and generally disregarded local laws in the host countries.[517] Businesses invested in these markets at a loss or acted inappropriately. The offences included illegally obtaining foreign currency, using money laundering to evade taxes and generally investing in nations with lax laws and scant

[513] Articulated in an official speech my former Chinese Vice Premier Wu Bangguo at the opening ceremony of the 2001 Investment and Trade Fair in Xiamen, Fujian Province. 'China to Allow Foreign Purchase of Small and Medium-Sized Enterprises' *People's Daily* 15, available at <http://www.china.org.cn/english/GS-e/19033.htm>.
[514] Du (n 96).
[515] Nicholas Calcina Howson, 'China's Acquisitions Abroad--Global Ambitions, Domestic Effects' [2006] Law Quadrangle Notes 73; see Du (n 100).
[516] 'Full Text of Jiang Zemin' s Report at 16th Party Congress on Nov 8 , 2002' (Ministry of foreign Affairs of the People's Republic of China, 2019) 1, available at <https://www.fmprc.gov.cn/mfa_eng/topics_665678/3698_665962/t18872.shtml>.
[517] ibid.

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oversight of OFDI. As China encouraged investment in FOCAC, African states with weak supervision and poor law enforcement became a more accessible target market for some investors. To manage the risk, the Chinese State Council introduced new investment rules, classifying OFDI into three categories: encouraged, restricted, and prohibited.[518] This regulation followed the process that China established in its inbound FDI regulation.

With the introduction of the going out policy in 1999, China moved from a restrictive approach to encouraging FDI by private sector bodies. The policy strategy elevated China's OFDI and resulted in the materialisation of an OFDI-specific policy. During this phase, Chinese companies invested in developed countries as a risk management strategy and were motivated by government support. African markets were perceived as risky and unknown destinations. Chinese companies were investing in industries that would, in return, improve their competitiveness.[519] However, the rapid growth of Chinese OFDI and the target industries, coupled with shrinking forex reserves in China, prompted the government to take a closer look at the types of investment Chinese private companies were undertaking overseas. The government declared some sectors as irrational investments since they were not directly influencing priority sectors in the domestic economy, nor, in some cases, were they even linked to the domestic company's operations.[520]

After its implementation in 1998, the going global policy as a national policy was first mentioned in the Chinese Communist Party's Central Committee Opinion on the Tenth National Economic and Social Development Five-Year.[521] The plan was subsequently included in the tenth five-year plan in 2000 and subsequent plans.

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[518] The encouraged category includes OFDI in: (i) infrastructure projects relevant to the Belt and Road Initiative (BRI); (ii) promoting the export of advantageous production capacity, quality equipment and technology standards; (iii) cooperation with foreign high-tech and advanced manufacturing enterprises and the establishment of overseas research and development centres; (iv) exploration of natural resources on the basis of careful evaluation of economic benefits; and (v) agriculture, forestry, animal husbandry, fisheries, trade, culture, financial institutions, logistics and other services fields. The restricted category includes: (i) OFDI in countries that have no diplomatic relations with China or are currently at war, or sensitive countries and regions in which OFDI should be limited based on a bilateral/multilateral treaty; (ii) OFDI in real estate, hotels, cinemas, entertainment and sports clubs; (iii) overseas investment platforms without specific industrial projects; and (iv) OFDI that does not meet the technical standard requirements, environmental protection, energy consumption, and safety standards of the host economies. The prohibited category includes: (i) OFDI involving any technology, process, or product whose export is prohibited; (ii) OFDI in gambling or pornography industries; and (iii) any other OFDI that impairs or may damage China's national interests or national security.

[519] Wang and Gao (n 78).

[520] ibid.

[521] Duncan Freeman, 'China's Outward Investment: Institutions, Constraints and Challenges' (2013) 7 Brussels Institute of Contemporary China Studies, Asia Paper.

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4.6.3 Five-year plan

China's five-year plan is the government's most important policy document, first published in 1953 and renewed every five years since.[522] The paper outlines China's economic growth plan and priorities. The plans are a key indicator of the government's direction and philosophies on economic development. The five-year plans were a principal policy instrument for the government to manage the economy before opening up. After opening up in 1978, the plan moved from being an instructive document to a blueprint plan.[523]

The going global policy was announced in 1999 at the end of the ninth five-year plan and subsequently mentioned in the tenth and eleventh five-year plans.[524] The tenth plan began in 2000, the same year FOCAC was established. However, the eleventh five-year plan was pivotal, shifting focus from a planned economy to a market economy, emphasising China's need to align with international standards and WTO commitments. The eleventh five-year plan set clear guidelines for policy direction and created a sound foundation for outbound investments. The plan emphasised the need for successful foreign investment development to support national economic and social development and pave the way for other international policies. Every five-year plan since the eleventh plan has included strategy and China's vision for overseas investment.

The most recent plan, the fourteenth, was issued in 2020. The plan is formulated in the context of China`s goal to build a moderately prosperous society by 2035. It also announced President Xi Jinping's intentions to revive the dual circulation economy.[525] Chinese leaders affirm that 'dual circulation' does not mean an inward-focused strategy. However, global analysts are concerned that China's 'dual circulation' will intensify its global access and growth for key inputs to China's domestic economy without reciprocal access to its market.[526] The NDRC has announced that it

[522] An-gang Hu, Yi-long Yan and Jie Lu, 'From Economic Plan to Development Planning: Transformation of China's Five-Year Plan (1953–2009)' (2010) 8 China Soft Science 14; Werner Menski, *The Legal Systems of Asia and Africa* (Second Edi, Cambridge University Press 2006).
[523] Yongsheng Zhang, 'To Achieve the Goals of China's 11th Five-Year Plan through Reforms' [2006] Development Research Center, Beijing, mimeo.
[524] Mumuni and Murphy (n 136).
[525] The dual circulation economy is a policy proposed by the Chinese government. It is based on the idea of promoting domestic consumption and domestic production while also maintaining trade relations with the outside world. China is increasingly embracing a 'dual circulation' economic model, in which domestic and foreign markets play complementary roles. On the one hand, this model prioritises domestic economic activity and seeks to reduce dependence on foreign markets. On the other hand, it also recognizes the need for China to engage with the global economy to continue its economic development.
[526] Karen M Sutter and Michael D Sutherland, 'China' s 14 Th Five-Year Plan: A First Look' (2021).

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will increase regulatory oversight of inbound investors without applying the same oversight to Chinese companies investing overseas. China is particularly interested in technology and exports. The strategy emphasises the private sector's preeminent position in technological advancement. Therefore, the government increased the capacity for Chinese businesses to create modern technologies and gain access to the global market. One can anticipate that the state will further loosen restrictions on foreign investments.

4.7 FDI laws and regulation

The laws that have been passed to promote and support FDI are listed in this section. The initial rules promoting the establishment of foreign corporations and partnerships in China are discussed. Then, programmes and policies meant to encourage foreign investment are examined. The restrictions China imposed to guarantee that OFDI flows served domestic interests are discussed in both sections.

The Chinese government introduced Home Country Measures (HMC) to facilitate, support, or promote OFDI. Studies by different academics are scarce because China has only recently begun to invest abroad.[527] Ming Du identifies several key problems with China's OFDI regulation.[528] One is the Chinese SOEs are governed by a convergence of domestic law and foreign investment law. The other is the political and economic climate in China demands that the nation's laws governing foreign investment be more nuanced.

4.7.1 Inbound FDI laws and regulation

Prior to the introduction of foreign investment law in 2020, the laws governing foreign investment in China included the Sino-Foreign Equity Joint Venture Law (1979 EJV Law), the Sino-Foreign Cooperative Joint Venture Law (1988 CJV Law) and the Wholly Foreign-Owned Enterprise Law (1986 WFOE Law). These were developed in the early years of China's opening up with the intention of encouraging investment and considering the requirements of foreign companies. The WFOE law gave foreign companies complete control over their businesses. On the other hand, the EJV and CJV laws only allowed foreign companies a limited amount of power and a return on

[527] Becker-Ritterspach and others (n 64).
[528] Du (n 258).

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investments based on equity or rights under a contractual agreement. The transfer of managerial know-how and technology was encouraged by all investment laws.

After the promulgation of the EJV, WFOE and CJV laws, several Chinese ministries promulgated the Provisional Rules (1995) and the Guiding Catalogue (1995). Both were consecutively repealed and amended. The Guiding Catalogue regulated the approval of foreign investment projects. The Provisional Rules were replaced by the Rules (2002), which regulated the approval of foreign investment projects. The Rules categorised projects for FDI into four categories: encouraged, permitted, restricted, and prohibited. This categorising ensured that the Chinese government could direct and manage the inflow of FDI to serve Chinese interests. The Guiding Catalogue was amended seven times before it was replaced by the 2002 rules (table 7). These measures[529] liberalised FDI control and access to the Chinese market. The Chinese government took a gradual approach to decentralising its FDI control.

[529] Wenwei Guan 'Beijing Consensus and Development Legitimacy: The Evolution of China's Foreign Direct Investment (FDI) Regime from a Law & Development Perspective' (2017) 12 *Asian Journal of Comparative Law* 115, available at <*https://www.cambridge.org/core/terms.https://doi.org/10.1017/asjcl.2017.3 Downloadedfromhttps://www.cambridge.org/core.UCT*> accessed 14 April 2019.

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Table 7 Catalogue guiding foreign investment developments.

Year	Guiding catalogue
1995	Promulgated
2001	Guidance on foreign industries published; revised in 2004, 2007, 2011 and 2017
2004	Encouraged projects increased to 69 per cent
2007	Encouraged projects increased to 73 per cent Encouraged FDI in high and clean technology to promote innovation and industrial structure optimisation
2011	Loosened FDI equity restrictions on eleven items in the restricted and encouraged category Three items have been added to the encouraged list Items removed from restricted and prohibited lists Encouraged FDI in emerging strategic industries in high-tech, new energy, new materials, environmentally sustainable and value-added material
2013	FDI projects are only subjected to the registration requirement, excluding investments on the restricted list or those that require a Chinese partner to have a majority shareholder Verification and registration power decentralised from central to local authorities
2015	The restricted list reduced from 79 to 48 items Chinese majority shareholding of EJV and CJV reduced from 44 to 35 items FDI extended to investments in logistics, e-commerce, finance, retail and wholesale
2017	Reviewed and repealed the 2015 catalogue
2018	The national negative list was removed from the catalogue and published under special administrative measures on access to foreign investment
2022	A new catalogue is to take effect on January 2023. The new catalogue encourages investments in advanced industries, environmental protection and

Source: Author's own construction

FDI in the restricted category was subject to more requirements and stricter approval provisions. The restricted category included investments with outdated technology, projects that would harm the environment, or crowding out state-supported infant industries.

The encouraged category included investments that transferred agricultural technology, enhanced labour, was environmentally friendly and had a resources advantage. Foreign-funded projects were further encouraged in infrastructure projects that needed long-term investment. Chinese regulations and laws provided preferential treatment for investment in the encouraged category.[530] China has constantly tested these new policies on a pilot base before they are applied nationally. The SEZs have different catalogues of negative list and encouraged list items.

[530] ibid.

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Restrictions on the negative list are first relaxed in the free trade zone (FTZ), and the new encouraged list is equally added to FTZs.

According to the 2004 'Decision of the State Council on Reforming the Investment System' and of the NDRC 2004 Interim rule, the authority to approve resource extraction projects whose investment volume exceeded US$30 million, and non-resource projects with an investment volume of more than US$10 million, rests with the central government.[531] For projects involving lesser volumes, the approval processes assigned to provincial governments were to be applied; these processes are less comprehensive and complicated than the process applied by MOFCOM at the state level.[532]

The role and influence of the Chinese government remain strong in guiding and influencing OFDI according to certain target regions and sectors under the approval process and owing to the corporate governance structure of SOEs.[533] Following a series of laws to encourage foreign investment (Table 8), on 1 January 2020, China introduced the foreign investment law, which superseded the EJV Law, WFOE Law and CJV Law, all intended to reform China's FDI approval regime and governance.[534]

Table 8 China's foreign investment regulation

Year	Legislation promulgated
1979	Sino-China Equity Joint Venture Law
1986	Foreign Capital Venture Law
1995	Provisional Rules on Guiding Foreign Investment Orientation (Provisional Rules)
1995	Guiding Catalogue of Industries for Foreign Investment 1995 (Guiding Catalogue)
2002	State Council Rules on Guiding Catalogue Foreign Investment Orientation
2006	Six ministries enacted special cross-border merger and acquisition regulation
2008	Corporate tax law

[531] Berger (n 66).
[532] Damien P Horigan, 'Law as Soft Power in Asia' <http://www.bbc.com/news/world_radio_and_tv>. Markus Fisch, 'Regulatory Procedures of Outbound Transactions by Chinese Investors'. US Chamber of Commerece, 'China's Approval Process for Inbound Foreign Direct Investment : Impact on Market Access, National Treatment and Transparency'.
[533] ibid.
[534] Shan Gao, 'The Evolution of China's Foreign Investment Policy and Law' 328, available at <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1007&context=sjd>.

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	New tax laws incorporating foreign and domestic tax systems
2020	New foreign investment law

Source: Author's own construction

4.8 Strategic initiatives

In Chapter 2 of the current study, research revealed that China's civil laws developed after borrowing from Japan's legal development. When China first opened up, Chinese leaders sought to emulate the more restrictive Japanese and South Korean investment laws, eliminating the information report system and the requirement for a confirmation letter from the NDRC. The stricter rules encouraged newer and less cumbersome requirements, allowing local enterprises to file directly with the NDRC for approval and eliminating review at the provincial level. However, in contrast, China's development was spurred by FDI compared to Japanese and South Korean development. For this reason, the new policy development changed its emphasis from restriction to regulation to raise the standard of China's OFDI. Support was provided to competent companies investing abroad and promoting projects encouraging OFDI, economic transformation and improvement.[535] This position was reached after a series of engagements between China and its external investors, mainly the Chinese diaspora in neighbouring Asian countries. Negotiating between the Chinese diaspora and local government was critical in shaping policies and an environment favourable to OFDI.[536]

Although OFDI in China is a relatively new phenomenon,[537] China has become the world's second-largest source of OFDI (US$196.2 billion),[538] with the United States in the lead. China's attitude towards OFDI changed with its accession to the WTO when Beijing gradually moved from a planned economy to a partly market-orientated economy.[539] The actual OFDI from China to Africa is hugely underestimated by MOFCOM due to 'round-tripping,' with MOFCOM initially only requiring the initial investment to go through the approval process.[540]

[535] Wang and Gao (n 78).
[536] Ye (n 479).
[537] Berger (n 66).
[538] Statistical Bulletins of China's Outward Foreign Direct Investment, cited by Wang and Gao (n 78).
[539] Lee (n 48).
[540] Berger (n 66). ROUND-TRIPING Foreign direct investments in China refers to part of FDI inflows in that belongs to the return of Chinese capital that has gone abroad.

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4.8.1 Investment attraction and regulation

China has made significant development in attracting FDI since opening up in 1978. Lack of capital is no longer a problem as China has accumulated astronomical foreign reserves and is better positioned to regulate FDI. Focus has shifted from attracting FDI in large volumes to focusing more on high-quality investments. China now encourages FDI in industries that transfer technology, and it has restricted industries that consume excessive energy and contribute to environmental degradation.

China developed a strong policy to regulate inbound FDI from developed countries to ensure that it protected its local industries and directed investments to industries and regions that were a priority for China's modernisation strategy.[541] Developing countries have been the leading destination of Chinese OFDI.[542] As a new foreign investor, China borrowed some international guidelines and strategies for investing overseas. However, to align its OFDI to its national economic development policy and Communist Party objectives, foreign laws and regulations borrowed were bent to infuse Chinese legal characteristics. The SEZ became a policy test bed for foreign investors to apply foreign standards of a market economy while retaining a planned economy. Special legislation was passed to regulate SEZs and help navigate China through a uniquely Chinese-planned market economy. China advocated the SEZ approach to other developing nations and used the same gradual approach in dealing with African countries. While China promotes itself as a staunch supporter of the international rule of law and its institutions, the lawmakers in China remain sceptical of a one-size-fits-all approach to international law.[543] Berger argues that China specifically signed liberal bilateral investment treaties as a proactive approach to introducing liberal treaty provisions to developing countries.[544]

China adopted a more gradual approach to selectively borrow international laws. The new foreign investment law makes China's legal system fully compliant with the WTO rules, and the system operates at the same level as most developed countries. The new law is anchored on the pre-establishment of national treatment and the negative list, under which all businesses in China,

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[541] Ross Garnaut, Ligang Song and Cai Fang, *China's 40 Years of Reform and Development: 1978–2018* (Australian National Uuniversity Press 2018).
[542] Berger (n 66).
[543] Robert D Williams 'International law with Chinese characteristics: Beijing and the 'rules-based' global order' 1–25.
[544] ibid.

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including SOEs, private companies and foreign companies, are equal under the law when they are set up. The clause meets the core principles of WTO rules — unconditional national treatment and non-discrimination, which aims at free, fair, and open operation and competition on a level playing field, within and among nations. However, this new law had given the Chinese government more access to foreign companies and less protection than when foreign investors were ringfenced.

For instance, the government can now order a foreign investment enterprise (FIE) to change its business operations if it is deemed to be against 'the public interest'.[545] Article 20 makes a provision for the government to appropriate any investment made by foreign investors for the public interest. On the other hand, FIL gives foreign companies access to procurement contracts for foreign investors in China. Overall, foreign investment law gives foreign investors more flexibility than with the limiting EJVs, CJV and the WFOE because they are now bound by the corporate laws that apply to domestic entities, such as the company law or, as appropriate, the partnership law. Under the foreign investment law (FIL), FIEs are entitled to national treatment in various areas such as market, share swaps and government procurement opportunities.

4.8.2 Guidelines for companies investing abroad

After the 1997 financial crisis in Asia, the Chinese government was concerned about economic losses from failed overseas investments and a lack of control over OFDI investment. The State Council published the National Planning Commission, which came to be known as 'The Opinion.' After its publication, The Opinion defined industries and set a trend regarding which industries Chinese companies should focus on.[546] Shortly after issuing The Opinion, other key institutions such as the Ministry of Foreign Trade and Economic Cooperation, the State Administration of Foreign Exchange (SAFE), the National People's Congress and SASAC published policies to standardise the management and administration of applications by Chinese companies investing overseas.

4.9 *Chinese institutions regulating OFDI.*

The announcement of the opening up policy did not clarify mechanisms for attracting FDI. FDI was driven from the bottom up by local government lobbying the national government. As a result,

[545] Article 6 , Foreign Investment Law of The People's Republic of China.
[546] SF Chen. 'China OFDI policy system research' (2009) *Shen Yang Industrial University,* Shen Yang (in Chinese) cited in Wenbin and Wilkes (n 37).

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FDI proliferation was significantly different in regions, sectors and across national institutions, enabling an environment that encouraged the diffusion of FDI guidelines and incentives for foreign investors.[547] The central government has had the main responsibility for policy for overseas investment, with the State Council taking the lead position.

In 2009, Wenbin and Wilkes collated policies on overseas investments, identified 26 central agencies and classified them into three levels, as outlined in Figure 4.1.[548] The State Council as the principal agency was at the first level, ministries at the second level and functional departments at the third level. The line ministries are at the fourth level overseeing policy at the sector level. The ministries at the provincial level are responsible for execution.

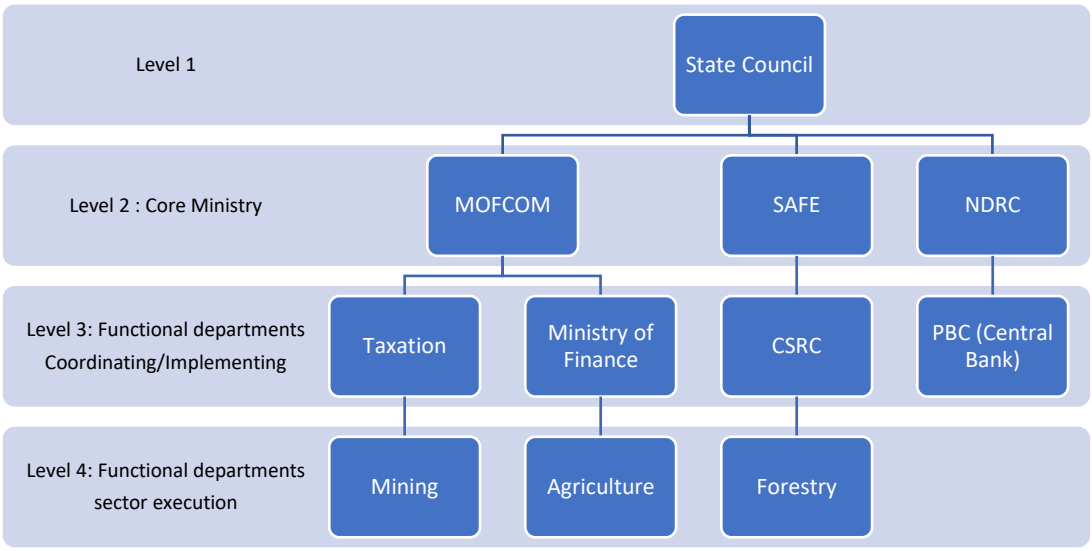

Figure 4-1: China's FDI central agencies

Source: Adapted from Huang Wenbin & Andreas Wilkes 'Stages in China's Overseas Investment Policy Development' *Analysis of China's overseas investment policies* (2011) 5–14 available at: https://www.jstor.org/stable/resrep02313.8.

The State Council, the highest administrative organ in China, has core influence and issues between 5 and 7 per cent of OFDI policy.[549] While most of its regulatory authority is assigned to

[547] The first Phase of Chinese FDI came from Chinese diaspora living in Hong Kong and neighbouring Asian countries. See Ye (n 72).
[548] Wenbin and Wilkes (n 447).
[549] ibid.

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MOFCOM and local governments, the State Council retains its authority as the final decision-maker, but only regarding investments that would have significant macroeconomic or foreign policy implications.[550] At level 2, core ministries and special departments like NDRC and SAFE have a management role in overseas investments. Functional departments at level 3 account for about twenty per cent of OFDI policy.[551] Sector-line ministries at level 4, such as mining, agriculture, and forestry, play a key policy execution role regarding trends and regulation. The most important execution agency to track the execution of state policy and OFDI investment trends and signals is the State Asset Supervision and Administration Commission (SASAC). The State Council established SASAC in 2003 to represent the Chinese government in non-financial SOEs. As the Chinese government's ultimate investor, SASAC has wide-reaching responsibilities and powers.[552]

4.10 Conclusions

To comprehend the foundation and external influence of China's foreign direct system, this Chapter has attempted to outline and describe the development of the Chinese legal system. The most recent historical account of legal development in China in the context of political changes and the other five leadership phases was presented at the beginning of the Chapter. As the feudal system came to an end with the Qing dynasty, China's legal system began to take shape. Since the end of imperial rule in 1911, China has borrowed laws from more than twenty countries. The most significant legal transplants occurred during the Republican era (1912–1949) when China borrowed heavily from Japan, Germany, and other Western countries. Since its founding in 1921, the Communist Party has influenced the development of the Chinese legal system through benchmark studies conducted by Chinese international legal scholars.

The present study describes how multilateral organisations and other external legal systems have influenced the development of the contemporary Chinese legal system. The Chinese government has been working hard to improve its legal system in recent years. While the civil

[550] Du (n 258); National Development and Reform Commission (NDRC), 'Decision of the State Council on Reform of the Investment System: Guofa Paper No. 20 in 2004', available at <http://en.ndrc.gov.cn/policyrelease/200602/t20060207_58851.html>.
[551] Wenbin and Wilkes (n 37).
[552] ibid.

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code borrowed from the German civil code, the development of the contract law is expected to borrow from the Uniform Commercial Code of the United States

China was able to replace the British colonial system in commerce and the multilateral with a combination of borrowed laws and Chinese legal characteristics to develop a legal system that is best suited for its economy and politics, despite the fact that China and Africa both share a history of colonial transplant and the status of developing nations. China borrowed laws that were close to its own legal systems and aligned with international regulations to raise its legitimacy to attract investment into China. Compared with other Asian countries, China's experience of legal transplant is unique. After 100 years since the replacement of the feudal legal system, China has a complete legal system that can now influence the global legal regime.

China was more liberal in attracting FDI, and it ultimately adopted a limited open policy in terms of a more dominant national strategy.[553] In contrast to the Japanese legal system and the requirements of the WTO, China adopted a new model that slowly opened markets but allowed a high degree of government control. In the process of developing a world-class legal system, China has challenged global hegemony and set itself to become a force of influence in future investment laws development. In just a century, China progressed from British occupation[554] with no legal system to developing a unique legal system that could possibly change the global regime.[555] However, in the process of challenging the global north leadership, China has applied the same model by establishing multilateral organisations to replace the World Bank, WTO, and IMF as funders of economic sponsors. The present study moved on to examine the specific policies and institutions in place to direct and support FDI in line with Chinese national interests.

The legal transplantation experience in China teaches other developing nations essential lessons. The following Chapter compares and contrasts China's development path with the way in

[553] Ye (n 72).

[554] Occupation of China by Britain is not the same as a colonial occupation. Britain never politically took hold in mainland China, as it did in India or Africa, Britain occupied an inalianable part of China, Hong Kong from 1841 to 1941 and again from 1945 to 1997. The Chinese refer to British occupation as a 'century of humiliation'. The term is used to describe the period of intervention and subjugation of the Qing Dynasty by Western powers and Japan from1839 to 1949.

[555] James V Feinerman *Chinese Participation in the International Legal Order : Rogue Elephant or Team Player?* Cambridge University Press on Behalf of the School of Oriental and African Studies Stable, available at *http://www.Jstor.Org/* 186.

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which Africa changed its laws by borrowing. The Chapter will discuss how China's status as a new legislative power affects African development and legal reforms in more detail. To better understand the Chinese characteristics of the new wave of legal transplants, comparisons and differences will be drawn. The next Chapter aims to show how Chinese FDI regulations and policies put in place since the country's opening up have an impact on African state investment attraction strategies and attitudes towards China.

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Chapter 5 AFRICA'S LEGAL TRANSPLANT EXPERIENCE

5.1 Introduction

The relationship between China and Africa is complex; the literature review in Chapter 2 contains both criticism and praise. While economic exchanges are growing exponentially, with China overtaking the global north as a trade partner and recently securing a substantial portion of African investment projects, legal exchanges have lagged. Africa and China have both agreed that improved economic cooperation necessitates greater legal harmonisation within the framework of FOCAC. All the parties work to harmonise their legal systems outside the developed world and reform their domestic laws. The prospect of Africa China legal cooperation can lead to a new form of global south legal transplant.

The third Chapter introduced legal transplant theory as a lens for understanding the possibility of transplanting Chinese economic and legal culture to African commercial practices. Despite differences in the possibility of legal transplants between countries, Western scholars have overlooked two aspects of transplantation: transplantation between developing countries and transplantation through FDI. The Africa China relationship introduces a new type of transplant. This new relationship is studied in this Chapter and the next. Chapter 4 sought to comprehend China's experience with legal transplant. The research in this Chapter aims to draw from the history of how Africa has handled legal transplant in the past and more current trends under the new relationship with China. As the new top net capital exporter poised to overtake the United States as a norm exporter by 2035,[556] China is anticipated to influence the next generation of legal transplants in Africa.

There are seven sections in this Chapter, each covering a different aspect of the China–Africa legal transplant. The method and means by which China is likely to introduce its legal standards and norms in Africa are covered in this Chapter. However, the success of this novel type of transplant depends on several variables. The Chapter's opening section describes the history of

[556]Yun Sun, 'An Examination of the 2035 Vision for China-Africa Cooperation' (2022) <https://www.brookings.edu/blog/africa-in-focus/2021/12/27/an-examination-of-the-2035-vision-for-china-africa-cooperation/>.Naomi Wilson, 'China Standards 2035 and the Plan for World Domination—Don't Believe China's Hype' (2020) <https://www.cfr.org/blog/china-standards-2035-and-plan-world-domination-dont-believe-chinas-hype>.

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Africa's legal transplants from the colonial era to its recent borrowing from developed nations. A legal analysis of the development of Africa China relations follows this section. After that, the soft power methods China has employed to exert pressure on Africa are examined in comparison to the use of Western colonial hard power in Africa. To assess the level of legal cooperation and assistance Africa receives in developing its legal system, which could facilitate legal transplants, an account of Africa–China legal cooperation in various multilateral agreements influenced by China is provided. Findings regarding the nature of the China–Africa legal transplant form the Chapter's conclusion.

The following three questions were raised in the first Chapter to untangle Africa-China FDI flows and concerns in relating to the power asymmetry and legal framework that governs these flows:

(i) To what extent does China's OFDI affect Africa's development agenda and power asymmetry through legal transplant and harmonisation of legal frameworks?

(ii) How does China strategically utilise FDI initiatives to secure Africa's support for its global strategy and aspirations to shape international law?

(iii) How should African policy and lawmakers respond to China's legal harmonisation in FDI regulation to ensure independent and sustainable economic and legal reforms?

5.2 African colonial transplant

The continent of Africa is not homogeneous; using the term 'African' to describe a single phenomenon of legal transplantation is an oversimplification. However, African leaders have been working together as a bloc since 2000 to develop the Africa–China multilateral partnership under the FOCAC framework. To distinguish different legal systems in Africa - including the legitimacy and position of traditional African laws as a legal family falls beyond the scope of this study. Rather than focusing on a single country on the continent, this research Chapter compares the legal transplants of the West and China in Africa. As a result, the study focuses on Africa–China relations fostered by FOCAC. The study examines how Chinese policy, law, and regulations will affect Africa's development. China has developed and published a white paper on African policy

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under its foreign relations policy.[557] As a result, while each African country's response to China may vary at the bilateral level, a more cohesive response is needed at the continental level, particularly in the aftermath of the ACFTA.

African laws have a long and complex history. One of the key issues that have plagued the African legal system is the fact that in the broader legal landscape, the African legal system has been ignored as a legal family. One of the primary reasons for this is the legacy of colonisation, which, is owing to marginalisation and decolonisation efforts has left African legal systems fragmented and often struggling to gain recognition and legitimacy on the global stage. During the period of European colonization, traditional African legal systems and norms were often suppressed and replaced with the legal system of the colonizing powers. This process had a profound impact on the development of the legal systems in the continent, as many African societies were forced to adopt the legal systems of their colonisers. The legacy of colonization has perpetuated unequal power dynamics within the global legal community, where Western legal systems often take precedence, overshadowing the rich legal heritage of Africa.

In addition to that legacy, after independence came a continued lack of recognition and respect for the legal systems within the international community, for the globalisation of legal systems, and for the internal political dynamics of many African countries continued. While there have been efforts in recent years to revitalise and promote African legal traditions, much work remains to be done in order to ensure that these legal systems are recognised and respected within the broader legal landscape. To gain recognition, African legal systems need to be reformed to meet global standards, offer legal guarantees for investors and, above all, support and regulate the continent's economic development. The legal reform process can nonetheless be costly and requires the capacity that the continent lacks. Borrowing and bending existing laws is, therefore, less expensive and more efficient than creating new rules. However, given Africa's history of enacting ineffective laws from colonial legal systems, sustainability will be a critical issue in the future.

The African experience with legal transplants began with colonisation and was a forced transplant through colonial powers. Watson hypothesised that a transplant which comes through

[557] Ministry of Foreign Affairs of the People Republic of China, 'China's Policy towards Africa' 5 <https://www.fmprc.gov.cn/ce/ceza/eng/zghfz/zfgx/t165330.htm> ;Yun Sun, 'Africa in China's Foreign Policy' (2009) 199 The China Quarterly 627 <http://www.journals.cambridge.org/abstract_S0305741009990130>.

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power tends to become exhausted when that power comes to an end. According to this logic, African laws should have replaced the European legal systems after colonisation. Mancuso suggests that the reason former colonial legal systems (common law and civil law) survived during decolonisation was that the local powers autonomously decided that the African leaders may have attributed their prestige status to European laws.[558]

The borrowing and imposition of legal systems in Africa has resulted in plural legal systems.[559] When foreign legal systems were imposed, African legal systems were labelled primitive by the Europeans to subjugate African civilisations. Although Africa and China share a common development with ancestral influence in their primary sources of law, African laws were unwritten, in contrast to the Chinese legal system. Consequently, legal texts or manuscripts are unavailable as reference points. For various reasons, African laws have been orally transmitted from one generation to another. This practice is still efficient in customary issues to deal with dispute settlement and laws of property rights at the societal or individual level.

5.2.1 Colonial transplant

Africa's legal system development predates the period of colonial rule.[560] The classification of Africa's legal transplant experience as prestige attribution makes the mistaken assumption that the European system and culture were stronger or more advanced during the colonial period than the African legal system.[561] The concept of a legal transplant based on prestigious laws also implies that colonial laws completely replaced African legal systems. However, colonisation resulted in a multi-layered legal system. Many colonial laws were formalised but never adopted or implemented in societies; they were incompatible with the societies on which they were imposed when they were introduced. Traditional legal systems were amended, modified, and fused with some colonial laws over time, resulting in new hybrid legal systems.

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[558] Salvatore Mancuso, 'Legal Transplants and Economic Development : Civil Law Vs . Common Law ?' [2009] One Country, Two Systems, Three Legal Orders - Perspectives of Evolution 75.
[559] Menski (n 522).
[560] ibid.
[561] Various scholars point out that some weaker juristics retained and adopted the European law or common law to induce legitimacy in their own ledla system. These scholars accorded prestige to these traitional Western legal systems. See Alan Watson, 'Legal Transplants and European Private Law' (2006) 4 Electronic Journal of Comparative Law 1 <http://www.ejcl.org/ejcl/44/44-2.html>; Ajani (n 364); Jean-louis Halpérin and others, 'Western Legal Transplants and India' (2011) 2; Jean-Louis Halpérin, 'Entanglements in Legal History: Conceptual Approaches' (2015) 3 Comparative Legal History 332.Miller (n 354).

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According to Legrand, legal transplantation is impossible because once a law is severed from its roots and transplanted into new territories, it transforms into something else and reflects the society to which it is transplanted.[562] This process of legal transplant could explain the diversity of laws that currently exists in Africa. However, the notable characteristics of colonial principles in written African laws support Watson's position that law can be easily transplanted and have a long life, even when it contradicts the interests of society or the ruling elite.[563] Colonial activities in Africa suppressed Indigenous societies' interests, ensuring colonial laws were easily transplanted and enforced without much resistance. During the colonial period, legal transplantation was more directly imposed. This was similar to imperialistic transplantation, which was coercive, direct and carried out with force.[564] However, after independence, the transplant was reinforced indirectly with the continued influence of external actors, such as international organisations and donor countries, on the legal systems of African countries.[565] These external actors often prioritise the promotion of Western-style legal systems and may provide funding and legal, technical assistance (LTA) to support the adoption and implementation of these systems.[566] This can create a dynamic in which African countries feel pressure to conform to external expectations, even if it means retaining legal systems that were imposed on them during the colonial period.[567]

Watson introduced the concept of legal colonial domination as a legal transplant factor at a later stage in his debate.[568] This concept of legal transplants focused on the transplant of Roman law across Europe and overseas in their colonies. The Napoleonic army's forced introduction of the French civil code in Europe is an excellent example of the imposition of a foreign legal model. This is consistent with the pattern of legal dominance imposed by colonial rulers.[569] Morin and Gold identify five causal mechanisms under which a legal transplant happens, one of them being

[562] Legrand (n 337).
[563]Alan Watson, 'Comparative Law and Legal Change' (1978) 37 The Cambridge Law Journal 313 <http://www.jstor.org/stable/4506104>; Chen-Wishart (n 328).
[564] Jean Frédéric Morin and Edward Richard Gold, 'An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries' (2014) 58 International Studies Quarterly 781.
[565] Ferrando (n 402).
[566] Husa (n 394).
[567] Agnes Binagwaho, Richard Freeman and Gabriela Sarriera, 'The Persistence of Colonial Laws: Why Rwanda Is Ready to Remove Outdated Legal Barriers to Health, Human Rights, and Development'.
[568] Watson, *Society and Legal Change* (n 73); Halpérin and others (n 561).
[569] Matteo Solinas, 'The Nature of Legal Transplants- Inspirations from Postcolonial Scholarship' (2003) 10 227.

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coercion.[570] Coercion occurs when one country uses military and economic power to impose a coercive legal system on another. During colonial times, transplants were characterised by military strength. Economic power has transcended the colonial era and is now a key component of neo-colonisation.[571] Before colonisation, states in the global north adopted legal rules to harmonise rules with neighbouring states for ease of trade or to meet a need in their rulemaking. The new rules were implemented via a negotiated process.

5.2.2 Post-colonial borrowing

After the end of colonialism, European legal systems evolved without the continued forced transplant into Africa. The newly independent African countries began to formalise their own legal systems and started borrowing laws from non-European sources. However, the process of withdrawal from African countries differed for the six European territories which were allotted African colonies.[572] Each jurisdiction took a different approach to legal dissemination in Africa. On the one hand, the French were very hostile to local customs, whereas Germans preferred direct rule through the codification of laws with no regard to local legal systems. However, the English took a less direct approach, allowing lawmaking discretion by regional powers in their colonial territories, which had a more plurality-conscious approach.[573] As a result, the African countries colonised by the British government have a more diverse but not necessarily better legal system. The British system came to an end with colonial territories that recognised Indigenous laws and traditional African authorities while maintaining British-style court systems. Legal hybrid identities did not result in a balanced approach between colonial and Indigenous background characteristics but instead became new creations in their own right,[574] essentially creating codification of laws without regard for local laws.

After colonisation, Africa had a pluralistic legal system reflecting customary laws in place before colonisation and some foreign laws imposed during colonisation. Currently, African states' laws incorporate common, civil, Sharia, and Hindu law. Following the Bandung Conference,

[570] Morin and Gold (n 564).
[571] Nkrumah (n 179).
[572] Salvatore Mancuso, 'The New African Law: Beyond the Difference Between Common Law and Civil Law' (2010) 14 Annual Survey of International & Comparative Law 39.
[573] Menski (n 522).
[574] Solinas (n 569).

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African leaders considered borrowing from socialist law. The majority of transplanted laws during colonisation were retained to facilitate further reform and improve existing African laws.[575]

The efforts to preserve African laws focus on customary laws rather than economic laws. Legal scholars have concentrated on closing the gap and establishing the rightful place of African law in customary law, leaving a void in economic law matters. Consequently, Africa's investment and business laws remain open to international influences as African governments reform their laws to lower entry barriers and create a more welcoming environment for investors. African nations are, therefore, susceptible to soft power and smart power from foreign investors. This development discourse challenges investors' disregard for Africa's socioeconomic interests and a possible race to the bottom in local laws. In the absence of the necessary regulations or labour relations, laws affecting socioeconomic development are transplanted according to the codes of private investors' corporate social responsibility.

With recent exposure to Chinese investments, African legal development is now poised to borrow from the Chinese legal culture because of the perceived prestige derived from the success of China's economic development model.[576] Legal transplants in the prestige category are generally sponsored by a country with a more substantial or perceived robust legal system.[577] The host country will borrow laws that are perceived to be effective in the sponsor country. Ancestral customs are widely regarded as antiquated,[578] being neither progressive nor prestigious, especially in business. The law continues to exclude ancestral business customs from economic development. The borrowing of the China model by lawmakers in Africa is motivated primarily by economic outcomes rather than an understanding or appreciation of the Chinese legal system.[579] China and African countries are classified as developing nations or countries of the global south. The majority of legal transplant literature is premised on transplant recipients coming from the global south and originators from the global north. However, the global south's desire to develop a law that reflects the needs of developing nations creates a new causal effect. While China and Africa have not been

[575] Rene´ David and John EC Brierley., *Major Legal Systems in the World Today* (Stevens 1978).(cited in Menski (n 522).)
[576] Miller (n 349).
[577] Ajani (n 364). See also Kyselova (n 332).
[578] Martin A Klein and Walter Rodney, 'How Europe Underdeveloped Africa' (1974) 7 The International Journal of African Historical Studies 323.
[579] Morin and Gold (n 564).

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in a position of strength in international law, China's growing power has shifted its government from being a rule-taker to a rule-maker. African countries see China as a proxy for the interests of the global south on international platforms and, therefore, as more aligned with African interests in international lawmaking. China has persuaded African states with common interests in developing countries to align with China through soft power. As a result, the prospect and logic of emulating Chinese legal systems and policies may prevail, particularly in new sectors such as technology and infrastructure, which will be crucial in the ACFTA. Among the five different causal mechanisms for legal transplants identified by Morin and Gold, emulation is the only one that ignores power asymmetry.[580]

5.2.3 A novel pluralistic borrowing system

In view of the preceding arguments in Chapter 3 about the concept of the legal transplant, it is clear that legal borrowing is a complex matter. Even when imposed under hegemonic conditions, legal borrowing involves complex reception processes that must be disentangled into a proper socio-cultural context. African leaders have also acknowledged that the Western hegemonic model (the new hybrid system) cannot continue to promote the global north development agenda without considering the interests of developing economies. African leaders are now considering a plurality-conscious[581] reconstruction of laws aligned with the African agenda. A new pluralistic borrowing considers existing global north policies, traditional African laws, and other global south countries that have successfully implemented new legal approaches.

The history of African legal development demonstrates that the model of legal transplants does not accurately represent the process of legal evolution. Modern African law does not explain the tension and interaction with existing African legal traditions. Only by considering the hybridisation process can appropriate meaning be assigned to Africa's legal borrowing and the mechanism of reception be comprehended. The concept of hybridity assumes that cultural norms that emerged in colonial contexts are necessarily original.[582] They are neither colonial nor Indigenous but rather unique to each African country's situation. The varying approaches taken by

[580] ibid.
[581] Werner Menski, 'Indian Secular Pluralism and Its Relevance for Europe', *Legal practice and cultural diversity* (Ashgate 2016); Menski (n 522).
[582] Moses N Kiggundu, 'China-Africa Legal and Judiciary Systems: Advancing Mutually Beneficial Economic Relations' (2013) 04 Beijing Law Review 155 <http://www.scirp.org/journal/doi.aspx?DOI=10.4236/blr.2013.44020>.

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each European country in their African territories resulted in hybridisation in the African legal system.[583] The African states are eager to build legal systems that foster long-term socioeconomic development while attracting and protecting FDI.[584]

5.2.4 Neo-pluralism in African law

As a result of colonial occupation by various European countries, African comparative law scholars have continued to study and borrow from common law, civil law, and, more recently, American law. China, as a new law sponsor, has been understudied. The China–Africa experience will occupy a new space in comparative law studies, which previously focused on the neo-colonial and global north experiences.

Chapter 3 identified the circumstances under which legal transplantation has occurred or could occur. China and Africa have a history of forced legal transplants. China developed its legal system to harmonise with and protect international business interests during a millennium of humiliation and imposed transplant, but it also borrowed from other similar systems, primarily from Japan and the European civil code.[585] On the other hand, colonial legal culture in Africa evolved, specifically in business. Customary laws have been encompassed in public laws. The growing partnership between Africa and China allows Africa to consider borrowing from China as it develops in sectors where China will have a more significant influence, such as in cybersecurity, health,[586] and e-commerce.

5.3 The evolution of China–Africa legal relations

Legal corporations in the global north have been defined by exchanges between developed countries and colonial relationships. The legal transplant literature has followed the Western perspective, which under-reports Islamic law transplants, trade, and diplomatic relations prior to

[583] Solinas (n 569).
[584] ibid.
[585] Lei Chen, 'The Historical Development of the Civil Law Tradition in China: A Private Law Perspective' [2011] SSRN Electronic Journal; Chen, 'Transplant of Civil Code in Japan, Taiwan, and China: With the Focus of Legal Evolution' (n 434).
[586] China has fared better than any other major economy in combating the Covid-19 pandemic. With an annual growth rate of 2.3 per cent, China was the only major economy to post positive GDP growth in 2020. It was also the first country to offer support to African countries. Managing the Covid-19 pandemic will become a key priority for global economies for the next few years, also building the capacity for any future pandemics.

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colonial transplants. The Western narrative also ignores China's long-standing trade and diplomatic relationship with Africa and south–south relations.

When Zheng He returned from Swahili lands in Africa in 1419, he was accompanied by African ambassadors who stayed in China for two years.[587] This exchange was the first recorded diplomatic exchange between China and Africa. Sái'd of Mogadishu of the Ajuran Empire is known as the first African ambassador to China. The African representatives who returned to China travelled with Zheng He, not as prisoners but as diplomats, to share information and pay tribute to Chinese emperor Zhu Di.[588] Unlike the colonial West, China intended to engage in trade, share China's greatness and learn from foreign lands. Indeed, upon his return, Sái'd, as a scholar and a diplomat, may have likely recorded and shared information used by other scholars, including Ibn Battuta of Morocco, about China's political, trade and cultural landscape. Sái'd learned Mandarin and translated what he learned in China into a local language in Somali, a practice China hopes to continue with the China study programmes and exchanges. Gronewold, a sinologist,[589] suggests that Zheng He's voyages were also a pre-emptive measure to keep at bay any possible military threats from the East while maintaining peace in the region.[590] This historical account, however, shows that China has long relied on soft power through culture and trade to influence global relations and retain its tributary system through diplomatic relations.[591] 'Giraffe' diplomacy[592] accordingly frames a historical relationship that did not include colonising Africa and only reflected peaceful exchanges.

5.3.1 Soft power in legal discourse

A country's domestic legal system might not commonly be thought of as a source of soft power.[593] Taking the domestic legal system further, Dawinder Sidhu introduced the conception of law as a

[587] Marcus Power, Giles Mohan and May Tan-Mullins, *China's Resource Diplomacy in Africa, Powering Development*, vol 6 (Palgrave Macmillan UK 2012). Kwasi Konadu, 'Zheng He's Ming Dynasty Voyages to East Africa' (2018) <https://www.kwasikonadu.info/blog/2018/3/18/zheng-hes-ming-dynasty-voyages-to-East-africa>.
[588] JR Holmes-SouthEast Review of Asian Studies & Undefined 2006 '' Soft Power' at Sea: Zheng He and China's Maritime Diplomacy' *questia.com*.
[589] Information Office of the People's Government of Fujian Province, Zheng He's Voyages Down the Western Seas, 22
[590] Sue Gronewold, 'The Ming Voyages' (*Asia for Educators*, 2009) 1 <http://afe.easia.columbia.edu/special/china_1000ce_mingvoyages.htm> accessed 3 April 2020.
[591] Henry Kissinger, *On China* (The Penguin press 2011).
[592] The giraffe was first presented to China as a gift from Kin of Malindi to emperor Zhu Di.
[593] Damien P Horigan, 'Law as Soft Power in Asia' [2018] 15th ASLI Conference <http://www.bbc.com/news/world_radio_and_tv>.

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source of soft power in 2011. He articulates how the moves in protecting individual rights, as studied and experienced by Muslim scholars in America, including the freedom of religion in America, can positively influence the way in which the Muslim world perceives the United States.[594] Positive influence can be viewed as a form of soft power, in which American law is perceived as more appealing and prestigious as an all-inclusive system. Based on the perceived prestige, one country's legal and business communities might be drawn to another country's substantive law and courts.[595] This may be due to foreign law efficiency in resolving domestic problems or because they are more sophisticated than domestic laws.[596] Horigan specifically mentions Asian countries which have a pluralistic legal culture with mixed borrowed and Indigenous laws. Using soft power in law enhances the host country's choices of law clauses to adopt.[597]

Academic studies have not fully demonstrated that a country's legal dimensions — specifically, its legal institutions and adherence to the rule of law — are also a form of soft power.[598] An academic legal programme can also be a soft power tool to promote the host country's legal norms. China has been exploring legal programmes under FOCAC, BRICS and the BRI as a way to popularise the Chinese socialist legal system.

5.3.2 Soft power in legal education and training

The establishment of FOCAC and other China multilateral forums with African states has increased business and trade exchanges, necessitating legal assistance and policy interventions. The expansion of economic transactions has also increased the need for legal cooperation on both sides. Legal practitioners and academics need to learn about each other's legal and judicial systems, practices, and reforms.[599]

A declaration was passed at the third legal forum to drive legal exchange and cooperation between both sides. This was intended to actively promote pragmatic legal cooperation between China and Africa and conduct bilateral cooperation such as judicial assistance. Since the

[594] Dawinder S Sidhu, *Judicial Review as Soft Power : How the Courts Can Help Us Win the Post-9 / 11 Conflict*, vol 1 (2011).
[595] Ajani (n 364).
[596] Horigan (n 593).
[597] ibid.
[598] Sidhu (n 594).
[599] Kiggundu (n 582). Kiggundu

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declaration, China has hosted several legal education visits and programmes to carry out the FOCAC action plans. Article 2.3 of the 7th FOCAC Beijing action plan outlines an initiative to facilitate exchanges between legislatures, consultative bodies, political parties, and local governments.[600] According to article 6.2.12 of the same action plan, the China Law Society annually invites African legal practitioners to attend a fully sponsored visiting law programme in China. The learning visits provide opportunities for Chinese partner universities to form new alliances, research African laws, and establish China–Africa research law centres. Visiting African scholars also take part in sightseeing and cultural excursions to expose them to broader Chinese culture, which is a key component of Chinese soft power.

Since the forum's inception, China has committed to assisting Africa's human development through education. Article 4.3 of the FOCAC 2018–2021 action plan outlines commitments to education and human resources, while article 5.3 focuses on education and think tanks. In addition to the short-term programme, as part of the 7th FOCAC action plan, China recruits African degree students, including undergraduates and graduates. Education is divided into two sections, emphasising China's commitment to assisting Africa's educational development.

China has established twenty African research centres, a university faculty specialising in African law at Xiangtan University and five universities that offer African law studies.[601] Xiangtan University's Africa Law Centre published 30 African monograms, 500 research papers, 12 doctoral theses, and 120 master theses between 2005 and 2019. This documentation demonstrates China's deliberate intention to expand the use of education and vocational training as soft power in law. This is one aspect that has received extraordinarily little attention in research.

5.3.3 Measuring soft power success

Wu suggests measuring soft power in both conventional and unconventional ways.[602] The measures can be derived using foreign policy research, political communication, trust, and social capital.[603] He Wenpin and other researchers have employed unconventional methods using indirect

[600] Ministry of Foreign Affairs, 'Forum on China-Africa Cooperation Beijing Action Plan (2019-2021)' (n 152).
[601] Universities that offer African Law studies: Beijing Foreign Studies University, Zhejiang Normal University and Institute for West Asia and African Studies (Chinese Academy of Social Sciences) have African Laws study.
[602] Irene Wu, 'Measuring Soft Power with Conventional and Unconventional Data' [2017] Measuring Soft Power 1.
[603] ibid.

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indicators to prove a country's attractiveness. The more visible measures include per capita information technology usage (including personal computers, internet usage, phone lines, and cell phones), number of patents, research and development expenditure, book sales, music sales, top brand names, and so on. Unconventional methods have proven to be unreliable indicators of a country's attractiveness; However, Wu argues that these are more short-term measures.

At the turn of the millennium, a few independent institutions and companies, including the Institute of Government, EY,[604] and the Rand Corporation, developed and created indexes that measure China's soft power.[605] These were based on the quality of government, diplomatic negotiations, cultural output, and other qualities. However, their measurement is based on the sponsor country's projection of soft power rather than the reception from the host country. A more recent and popular index comes from The Brand Finance, named the Global Power Index.[606] The indices were also undertaken by the United Kingdom and American institutions and took a small sample of countries which excludes a more global view. The Institute of Government index ranked twenty countries; the EY study reviewed a handful of countries, and their more recent Global Power Index includes 120 countries.

A conventional method would use data from migrant flows, cultural exchanges, diplomatic visits, and education exchanges; according to Nye, a successful soft power results in successful diplomacy. Based on this measurement, Chinese soft power should be measured regarding legal exchanges and diplomacy with African countries. The Chinese government has kept a record of China–Africa scholarly and professional legal exchanges that expose African legal scholars and professionals to Chinese laws. Chinese soft power in Africa can be gauged using statistics on legal interactions and education.

5.3.4 Evaluation of Chinese soft power

Chinese policymakers and analysts are well aware of China's rapid economic development in recent decades and how it has sparked global suspicion and concern. Some are concerned that as

[604] Formerly Ernest and Young
[605] Wu (n 602).
[606]In 2022, China achieved its highest ranking, moving up to fourth place. This notable ascent can be attributed to China's effective Zero-Covid policy and its substantial support to other developing nations amid the Covid-19 pandemic. Notably, it is crucial to recognize that the index is a survey-based nation brand index.. The survey is based on 120 nation brands from over 100 000 people.

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China grows stronger, it will become a more assertive and aggressive power, threatening Western hegemony. Because of its apparent compatibility with Chinese traditions, the concept of soft power may have been especially appealing to the Chinese. As previously stated, Chinese scholars and analysts frequently draw parallels between Nye's soft power formulation and classical Chinese teachings such as Sun Zi and Mencius. However, China's appeal to developing nations stems more from its economic miracle than its cultural appeal.[607]

The EY index compares the soft power situations of developing countries to the United States and concludes that China cannot compete with the United States to become a superpower. There are indications that the Chinese government is more open to soft power than before, primarily through legal cooperation.[608]

China has made significant strides in recent years in strengthening its legal cooperation with other countries. This has included a range of efforts, such as signing and implementing bilateral and multilateral legal agreements, participating in international legal organisations and forums, and providing legal assistance and training to other countries.

5.4 Legal cooperation

Asian countries present a successful example of China's legal cooperation. The China ASEAN Free Trade Area (CAFTA), signed in 2002 and entered into force in 2010, served as a model for regional integration and an example of legal cooperation. The CAFTA helped to promote trade between and investment between China and its neighbours. Following this regional success, China sought to deepen legal cooperation with African countries, particularly through FOCAC. China–Africa legal cooperation is based on China's Ten Principles for dealing with international foreign relations. Before FOCAC, bilateral agreements were the primary form of legal cooperation with some legal cooperation characteristics.[609] However, with the establishment of FOCAC, China has engaged in more sophisticated legal cooperation.

[607] Joshua Kurlantzick, *Charm Offensive: How China's Soft Power Is Transforming the World* (Yale University Press 2007).
[608] ibid.
[609] Yonghong (n 47).

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The growing China–Africa relationship has sparked interest for legal practitioners and scholars to study each other's legal and judicial systems, practices, and reforms.[610] A harmonised legal system can increase trade and investment volumes while reducing the costs of doing business. Nonetheless, there are other costs associated with legal cooperation to harmonise legal systems.[611] Garoupa and Ogus highlight the economic costs, while Legrand emphasises the social and political costs.[612] Economically and financially, China has absorbed most of the costs. China has annually sponsored legal cooperation forums, conferences, and workshops. Recently China hosted a legal conference to boost trade between China and its partner countries and provide some legal guarantees for Chinese OFDI. In a congratulatory letter from President Xi Jinping to China's International Legal Cooperation Forum, he expressed his hope that the forum will establish new global economic rules. This could imply reversing the Westernised international legal system for a more global south system or an international legal system with Chinese characteristics. Examining China's involvement in these forums may shed light on a new mode of legal collaboration between China and Africa.

5.4.1 Multilateral forums for FDI legal corporation

Xi Jinping set a series of national goals at the opening of the Chinese Communist Party Congress's Nineteenth Ceremony, including becoming a global leader in terms of composite national strength and international strength. He stated that China would strive to move closer to the centre stage, making a greater contribution to humanity and blazing a new path for other developing countries to modernise. Chinese leaders want to position their model as a new option for other countries and nations seeking to accelerate development while maintaining independence.[613] This speech places China at the forefront of other developing countries. It harkens back to China's ancient self-perception as the Middle Kingdom, to which all nations came to learn from its superior culture and pay tributary. Previously, China did not make concessions to neighbouring countries which violated the tributary system, which would, in their view, endanger its imperial sovereignty. Therefore, if China refuses to make concessions in contemporary collaboration, it is mainly from historical practice. China's rise may provide an alternative option for developing countries, but

[610] Kiggundu (n 582).
[611] Emanuela Carbonara and Francesco Parisi, 'The Paradox of Legal Harmonisation' (2007) 132 Public Choice 367.
[612] Nuno Garoupa and Anthony Ogus, 'A Strategic Interpretation of Legal Transplants' (2006) 35 The Journal of Legal Studies 339; Legrand (n 337).
[613] Rolland (n 219).

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its power over and coercion of smaller nations must be monitored. Former United States Secretary of State, Rex Tillerson, cautioned the African Union's chair about Chinese investments that would eventually increase debt exposure to China, giving the Chinese government political and fiscal leverage in the continent.[614] He also alerted that China's position of strength would jeopardise Africa's resources, sovereignty, and economic stability.

The international trade system shapes the global economic governance of FDI. By contrast, no single multilateral organisation addresses all aspects of FDI governance.[615] Although no multilateral organisation exists, developed countries' policies, institutions, and multinational corporations have shaped the international FDI legal framework. But Messner and Humphrey contend that in the near future, China and other developing nations will reshape the current hegemony and establish a new multipower legal network.[616] China's cross-border investment necessitates a large number of legal agreements outside multilateral platforms. As a result, China has established multilateral platforms for legal cooperation that harmonise legal practices and uphold international laws. On the other hand, China has attempted to amend parts of international law that China deemed unsuitable and do not serve their national interests. However, preserving elements of international law and membership is critical to legitimising China as the new rule-maker.

The Chinese government created a number of domestic policies, rules, and institutions to control OFDI. The next section explains how China establishes legal collaboration with multilateral organisations to compel African states to join in order to safeguard its global investments and broaden its influence. FOCAC, the BRI, and BRICS are the three initiatives directly related to Africa which are the focus of the next section.

5.4.2 Legal collaboration between Africa and the BRI

The implementation of China's OFDI policy and the promotion of a legal system in emerging economies are both examined in this section. Understanding African economies is key to understanding how China will leverage BRI as a soft power tool to influence policy in international

[614] Aidi (n 186).
[615] Berger (n 479).
[616] Kissinger (n 591); Jing Gu, John Humphrey and Dirk Messner, 'Global Governance and Developing Countries: The Implications of the Rise of China' (*World Development*, February 2008) 274, available at <https://linkinghub.elsevier.com/retrieve/pii/S0305750X0700201X> accessed 26 April 2019. See Berger (n 479).

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investment law and in Africa because African nations are signatories to the initiative. In order to draw benefits from BRI projects, BRI countries are positioning themselves to create investment attraction policies. It may be helpful to map and comprehend the development of the BRI legal framework to understand how Africa can participate in and affect the advancement of the new framework.

5.4.2.1 An introduction to BRI in Africa

As described in Chapter 4, the BRI is China's largest infrastructure project and a new source of China's OFDI.[617] In 2013, President Xi Jinping proposed the initiative to connect China with Asia, Europe, Africa and Oceania through sea, road, and rail.[618] The initiative invoked China's ancient silk road land-and-sea trade paths. BRI projects aim to stimulate economic activity in participating countries through peaceful collaboration. On the other hand, BRI predates Xi Jinping's presidency; it strengthens China's outward policy and is an extension of China's internationalisation strategy.[619] The BRI, which is central to China's global strategy, is enshrined in the constitution of the CPC as a provision for international development aimed at achieving shared growth. The initiative is critical to China's promotion of soft and hard connectivity with the rest of the world. Critics, particularly American scholars and politicians, see it as China's new geopolitical strategy to expand its sphere of influence internationally and disseminate a new world order with Chinese characteristics.[620]

[617] The People's Republic of China, 'Full Text: Action Plan on the Belt and Road Initiative' [2015] The Belt and Road Initiative <http://english.www.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm>.
[618] In the first quarter of 2020, Refinitiv is tracked a cumulative milestone of US$4 trillion worth of BRI and Chinese involvement project of which US$3.3 trillion are active projects. Some projects were put on hold due to the Covid-19 pandemic. Refinitiv, 'BRI Connect: An Initiative in Numbers' <https://www.refinitiv.com/content/dam/marketing/en_us/documents/reports/refinitiv-zawya-belt-and-road-initiative-report-2019.pdf>.
[619] Mwanda Phiri and Nakubyana Mungomba, 'Leveraging the BRI for Africa's Industrialisation and Intra-Trade (Opportunities for the AfCFTA)' (*Africa Portal*, 2019).
[620] The MOU was signed on the common 'understanding' of cooperating on the five cooperation priorities of BRI 1. Policy coordination, 2. Facilities connectivity, 3. Unimpeded trade, 4. Financial integration, 5. People-to-people bonds. The five priorities are 'guided by the principles of wide consultation, joint contribution and shared benefits'. Jamie P Horsley, 'Governance and Regulation of China's Overseas Economic Activities and the Belt and Road Initiative : Managing the Impacts' (2020) 1 <chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/https://law.yale.edu/sites/default/files/area/center/china/document/horsley_bri_governance-managing_impacts_feb_2020.pdf>.

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As of early 2020, just before the Covid-19 outbreak, 138 countries had signed the BRI memorandum of understanding (MOU).[621] Forty of Africa's 54 countries are signatories, including the African Union (AU), representing nearly one-third of all BRI partner countries. There is no apparent reason the remaining fourteen countries have not joined the BRI group, with the exception of Eswatini, which maintains diplomatic relations with Taiwan. Non-signatory countries may represent an untapped African voice in China's relationship with Africa.[622]

Scholars have questioned Africa's strategic importance in the BRI. Initially, prior to FOCAC 2015, only three African countries (Djibouti, Egypt, and Kenya) were included in the BRI plan; furthermore, the BRI was not included in China's African foreign policy.[623] This highlights Africa's strategic importance in China's development and geopolitical strategy.[624] Some scholars have suggested that Africa was included in the BRI as an afterthought solely to legitimise the initiative.[625]

The late inclusions suggest that Africa is more important to the BRI regarding policy endorsement than resources and founding objectives. When the West resisted the BRI, China could have considered African countries to give the project some global legitimacy. With this in mind, African states should consider their expandable role in BRI infrastructure projects and comprehend the role of BRI countries. Despite the lack of leverage that other countries have in the initiative, African countries can influence the direction of the BRI through cooperation and active participation in BRI policies through new legal cooperation exchanges. African states need to consider how they can play a more prominent role in BRI infrastructure projects and understand the role of BRI countries.

621 Statistics confirmed by the official website of Belt and Road, as of 19 March, available at www.yidaiyilu.gov.cn, https://green-bri.org/countries-of-the-belt-and-road-initiative-bri.
622 The 14 African countries that have not signed a BRI MOU: Eswatini, Democratic Republic of Congo, Central African Republic, Benin, Comoros, Lesotho, Mauritius, Botswana, Equatorial Guinea, Malawi, Guinea Bissau, Eritrea and Niger.
623 Robert Tama Lisinge, 'The Belt and Road Initiative and Africa's Regional Infrastructure Development: Implications and Lessons' (2020) 12 Transnational Corporations Review 329 <https://doi.org/10.1080/19186444.2020.1795527>.
624 Yu-Hsuan Wu, 'Framing a Sino Centric Narrative? China's Public Diplomacy in Africa through Global, Regional, and Bilateral Lenses' (University of Pretoria 2018).
625 Muhammad Sabil Farooq, Nazia Feroze and Yuan Tong Kai, 'An Analysis of China and Africa Relations with Special Focus on 'One Belt and One Road' (2019) 75 India Quarterly 366. Farooq ibid.

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5.4.2.2 BRI and FOCAC intersection

The Belt and Road Initiative (BRI) and the Forum on China Africa Cooperation (FOCAC) are two major initiatives launched by the Chinese government that have the potential to significantly impact the economic and political landscape of Africa. BRI has focused on infrastructure connectivity with Asia, Europe, and Africa, while FOCAC has a broader focus on strengthening political, economic, and cultural ties. There is a clear intersection between the BRI and FOCAC, as both initiatives aim to enhance China's economic and political engagement with Africa. In particular, The Chinese government has used the FOCAC meeting since 2015 as a key vehicle for promoting the BRI to African countries. Commitment to support the BRI is also included in FOCAC 9's Dakar action plan.[626] During the FOCAC 8 summit in Beijing in 2019, 28 African countries signed the BRI MOU. The commitment followed after a series of financial commitments from China. For example, at the 2017 FOCAC summit in Beijing, the Chinese government pledged to provide US$124 billion in financing for BRI projects in Africa, including infrastructure development, industrialisation, and agriculture modernisation. At the 2015 FOCAC summit in Johannesburg, China announced a series of measures to support the development of the BRI in Africa, including the establishment of a US$10 billion special fund for BRI projects and the launch of a China Africa infrastructure cooperation platform. The significance of the continent can be increased through FOCAC, as detailed below.[627] However, it is important to note that the intersection between the BRI and FOCAC has not been without controversy and legal challenges.

5.4.2.3 BRI legal conflicts

Given the scale of BRI projects and the developing countries involved, legal conflict and poor governance are unavoidable risks. This will significantly jeopardise the completion of infrastructure projects and other investments.[628] Each of the 138 BRI signatory countries has a unique legal system and culture, further complicating the opportunity to resolve legal disputes or delayed agreements. Because of differences in political, economic, and cultural backgrounds, each country faces a unique set of legal risks in terms of policy, political, legal, and environmental

[626] Ministry of Foreign Affairs of the People Republic of China, 'Forum on China–Africa Cooperation Dakar Action Plan (2022–2025)' (n 159).
[627] Sun, 'Africa in China's Foreign Policy' (n 557).
[628] Shuang Liang, 'The Notion of Legal Cooperation under the BRI and the Spirit of Upholding International Law by the United Nations - Taking the PPP Projects as an Example' (2019), available at <https://www.wgtn.ac.nz/law/research/publications/about-nzacl/publications/special-issues/hors-serie-volume-xxv,-2019>.

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protection, intellectual property protection, labour rights protection and more. A BRI legal framework, judicial cooperation, and the rule of law harmonisation among its members are required to mitigate the inherent legal threats.

Because a large number of BRI projects are being built using the public–private partnership financing structure, immediate attention has been focused on legal agreements in this sector. Contract terms in these projects can provide a good resource for case studies in BRI legal cooperation. According to Liang's research, the BRI concept of legal cooperation in public–private partnership promotes the spirit of the United Nations goal of upholding international law and thus does not promote a Beijing agenda.[629] Although China has adopted global practices, it has criticised some international legal perspectives as inappropriate for the global north. Above all, China prioritises domestic interests.

However, international regulation for the BRI project is not institutionalised, and there is no multilateral agreement-governing body, such as the WTO.[630] Consultation, bilateral MOUs, and cooperative documents are used to develop legal partnerships between BRI countries. China promotes the BRI as an alternative governance structure to those ideologies which benefit only the most powerful political and economic actors and has signed subject-specific multilateral agreements with BRI countries. China is at the centre and leadership of facilitating relationships on the platform as the initiative's custodian with the highest risk exposure. Chinese academics agree that the BRI, as a transcontinental initiative, supports and incorporates the international order and the United Nations Sustainable Development Goals 2030 into its projects. However, American academics argue that the BRI is also very Sinocentric[631] , and the initiative works towards transplant alternative norms and practices, especially in its partnership with developing countries.[632] The BRI agreements, particularly the subject-specific multilateral agreements signed with BRI countries, are the most politically and economically powerful Chinese multilateral

[629] ibid.
[630] Road Initiative and Jamie P Horsley, 'Working Paper : Challenging China to Make Good Project Governance a Centerpiece of the China Marked in August 2018 the Fifth Anniversary of Chinese Communist General Secretary Xi Jinping ' s Ambitious Belt and Road Initiative (BRI) with Claims That Its ' 1. Chinese leaders argue that the development of existing international multilaterals like WTO and UNICITRAL are orientated towards developing countries and are generally designed to complement developed nations without consideration of developing nations.
[631] Rolland (n 219).
[632] Alden and Large (n 242).

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agreements.[633] At the bilateral level, primary agreements are supplemented by secondary agreements.[634] Although the primary agreements are in the form of MOUs and are not legally binding, contradicting their spirit or failing to comply with them will have diplomatic ramifications with China.

Chinese ministries, institutions, and banks have issued various policy documents and regulations to manage BRI projects to protect their investments and ensure performance. China has established the legal infrastructure to resolve disputes arising from overseas economic engagements, including BRI projects. For example, the new China International Commercial Court was established within the Supreme People's Court expressly to handle cases involving BRI disputes. The countries along the BRI route face the aforementioned legal risks. China has taken a proactive approach to developing a BRI regulatory framework that facilitates legal cooperation among BRI countries to reduce associated risks. Under the BRI legal framework, China is funding the implementation of a cooperative research programme, as well as legal capacity-building and international law-talent training for countries along the BRI route.[635]

5.4.2.4 BRI lawyer's network

Belt and Road International Lawyers Association (BRILA) is a Chinese organisation registered and professionally managed by the Ministry of Justice and the Ministry of Civil Affairs. BRILA was established at the end of 2019 with 85 founding members. Fifty founding members were from China, and 35 members represented other countries and regions. The All-China Lawyers Federation initiated and proposed the association to promote exchanges and legal cooperation. The association is China's first registered international bar association.

The primary mission of BRILA is to create a regular communication mechanism for lawyers from the BRI's participating countries and regions. Mechanisms include conferences, visits, and training on key legal issues, in addition to legal services to support economic exchanges and the

[633] BRI agreements wield significant political and economic influence constituting a defining and pivotal aspect of BRI. The initiative has brought about an unprecedented surge in the number of agreements made. The primary agreements in BRI are considered as a form of soft law. Wang He argues that BRI primary agreements can be seen as a form of soft law that repurposes soft law characteristics for project development rather than rule development. It highlights the unique features of minimal legalization, a coordinated and project-based nature,d a hub-and-spoke network structure in these agreements. Heng Wang, 'The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges' (2021) 20 World Trade Review 282.
[634] Wang, 'The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges' (n 316).
[635] Horsley (n 630).

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improvement of BRI regional trade rules. The activities reflect the five major BRI principles: policy coordination, facility connectivity, unrestricted trade, financial integration, and people-to-people exchange. According to Article 3 of the organisation's constitution, BRILA will follow the constitution, laws, regulations, national policies, and customs of the country of registration. This agreement gives China priority influence over the development of rule and regulation harmonisation in BRI countries. Other countries will not have to negotiate power with China as the primary investor. Unfavourable contract terms unique to China could be imposed as the standard of practice in BRI. The present study reviews aspects of Chinese contract law that have influenced Chinese investment agreements in infrastructure projects in Chapter 6.

BRILA also established the BRI lawyers' programme to develop legal expertise to advise Chinese companies on BRI-related cases and to ensure compliance with host country laws. Under the BRI, China promotes the value of 'pluralism' and a non-interference stance in international systems.[636] For African governments interested in retaining their political system rather than changing it to attract FDI from developed countries, the cooperative approach has been the appeal of Chinese investments. During the launch of BRILA, China's former Minister of Justice, Fu Zhenghua, remarked in his opening speech that 'establishment of the association marks that lawyers in BRI countries and regions have entered a new stage of exchanges and cooperation, and their participation in constructing the world legal system has opened a new Chapter'.[637] Chinese officials expect the association to significantly influence the legal system, innovation, and the development of a community with a shared future for humanity.

The BRI is becoming a valuable and strategic soft power tool for economic development.[638] China is using BRI legal cooperation and education as soft power in Africa and, in so doing, the global hegemony. Through various paths described in section 5.4.1 of the previous Chapter, Africa transplanted different legal systems from common and civil legal systems. While China has a long history with Africa as a developing nation in the last century, it is at a disadvantage because it lacks the years of used language and legal culture that the global north has experienced in Africa. China offers African countries an antithesis to the worldwide northern development through BRI

[636] Stephanie Olinga-Shannon, Mads Barbesgaard and Pietje Vervest, 'The Belt and Road Initiative (BRI): An AEPF Framing Paper' [2019] Asia Europe People's Forum <https://aepf.info/BRI-AEPF-Framing-Paper>.
[637] China State Council Information Office, 'Body for Belt Road Lawyers Launched' (*China State Council Information Office*, 2019) <http://english.scio.gov.cn/beltandroad/2019-12/12/content_75504491.htm>.
[638] Wang, 'The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges' (n 316).

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initiatives to influence and install Chinese ideals through soft power aspirations without political conditions.

As noted above, the conditions of the BRI MOU are not legally binding. Both parties can interpret the terms of the agreement to direct diplomatic relations. According to Devonshire-Ellis, a China-based international lawyer, China can use the MOU, while non-binding, as a basis for future diplomatic conditions.[639] Devonshire-Ellis raises the possibility of suzerainty as a concern about China's use of the BRI to reintroduce its tributary system and foreign policy approach.[640]

According to Chinese leaders, the BRI is based on equality and mutual benefit, with all parties participating as equal contributors and beneficiaries.[641] China, however, is taking the initiative in the relationship and the agenda because it is willing to facilitate capital, contracts, and legal capacity. African countries continue to lack the capacity to reform and enforce domestic foreign investment laws and participate meaningfully in the creation of international investment laws. Chinese leaders are expecting African legislators to participate in the development of the BRI legal framework as equal partners.

Through the BRI, China can promote its norms and practices in the global south, which according to the research mechanism investigated by Benadballah, Chinese norms and practices spread to countries in the global north has been difficult.[642] This researcher suggests that while China works to uphold the current legal system, it has also used a number of programs to share Chinese knowledge, norms, and culture with African governments in order to have an impact and soft power influence on African leaders.[643] Benadballah contends that rather than asserting African agency, this new influence threatens Western norms in Africa. Through these shared platforms, African elites and civil servants can be easily swayed by China, leading to the eventual imitation

[639] Chris Devonshire-Ellis, 'China ' s Overseas Free Trade Zones & Industrial Parks' (2019) 1, available at <https://www.silkroadbriefing.com/news/author/silkroadbriefing/>.
[640] Chris Devonshire-Ellis, 'Suzerainty Issues Hold Back the West in Embracing China's Belt and Road' (*Silk Road Briefing*, 2018), available at <https://www.silkroadbriefing.com/news/2018/02/07/suzerainty-issues-hold--embracing-chinas-belt-road/>.
[641] State Councillor and Foreign Minister Wang Yi speech, 'Stronger Legal Cooperation for Sound and Steady Development of the Belt and Road Initiative 2018/07/03' (2020) 1 <johannesburg.china-consulate.org/eng//xwdt/zgyw/t1573636.htm>.
[642] Benabdallah (n 248).
[643] Lina Benabdallah, *Shaping the Future of Power: Knowledge Production and Network-Building in China-Africa Relations* (University of Michigan Press 2020), available at <https://books.google.co.za/books?id=WcfrDwAAQBAJ>.

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of Chinese economic development.[644] China employs professional legal training programmes and visits to either export Chinese norms or to create a new global legal development norm.[645]

China pledges to collaborate as equal partners with its international BRI partners, particularly African nations, as a result of its newly acquired position as a rule-maker.[646] Although China supports the global order, Benadballah asserts that its engagement is China-focused and aims to spread alternative norms and practices.[647] Adopting Chinese legal culture, on the other hand, may imply that Africa will remain silent on issues such as human rights and environmental laws or that it will be excluded from BRI policies and legal cooperation. China has stated its willingness to comply with international orders but has indicated that it will not be pressured to engage in practices that are not in its best interests.[648] One-third of the BRI is supported by African leaders, who make it easier to adopt a Chinese-led BRI framework that can eventually be applied to the creation of international investment legal frameworks.

5.4.3 BRICS legal cooperation

The acronym BRICS refers to five countries: Brazil, Russia, India, China, and South Africa. In 2001, Jim O'Neill, a chief economist at Goldman Sachs, popularised the concept when he profiled the BRIC countries (excluding South Africa) for the G7[649] to pay attention to these countries' future roles and weight in global economies and policymaking forums.[650] O'Neill's report had an unintended consequence: the formation of the BRICS forum. South Africa joined the BRIC group in 2010 after China extended an invitation. South Africa's participation was justified as playing a critical role in assisting Africa to realise its full potential and promoting trade and infrastructure expansion. South Africa's participation represented the continent's interest in BRICS.[651]

[644] Benabdallah (n 248).
[645] Benabdallah (n 643).
[646] Benabdallah (n 248).
[647] ibid.

[649] The G7 refering to the Group of Seven is an informal intergovernmental organization made up of the world's largest developmed economies : Germany, France, Japan, Italy, The united states , United kingdom and Japan. The European Union also participates as a non-enumerated member. The group excludes emerging powers like China.
[650] Jim O'Neill, 'Building Better Global Economic BRICs', vol 66 (2001).
[651] Maite Nkoane-Mashabane, 'South Africa ' s Role in BRICS , and Its Benefits to Job Creation and the Infrastructure Drive in South Africa' (2012) <http://www.g20civil.com/articles/1081/ 1/8>.

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The BRICS legal forum was established in 2014 to recognise the critical role that law would play in BRICS investments and the necessity of corporations. Since then, the forum has assisted annual conferences in discussing issues ranging from the rule of law to dispute resolution. Global South issues on global governance are one of the three pillars that have anchored BRICS membership. According to the official website of the BRICS legal forum, it was established.

> As a permanent platform for legal cooperation and professional exchange of ideas between lawyers of the BRICS countries as well as the promotion of legal diplomacy, using law as an instrument for economic cooperation and social development.[652]

For this group, the main goals of legal cooperation are exchanges in various areas of national law, business practices, and international trade.[653] The close legal forum can develop a framework for laws and regulations in new sectors such as the digital economy and technology. At the BRICS legal forum 4, discussants suggested that the group consider developing a legal framework for the digital economy, governance, and regulation of innovation in artificial intelligence (AI) and the Internet of Things.[654] Close collaboration and legal cooperation will undoubtedly result in the convergence of the business laws of the BRICS countries.[655] However, the systems of some of the BRICS countries differ greatly, making system harmonisation difficult or defeating the goal of avoiding undue or disproportionate pressure from a more robust economy. BRICS knowledge exchange has focused on harmonising with each other's legal systems rather than a unipolar legal system. With a better understanding of each other's legal systems, the BRICS countries can benchmark and adopt best practices models appropriate for global south economies.[656] An ongoing effort to build and maintain organisations, institutions, and judicial systems that offer all legitimate actors mutually beneficial legal protections is made through constant cooperation.

5.4.4 FOCAC legal cooperation

Although it is widely acknowledged that trade and investment are 'defining features' of the Africa–China relationship, before 2009, the legal environment had not been sufficiently identified,

[652] See http://brics-legal.com/eng/about-the-forum/
[653] 'IV BRICS LEGAL FORUM BOOK OF ABSTRACTS' <http://alrf.ru/association/Тезисы БРИКС финальные.pdf> accessed 22 May 2019.
[654] ibid.
[655] Jian Fan, 'The Convergence of Business Laws and the Economic and Trade Cooperation among BRICS Countries', *IV Brics legal Forum* (2017).
[656] denis de castro Halis and guilherme vargas Castilhos, 'The BRICS Investment Framework'.

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scrutinised, or comprehended on both sides. Chinese officials and academics have declared that academic research should precede legal cooperation. Since FOCAC's inception, only a few legal cooperation items have been outlined in FOCAC's action plans (Table 9). [657]

Prior to FOCAC, Former President Jiang Zemin outlined a five-point proposal for comprehensive cooperation and interaction.[658] Although they did not specify legal cooperation, These points became a policy foundation for Africa China relations. Prior to FOCAC, bilateral agreements were the main forms of Sino-African legal cooperation. These agreements contained four aspects:

- Joint Communiqués on establishing diplomatic relations.
- Agreements on sending Chinese medical teams to African countries.
- Agreements on economic and trade cooperation.
- Agreements on cooperation of culture, education, science and technology

In addition to the bilateral treaties, China signed MOUs with various African countries in commercial trade, investment and taxation.

Table 9 FOCAC summits and ministerial meetings legal action plans

Forum	Year	Host country	Action Plan Legal Cooperation Declarations
1	2000	China	**Beijing Action Plan (2000-2003)** Commitments in Legal developments None- legal cooperation excluded
2	2003	Ethiopia	**Addis Ababa Action Plan (2004-2006)** Legal cooperation established for non-traditional security issues Commitment to improve trade laws and regulations (A 2.3)
3	2006	China	**Beijing Action Plan (2007-2009)** Legal cooperation issues were clearly outlined in the action plan, mainly under political cooperation.

[657] FOCAC newsletter (2009) 'Strengthening China-Africa Legal Exchanges and Promoting All-round Development of China-Africa Relations.' http://www.fmprc.gov.cn/zflt/eng/xnyfgk/t648400.htm . Gu Zhaomin's Closing Speech at the third FOCAC legal forum (2009), available at http://www.fmprc.gov.cn/zflt/eng/ltda/dwjbzjjhys/hxxd/t1006745.htm.

[658] Zeng Aiping and Shu Zhan, 'Achievements, and Prospects of the Forum on China-Africa Cooperation' [2018] China International Studies <https://www.focac.org/eng/lhyj_1/yjcg/P020181026382446204313.pdf> accessed 3 April 2019; Garth Shelton and Farhana Paruk, 'The Forum on China–Africa Cooperation: A Strategic Opportunity' [2008] Institute for Security Studies Monographs.

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			• The actions outlined increased contact between the legislature and local governments & high-level structures at National People's Congress level, parliament and African Union. • At the local level, China's regulatory and administrative exchanges were to be established through **sister cities/province partnership** • Other areas for legal cooperation were **Consular and Judicial Cooperation**. Increase the flow of people, especially skilled labour, but while curbing illegal immigration through law enforcement. • Facilitate the negotiation, conclusion and implementation of the **Agreement on Bilateral Facilitation and Protection of Investment and the Agreement on Avoidance of Double Taxation to encourage** for investment cooperation and protect investors. • Pledged facilitation necessary in terms of **administrative approval procedures, customs clearance and border entry and exit** for company investors of the two sides
4	20	Egypt	**Sharm El-Sheik Action Plan (2010-2012)** Committed to ongoing exchanges on political Affairs, including - Consular, Political parties, legislature and local government (A 2.3) - Consular in Judicial Cooperation (A 2.4) Committed to holding a FOCAC legal forum (A2.4.3) - Cooperation in International Affairs (A 3.8)
5	2010	China	**Beijing Action Plan (2013-2015)** Theme: 'Grasp the opportunities, strengthen the collaboration and push forward the overall development of the China–Africa new type strategic partnership' Topics: 1. The mutual impact of the development of China–Africa relations and China–Africa legal cooperation 2. The laws and regulations of China–Africa economic and trade cooperation 3. The judicial cooperation between China and African countries Institutionalised: China has established consular consultation mechanisms with South Africa, Egypt, Senegal and Nigeria. http://tz.china-embassy.org/eng/ztgx/zz/t960553.htm
6	2015	South Africa	**Johannesburg Action Plan (2016–2018)** Commitments in Legal developments (A 6.2.5 and A 6.2.6 - Improving judicial and personnel exchanges - Institutionilisation of FOCAC - China Africa legal research Sub-Centre -Establish China-AALCO Research and Exchange Programme on international law
7	2018	China-Beijing	**Beijing Action Plan (2019–2021)** The two sides committed to continue to improve the mechanism in - FOCAC legal forum, raise its influence and efficacy. (A 6.2.12 - The China–Africa joint arbitration mechanism, the China–Africa Joint Arbitration Centre and its office network in Africa and raise its international standing. - Building in jointly building the China–Africa Legal Research Subcentres and the Legal Professionals Training Bases and expand the scope and

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			depth of the studies on the legal system of countries involved in jointly building the BRI. - Increase exchanges and coordination with the AU on legal matters
8	2021	Dakar	**Dakar Action Plan (2022–2025)** **legal cooperation under six key sections** 1. **ECONOMIC COOPERATION**: Share Information in general and in finance. Combat illegal trading at customs A 3.4.3, A 3.6.6. A3.8.7 2. **CYBER SECURITY:** Data protection and surveillance of other countries. Internet laws Cyber Legal systems A 4.6.2, A 4.6.4 3. **LAW ENFORCEMENT:** China Africa Police. A 6.1, A6.1.7 4. **JUDICIARY:** Legal Assistance, Ongoing Cooperation and forums 6.2 5. **MARITIME COOPERATION:** Maritime law enforcement and capacity building A 7.2.6 6. **STATE GOVERNANCE:** Law enforcement 8.2

Notes: Adapted from Action plans from the Forum on China Africa Cooperation (FOCAC) from 2000-2021. Available from the Ministry of Commerce Forum on China Africa Cooperation official website. http://www.focac.org/eng/zywx_1/zywj/

Hong and Zhu provide a historical account of legal exchanges and cooperation between China and Africa, beginning in 1874 when Ghana (then known as the Gold Coast) began to apply Hong Kong English law which had been enacted in 1865. The formal legal corporation between Africa and China is presumed to have formed in 1955, during either the Bandung or Asia–African conferences. China presented ten principles for dealing with international relations at the Bandung Conference.[659] Hong proposes that these principles may have served as the basis for China–Africa legal cooperation. The conference did not result in any action; However, the Bandung Spirit laid the groundwork and provided a model for south–south alliances, which led to the formation of intra-continental institutions.[660] In addition, Egypt opened the first African embassy in Beijing, and in 1956 the Asian Legal Consultative Committee, now known as the Asian-African Legal Consultative Organisation (AALCO), was founded.

Between the Bandung Conference and the formation of FOCAC, bilateral agreements were the primary forms of Sino-African legal cooperation. In addition to bilateral treaties, China signed the MOUs with African nations regarding commercial trade, investment, and taxation. The China–Africa legal forum (FOCAC legal) was then established to supplement and expand the FOCAC

[659] Yonghong (n 40).
[660] Olivier (n 82).

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action plans for cooperation. The establishment of the FOCAC legal forum paved the way for establishing a permanent platform for the African and Chinese legal communities. The goal was to increase economic and trade development support between Africa and China by bolstering cooperation based on mutual understanding. The forum provided the opportunity for both Africa and China to introduce their own legal systems and to familiarise themselves with the legal systems of their counterparts. Principally African and Chinese legal practitioners agreed to mutual legal transplantation upon the forum's establishment.[661]

Legal corporation for China–Africa in the fifth FOCAC action plan was initially categorised under policy and politics under the peace and security subheading (Table 10). China proposed four critical areas for future cooperation with African nations, one of which was exchanges between judicial and law enforcement agencies, particularly to address immigration issues and to increase intelligence exchanges on terrorism, drug trafficking, and other transnational crimes. FOCAC's commitment to expanding exchanges between its judicial and law enforcement agencies has created a new platform for addressing migration issues between Africa and China. Through increased interaction and consultation, Africa and China can develop practical and functional immigration procedures that protect migrants while preserving the benefits for the host nation.[662]

The first FOCAC meeting centred on creating a common strategy for dealing with the post-Cold War international system and enhancing trade and investment ties between Africa and China. Alongside the conference, four workshops were held on Africa–China trade and investment, China and Africa's reform experiences, poverty eradication and sustainable development, and

[661] Mutual legal transplantation refers to the exchange and adoption of legal principles, norms, and practices between different legal systems. It applies where two legal systems have a two-way transfer of legal concepts between China and Africa, for example, which each jurisdiction draws upon the other's legal practices. This process is not limited to formal agreements but may also manifest through informal mechanisms, cultural exchanges, and pragmatic adaptations. Mutual legal transplantation is characterized by its reciprocal nature, where both sides in the interaction may adopt elements from each other's legal systems. During the Middle Ages, there was a significant exchange of legal ideas between the Roman and Germanic legal systems in Continental Europe. The interplay between Roman and Germanic legal traditions through the process of reception showcases an example of mutual legal transplantation, where both systems influenced and shaped each other over time. As a result, the legal systems in Continental Europe became characterized by a mixture of Roman (civil law) and Germanic (customary law) elements, a legal tradition known as civil law.

[662] Shelton and Paruk (n 658).

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education, science, technology, and health cooperation.[663] Given the importance of legal exchanges, a decision was made to establish the FOCAC legal forum during the fourth legal forum held in Sharm El Sheikh, Egypt.

During the fourth legal forum, the Egyptian ambassador, H.E. Mr Allam, brought up a topic currently a significant source of concern for the West regarding Africa–China relations.[664] The proposed legal cooperation called into question the global south's influence on international law and necessitated a re-evaluation of South-South participation in the development of international law. The forum was proposed as a mechanism for introducing global south norms and values into international legal discourse and beginning to alter international law. The ambassador even suggested legalising the forum to provide a more law-based mechanism than an interest-based platform; this forum could significantly affect the global discourse on legal issues.

A commitment to consider institutionalising the legal forum was made via the legal forum platform. Specific areas of legal services, professional training, and the mechanism for the out-of-court settlement of disputes have been identified by the forum's discussants as areas for increased cooperation.

- After the first discussion to establish FOCAC legal forum, six separate forums were held from 2009 to 2015 (Table 10). The China Africa legal forum served to supplement and deepen cooperation as outlined in the FOCAC action plans. The first legal forum held in Cairo was considered the birth of Africa China cooperation in the field of legal affairs. The forum was initiated under the political relations, regional peace, and security commitment of the FOCAC action plan. Several measures for cooperation in the areas of economics, trade, agriculture, tourism, science, education, culture, health, and the environment were outlined during the forum. In addition, two outcome documents outlined a proposed new relationship between China and Africa, based on Deng Xiaoping's broad foreign policy framework and Jiang's Sino-African vision, crafted during his 1996 visit.

[663] ibid.
[664] 'The China Monitor' (2010), available at <http://www0.sun.ac.za/ccs/wp-content/uploads/2010/04/China_Monitor_MARCH_2010.pdf> accessed 19 May 2019.

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Table 10 Focal legal forum and developments

Forum	Year	Host Country	Themes and Developments
1	2009	Egypt	Help after FOCAC 4 Ministerial Summit at Sharm El-Sheik[665] 20 African countries and West Asia with almost 100 representatives **Main theme**: 'Strengthening China Africa Legal Exchange and Promoting All-round Development of China–Africa Relationship' **Discussion topics** (1) the role of law in China–Africa engagement. (2) the introduction of legal systems. (3) the effects of legal systems on China Africa economic relations; and (4) methods for economic dispute resolutions between China and African countries. **Proposals:** 1. Building the legal forum into a long-acting platform, 2. Implementing the training projects for African young legal talents, 3. Seeking cooperation with other international legal organisations to expand the forum's influence.
2	2010	Beijing	**Theme** "Grasp the opportunities, strengthen the collaboration and push forward the overall development of the China Africa New type Strategic Partnership". **Key Topics** 1 The Mutual Impact between the Development of China Africa Relations and China Africa Legal Cooperation 2. The Laws and Regulations Relating to China Africa Economic Cooperation 3. China Africa Judicial Cooperation Key Concerns and recommendations • The role of international law in South-South relations. • A mechanism that begins to change international law and infuse their norms and values into international legal discourse • Legalising the forum to give a more law-based mechanism rather than an interest-based platform, so the forum can have real influence in shaping global discourse on legal matters.
3	2012	Mauritius	Theme: Deepening China Africa Legal Cooperation: The New China Africa Strategic Partnership Topics 1. The International Law, Concerning "Peaceful Coexistence" to "Cooperation for Mutual Development" and China Africa Cooperation in the New Stage 2. The Legal Environment for Investment in Africa : Changes in the applicable rules of Laws Relating to African International Civil and Commercial Relations

[665] Ministry of Foreign Affairs, 'Forum on China-Africa Cooperation Sharm El Sheik Action Plan (2010-2012)' (2012) 2. https://www.fmprc.gov.cn/zflt/eng/xnyfgk/t647037.htm, accessed 6 June 2021.

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			3. Dispute Resolution Mechanism with China Africa Characteristics Purpose • Encourage **dialogue**, **cooperation** and exchange with a view to seeking mutual reinforcement and common development in the legal and judicial fields • Promote the pragmatic legal cooperation between China and Africa and conduct cooperation like judicial assistance at bilateral level
4	2013	Zimbabwe	**Theme**: Practicing Legal Diplomacy: Taking China Africa Relations to New Heights **Topics** 1. Accelerated action for the Adoption of Best Practices in Trade and Investment for the Benefit of China Africa Cooperation's Legal Frame Works 2. Elimination of the Legal Obstacles in Sino Africa Cooperation 3. Characteristics of Comprehensive Investment Treaties for the Mutual Benefit of China Africa Cooperation4. Corruption under the Background of Sino Africa Cooperation and its Impact on the Sustainable Development 5. An Assessment of the Effects of Climate Change on Economic Development in light of the China Africa Relationship 6. Development of Economic, Social and Cultural Rights of the African Population under the China Africa Cooperation
5	2014	Angola	**Theme:** Legal Collaboration and Networking for Effective Cooperation between Africa-China **Topics** 1. Formal and Informal International Cooperation 2. International Cooperation-Transnational and Emerging crimes
6	2015	South Africa	Key Developments • China announced that it had signed the New York Convention and practices laws which are in line with the International Criminal Court and international practice • urged that while China and Africa should observe international practices, they should also form a legal fraternity that adopts laws, rules and regulations that are fair to South-South relations as developing worlds • Considered twining legal practice and helping each other in the study of law • suggested using the Forum legal forum as a mechanism to develop and further research, academic service and deepen cooperation • Formation of CAJAC

International law was a common topic at six forums held between 2009 and 2015, The ongoing commitments to establish FOCAC legal forum and other plans to institutionalise China -Africa legal initiatives had failed. The China Law Society will no longer host the forums as a

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sub-event due to budget constraints.[666] Furthermore, the research sub-centre to be based in Africa was never established (Table 10). To date, CAJAC has been the most notable institutionalised initiative from the FOCAC legal forum initiatives.

A notable aspect observed in the realm of Africa China legal cooperation is China side's consistent initiative to unilaterally host conferences aimed at fostering knowledge exchange. This pattern has resulted in a distinct void for African countries in their efforts to actively engage with Chinese law. Consequently, SEZ have emerged as crucial mechanisms for African to establish channels of interaction and exert influence over China's legal impact on OFDI in Africa. These dynamics underscore the significance of bilateral cooperation in shaping the legal landscape and present an opportunity for further exploration into the evolving dynamics of legal influence in the Africa China context. The author of the study recognises that these nuances contributes to a more insightful analysis of the complexities surrounding Africa China legal interactions and paves the way for future research endeavours in this field.

5.5 A policy tool – the special economic zone (SEZ)

A SEZ is a geographically delimited area within which a government facilitates industrial activity through fiscal and regulatory incentives and infrastructure support.[667] China's miracle growth can be accredited to its use of SEZs to attract FDI. The SEZ played a vital role in realising China's opening up policy and its industrial transformation. Under the policy, China designated a special area for investment attraction and created favourable conditions and exemptions from some regulations for foreign investors. The first four SEZs for China were established in 1980 on the south-Eastern coast in small villages in Shenzhen, Zhuhai, Shantou, and Xiamen. All four were established in proximity to the closest sources of FDI, namely Hong Kong, Macau, and Taiwan. The success of SEZs in China as a source of China's economic prosperity made the SEZ a popular policy instrument that African countries are now looking to emulate.

The first modern SEZ was established in Brooklyn, United States, in 1937, and it was set up as a catalyst for export. The zone benefited from supporting legislation which included a series of

[666] The China Law Society has discontinued hosting the FOCAC legal forum owing to budget constrains. Despite this, it is not an indication of lack of appetite for the forum. The law society continues to host China Africa law exchange programs and conferences, inviting African law scholars and lawmakers to attend.
[667] UNCTAD, 'Historical Trend in Special Economic Zones' [2019] Special Economic Zones 80.

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fiscal benefits for exporters. The best-known first European SEZ was established in 1959 at Shannon Airport in Ireland. The free zone was a tremendous success and was subsequently copied by other countries. According to the International Labour Organization, many new zones have been set up since, and by 1986 there were 176 zones in 47 countries. In 2019, UNCTAD estimated that there were 5400 SEZs globally, more than half of which were established in China. More than 80 years since their establishment, SEZs yield mixed results sustaining debates about their continued use as instruments for economic development. There has been notable success in Asia, while Africa has registered more disappointments.

The SEZ provides a regulatory regime for businesses and investors, distinct from what typically applies in the broader national or subnational economy in which they are established.[668] China used SEZs as a policy lab or a regulatory sandbox to test its opening up policy. China continues to use the same strategy to attract and reform regulations for FDI and test policymaking in foreign zones, as is the case of Chinese-owned SEZs in Africa.[669] While special regulations are set by local governments in partnership with Chinese partners for these zones, they can generate spillovers outside the zone. Governments can promote policy influence through soft policies.[670] These impacts can be in the form of procurement, labour practices and environmental practices in the local economy.

In 2006, the Chinese government announced it would establish up to 50 overseas economic and trade cooperation zones. The plan was part of the implementation of its eleventh five-year plan.[671] In the same year, during FOCAC, President Hu Jin Tao announced that China would set up SEZs in Africa. This was done to encourage Chinese investors in Africa.

China used Shenzhen as a selling proposition case study.[672] Wathuti's thesis analysis identifies two legal framework aspects that significantly contributed to the failure of the China–Kenya SEZ,

[668] ibid.
[669] A study by Wang documents that the first four SEZs in China (Shenzhen, Zhuhai, Shantou, and Xiamen) accounted for around 60% of all FDI flows during the years that followed their establishment. SEE Matei Alexianu and others, 'Doing Special Economic Zones Right: A Policy Framework' (2019), available at <https://www.theigc.org/wp-content/uploads/2019/11/WEB_SEZ-synthesis-paper-2019.pdf>.
[670] ibid.
[671] Thomas Farole and Lotta Moberg, *Special Economic Zones in Africa* (2017).
[672] Gacembui Tabitha Wathuti, 'An Analysis of The Legislative Framework Governing Special Economic Zones in Kenya.' (2019).

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non-implementation of the law and failure to address pivotal issues.[673] The gaps in the framework needed to be addressed for the projects to succeed and to adopt the China SEZ as part of an economic vision for 2030 for Kenya.[674] This situation applies to most China–Africa SEZs. This section reviews common legal issues the legal framework has failed to deal with as a consequence of Chinese legal practices in the SEZs.

China has a model and legal framework for establishing overseas and economic and commercial cooperation zones (OECCZs). China's objective is to protect its interests without considering the host country's needs.[675] Lin Yifu, a renowned China economist and former World Bank senior vice President defines the establishment of OECCZs as 'building a nest for the Phoenix.' Theraux interprets the phoenix in this statement as representing China; therefore, China is creating a new China model for developing countries.

The OECCZ was created when Chinese officials realised that the China SEZ model could not be simply transplanted into Africa. The difference between an SEZ and China's OECCZ is that SEZs are created by a domestic government incentivising overseas investors to invest in its domestic economy. What China has created in Africa is different. China's OECCZs are industrial zones created by a foreign government (China) in another country's territory to encourage and accommodate Chinese companies. The Chinese government, therefore, sets the terms for financial and legal incentives for the companies. The Chinese companies are de-facto subject to Chinese law.[676] The OECCZs are to be established by the Chinese government. They were created by a Chinese company appointed by the Chinese government.[677] The objective of creating OECCZs is to promote China's going out policy.

In 2017, China had 99 overseas SEZs, thirteen of which were state-level OECCZs. The state-level zones will more likely represent state interests and the Chinese legal culture and framework guiding FDI in Africa. Four of the thirteen zones were located in Africa. Initially, there were six in Egypt, Mauritius, Nigeria (two zones), Ethiopia, Zambia, and Egypt (Table 11). In all, there are

[673] ibid.
[674] ibid.
[675] Thierry Pairault, 'China in Africa : Phoenix Nests VersusThierry Pairault'.
[676] ibid.
[677] *China's National Security : Endangering Hong Kong's Rule of Law?*, edited by Cora Chan, and Londras, Fiona de, Bloomsbury Publishing Plc, 2020. ProQuest Ebook Central, available at https://ebookcentral.proquest.com/lib/uoct/detail.action?docID=6129584.

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25 Chinese SEZs in Africa. However, for the purposes of this research, the focus is at the macro level, and therefore the study is limited to the state-level zones.[678]

Table 11 China's state-level SEZs in Africa

Country	Legal challenges and incentives	Strategic importance and profile
Ethiopia	Displaced landowners and farmers without proper compensation	Jiangsu Oriental Industrial Park Djibouti's pilot free zone and economic transformation: towards a new structural economy.
Zambia	Weak labour protection issues	Nonferrous Metal Mining Group Industrial Zones Zambia–China cooperation zone http://zccz.cnmc.com.cn/indexen.jsp The first economic and trade cooperation zone was established by China in Africa. Interest: mining manufacturing for Zambia. Copper reserves. The project was delayed by the legal framework that existed in Zambia at the time. Zambian Development Agency Act, No 11 of 2006, paved the way for the commencement of this project. The Zambia–China cooperation zone became the first multi-facility economic zone for Zambia and the first economic and trade cooperation zone for China in Africa.
Algeria	Procurement	Failed
Egypt	Contract clarity Parallel administrative structures	Tianjin TEDA Suez Economic and Trade Zone The Special Economic Zone is established to propel the construction of the China-Egypt Teda Suez Economic and Cooperation. Considered an early achievement of the BRI. Core Business in Construction and real estate development. http://www.setc-zone.com/eng/
Nigeria	Labour riots	Lekki Special Economic Zones (LFTZ) and Ogun Guangdong Free Trade Zone (OGFTZ) both set up for multi-sector manufacturing http://www.calekki.com/col/col19607/index.html
Mauritius	Environmental law	Jinfei Economic and Trade Cooperation Zone Established as a coastal trading hub Focus on Products processing

Source: OECCZs certified by MOFCOM[679] and UNDP [680]

Note: Adapted from António, Nelson Santos Ma, Shaozhuang China s special economic zone in Africa: context, motivations and progress.[681]

[678] Available at http://www.cccme.org.cn/cp/cooperation/zones.aspx.

[679] Salah El-rashidy, 'The Role of China ' s Overseas Special Economic Zones in Economic Development' (2016).
[680] UNDP (n 154).
[681] Nelson Santos António and Shaozhuang Ma, 'CHINA' S SPECIAL ECONOMIC ZONE IN AFRICA: CONTEXT , MOTIVATIONS AND PROGRESS' (2015) 25 Euro Asia Journal of Management 79.

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Although FDI, when received through overseas SEZs, was good for developing the countries in which they were established, without a regulatory framework to guarantee the essential domestic spillovers[682], the SEZ lacked sustainable economic impact on the ground. Chinese companies that were established inside SEZs failed to comply with local laws; therefore, a unique regulatory framework is required as a joint effort between Africa and China. The regulatory guidelines and contract should include the transfer of skills and technology and the integration of the domestic private sector into these large-scale investment programmes.

5.5.1 Common legal issues

Legal challenges arise between Chinese companies established in the SEZs because the enterprises are incorporated into African states. Still, they receive financial and political support from MOFCOM in China. Since the companies operate inside the SEZ, they can circumvent local laws. In Egypt, companies in the SEZs can use flexible labour regulations, which allow Chinese companies to use contract labour and simplify the termination of employees rather than follow employment contracts.

Establishing Chinese SEZs on the continent has revealed weaknesses in the regulatory policy of African nations. Governments establish SEZs for four specific reasons: (i) to attract FDI; (ii) to serve as a 'pressure valve' to alleviate large-scale unemployment; (iii) to support a broader economic reform strategy; and (iv) to act as experimental policy laboratories for the application of new policies and approaches. The China–Africa SEZs have only succeeded at facilitating investment, but they are still lagging behind on large-scale employment and creating broader economic reforms. However, for China, the state SEZs have allowed China to test policies and approaches towards OFDI regulations and support for the going out policy. The experience of Chinese overseas SEZs suggests that policymakers need to rethink how to conceptualise the relationship between foreign SEZs and the host country's regulatory environment.

The SEZs are set up to prepare an optimal market accommodating Chinese investors.[9] China could, therefore, undermine the host country's interest and undermine the regulatory environment. Chinese companies investing in China-owned overseas special economic zones (OSEZ) are de facto subject to Chinese law and are mainly interested in aligning with CPC interests. The policies

[682] The essential domestic spillovers include job creation , infrastructure, technology transfer , increased procurement from local suppliers and foreign investment,

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and incentives offered by Chinese MOFCOM in China are invisible to or understudied by African governments. While Chinese companies investing and operating in OSEZ are expected to comply with local regulations, they still prioritise Chinese rules and interests. As a result, Chinese investors face struggles with regard to compliance with local laws. The challenge for Africa–China relations is to minimise these expectation gaps for local policymakers and Chinese investors.

5.6 Lessons from the China model

Due to its special investment structure, the SEZ often develops the agility and responsiveness needed to eliminate other procedural inefficiencies while avoiding red tape. But even though China's experience has ushered in quick industrial development, there have been some difficulties for the Chinese government in their SEZs, such as people being displaced, environmental damage, and social problems.

5.6.1 The Shenzhen experience

Promotion of China–Africa's SEZs is informed by China's successful path from establishing four SEZs in Shenzhen, Shantou. African leaders used the Chinese SEZ as justification to develop SEZs in their countries. However, a more comprehensive review of China's SEZ is vital for African countries to gauge the China–Africa SEZ FOCAC action plans and local policies accurately.

SEZs have been an enormous success in China, and they are regarded as the best tool for economic growth worldwide. However, Gopalakrishnan aptly points out that this impression could be incomplete and incorrect.[683] The establishment of SEZs in China has brought about social and economic challenges. Numerous development inequities usually omitted in this narrative were identified, including loss of land by local communities, real estate bubbles, and worker violence.[684]

The SEZs were first established to protect the Chinese economy from foreign influence and from the disruptive effects of capitalism. However, initially, the SEZ attracted an influx of illegal goods, forex shortages, and inflation which impacted local society with displacements and losses

[683] Shankar Gopalakrishnan, 'Negative Aspects of Special Economic Zones in China' (2007) 42 Economic and Political Weekly 1492.
[684] ibid.

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to local farmers. The CPC had to put a moratorium on the zones to halt these negative trends. These are similar actions that African countries need to consider.

The key difference between China and the African states is ownership, in that the Chinese government has retained ownership of the land and the SEZs. Also, the establishment of the SEZ in China resulted from the push from Hong Kong and Macau, where there was a strong investment and trade drive, unlike the situation in Africa, where Chinese investors needed to be coerced by government orders and incentives.

5.6.2 The Asian experience of the China model

In this Chapter, the study establishes that China took a non-conventional approach to legal transplant and challenged the common path for legal transplant theories discussed in Chapter 3. The research also demonstrates that China's approach to FDI moved from restrictive to regulatory to encouraged. In each state, China issues regulatory measures to achieve the state's objectives before applying them broadly. Then in 2000, China launched the going out policy. Its process followed the same approach used in regulating inbound FDI. When China opened up in 1979, regulations were issued to contain and manage any risks that FDI might present to the CPC's interests. China approached OFDI with the same caution, following the strategy it applied in developing regulations for inbound FDI as it did for OFDI. To test the inbound FDI policies, China established SEZs as a policy test bed. The present Chapter discussed the concept of China's SEZ and some of the legal lessons in the SEZ.

The study examines how China exports its regulatory model to other developing countries. The next session specifical looks at China's neighbours in Asia as a proxy. Asian nations with a shared culture, history, and legal systems are more likely to engage in legal transplants, according to the first-order legal transplant. To encourage investment, China has taken a proactive role in the legalisation of transplants in SEZs. This offers a useful case study of how China has used the law to encourage inbound FDI and regulated outbound FDI.

From historical experience, Asia serves as a test bed to gauge the effects of China's influence as a law exporter. The Asian experience presents a good test for the second-order transplant. China has been exporting its regulatory model to its neighbouring countries in Asia for a number of years.

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This has been particularly evident in Cambodia and Vietnam, where China has been working closely with the countries to develop new laws and new regulations.

One example of this can be seen in the area of intellectual property law. China has been working with Both Cambodia and Vietnam to develop new laws and regulations to protect property right. This included the establishment of specialised intellectual property courts, as well as the development of laws and regulations to combat counterfeiting. Another area is in the area of trade law. Asian countries have entered into free trade agreements with China, which have resulted in the adoption of many Chinese laws and regulations related to trade and investment. This has included the adoption of Chinese intellectual property, competition, and consumer protection, as well as the establishment of an arbitration mechanism to resolve disputes. China has tried to directly transplant some of its laws to neighbouring countries with mixed results.

5.6.2.1 China-Vietnam legal transplants

In the 1980s, Vietnam began to open up its economy to foreign investment and sought to establish a legal framework to govern these transactions. In order to do so, Vietnam looked to China, which had already developed a sophisticated legal system for foreign investment. China also provided investment, support and technical assistance and funding to key projects in Vietnam at the time. China As a result, Vietnam adopted many of the same laws and regulations that China had put in place, including the Foreign Investment Law, the Company Law, and the Law on Enterprises with Foreign Investment. These laws have played a crucial role in attracting foreign investment to Vietnam and have helped to create a stable and predictable business environment.

Another area where Vietnam has transplanted Chinese laws is in the realm of intellectual property. In the past, Vietnam had very weak intellectual property protections, making it difficult for foreign companies to protect their patents, trademarks, and other intellectual property rights. However, in recent years, Vietnam has made significant efforts to strengthen its intellectual property laws, largely by adopting many of the same laws and regulations that are in place in China. This includes the Law on Intellectual Property, the Law on the Protection of Consumers' Rights and Interests, and the Law on Competition and Environment. These laws have helped to create a more level playing field for foreign companies operating in Vietnam and have contributed to the country's economic development. A more recent exercise of transplant is linked to Vietnam’s cyber security

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law. The exercise followed after China held a training session for Vietnamese officials.[685] A new cybersecurity law was introduced in Vietnam, closely aligned with Chinese law.

In addition to adopting Chinese laws, Vietnam has also sought to replicate China's regulatory institutions. For example, Vietnam has established a number of regulatory agencies that are modelled after their counterparts in China, such as the State Administration for Market Regulation and the National Intellectual Property Administration. These agencies play a crucial role in enforcing Vietnam's regulatory framework and ensuring compliance with the laws and regulations that have been transplanted from China.

Overall, China has played a significant role in shaping Vietnam's legal and regulatory systems. By exporting its regulatory model to Vietnam, China has helped to create a more stable and predictable business environment in the country, which has, in turn, contributed to Vietnam's economic development. However, the process has not been without challenges. The study on the transplant of the China SEZ model to the Vietnam bill argued that even though China and Vietnam share a common history, culture and ideology, the legal transplant failed, even though Vietnam appreciates the China SEZ model.[686] The study argues that in the near future, the prospect of second-order legal transplants between China and Vietnam will face challenges owing to China's national brand in Vietnam. Erie concludes that China lacks the prerequisite experience to transplant its laws in the near future and would need to integrate its legal system first.[687]

5.6.2.2 China-Cambodia legal transplant

Beijing's closest ally in Southeast Asia is still most likely Cambodia. Relations between China and Cambodia have existed since the days of the Khmer Empire and have persisted through the establishment of formal diplomatic ties in 1958. China has backed Cambodia in power, even during the Hun Sen coup, in a manner similar to its support for rogue leaders in Africa. Despite

[685] A number of countries have south capacity building training for law enforcement from China . they include : The countries that have sought training from Chinese officials stretch from Asia to South America, from Africa to the Middle East and into Eastern Europe. They include: Bangladesh, Cambodia, India, Indonesia, Myanmar, Pakistan, the Philippines, Singapore, Sri Lanka, Thailand, Vietnam, Belarus, Georgia, Russia, Brazil, Venezuela, Egypt, Iran, Jordan, Lebanon, Libya, Morocco, Saudi Arabia, Syria, United Arab Emirates, Angola, Ethiopia, The Gambia, Kenya, Malawi, Nigeria, Rwanda, South Africa, Sudan, Zambia, Zimbabwe. Lindsey Ford Extending the long arm of the Law

[686] Matthew Steven Erie, 'Chinese Law and Development' (2020) 51 SSRN Electronic Journal 1.

[687] Matthew S Erie and Do Hai Ha, 'Law and Development Minus Legal Transplants: The Example of China in Vietnam' [2021] Asian Journal of Law and Society 1 <https://www.cambridge.org/core/article/law-and-development-minus-legal-transplants-the-example-of-china-in-vietnam/1897C52825F6B29B88C17D6360C18EF4>.

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Hun Sen's animosity toward China in 1988, China continued to support Hun Sen, and he eventually changed his stance when he realised that China has strategic economic value.[688] Even though the international community denounced Hun Sen's actions and isolated Cambodia, China has continued to support him and helped Cambodia with its judicial reforms in 2016, contributing money, training, and expertise.[689] The independent Cambodian Centre expressed concern that China was ineligible for aid and that its lack of judicial independence could exacerbate an already dire situation.

In addition to being a source of minerals and energy for China's own development, China saw Cambodia as a helpful ally in defending its sovereignty claims against neighbouring Southeast Asian nations. China has benefitted politically from its expanding influence in Cambodia by applying pressure and offering inducements on sensitive issues that are thought to threaten its sovereignty. Despite international outrage, Cambodia has reached agreements with China on issues involving the return of prisoners of war and disputes over territory in the South China Sea.

China is believed to exert influence over the Cambodian government through its FDI in the country. Cambodia is taking precautions to maintain a balance in its relations with world powers as a risk mitigation strategy and to limit its exposure. Along with working with the US, Cambodia is also receiving military instruction and legal technical support. In contrast to some other East Asian nations, Cambodia continues to support China in order to generate economic interest.

Cambodia shares a border with China and is considerably smaller than most African nations. Owing to its proximity to China, Cambodia is more likely than Africa to be influenced by China. The close proximity also implies that Cambodia and China have a long history of interaction. Owing to their proximity, scholars in Cambodia are more familiar with the concept of studying Chinese law than scholars in Africa. Additionally, compared to many African governments, the Cambodian government has generally been more open to Chinese assistance.

5.6.2.3 *China-Asia legal transplant Risks and benefits*

The practice of borrowing laws from China by other developing nations is becoming increasingly prevalent. Some scholars argue that borrowing laws allows countries to rapidly modernise a

[688] Prashanth Parameswaran 'China and Cambodia: With Friends Like These....'' (2013) 13 *China Brief*.
[689] Prak Chan Thul, 'China Agrees to Help Cambodia Overhaul Its Criticized Judiciary' (*Reuters*).

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country's legal systems and institutions to adapt to the changing global economic landscape. In the case of China elevated many out of poverty in a miraculously brief period. The process of direct transplant of Chinese law by developing countries has raised many concerns. As Matthew Erie points out that China's legal system is still young and needs to integrate and be stress-tested. Secondly, the process may raise questions about developing nations like Vietnam, Cambodia and African countries' sovereignty and the extent to which this might enable asymmetric power with China. In addition, these developing nations need to carefully consider the implication of China's regulatory model and to ensure that it is consistent with their national and continental interests.

Taking consideration of China's regulatory model required understanding China's legal tradition and its current ambition. Historically China has a distinct legal tradition with roots in Confucianism and legalism, which may not be fully understood or appreciated by lawmakers and judges in other countries. This can lead to confusion and inconsistency in the interpretation and implementation of the borrowed laws, which can have grave consequences for the rule of law and the protection of individual rights. Chapter six illustrates this by discussing the use, interpretation, and adoption of the cyber sovereignty doctrine by African states.

5.7 Chapter conclusion

This Chapter demonstrates how the reform of investment laws affects both China and Africa. The text considers how international law affected African laws prior to, during, and after colonialism. As a result, African nations now have a variety of legal systems that combine African and former colonial legal systems, resulting in pluralistic legal systems.

The third section of this Chapter traces the process in which China's new development, which aims to increase geopolitical influence, will affect Africa's legal developments. China, however, employs more soft power to persuade African nations to adopt its development model than other developing countries. Multilateral cooperation has been established by China to promote economic growth in developing countries. In order to assess how China promotes an alternative legal system outside the international multiform, the Chapter examines legal cooperation at the macro level between the Chinese government and African states under the BRI, FOCAC, and BRICS. China

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prioritises economic cooperation under each multilateral agreement to expedite development that will follow the China model and engages in cultural and legal cooperation as a soft power tool.[690]

This study examines the impact that Chinese capital export has had on the continent's cyber sector at a micro level in the following Chapter. From case studies in the cyber sector on investments as identified in the FOCAC action plan, more specific legal opportunities and challenges are drawn in order to assess how they specifically affect the African economy and regulatory developments. The creation of jobs, local businesses, and environmental protection are among the topics of research and media coverage regarding the effects of Chinese investments. Furthermore, Chapter 6 examines civil interests and lawmaking in the cyber sector as a result of Chinese investment funding, training, and support. Finally, policy and regulatory reforms will be recommended to create a supporting legal framework to ensure that Chinese investments will have a positive impact on sustainable development.

[690] Zhang Weiwei, 'The Allure of the Chinese Model' *The New York Times* (2006) 4, available at <http://www.sinoptic.ch/textes/articles/2006/20061102_zhang.weiwei_chinese.model-en.pdf>.

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Chapter 6 CYBER SOVEREIGNTY

6.1 Introduction

Africa and China have entered into treaties and legal cooperation agreements that seek to reconcile their legal systems and define their cooperation objectives to harmonise economic relations. African countries and China are considered developing economies, and it seems appropriate for them to produce legal systems that consider their developing needs. However, in view of China's economic power in relation to the African states, it is highly possible that an asymmetrical transplant will take place which is biased towards China's legal system and geared only to serve Chinese interests. This Chapter discusses the legal aspects of Chinese investments in Africa to analyse how China has affected the regulatory environment on the continent directly or indirectly. The Chapter analyses cyber laws, a new area of legal development which did not exist during the colonial era. The study identifies core China ideologies on cyber laws and the way in which ICT investments influence African cyber policy, laws, and regulations.

In contrast to other areas of legal development and cooperation, cyber laws govern an area of human development that is new, forward-looking, and constantly reforming. Many countries are still developing their cyber laws and regulations. Internationally there is no standard definition or regulatory framework for cyber law. However, the need to combat cyber terrorism and to effect e-commerce transactions has necessitated international collaboration. The collaboration has, in turn, led to the drive to establish harmonious international standards. In the absence of a standard global definition of cyber, the broad definition by Western standards of cyberspace applies. The various industry reports encompass all things related to ICT with security as emphasis.[691] For this reason, legal concepts in this analysis are broad, covering various aspects of cyber regulation; However, the focus is on data protection.

6.2 Building international cooperation

A new Chapter in human technology has created a unique resource of production: data. Cyber development creates new commodities, locations of trade and other resources that affect all

[691] See Stevens 2016.

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humanity in all industries.[692] Data has become a new valuable resource generated by people, prompting the phrase: 'Data is the new oil', with an associated core question from government and companies being: 'How do we drill it?'[693] New ideologies have been developing to protect humanity in this new era and support the growing international e-commerce. Developing economies have been slowly creating new policies, laws, and regulations for their domestic and international markets.

Economies that are faster at developing ICT sectors are at the forefront of influencing global platforms brought in by cyber developments. Nonetheless, developing countries, with their large consumer market and high number of internet users, have an opportunity to develop legislation that supports their agenda. With the lagging ICT development on the continent, Africa does not have sufficient power to influence global development in cyber law. In addition to the asymmetric power between the continent and other economies, the West and China are contending for the influencer position on cyber developments in Africa. There is a considerable drive to sway African leaders to support a specific cyber law ideology to either retain hegemony or reverse it.

Cyber development has increased the number of international transactions and blurred the lines on cyber jurisdiction, increasing the need for domestic and international law. All countries face the same threat of cyber security, which includes cyber terrorism and commercial fraud. Cyber activities and threats transcend geopolitical borders.[694] A less splintered global cyber legal landscape is required to provide increased security between countries. Increased cooperation between countries and legal borrowing from each other is essential for improving institutional capacity for cyber governance and providing legal guarantees for digital economies. In this new era of human development, previous conditions of legal transplants no longer apply. No country

[692] Marko Javornik, Nives Nadoh and Dustin Lange, 'Data Is the New Oil How Data Will Fuel the Transportation Industry — The Airline Industry as an Example' 295.
[693] Therese Fauerbach, 'More Valuable than Oil, Data Reigns in Today's Data Economy' [2019] The NorthridgeGroup <https://www.northridgegroup.com/blog/more-valuable-than-oil-data-reigns-in-todays-data-economy/>; Sam Jossen, 'The World's Most Valuable Resource Is No Longer Oil, but Data (2017) 423 The Economist 5 <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data>.
ibid; Marko Javornik, Nives Nadoh and Dustin Lange, 'Data Is the New Oil How Data Will Fuel the Transportation Industry — The Airline Industry as an Example' 295.Paul Olivier, 'If Data Is The New Oil, When Is The Extraction of Value From Data Unjust?' (2017) 7 137.
[694] Pardis Moslemzadeh Tehrani and Nazura Abdul Manap, 'A Rational Jurisdiction for Cyber Terrorism' (2013) 29 Computer Law & Security Review 689.

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has the prestige or long-standing expertise in this area.[695] Most constitutions make provisions for privacy protection at the domestic level without a specific cyber law. At the same time, cybersecurity provides clarity and depth on privacy rules and safety. Without strong telecommunication and regulatory environments on the African continent, economic development in telecommunication, e-commerce, and the Internet of Things (IoT) will lag in cyber law development and governance.

To date, major economies have developed cyber governance regimes with the determination to make their regime a global model. As a result, three notable approaches and/or models influencing Africa have emerged. The United States has a multistakeholder approach; Europe has the European Union's General Data Protection Regulation (GDPR), and China initiated the cyber sovereignty approach as a developing country. From an Asian perspective, cyber sovereignty differs from cyber security in that it focuses more on information and content on the internet. Asian countries like China have focused particularly on internet infrastructure and processes.[696] Section 6.2 looks at state regulation over the internet, which can also be referred to as internet governance. The Tunis Agenda[697] defines internet governance as

> the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet.

Section 6.3 conducts a brief comparative analysis of the American model, the European framework, the Chinese ideology, and the African model; However, due to the study's limited scope, a deeper review focuses only on China–Africa. The section further reviews Africa's state of cyber law development and the model African counties have adopted. In conclusion, Chinese investments in Africa and their correlation with legal cooperation in Africa are discussed.

[695] 'By Chance and Prestige : Legal Transplants in Russia and Eastern Europe Author (s): Gianmaria Ajani Source : The American Journal of Comparative Law, Vol . 43, No . 1 (Winter, 1995), Pp. 93- Stable URL : Http://Www.Jstor.Org/Stable/840578 By Chance (2018) 43 93.
[696] Niels Nagelhus Schia and Lars Gjesvik, 'China's Cyber Sovereignty' 1 <http://www.jstor.com/stable/resrep07952>.
[697] Tunis Agenda for the Information Society. UN Document: WSIS-05/TUNIS/ DOC/6(Rev.1)-E, November 18, 2005

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6.3 Cyber governance regimes

Krasner argues that in the early days of internet development, the regime concept was rarely applied to cyber domains.[698] However, governance has been a critical aspect of the cyber domain for a short period. The fight for leadership in the cyber sphere has dominated the West and China over cyber developments in Africa. Both sides want more control and access to Africa's data. In today's data economy, raw data from Africa is essentially more valuable than extracting raw resources.[699] Historically those who controlled oil controlled the global economy.[700] With international travel slowing down and concerns over Covid-19 statistics and impact, the oil demand reduced as data became more in demand.

The value of data has been amplified as the world faced the Covid-19 pandemic.[701] International lockdowns and quarantines moved global masses and businesses from offline activities to online. Governments and non-state participants have used this opportunity to shape and control narratives using access to data information.[702] In the new data economy, whoever controls data, controls the global economy.[703]

The United States, the European Union and China have a shared ambition to become global leaders in cybersecurity's next phase of human development. They all have Africa as a common target for influence and supporting partners. A global cyber security regime has not yet developed, leaving room for each state to try and export its model in various forms.[704] All three have used private sector investments to influence Africa. However, they have had varying degrees of policy influence. Developments in the United States during former President Trump's office led to a more

[698] Krasner defined regimes as 'principles, norms, rules and procedures that govern issue areas in international affairs', Stephen D Krasner (ed), *International Regimes* (Cornell University Press 1983); cited in Joseph S Nye, 'The Regime Complex for Managing Global Cyber Activities' [2014] CIGI Publications 1.
[699] Jossen (n 693).
[700] Ian Bremmer, 'State Capitalism Comes of Age-the End of the Free Market' (2009) 88 Foreign Aff. 40.
[701] Tomiwa Ilori, 'Data Protection in Africa and the COVID-19 Pandemic : Old Problems , New Challenges and Multistakeholder Solutions' (*Africaninternetrights.org*, 15 June 2020) 1 <https://africaninternetrights.org/en/updates/data-protection-africa-and-covid-19-pandemic-old-problems-new-challenges-and> accessed 29 January 2023.
[702] Freedom House, 'The Pandemic's Digital Shadow' [2020] Freedom on the Net 7 <https://freedomhouse.org/report/freedom-net/2020/pandemics-digital-shadow>.
[703] Fauerbach (n 693).
[704] Laura DeNardis *The Global War for Internet Governance* (2014); Milton L Mueller *Networks and States: The Global Politics of Internet Governance* (2010); Nye, supra n 642; cited in Jinghan Zeng, Tim Stevens & Yaru Chen 'China's Solution to Global Cyber Governance: Unpacking the Domestic Discourse of 'Internet Sovereignty'' (2017) 45 *Politics and Policy* 432–64.

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distant approach to policy support.[705] Europe has balanced support and private sector developments, offering aid and investments by different stakeholders. China has provided aid in social infrastructure projects and private sector investments but recently has also offered policy development assistance.

6.3.1 United States multistakeholder approach

The traditional model of internet governance has been dubbed the multistakeholder partnership approach. This governance model involves participation by all stakeholders, which includes governments, civil society, the academic community, the technical community, and all users in shaping the evolution of cyberspace and internet use. The multistakeholder partnership approach emerged as a new concept during the World Summit of the Information Society. The American government endorsed this model in 2011 and 2012, respectively, in the White House's international strategy for cyber governance.[706] The International Telecommunications Union also recognised this model as a framework for global governance.[707]

Although there is no standard definition of multistakeholder governance, it can be defined as a model that allows equal participation and consensus-based discussion to handle any questions. The process is based on the principles of transparency and accountability as described by Lawrence E. Strickling, the US Department of Commerce Administrator:[708]

> The multistakeholder model of Internet governance is the best mechanism for maintaining an open, resilient, and secure Internet because, among other things, it is informed by a broad foundation of interested parties including businesses, technical experts, civil society, and governments arriving at consensus through a bottom-up process regarding policies affecting the underlying functioning of the Internet domain system.

The model is seen as a private sector-led cyber regime supported by various stakeholders. The Corporation for Assigned Names and Numbers (ICANN) has supported the growth of internet governance and described itself as a multistakeholder.[709] After the global multistakeholder Meeting of the Future, most governments supported the multistakeholder governance model,

[705] Roxana Radu, *Negotiating Internet Governance* (Oxford University Press UK 2019).
[706] John E Savage and Bruce W McConnell, 'Exploring Multi-Stakeholder Internet Governance' [2015] Brown University Bruce W. McConnell, EastWest Institute. https://www. ngo/sites/default/files/Exploring% 20Multi-Stakeholder% 20Internet% 20Governance_0. pdf.
[707] ibid.
[708] ibid.
[709] ibid.

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excluding China, India, Russia, and other developing nations.[710] From the beginning, China preferred the United Nations-led model, which leans towards government sovereignty and extends towards internet sovereignty. Although some scholars have agreed that there is no universal approach or a unified institutional custodian of the concept, the sovereignty versus multistakeholder dichotomy currently exists.[711] Raymond and Denaris even go as far as declaring 'multistakeholdersim' a buzzword rather than an institutional norm. Both concepts are complex and cannot be limited to a binary definition. However, to date, Raymond and Denaris help to frame opposing arguments in the governance regime approach from the West versus developing nations. Multistakeholderism is a concept commonly used in political circles. For the purposes and scope of this research, the broad concept is applied with the acceptance that there are several types of multistakeholderism. The main short-comings of multistakeholderism are its inability to cater to all stakeholder's interests. Therefore, stakeholders engage in forum shopping.[712]

6.3.2 European Union's General Data Protection Regulation (GDPR)

As a regional bloc, the European Union enforced the GDPR in May 2018. This regulation was introduced to govern privacy and data transfer and protect European citizens' privacy. The regulation harmonised standards between member states and was also promoted beyond the Union's borders, with many global south countries adopting similar legislation to the GDPR and so complying with the European standards.[713]

The adoption is also being spearheaded in Africa, which some scholars believe is another initiative to gain more control in the continent.[714] Radu maintains that while the GDPR allows member states to adjust specific parameters to fit their local parameters, it remains a centrally controlled regulation by the European Union with an extraterritorial effect. Greze, a law scholar, questions the global enforceability of the GDPR due to the European Union's physical location of

[710] ibid.
[711] Mark Raymond and Laura Denardis, 'Multistakeholderism: Anatomy of an Inchoate Global Institution' (2015) 7 International Theory 572.
[712] and Emily Taylor Stacie Hoffmann, Dominique Lazanski, 'Standardising the Splinternet: How China's Technical Standards Could Fragment the Internet' (2020) 5 Journal of Cyber Policy <https://oxil.uk/publications/2020-08-29-standardising-the-splinternet/Standardising the splinternet how China s technical standards could fragment the internet.pdf>.
[713] Radu (n 705).
[714] David Fischer, 'A Digital Scramble for Africa' (2006).

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establishment or object.[715] Greze argues that article (3)2 of the GDPR fails to address the issue of enforcement. Despite this limitation, the GDPR has proved more influential in third-world countries than the American stakeholder model. More countries in the global south are borrowing the GDPR principles for their domestic laws to deal with problems such as data privacy.[716] China, however, has not directly transplanted the GDPR, similar to the way in which other Chinese laws were reformed to comply with or borrow from international laws. China has infused its own Chinese characteristics into cyber laws, culminating in a third alternative for China's cyber sovereignty.[717]

6.3.3 China's cyber sovereignty

China has implemented various cyber policies, laws and regulations to govern cyberspace activities within its borders. These measures aim to safeguard national security, protect user privacy, regulate online content, and promote cybersecurity.

It is generally assumed that China introduced the concept of sovereignty in cyberspace governance; Zeng et al. argue that others developed it in multilateral platforms to reverse the United States hegemony. They point to the Tallinn Manual as a Nato-sponsored study that recognised cyber sovereignty over domestic cyber infrastructure. Regardless of its origin of sponsorship, China champions cyber sovereignty as its normative position on cyber governance. Here are some key policies, laws, and regulations related to cybersecurity in China:

1. Cybersecurity Law (CSL): The Cybersecurity Law, implemented in June 2017, is a comprehensive legislation governing cybersecurity in China. It applies to all network operators, defined broadly to include organisations and individuals that own, administer, or use networks. The law focuses on protecting critical information infrastructure, regulating data protection and cross-border data transfers, and establishing security management systems.

[715] The location factor differentiated between the geographical location of processing versus where the effect of the processing was felt. Benjamin Greze, 'The Extra-Territorial Enforcement of the GDPR: A Genuine Issue and the Quest for Alternatives' (2019) 9 International Data Privacy Law 109.
[716] Emmanuel Pernot-Leplay, 'China's Approach on Data Privacy Law: A Third Way Between the U.S. and the E.U.?' (2020) 8 Penn State Journal of Law & International Affairs 49.
[717] ibid.

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2. Data Localisation: The CSL requires critical information infrastructure operators (CIIOs) to store personal data and important business data gathered within China on domestic servers. CIIOs are required to undergo security assessments for cross-border data transfers.

3. National Intelligence Law (NIL): Implemented in 2017, the National Intelligence Law provides a legal framework for intelligence gathering and national security in China. It grants intelligence agencies broad authority to access and collect information from various sources, including cyberspace.

5. Multi-Level Protection Scheme (MLPS): The MLPS is a security framework established by the Chinese government to classify and protect information systems based on their importance and potential risks. It outlines different protection levels and corresponding security measures that organisations must implement based on their classification.

6. Internet Content Regulations: China has strict regulations on online content and activities. The government employs various mechanisms, including the Great Firewall, to control and censor internet content. The regulations prohibit the dissemination of information deemed to be harmful to national security, social stability, or public order.

7. National Encryption Law: China's National Encryption Law, implemented in 2020, regulates the use, development, production, and management of encryption technologies and products. It requires network operators to provide technical support and assistance to authorities in decrypting information under certain circumstances.

8. Personal Information Protection Law (PIPL): The PIPL is a comprehensive law passed in August 2021 that governs the collection, use, storage, and transfer of personal information in China. It establishes rules for consent, data minimisation, and data subject rights and imposes obligations on data controllers and processors.

9. Social Credit System: China has been developing a social credit system that aims to assess individuals and organisations based on their behaviour and trustworthiness. While not solely focused on cybersecurity, this system includes aspects related to online activities and can impact access to certain privileges or services.

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China first publicly elaborated on its internet policy and view in 2010 with the publication of a white paper, 'The internet in China', issued by the Information Office of the State Council.[718] The concept of cyber sovereignty[719] was introduced in the International Code of Conduct on Information Security in 2011, and an updated version was issued in 2015. Additionally, the idea was explicitly mentioned in the National Security Law of the People's Republic of China, promulgated on 1 July 2015.[720] Subsequently, the concept was included in three key policy documents: Cybersecurity Law, the National Cybersecurity Strategy, and the International Strategy of Cooperation in Cyberspace.[721] Ultimately China's cybersecurity law came into effect on 1 June 2017. The Chinese government has several objectives to promote its model of cyber sovereignty, with the protection of the CPC as the ruling party being of primary importance.[722] According to the CPC, a threat to its leadership translates as a threat to the nation-state.[723]

China's internet model is economically and ideologically different from the European and Western models. Internationally, the model has been integrated into the aspects of the BRI development and investment strategy, primarily through infrastructure. BRI infrastructure projects are tailored to enhance Chinese investment and trade in BRI countries.[724] ICT investment projects also enhance the export of Chinese infrastructure, investment, equipment, and influence. President Xi Jinping has highlighted the value of China's internet model as a tool to import China's governance model. The Digital Silk Road was born out of this strategic position. This high-level

[718] Information Office of the State Council of the People's Republic of China, 'The Internet in China' (Information Office of the State Council of the People's Republic of China 2010), available at <http://english.scio.gov.cn/>.
[719] The cyber sovereignty concept was coined by Bruce Scheneier see Andrea Leiter, 'Cyber Sovereignty: A Snapshot From a Field in Motion' (2020) 61 Harvard International Law Journalsovereignty: a snapshot from a field in motion.
[720] Definition of cybersecurity in the National Chinese Law: Countries should respect each other's right to choose their path of cyber development, model of cyber regulation and Internet public policies, and participate in international cyberspace governance on an equal footing. No country should pursue cyber hegemony, interfere in other countries' internal affairs, or engage in, condone, or support cyber activities that undermine other countries' national security.
[721] Cai Cuihong, 'Global Cyber Governance: China's Contribution and Approach' (2018) 4 China Quarterly of International Strategic Studies 55.
[722] At the 2015 World Internet Conference in Wuzhen, China Xi Jinping defined cyber sovereignty as a principle by which the global community should: "respect the right of individual countries to independently choose their own path of cyber development, model of cyber regulation and Internet public policies, and participate in international cyberspace governance on an equal footing. No country should pursue cyber hegemony, interfere in other countries' internal affairs or engage in, connive at or support cyber activities that undermine other countries' national security. "Remarks by H.E. Xi Jinping President of the People's Republic of China at the Opening Ceremony of the Second World Internet Conference," Ministry of Foreign Affairs of the People's Republic of China, Wuzhen, China, December 16, 2015, available at https://www.fmprc.gov. cn/mfa_eng/wjdt_665385/zyjh_665391/t1327570.shtml.
[723] Zeng, Stevens and Chen (n 704).
[724] Ryan Gallagher, 'Export Laws: China Is Selling on Surveillance Technology to the Rest of the World' (2019) 48 Index on Censorship 35.

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intent has been repeated by Chinese leadership at various events in formal speeches and in the official paper, China Standards 2035.[725]

An underpinning comparison between China and the West is the application of internet governance and end users' rights. China's model is criticised for encroaching on users' freedom with censorship and citizen surveillance. The government seems to have incorporated invasion of private lives, infringement of freedom of expression, and limited flow of information. China does not separate cyber security from cyber sovereignty.[726] China's cyber security is propelled by cyber government sovereignty to policy.[727] ICT infrastructure has been used as a tool of government to achieve cyber sovereignty. Sacks points out with concern that China is building the most extensive governance administration for cyberspace and the ICT system in the world. The Chinese government has tried to move at equal speed to technology to regulate the internet, cyber security, and the digital economy. China's ICT has a vast global footprint; if it is a tool of China's cyber sovereignty, this could imply that China may be exporting its internet norms.

The promotion of China's cybersecurity and sovereignty has followed the typical process China takes to develop policy. It characteristically starts with a speech by a senior public official, followed by a consultative approach before taking a policy position. Through BRI, the world's largest infrastructure project, China spreads its technology under the guise of global connectivity for humankind. However, wrapped in the sharing of technology advancement is the Chinese model for cyber governance. This model includes internet governance and surveillance. China advocated for state-supervised internet and surveillance equipment in China and supported governments with the same ideologies. Domestically through the CPC leadership, internet sovereignty regulations have been easier to enforce, including requiring compliance from international companies investing in China.

As revealed in Chapter 4, the development of regulation of China's outbound FDI model mirrors China's inward FDI regulation. First, it is restrictive; then, it is expanded in policy sandboxes in the form of SEZs with gradual opening up. However, even when China opened up,

[725] China Standards 2035 Alexander Chipman Koty, 'What Is the China Standards 2035 Plan and How Will It Impact Emerging Industries?' (*China Briefing*, 2020) <https://www.china-briefing.com/news/what-is-china-standards-2035-plan-how-will-it-impact-emerging-technologies-what-is-link-made-in-china-2025-goals/>.
[726] Schia and Gjesvik (n 696).
[727] ibid.

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the government's central planning remained in critical aspects and sectors of the economy. Cyberspace seems to be a critical sector in which the Chinese government retains complete control. The thirteenth five-year plan included cybersecurity and informatisation work as paramount priorities. It was the first five-year plan under President Xi Jinping's leadership, in which ICT was allocated the highest priority and identified as a critical instrument for China's rise to global power.[728] The patterns China has followed in outbound FDI beg the question of whether China exercises or attempts to exercise control in cyberspace in its outbound investments, especially in Africa.

China's domestic population, member countries of China-driven multilateral platforms such as FOCAC, BRI, and BRICS, together with the Shanghai Cooperation Organisation, represent more than 50 per cent of internet users worldwide. These countries represent the global south with a shared concern about the United States' interference and hegemony. China argues that internet sovereignty should not be pinned to arguments about censorship for users but should rather focus on decentralising control from the United States, which houses internet infrastructure. Internet sovereignty, according to China, is the move to include other nations in the governance and development of the internet.[729] Therefore, the promotion of cyber sovereignty is intended to protect emerging economies' engagement and equal participation in cyberspace governance, which the West has traditionally led. The concept is promoted as a shared contribution by each state and joint management of critical infrastructure as outlined in Article 3 of China's document on the international cooperation strategy on cyber security. President Xi Jinping encourages the notion of 'a community of A shared Future in Cyberspace', a contribution of China's long history of values to the world, which was incorporated into a resolution of the United Nations Human Rights Council. Xi Jinping labelled China's model as 'multilateral pluralism based on cyber sovereignty.[730]

As a developing nation on a path of reform, China's interest is not limited only to equal participation as a developing nation, but as outlined in section 6 article 22-24 of the National

[728] Scott Kennedy and Christopher K Johnson, *Perfecting China, Inc.: China's 13th Five-Year Plan* (Rowman & Littlefield 2016). Cited in Yu Hong, 'Reading the 13th Five-Year Plan: Reflections on China's ICT Policy' (2017) 11 International Journal of Communication 1755.
[729] Schia and Gjesvik (n 696).
[730] Cai Cuihong, 'China and Global Cyber Governance: Main Principles and Debates' (2018) 42 Asian Perspective 647+ <https://link.gale.com/apps/doc/A561882757/AONE?u=anon~b76e06bb&sid=googleScholar&xid=7aec6dca>.

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Standardization Development Action Plan (NSD) Action Plan also seeks to lead and contribute to the global governance system.[731] The plan to lead global standards in technology is a tangible objective outlined in various policy documents, such as the strategy to reform, which is outlined in the International Strategy of Cooperation on Cyberspace of China[732] and the blueprint document China Standards 2035. The latter Chinese domestic companies implement the policy at home and on global platforms. Meanwhile, technology companies have increased their activities and become effective participants in international standards-setting forums.[733] For example, Chinese companies and institutions occupy 10 of the 57 chair and vice-chair positions at the Third Generation Partnership Programme, an international coalition of seven standards organisations working on 5G.[734] Beijing is proactively shaping international standards for emerging technologies, including blockchain, the internet of things and 5G, by securing leadership positions in international standard-setting bodies. Chinese experts have taken the lead role in the 5G group of the International Standardisation Organisation (ISO), known as 3GPP, by submitting 40 per cent of the standards and 32 per cent of the documents.[735]

The new cybersecurity law of China did not evolve from a series of reforms. Before its promulgation in June 2017, various rules and regulations were applied to manage data and privacy protection. The prior use of rules and regulations rather than policy or law indicates that China did not begin with a cohesive cyber policy. Like other laws, the new cybersecurity law has Chinese characteristics. For instance, there is no central body of authority to manage and enforce the law, and it is instead integrated into other industrial laws. The new law only applies to network operators and critical information infrastructure operators rather than to all companies in China. The companies it applies to are responsible for implementing sound security and protocols.

Through the GDPR, the European Union has been leading an international regulation regime, which is also being spearheaded in Africa to gain more control in the continent.[736] On the other hand, China has been working through Chinese mega companies to introduce the China model in

[731] National Standardization Development Outline 2021.
[732] 'International Strategy of Cooperation on Cyberspace' (Ministry of Foreign Affairs of the People's Republic of China).
[733] Adam Segal 'China's Alternative Cyber Governance Regime' (2020) *Hearing on 'A 'China Model?' Beijing's Promotion of Alternative Global Norms and Standards'* 1–8.
[734] ibid.
[735] Report Papers, Kristin Shi-Kupfer and Mareike Ohlberg, 'CHINA ' S DIGITAL RISE Challenges for Europe' (*Merics Papers on China*, 2019).
[736] Fischer (n 714).

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cyber technology. Contrary to the Western approach of conditionality with aid in infrastructure funding, China has used soft power to create a positive image of Chinese tech companies. China's ICT has been elevated to international standards, and the quality of its brands in ICT has been supported by the government. The Made in China 2025[737] policy propelled the position of Chinese mega tech companies as a preferred partner to drive technology development on the continent. This preference in Africa was further cemented by agreements in the FOCAC action plan. As a result of FOCAC's consultative approach, more African countries choose to work with Chinese ICT companies than Western companies.

However, the West has criticised China's cyber sovereignty model, mainly citing human rights and democratic access. The key concern is the influence of China's approach on Africa's democracies and society if China transplants its model. One of the priorities of China's promotion of cyber sovereignty is to protect the CPC. Sebastian Heil, a German political scientist, labelled President Xi's use of the internet to protect the party's position as 'digital Leninism'. Accordingly, China's internet sovereignty has been characterised by central planning, including media control and keeping tabs on citizens through media monitoring and censorship. China employs 1500 cyber soldiers to track citizens' private activities on super apps such as WeChat, the internet, and its new social credit system. As a result, Freedom on the Net, a report published by Freedom House[738] , which is a Washington-based think tank, ranked China as the world's worst internet abuser for six consecutive years.[739]

6.3.4 African cyber governance and reforms

African countries have varying forms of cybersecurity law or data protection law, or some form of regulation. As of 2021, only 37 African countries had passed a substantive legal provision or a draft on cybersecurity, as detailed in Table 12. Different countries are at various stages of developing their cyber security law.

[737] Made in China initiative laid out China's objective to take over as the leader in a number of critical manufacturing sectors. The sectors include advanced technology

[738] Freedom house advocates for U.S. leadership and collaboration with likeminded governments, available at https://freedomhouse.org/about-us.

[739] 'Freedom on the Net 2021' (2021).

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Table 12 Status of data protection laws in Africa 2022

Legislation status	Number	Percentage
Have legislation		52
Draft legislation	9	17
No legislation	13	24
No information	4	7
	54	100

Source: Author's own construction

At the continental level, the African Union Convention on Cyber Security and Data Protection (also referred to as the Malabo Convention) was adopted in 2014, urging member states to establish a legal framework to protect individual privacy rights online and offline. The convention contains provisions from the Budapest Convention on personal data and cybercrime but lacks provisions on international cooperation.[740] By early 2021, only eight[741] of the fifteen member states required to affect the convention had ratified the convention. Fourteen members had signed, and six deposited the convention with the AU Commission. By 2018, this slow progress had earned Africa the title of the World's Worst Committed in Cybersecurity on the International Telecommunication Union's global cybersecurity index. At the regional level, the law of the Economic Community of West African States (ECOWAS) was signed by thirteen countries, and it is the only legally binding law in the regional agreements. Many countries based their legislation on the Malabo Convention and the Budapest Convention.[742] However, some countries have amended the provisions of Chinese cyber law, as highlighted in the next section of this study. Fischer argues that the Malabo Convention has failed because it applies little pressure on foreign actors in host countries to provide appropriate legislation that protects FDI and allows investors to meet their investment goals.[743] Onuoha suggests that the African Union's top-down approach has delayed implementing and adopting governance standards.

For a variety of reasons, some countries have passed cyber protection laws without enacting the law and only have bills in place. In the absence of a law or bill on data privacy, provisions include sector-specific legislation and policies or the following of guidelines under regional

[740] Zahid Jamil, 'Comparative Analysis of the Malabo Convention of the African Union and the Budapest Convention on Cybercrime' (2016) 2 Photosynthetica 1, available at <http://link.springer.com/10.1007/978-3-319-76887-8%0Ahttp://link.springer.com/10.1007/978-3-319-93594-2%0Ahttp://dx.doi.org/10.1016/B978-0-12-409517-5.00007-3%0Ahttp://dx.doi.org/10.1016/j.jff.2015.06.018%0Ahttp://dx.doi.org/10.1038/s41559-019-0877-3%0Aht>.
[741] Angola, Ghana, Guinea, Mauritius, Mozambique, Namibia, Rwanda, and Senegal.
[742] Jamil (n 740).
[743] Fischer (n 714).

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frameworks, continental conventions, and Acts.[744] For example, Mozambique does not have a data protection law. However, the Constitution, civil code and penal code include data protection. In 2018, UNCTAD reported that 128 of 194 countries had put in place legislation for data protection, with a 55 per cent adoption rate in Africa and Asia.[745]

Only two economic regions, ECOWAS and the Southern African Development Community (SADC), have laws at the regional level, while the East African Community (EAC) is only a guiding framework. At the continental level, the African Union adopted a continent-wide convention. At the regional and continental level, the instruments providing data privacy and internet rights and freedoms have not received requisite recognition from member states, except those in the Organisation for Harmonisation of Business Law in Africa (OHADA). Wanyama, a legal officer at Collaboration in International ICT Policy, argues that the European Union's GDPR offers a better guideline for African states to collaborate at the regional and continental level for adequate data and privacy protection.[746] Currently, only a few African countries have a data protection law or bill (Table 13)

Table 13 African countries and regions with data protection laws and bills October 2021

Regional bloc / country	Legislation/regulation	Year of adoption	Legislation status	Internet privacy ranking
AU	African Union Convention on Cyber Security and Personal Data Protection: Malabo Convention	2014	Varying dates for ratification	
SADC	SADC Model Law on Data Protection	2013	Adopted	
ECOWAS	ECOWAS supplementary act a/sa.1/01/10 on personal data protection, 2010	2010 and 2011	Adopted	
EAC	EAC Legal Framework for Cyber Laws (In two parts)	2008 and 2013	Only framework	
Country level				
Angola	Law No. 22/11	2011	Adopted	24.4
Algeria	law Nr 18-07 of 25 Ramadhan 1439	2018	Pending enforcement	32.6
Benin	Code du numériqu	2009	Adopted	34.1

[744] The Gambia does not have a general data protection law; the Information Act governs the aspect of data protection. The Gambia, as a member of ECOWAS, applies the ECOWAS laws on data protection. The country is currently drafting a bill on data protection.

[745] UNCTAD, 'Data Protection and Privacy Legislation Worldwide'. (2018), available at https://unctad.org/page/data-protection-and-privacy-legislation-worldwide.

[746]Edrine Wanyama, 'What African Countries Can Learn from European Privacy Laws and Policies Https://Cipesa.Org/2017/07/What-African-Countries-Can-Learn-from-European-Privacy-Laws-and-Policies/ 1/8' <https://cipesa.org/2017/07/what-african-countries-can-learn-from-european-privacy-laws-and-policies/>.

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Botswana	Bill Data Protection Act 2018	2018	Passed	51.6
Burkina Faso	Law No. 010-2004/AN		Adopted, in revision	37.7
Cabo Verde	Law No. 133, Law No. 41 and Law No. 42 as a supplement	2001	Adopted	
Chad	Law No. 006/PR/2015 on the creation of the National Agency for Computer Security and Electronic Certification Law No. 008/PR/2015 on Electronic Transactions Law No. 009/PR/ on Cybersecurity and Cybercrime Law No. 001/PR/2017 on the Penal Code	2015	Adopted	
Congo DRC	Law No. 29-2019 du 10 Octobre 2019 portant protection des données à caractère personnel (in French)	2019	No Data	
Egypt	Law No. 151 Egyptian Personal Data Protection Law	2020		
Eswatini	Bill Data Protection, 2013	2013	Draft	
Gabon	Law No. 001/2011	2011	Adopted	
The Gambia	Data Protection and Privacy Policy	2020	Adopted	
Guinea	Law L / 2016/037/AN	2016		
Ghana	Data Protection Act of 2012	2012	Adopted	61.2
Ivory Coast/ Côte d'Ivoire	Law No. 2013-450 du 19 Juin 2013 relative à la protection des données à caractère personnel (in French)	2013	Adopted	
Kenya	Kenya Data Protection Act No. 24 of 2019	2019	Adopted	39.8
Lesotho	Data Protection Act No. 19 2012	2012	Adopted, not enforced	
Madagascar	Law No. 2014-038 Protection of personal data (in French)	2014	Adopted, not enforced	30.2
Malawi	Bill - Data Protection Act		Draft	38.7
Mali	Law No. 2013/015 (French)	2013	Adopted / partial	34.4
Mauritania	Draft Law No. 2017 - 020	2017	Adopted	
Mauritius	Data Protection Act 2017 Law 2019-014	2017	Adopted	47.6
Morocco	Law No. 09-08 along with Implementation Decree No. 2-09-165			46.9
Namibia	Bill - Electronic Transaction Act of 2019	2019	Draft	
Niger	Law No. 2017-28 du 03 Mai 2017 relative à la protection des données à caractère personnel, révisé en 2019 (in French)	2017	Adopted	22.7
Nigeria	Nigeria Data Protection Regulation			
Rwanda	Bill - Personal Data Protection, 2019	2020	Drafted	33.9
Sau Tome and Principe	Data Protection Law 2016	2016	Adopted	
Senegal	Law No. 2008-12 du 25 Janvier 2008 portant sur la Protection des données à caractère personnel (in French)	2008	Adopted	41.6
Seychelles	Bill- Data Protection Act of 2003	2003	Not adopted	

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South Africa	Protection of Personal Information Act 2013	2020	Adopted	61.0
Togo	Law No. 2019-014 relativbe a la protection des données a caractère personnelle (in French)	2019	Adopted	25.3
Tunisia	Organic Act No. 2004-63	2004	Adopted	46.9
Uganda	Bill Data Protection and Privacy Act 2019	2019	Not adopted	
Zambia	Data Protection Act, 2020	2020	Adopted	29.5
Zimbabwe	Cyber Security and Data Protection Bill	2021	Draft / in review	18.8

Source: Author's own construction

Of the 36 countries listed above, twelve adopted their laws after the 2016 GDPR enforcement. Before the GDPR, only sixteen countries had adopted specific laws for data protection. Some countries still have their laws in draft or review status. Since the introduction of the GDPR, the number has more than doubled.[747] Most African states' regulations closely align with the GDPR standards, and African states are showing a strong interest in reforming their data legislation.[748] This is evinced by a series of countries, such as South Africa and Egypt, recently introducing specific laws for data protection.[749] Although most countries have codified data protection laws, many of the laws are not in force for various reasons, including a lack of regulatory authorities to enforce the laws. However, adopting laws in Africa has not improved internet privacy in some authoritarian regimes. African countries, in general, have poor scores in terms of internet privacy. While legislation on paper mirrors the GDPR framework, in practice, African internet privacy and legislation are closer to China. The lack of privacy for citizens in African countries is comparable to China's internet privacy norms. Of the 110 countries rated by bestvpn.org for Internet Privacy, Zimbabwe has the lowest score in Africa and the fifth lowest globally.[750] China ranks lowest of all, which causes concern about its ambition to become a superpower and the influence it will have on Africa's authoritative regimes.

Africa has been slower than Western countries in developing cyber security laws. Government officials' lack of capacity and expertise is one reason why African countries have been lagging in drafting bills, passing legislation, and even enacting the passed legislation. Nzume submits that lack of funding is the reason that African countries have not developed the skills and created

[747] Brian Daigle, 'Data Protection Laws in Africa : A Pan- African Survey and Noted Trends' 1.
[748] ibid.
[749] ibid.
[750] 'Internet Privacy by Country' (*bestvpn.org*, 2014) 1.

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departments dedicated to establishing cyber laws.[751] China has used this gap to exercise its soft power in Africa's cyberspace. China has been strategic in providing training support as a means of influence and has pledged to support African countries to bolster their cyber laws in various aspects. The support has been facilitated by private Chinese ICT companies on the continent. The multiple workshops have influenced a change in Africa's trajectory and ideologies in cyber law development.

6.3.5 A new order transplant

While most African countries have adopted the European GDPR, each has followed a different model. Historically, African countries borrowed from the Western model based on historical ties and common legal systems. However, as the present research explores, cybersecurity's legal development as a new sector and area of law illustrates innovative ways in which the global south countries can borrow from each other. The successful influence of Chinese legal norms in this area will go a long way in legitimising China's governance ideologies and positioning China as a norm-maker. Selective and judicious implementation of transplanting practices enables the acceleration of sectoral legal reform in African countries with limited resources.[752] While acknowledging the potential harms associated with legal transplants, it is important to embrace an African perspective rather than an exclusively Anglo-American-European approach. This unique perspective allows for a nuanced understanding of the complexities and intricacies of legal transplants in the context of Africa-China's specific circumstances, leading to a more well-rounded and contextually appropriate framework for legal development.

Based on the Africa–China literature review in Chapter 2, the influence of Chinese companies in Africa is visible. African countries have borrowed from three different models: the American multistakeholder approach, the European GDPR framework and the Chinese cyber sovereignty model. However, the Chinese model has been more influential in the continent through soft power,

[751] Cathy-eitel Nzume, 'Slowly but Surely , Data Protection Regulations Expand throughout Africa The Interesting Case of Cameroon' (2021) 2011.

[752] Cyber authoritarianism in law refers to a form of government control and regulation of the internet and digital technologies with an authoritarian approach. It involves the use of legal mechanisms, regulations, and policies to restrict and suppress online freedom of expression, dissent, and access to information. Cyber authoritarian regimes typically employ a range of laws and regulations to monitor, censor, and control internet content, online activities, and digital communications within their jurisdictions.

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diplomacy and investment. It is, therefore, vital to understand how China will transplant its model into Africa.

6.4 China–Africa digital diplomacy

It is generally accepted that digital technology could help Africa leapfrog in development and could ensure that the continent leverages its young population dividend.[753] The growth in technology could present an opportunity for skills development, knowledge acquisition and economic development with global transactions. However, without the equal capacity to leverage, access and regulate, the growth in ICT could result in abuse and dominance of one group or state over another. The risk is higher in developing countries with no regulatory framework. In Africa, countries lack enforcement and monitoring capability at the national level and rely on private sector companies in technology and telecommunications to execute cyber security regulations.

ICT companies are the service providers who enable various transactions and security surveillance to take place. Therefore, they become the custodians of the data and information collected. For that reason, this section of the study examines the way in which Chinese telecommunication and technology companies have played a key role in promoting Chinese cybersecurity governance in Africa.

Since 2005, a growing number of Chinese ICT companies have been investing in Africa. To understand this phenomenon of the south–south legal transplant, one first needs to understand China's cybersecurity governance model and its policy with African countries on cybersecurity cooperation. Global cybersecurity can be approached in two ways, from a practical perspective or a regulatory perspective. The latter is centred on government control of cyber activities through legal provisions.

China's internet sovereignty internet model is easily and quickly finding a home in Africa due to its remarkable economic development and success in becoming the global powerhouse of technology manufacturing and exports. The internet of things 2020 projections estimated that 95 per cent of the world's IOT devices would be manufactured in China.[754] Africa can leapfrog cyber

[753] Bhaskar Chakravorti and Ravi Shankar Chaturvedi, 'Technology Could Promote Growth in African Countries.
[754] GSMA, 'How China Is Scaling the Internet of Things' 61 <http://www.gsma.com/newsroom/wp-content/uploads/16531-China-IoT-Report-LR.pdf>. ibid.

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technology developments by partnering with China under the FOCAC framework and the Digital Silk Road (DSR). China is committed to supporting African governments in developing their ICT infrastructure and cyber capability. In return, China could benefit from Africa's unswerving support at the international level, as enshrined in the Joint Declaration issued by African Union and China in 2015.

Capacity development of cyber capability has recently extended to legal assistance in cyber law development. Many African political parties seem to be taking a leaf from the CPC's self-preservation book. While importing Chinese technologies, they are adopting internet ideologies and using cyber tools to protect their political power. African politicians recognise the prestige of Chinese cyber doctrines and are consequently more open to borrowing aspects of Chinese cyber law reforms to advance their own political positions. The limitation of borrowing from China's success is the inadequate understanding of Chinese principles, values and vision that have informed China's cyber governance. This can be compared to the position Africa was in at the beginning of its colonisation.

6.4.1 FOCAC cyber commitments

China relies heavily on diplomacy and foreign aid to create favourable relationships and exercise influence abroad.[755] The FOCAC has been the best tool for China's soft power in Africa. Under the FOCAC 4 action plan (2019–2021),[756] both sides committed to cooperation on cyber security under Social Development, with a subsection on Science and Technology Cooperation and Knowledge Sharing as follows:

> Both sides acknowledge that a new era is coming with the increasing role of artificial intelligence and the development of quantum computing. In the future, the application of quantum physics principles to computing will have huge implications on operating systems, cyber security, big data, blockchains and other applications. China will leverage its strengths in these sectors to support African countries to the best of its ability.

Again, as part of peace and security cooperation, both sides agreed to enhance collaboration and strategies and share information on cybersecurity to enhance their security plans in terms of the military, police, and anti-terrorism.

[755] Available at https://warontherocks.com/2018/10/competition-with-china-isnt-a-strategy/.
[756] Ministry of Foreign Affairs, 'Forum on China-Africa Cooperation Beijing Action Plan (2019-2021)' (n 152).

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The action plan was operationalised in the form of Chinese companies investing in the sectors in Africa. Unlike in other sectors, Chinese companies investing in Africa ICT are mainly from the private sector rather than SOEs. The companies insist that a market force and profits drive their entry into Africa rather than fulfilling Beijing's agenda in the continent. It is clear that the companies are intricately linked with the CPC and serve their strategic ends.

A review of Africa–China contemporary studies can illustrate new and prospective trends of south–south legal transplant through ICT infrastructure investments. To further comprehend legal borrowing between China and Africa, the next section examines some trends in and connections between Chinese ICT investments, legal assistance and reforms on the continent.

6.5 China's ICT investment in Africa

From 2015 to 2017, Chinese ICT infrastructure financing in Africa exceeded US$1 billion. This investment was larger than the combined funds from multilateral agencies, G7 nations and African countries.[757] The China Tech Map[758] shows that by early 2021, China had invested in more than 266 technology projects in Africa. These projects vary from infrastructure, data centres and smart city projects to education.[759] Huawei is the most notable company on the continent, having championed African infrastructure in state buildings, including those of the African Union and parliaments in several countries. Chinese big data corporations such as Huawei, ZTE and Tencent have exported surveillance and censorship technology to countries including Ethiopia, Zambia, and Zimbabwe.[760] Chinese companies may argue that their interest in Africa is driven by commercial motives similar to those of a Western tech company. However, CPC secretaries in Chinese multinationals like Huawei ensure that the companies adhere to the party interests while profit-seeking. Article 19 of the Company Law of China provides a company with the necessary conditions for the Communist Party organisation to carry out its activities. The presence of party

[757] Rebecca Arcesati, 'China's Evolving Role in Africa's Digitalisation: From Building Infrastructure to Shaping Ecosystems' (2021) <https://www.ispionline.it/en/pubblicazione/chinas-evolving-role-africas-digitalisation-building-infrastructure-shaping-ecosystems-31247> accessed 4 September 2021.
[758] China Tech Map is an initiative by ASPI International Cyber Policy Centre.
[759] Khwezi Nkwanyana, 'China's AI Deployment in Africa Poses Risks to Security and Sovereignty' (*The strategist*, 2021).
[760] Valentin Weber 'Understanding the Global Ramifications of China's Information Controls Model' *Ahmed et al.'Artificial Intelligence, China, Russia, and the Global Order: Technological, Political, Global, and Creative Perspectives,' edited by Nicholas D. Wright* 72–7; cited in Fischer, supra n 657.

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committees and executives in the decision-making bodies of a company makes it easy for these companies to export African data and share it with the CPC and, therefore, with the state.

For the purpose of this study, a review of select countries that have adopted elements of the Chinese cyber regulation system is undertaken. The review assesses African government engagements with Chinese ICT companies and the direct linkages between investments and cyber regulation policies and enforcement.

The national government has selected China's mega ICT companies to spearhead China's internationalisation and meet domestic targets under the Digital Silk Road.[761] In 2020, the Ministry of Industry and Information Technology drew up seventeen key areas as priorities for AI development and urged Chinese hi-tech companies to action. In response, ICT companies and research institutions formed a national team.[762] In early 2021, seventeen of the 27 Chinese IT giants were appointed to the Chinese AI national team. The companies appointed to this team are, to some extent, also contributing to structural rules that affect the broader industry and international engagements.[763] The central government enables the expansion of these companies through policy support and generous access to cheap funding.[764] Alternatively, the Chinese Development Bank provides concessional loans to African states. These are procured from the ICT national team with longer-term repayments.

Chinese ICT companies have built over 80 per cent of all existing telecommunication networks and set up government networks in more than half of the countries on the continent.[765] Table 14 below illustrates the international relationship between the ICT national team and the Chinese government in key projects executed in Africa.

Table 14 China's ICT national team in Africa

China's ICT MNCs	Government linkages	African project

[761] Thomas and Mardell, Jacob and Arcesati, Rebecca S. Eder, 'Networking the 'Belt and Road' - The Future Is Digital ' [2019] Metrics <https://merics.org/en/analysis/networking-belt-and-road-future-digital>.
[762] Benjamin Larsen, 'Drafting China's National AI Team for Governance' (*Digi China Stanford University*) <https://digichina.stanford.edu/work/drafting-chinas-national-ai-team-for-governance/>.
[763] ibid.
[764] Eder, Mardell and Arcesati (n 761).
[765] By Joe Parkinson, Nicholas Bariyo and Josh Chin, 'Huawei Technicians Helped African Governments Spy on Political Opponents' 1.

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Alibaba	No government relations before 2021	Electronic World Trade Platform (eWTP) in Rwanda
Hikvision	2018 Annual Report states Chinese government is a controlling shareholder Chairperson appointed in 2018 to the National People's Congress	First Chinese AI company to invest in Africa in Zimbabwe Donated surveillance systems to the airport and borders
ZTE	Partially owned by SOE	ZTE provides the Ethiopian government with infrastructure that enables it to monitor and exercise surveillance over the communications of opposition activists and journalists ZTE and Huawei have nine training centres in Africa
Huawei	Chairman Ren Zhengfei is a former officer in the 'military technology division' of the People's Liberation Army The company is 99 per cent controlled by the 'trade union committee.'[766] Sun Yafang, Chairwoman of Huawei from 1999 to 2018, 'once worked in China's ministry of state security.' Chinese government expelled Canadian diplomats after Meng Wanzhou, CFO and chairman's daughter, were arrested in Canada	Built most of the telecommunication infrastructure in Africa: 70 per cent of 4G network and most of 2G and 3G[767] Principal adviser for Kenya ICT 'master plan' First 5G provider Huawei ICT academics, in partnership with 240 African universities
Transsion Holdings	No political links	International headquarters in Johannesburg First international mobile to set up a factory in Africa Installed 15 000 cameras throughout Johannesburg metropolitan area Owns 40 per cent of Africa's smartphone market Manufactured the first camera calibrated for dark African complexion, enhancing the ability to capture facial recognition
H3C	BRI implementing partner[768] H3C was invited by China Civil Engineering Construction Company to participate in the Nigeria Project The construction company is a subsidiary of a state-owned company	Constructed a Nigerian airport's new telecommunications network as part of BRI[769]
Per cent Corporation	BRI implementing partner	Developed an intelligent system for information visualisation and data analysis to assist the Angolan government in its decision-making process The system has every person's biometric information, such as fingerprints

[766] Christopher Balding and Donald C Clarke, 'Who Owns Huawei?' (2019). ibid.
[767] A Hawkins 'Beijing's Big Brother tech needs African faces' Foreign Policy 24th July 2018, available at https://foreignpolicy.com/2018/07/24/beijings-big-brother-tech-needs- African-faces/ (accessed 27 January 2020).
[768] Available at https://www.h3c.com/en/d_201806/1086703_294554_0.htm.
[769] Willem Gravett, 'Digital Neo-Colonialism: The Chinese Model of Internet Sovereignty in Africa' (2020) 20 African Human Rights Law Journal 125 <http://ref.scielo.org/kbd59s> accessed 18 June 2021.

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China Telecom	SOE	Plans to install 150 000 km fibre-optic network to serve 48 countries
Cloudwalk	Recommended by Guangzhou provincial government Received a US$301 million grant from the provincial government	Surveillance equipment in Zimbabwe

Source: Author's own construction

Although the companies are privately owned, the entry of all medium-sized companies into Africa has come through the state-led BRI. The smaller companies have typically partnered with an SOE to deliver the projects in Africa. African projects have also presented these companies with a path to internationalisation outside Chinese or Asian markets. However, most importantly, these projects give Chinese companies access to biometric information about the host country in cyberspace.

As part of the soft power exercise, it is common practice for these companies to host African leaders for a sponsored learning visit in China. These visits present the opportunity for China to showcase its strength in the industry and promote its governance model.[770] The World Internet Conference, also known as the Wuzhen Summit, is a pivotal event to promote China's internet sovereignty. This is an application of soft power in shaping the future of lawmaking in the ITC sector. These exchanges have led to improved ICT infrastructure and connectivity in Africa. The countries of Kenya, Cameroon, and Ethiopia have improved their connectivity after the investment from China. Although Ethiopia was improving from a low base, it recorded a slight increase in connectivity. Freedom House has posted mixed results of freedom of net following ICT infrastructure projects in these countries. However, the legal impact of the developments is not recorded and takes place through events and workshops rather than in the structured drafting of statutes.

Using seminars and learning visits, the Chinese government actively advises African countries on cyber policy and laws.[771] Since its inaugural event, China has used the World Internet

[770] Pádraig Carmody, 'Lina Benabdallah. Shaping the Future of Power: Knowledge Production and Network-Building in China-Africa Relations. Review' (*African Studies Review*, 2020) E25.
[771] ibid; Benabdallah (n 248); Gravett (n 769). Carmody (n 770); Benabdallah (n 248); Gravett (n 769).

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Conference as a key platform to promote Chinese cyber principles and norms.[772] However, reporters claim that the conference has failed to attain the global conference status China sought for it. Fischer proposes that ICT companies, rather than government departments, are responsible for the first step in creating a regulatory framework.[773] As interface hardware and software creators, they are the first to determine how the content is created, used, and accessed. The rules of use are usually influenced by social norms, domestic security, and political issues. Therefore, Chinese firms will set rules and regulations based on the CPC's political interests, domestic regulations, domestic legal code, and commercial interests.[774] However, Fischer emphasises that the ICT multinationals in the United States have a significant budget compared to the national GDP for the government to monitor the ICT companies.

China provides legal assistance capacity to African states' company executives, legal practitioners, and government officials through various channels. The assistance is under the auspices of the BRI, BRICS and FOCAC action plans, which align with China's cyber sovereignty.[775] The China model is particularly attractive in President Xi Jinping's presentation of China's ambition to be a new cyber superpower. He maintains that it will offer an alternative option for other countries and nations who want to speed up their development while preserving their independence. For African states faced with a huge infrastructure investment deficit and the need to escape the claws of their colonial past, the China model does represent an alternative that preserves Africa's dignity and sovereignty.

However, while China's funding and foreign presence might differ from prior colonial interests where raw resources carried value, it appears that in the future, data from African countries will carry equal, if not more, value. The Chinese government will easily gain access to the continent's data via China's ICT companies assisting host country governments. Beyond the party alliance, Chinese companies in the national team, under the guiding opinion of the Ministry of Science and Technology, are encouraged to share data and information with government

[772] Xi Jinping, 'Remarks by HE Xi Jinping President of the People's Republic of China At the Opening Ceremony of the Second World Internet Conference', *Speech, Second World Internet Conference, Wuzhen, China* (2015) <https://www.wuzhenwic.org/2019-10/16/c_549515.htm>.
[773] Fischer (n 714).
[774] ibid.
[775] Gravett (n 431); Gallagher (n 404); Khwezi Nkwanyana, 'China's A.I. Deployment in Africa Poses Risks to Security and Sovereignty' (2021). Gravett (n 769); Gallagher (n 724); Nkwanyana (n 759).

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departments and other platform companies. This data disclosure would make it easy for companies such as DIDI in the shared economy or Cloudwalk in surveillance and biometrics data to access domestic markets data and have a competitive or unfair advantage to succeed in new African markets.[776] Sometimes the success may crowd out emerging entrepreneurs. While these cases do not represent the entire continent, they can indicate how relations between African states and the dominant powers, as presented in Chapter 4 of this study, affect compliance with human rights in regulating the internet.[777]

6.6 China's legal assistance

The expansion of Chinese AI points to a new reality and a new leader in technology. For decades, the world turned to the United States for various forms of technology, and it, in turn, influenced norms and regulations globally. This position gave the United States a massive amount of geopolitical power, which was also asymmetric. China is now providing an alternative partner and influencing norms. Developing countries that have partnered with China for technological advances are not looking at formulating domestic internet and cyber security laws. This new trend presents a threat to United States interests.[778]

Table 6.4 shows the relationship between Chinese investments and the adoption of cyber regulations with Chinese characteristics by African countries. The table does not represent a sample size of African countries with a form of cybersecurity regulation and Chinese ICT infrastructure. However, it begins to draw a pattern between China's ICT investments in Africa and the export of Chinese legal provisions and norms in cyber regulation.

Table 15 Chinese ITC investment and regulatory influence

African country	ICT investment projects	Regulatory changes and government initiatives
Uganda Tanzania Zambia Benin	Huawei AI surveillance equipment EXIM Bank-funded Tanzania fibre optics China begins providing cyber-governance training for Tanzania 2015	Ugandan government uses Chinese surveillance to arrest 836 supporters of opposition leader Bobi Wine Introduction of online media law and blogger tax

[776] Available at https://www.newamerica.org/cybersecurity-initiative/digichina/blog/drafting-chinas-national-ai-team-governance/.
[777] Fischer (n 714).
[778] Abishur Prakash, 'China Is Taking Its AI Around The World . This Should Scare The US .' (*Medium.com*, 2018).

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		Uganda and Tanzania introduce restrictive policies on online media 2018
Nigeria	Huawei AI Uniview	Introduces Protection from Internet Falsehoods, Manipulation and Other Related Matters Bill Prohibits online statements deemed 'likely to be prejudicial to national security and 'those which may diminish public confidence in Nigeria's government.'[779] Media censorship (e.g., Twitter ban) Internet firewall Internet shutdown during elections
Zimbabwe	Cloudwalk: 3D facial recognition technology Chinese cyber policy workshops Huawei, 5G telecommunication Hikvision: Police hi-tech surveillance and facial recognition project	Introduces Cybercrime and Cybersecurity Bill, which criminalises communicating falsehoods online in a copy of China's legal rhetoric to stifle dissent Cybercrime, Cybersecurity and Data Protection Bill 2019 Nationwide internet shutdown Targeted voter messaging
Kenya	Huawei: supplies radio systems, improving enforcement[780] Huawei signs MOU with the government to share best practices, develop infrastructure, and build ICT capacity for government, including providing e-government services	Kenya passes Computer Misuse and Cybercrimes Act 2017 Media censorship Targeted voter messaging
Chad Togo Cameroon Sudan Zimbabwe Nigeria	Huawei ICT infrastructure EXIM finance	Internet shutdown Social media ban
Tanzania	Export-Import Bank provides a loan US$70 million to finance the nation's fibre-optic network	Tanzania passes a cybercrime bill that forbids 'misleading, deceptive, or false' internet postings and empowers the government to

[779] D Tegegn 'African Union's Revised Declaration on Principles of Access to Information and Freedom of Expression' 13th December 2019 Amnesty International USA, available at https://medium.com/@amnestyusa/african-unions-revised-declaration-on- principles-of-access-to-information-and-freedom-of-2d7d636dddb2 (accessed 9th July 2020).

[780] Available at https://www.americanprogress.org/issues/security/reports/2019/02/28/466768/mapping-chinas-global-governance-ambitions/

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		track down internet users who violate the rules[781]

Source: Author's own construction

Table 15 demonstrates that regulatory amendments have ensued following Chinese investments in Africa. In addition to the investment, most countries receive legal development capacity support facilitated by Chinese companies. In the case of Tanzania, China began providing cyber-governance training for Tanzania government officials in 2015. Drawing from the Freedom House report in 2018, 'increased activity by Chinese companies and officials in Africa preceded the passage of restrictive cybercrime and media laws.[782] Four oppressive cyber regulations have been adopted by oppressive governments following a Chinese ICT investment and visiting workshops in China:

- Launch of cybersecurity laws or bills that criminalise freedom of speech.
- Media censorship reduced data privacy and internet shutdown,
- Use of data for targeted voter messaging,
- Arrests of opposition party members using facial recognition or surveillance technology.

These acts are similar to the CPC's authoritarian governance, which uses surveillance technology or internet police on social media platforms such as WeChat.[783]

Chinese companies' objectives in supporting regulatory capacity-building are focused on guaranteeing a smooth implementation, reducing regulatory risk, and creating the capacity to operationalise the new technology. However, African states also appear to identify an opportunity to adopt China's cybersecurity laws and culture in order to manipulate domestic citizens. For example, in 2017, at a Chinese-sponsored event during a media roundtable,[784] Tanzania's Deputy

[781] Ibid.
[782] Stephen Kafeero, 'Uganda Is Using Huawei's Facial Recognition Tech to Crack down on Dissent a Ter Anti-Government Protests' (*Quartz Africa*, 2020).
[783] Nkwanyana (n 759).
[784] The media roundtable was co-sponsored by the government of Tanzania and the Cyberspace Administration of China (CAC). The CAC is China's top regulator and reports to the Central Cyberspace Affairs Commission, which is headed by President Xi Jinping.

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Minister for Transport and Communications, Edwin Nyogai, lauded China as a model for internet regulation, stating:

> Our Chinese friends have managed to block such media in their country and replaced them with their home-grown sites that are safe, constructive, and popular. We aren't there yet, but while we are still using these platforms, we should guard against their misuse.[785]

Furthermore, Nyogai declared that 'the government must find ways to ensure that while a person is free to say anything, there are mechanisms to hold them accountable for what they say.' The suggestion in this context is that internet sovereignty is compatible with the acceptance of freedom of expression but in a modified form within the limits of the law. Nyogai proposes that Tanzania should monitor some of the social media platforms that are already blocked in China: Twitter, Facebook, and Instagram. The media conference was co-sponsored by a Chinese government agency, the Cyberspace Administration of China (CAC). The CAC is responsible for internet censorship, oversight and control.

6.6.1 The Tanzanian case

Tanzania is a specific case with a history of harassing critics of the government. Recently the country introduced a statute governing internet content that relies heavily on the Chinese model.[786] In Tanzania, the posting of 'false content' is prohibited, a phrase reminiscent of the lexicon in Chinese law where 'making falsehoods' is prohibited.[787] The Tanzanian government alleges that this law was propagated to crack down on 'moral decadence', similar to the way in which 'decadent' material is banned from social media in China. In April 2018, in a transparent effort to constrain freedom of expression online, the government of Tanzania initiated a 'blogger tax'. The tax was priced at US$900 per year for social media personalities such as bloggers, YouTubers, and independent website owners to register and publish their own content online.[788] This tax amount allows the government latitude to shut down any user who disagrees with or posts negative information about the government. These actions took place following the training provided by the Chinese government in Tanzania in 2015.

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[785] As quoted in Nick Bailey, 'East African States Adopt China's Playbook on Internet Censorship | Freedom House' (*Freedom House*, 2017) <https://freedomhouse.org/article/East-african-states-adopt-chinas-playbook-internet-censorship> accessed 9 September 2021.
[786] Amy Hawkins, 'Beijing's Big Brother Tech Needs African Faces' (2018) 24 Foreign Policy.
[787] Gravett (n 769).
[788] ibid.

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Tanzania is but one example. Other countries in Africa have worked with Chinese ICT national team companies and state agencies to facilitate cyber developments in Africa. The CAC has worked and engaged with various African countries.[789] In August 2021, more than fourteen countries, together with the African Union Commission, attended a CAC cooperation forum, during which the Initiative on China–Africa Jointly Building a Community with a Shared Future in Cyberspace was launched.[790] However, the initiative is underpinned by principles and proposals made by President Xi Jinping during the 2015 World Internet Conference. In addition, the Minister of Foreign Affairs, Wang Yi, proposed the building of a digital Africa with the support of China's cyber expertise, noting the following key cooperation areas:

1. Developing digital infrastructure: The Last Mile.
2. Building cross-border digital economy capacity.
3. Digital education.
4. Digital inclusiveness.
5. Digital security.
6. Digital cooperation.

The initiatives are set to resolve end-to-end problems for Africa's cyber security. Improved infrastructure in e-commerce could improve access to commodities and exports of products from rural areas, resolving Africa's biggest problem of the 'last mile' or the 'last kilometre'.[791] Despite these initiatives to develop infrastructure, the outlined strategy ignores the lack of capacity in Africa to create a regulatory environment to manage these upcoming infrastructure developments. It will become incumbent upon China to fast-track the regulatory capacity to match the new development. Deng Li, the Assistant Minister of Foreign Affairs, affirmed in 2021 that the visions

[789] The CAC was launched in 2011 to centralise regulatory control of internet content. The CAC reports to a central cybersecurity and technology leadership group in the Communist Party, which is headed by President Xi Jinping. It was during the first meeting with this group that President Xi Jinping declared that China should become a 'cyber superpower'. Based on this notion, it is expected that the CAC will be core to delivering China's vision in the cyber sphere. The CAC hosted China's first World Internet Conference in 2014. Jane Li, 'How China's Top Internet Regulator Became Chinese Tech Giants ' Worst Enemy' (*Quartz*, 2021) <https://qz.com/2039292/how-did-chinas-top-internet-regulator-become-so-powerful/>.Rush DOSHI et al 'China as a 'CYBER GREAT POWER' Beijing's Two Voices In Telecommunications.' (2021) Foreign Policy at Brookings 1–30.

[790] 'Cyberspace Administration of China Launches the Initiative on China-Africa Jointly Building a Community with a Shared Future in Cyberspace' <http://www.cac.gov.cn/2021-08/25/c_1631480920680924.htm>., available at http://www.cac.gov.cn/2021-08/25/c_1631480920680924.htm, accessed 4 November 2021.

[791] The status of African road and telecommunication infrastructure prevents African delivery companies from accessing remote areas in Africa and processing payments. Goods ordered overseas arrive in urban areas but are undeliverable to the end user.

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of the initiative and subsequent forum would become a reality. China's assistance and support for digital Africa were soon made tangible with Benin with the initiative Digital Benin. A month after the forum, China extended a preferential loan to Benin for the development of its phase II project in the national broadband network.[792]

The Chinese Ministry of Foreign Affairs also confirmed that digital cooperation would be included in FOCAC 8, which was subsequently held in Dakar in 2021.[793] Discussions and cooperation action plans will, in future, be included in the FOCAC action plans as a high-level platform through which FOCAC will provide a legal framework for the cooperation.[794] As a triennial forum, this would also mean that action plans committed would be completed within the next three years. Without adequate regulatory capacity, Africa could simply transplant Chinese regulatory guidelines to support the new infrastructure and minimise investment risk for the Chinese ICT companies. Any future investment in ICT under FOCAC commitments will fail to deliver on the capacity-building in the continent without the commensurate regulatory capacity and legal climate.

Critics of China–Africa relations have often cited Chinese companies' lack of skills transfer, although the Chinese government has offered various programmes to develop African skills. Through this innovation, China is prioritising digital education. Africa, with its young population, albeit unskilled, is rightly positioned with youthful learners to take advantage of this learning opportunity. While doing so, African governments should also recognise that skills development in cyber areas goes beyond technology skills and requires expertise, lawmaking, and regulation enforcement.[795] Critics are, however, concerned that investment assistance which is driven by high-level government officials requiring legal assistance will also include the import of China's great firewall.

The CAC has grown to become the most powerful regulator, consolidating President Xi Jinping's superpower in domestic regulation of cyberspace and the internet. Domestic unicorn

[792] 'Our Work China Supports Digital Development in Benin' (*China International Development Cooperation Agency*).
[793] Deng Li, 'Remarks by Assistant Foreign Minister Deng Li At China-Africa Internet Development and Cooperation Forum' (2021) <https://www.mfa.gov.cn/ce/ceme//mon/wjbxw/t1901787.htm>.
[794] Osidipe Adekunle, 'Perspectives on China-Africa Digital Innovation Partnership for Post-Pandemic Recovery and Inclusive Development in Africa' *The guardian* (2021) <https://guardian.ng/features/perspectives-on-china-africa-digital-innovation-partnership-for-post-pandemic-recovery-and-inclusive-development-in-africa/>.
[795] ibid.

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internet companies like Alibaba, DIDI and Tencent felt its wrath at the beginning of 2021. Local Chinese companies generally fear the CAC. Because the CAC is an organisation key to shaping China's e-commerce regulation framework, African companies should closely observe CAC's activities in China. Additionally, African companies and policymakers should also closely observe Chinese companies because they are tasked with executing the six strategic objectives for the Initiative on China–Africa Jointly Building a Community with a Shared Future in Cyberspace.

6.7 Observations and challenges

Chinese investments aim to foster sustainable and substantial economic development on the continent. However, it is crucial for these investments to align with Africa's domestic economic policies and global investment regulations concerning investments in the global south. To ensure effective management of Chinese investment, African states must take an active role in regulating such investments. Understanding how China, as a new rule-maker, navigates, engages, and influences the legal landscape in Africa becomes paramount.

This Chapter evaluates three key aspects to comprehensively analyse the impact of Chinese investments on Africa's legal landscapes analysed at the second level in the cyber sphere and at the country level focusing on Tanzania. Firstly, it examines the direct legal implications of China's sponsorship in African laws, seeking to establish a clear relationship between Chinese investments and technical legal assistance programmes that contribute to developments in African legal frameworks. Secondly, the thesis delves into the review of existing regulatory tools designed to manage this new form of investment effectively. Furthermore, the research identifies policy gaps between Africa's economic policies and the regulatory environment in which Chinese investments operate. By addressing these gaps, Africa can optimise its engagement with Chinese investments, leveraging them to drive positive economic outcomes while ensuring compliance with its own policy objectives and global investment standards.

A. Legal Impact

Tables 14 and 15 above provides distinct features of Chinese investments, investments, data collection and infrastructure. Chinese ICT infrastructure financing in Africa exceeded US$1 billion from 2015 to 2017. This significant investment indicates that Chinese companies have a stake in the African ICT sector and can influence the formation of legislation and regulation on

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data governance issues. Furthermore, as providers of finance and infrastructure building, ICT companies, including Chinese telecommunication and technology companies, become the custodians of the data and information collected.[796] This implies that these companies have a significant role in shaping data governance legislation and regulation in African states.

B. Regulatory frameworks

The global North cyber governance model and the global South cyber security model represent two different approaches to developing cyber security and regulations. The American multistakeholder model and the European model are two separate models that fall under the global north. Reviewing Chinese cyber sovereignty and the African model for this study's constrained focus on the global south has limited the review of the global north model influence in the continent. Although the African model is not monolithic and distinct, it can categorise countries that engaged in a benchmarking exercise and developed a legal system that reflects their legal system and culture.

Chinese technology investment seems essential for Africa's growth in technology, but there are concerns about over-reliance on the technology itself and the development of policy and legislation.[797] So far, countries that adopted some legal norms from Chinese laws to develop domestic cyber policy have met resistance. This is not to say that Chinese law is unsuitable for borrowing from. However, the exercises should be done with caution to serve the host country's citizens. China is fast advancing in cyber security and is therefore advancing regulatory capacity-building faster than most developed countries could, without clearly understanding the foundational political and economic principles that inform Chinese cyber laws development. However, this should not prohibit the borrowing exercise. African countries could benefit from cooperating with and borrowing from China's cyber regulation. African countries should, However, invest more time in studying Chinese cyber law and adopt parts of the law that are optimal for domestic advances. Thus far, China's cybersecurity has been used for political gains rather than economic development or societal gains. China should equally be wary of giving its technology to African leaders to infringe on rights already in place in those countries. Whereas the

[796] Huawei is a notable Chinese company that has championed African infrastructure in state buildings, including those of the African Union and parliaments in several countries.
[797] Nkwanyana (n 759).

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new cyber regulations and initiatives may be applicable in China's civil system and its democratic dictatorship,[798] they will be exogenous to Africa and its Western-fashioned democracy. This can raise further concerns about internet regulation and create the perception that African citizens have limited possibilities to make their voices heard in the lawmaking process.[799]

African governments have adopted repressive regimes from China to protect votes, which has a particularly narrow focus. Adopting laws and regulations that violate human rights does not affect dissenting voices but will also impact the economy and the continent's diplomatic relations. Oppressive cyber laws could stifle the growth of the digital economy and innovation. Strict regulations will discourage technology investments and deter foreign companies from doing business in the region. This will increase dependency on Chinese technology when other international investors who value digital freedoms distance themselves. In addition, governments who also value democracy and human rights will distance themselves from African states with repressive regulations. Both China and Africa could find themselves facing diplomatic tensions and navigating complex relationships. China might have to defend its digital authoritarian African partners on the international stage, potentially affecting its global image and diplomatic positions in the cyber sphere.

Beijing is forging diplomatic allies in its quest to shape international cyber norms, mainly via two United Nations-mandated working groups (the Group of Governmental Experts and the Open-Ended Working Group). Ultimately, China's politics in the cyber sphere and other matters underlie the lack of trust that has turned the role of its companies into a controversial issue in the European critical ICT infrastructure.[800] Before the 2015 World Internet Conference, Amnesty International called on companies to take a stand and denounce the Chinese position, stating that talks about sovereignty were, in fact, an 'all-out assault on internet freedoms'.[801] China has rejected the idea that it is to blame for Africa's cyber repressive practices and has rebuffed the Western attack on China. Promoting its model in Africa is disingenuous. Chinese officials argue that they are not the only country that is providing technical support to the continent. However, China has inadvertently

[798] The Constitution of the People ' s Republic of China REPUBLIC OF CHINA 2018.
[799] Wanyama (n 746); Fischer (n 714).
[800] Available at https://merics.org/en/tracker/networking-belt-and-road-future-digital.
[801] 'Tech Companies Must Reject China's Repressive Internet Rules' (*Amnesty International*, 2015) 1 <https://www.amnesty.org/en/latest/press-release/2015/12/tech-companies-must-reject-china-repressive-internet-rules/> accessed 1st September 2021.

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promoted cyber practices that undermine human rights practices by authoritarian governments through various workshops and has funded the needed technical capacity, such as the internet firewall in Nigeria or citizen surveillance in Uganda. China is exporting its model of strict internet control and censorship to some African countries. While China's intention may have been to foster greater control and stability in their domestic markets, the unintended consequence has been the curtailment of human rights and individual freedoms in the African context facilitated by Chinese technology

6.8 Chapter conclusion

The fourth industrialisation ushers in a new era of technology, which has created an area for developing new technological policies and laws. With international transactions, cybersecurity is key for domestic and international law development. While most African constitutions provide privacy protection, cyber security provides clarity and depth on privacy rules and protection. Without a solid cyber regulatory environment on the continent, other countries will use Africa as a sphere of influence to dominate international platforms.[802]

More than 60 countries have been beneficiaries of the BRI cyber silk road through exports of new technologies, cloud storage services, infrastructure development or human resource capacity-building. Chinese support in technology development has assisted developing countries in meeting their very ambitious goals. For example, China was essential in enabling the implementation of surveillance programmes in Zimbabwe and Nigeria. Without China's support, these countries would not ordinarily afford the technology. China's Cloudwalk technology far exceeds American technology with the ability to scan and capture darker-skinned faces.

The hi-tech surveillance technology projects are funded to assist African countries in building smart city projects and reducing crime. However, in an authoritarian government where the rule of law is absent, Chinese technology has been abused by the ruling party, often to bolster their control and suppression of society.[803] African policymakers in these countries have openly lauded the Chinese sovereign model as a tool to manage their citizens. Promoting China's cyber sovereignty is attractive to Africa's autocratic regimes. Recent trends show that African states that

[802] Fischer (n 714).
[803] Available at https://merics.org/en/tracker/networking-belt-and-road-future-digital.

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adopted the cyber sovereignty model have abused the policies during elections to attack opposition parties, silence the public voice and therefore undermine some fundamental human rights.

The multistakeholder approach lost its standing after the United States election in 2016 when a Trump consultant abused Facebook data to manipulate voters. During the pandemic, democratic countries veered towards 'national interest' internet practices concerning sharing domestic data. The multistakeholder position is weakening against the cyber sovereignty model. Outside China, many authoritarian countries like Russia and Saudi Arabia, including European nations like Poland and Hungary, have adopted internet sovereignty.[804] However, China only began global advocacy of its model at the first World Internet Conference. In 2014, the Digital Silk Road was launched as part of the BRI; However, China's cyber sovereignty concept is still new and has not yet been fully developed into a cyber model. Therefore, it lacks practical evidence to be adopted globally; additionally, China has failed to convince international companies to endorse their global security, and Africa is the next possible frontier to export the materialising Chinese cyber sovereignty model. African countries are overzealous in collaborating with China to improve their ICT infrastructure and retain power.[805] An endorsement of the Digital Silk Road could include validating a China cyber model and a new cyber governance model for developing nations. However, the partnership could also lead to a failed transplant of the Chinese model when met with domestic dissent.

[804] Wolfgang Kleinwächter, 'Internet Governance Outlook 2017: Nationalistic Hierarchies vs. Multistakeholder Networks?' (*CircleID*, 2017) <https://www.circleid.com/posts/20160106_internet_outlook_2017_nationalistic_hierarchies_multistakeholder/>.
[805] Available at https://blogs.lse.ac.uk/cff/2021/05/20/chinese-digital-tech-in-africa-moral-panics-and-the-messy-reality-of-surveillance/

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Chapter 7 CONCLUSIONS AND RECOMMENDATIONS

This research aimed to examine the evolution of FDI regulation between China and Africa and to identify how the Chinese government uses policy, regulation, and legal cooperation to achieve its domestic objectives. The research embarked on a new path to understanding the role and influence of Chinese FDI on Africa by using a new policy, law, and regulatory lens.

It is clear that the growing investment and the legal cooperation between Africa and China will influence the continent's regulatory reforms. However, the questions and some of the research related to China's presence in Africa are often met with binary considerations. Some scholars and most African citizens believe China's presence is good for Africa's economic development. The 2021 survey by Afrobarometer covering 34 countries reports that Africans hold a positive view of China's activities in their countries.[806] On the other hand, critics lament the possibility of a second wave of colonization that could be delivered through a debt trap while precious raw resources are being pillaged and state sovereignty is compromised.[807] It is, however, evident from recent statistics and trends, as discussed in Chapter 2, that the partnership between China and Africa is more complex and will continue to grow from strength to strength.

China presents a robust second development model, with some developing countries choosing China as the preferred model. African leaders have promoted a 'look East' policy for an economic model that best resembles Africa's economic development history and hopefully a shared future. The increasing number of exchanges at diplomatic, investment, and societal levels leads to an inevitable transplant of political, business, and cultural norms.

The present research has provided a systematized review of the development and influence of regulations, laws, and policies concerning Chinese OFDI in Africa by scrutinizing the role of investments in facilitating legal cooperation and transplants.

Three key research questions were asked and discussed throughout the research:

[806] Josephine Appiah-Nyamekye Sanny and Edem Selormey, 'Africans Welcome China's Influence but Maintain Democratic Aspirations' (*Afrobarometer*, 2021) 1 <https://www.afrobarometer.org/publication/ad489-africans-welcome-chinas-influence-maintain-democratic-aspirations/>.
[807] Chellaney (n 181); Jonas Fallenius, 'Chinese FDI and Debt-Trap Diplomacy'; Chiyemura, Gambino and Zajontz (n 66).

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(i) To what extent does China's OFDI affect Africa's development agenda and power asymmetry through legal transplant and harmonization of legal frameworks?

(ii) How does China strategically utilize FDI initiatives to secure Africa's support for its global strategy and aspirations to shape international law?

(iii) How should African policy and lawmakers respond to China's legal harmonization in FDI regulation to ensure independent and sustainable economic and legal reforms?

The importance of this research project is rooted in understanding China's interests in Africa and assessing whether Chinese FDI can assist African countries in meeting their strategic objectives. Therefore, it is important to understand China's development agenda and how China drives and regulates its outbound investment. The research aimed to determine how Chinese investment in Africa can influence future developments of African policy, laws, and regulatory norms. It was anticipated that the study would point to more strategic drivers of Chinese OFDI and methods China has used to sway African countries to align with Chinese interests.

This concluding Chapter summarises the research findings and reflects the research progress from each Chapter. Furthermore, it provides recommendations for future research in legal transplants and legal cooperation between global south countries. The focus of this study was on China's OFDI to Africa since the establishment of the FOCAC in 2000.

The research established that China follows a pattern in developing policies, laws, and regulations, especially when dealing with foreign issues. China has followed a consistent pattern of restriction of foreign concepts and then testing them before encouraging nationwide adoption. The pattern is, therefore, to resist, allow, and then encourage. New concepts are tested locally with special regulations, allowed, and encouraged, culminating in nationwide practice before reforming local laws and ultimately turning into a policy. The study found that China has applied the same approach when engaging with host countries. Africa seems to be China's testing ground for its foreign policies before applying them internationally.

The following sections summarise the research findings, conclusions, recommendations for policymakers and research gaps for further research by Africa–China scholars. This Chapter

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reflects on research progress made throughout the six Chapters to address the research questions posed in Chapter 1. Finally, the Chapter concludes by making proposals for African and Chinese policymakers, legal practitioners, and scholars. The relevant recommendations are made in the form of policy recommendations, policy action plans for FOCAC, and identifying gaps for further research.

7.2 Summary of findings

7.2.1 China's investment drivers in Africa

The perceptions of China's presence in Africa are divided into contradictory frames of reference between the panda-huggers and dragon-slayers.[808] Chinese African economic relations have attracted much attention with binary views. Chinese watchers have colloquially branded the pro-China advocates panda-huggers, and those who oppose are called dragon-slayers. The literature review in Chapter 2 Section 2.4 appraises both sides of the argument to identify common narratives and themes characterising Africa China political and economic relations. The Chapter established the background against which the study was undertaken. In analyzing academic literature, opinion pieces, and media coverage related to Chinese investments in Africa, distinct themes emerged as critical issues framing the development of China–Africa interactions.[809]

The dragon-slayers suggest that most of the challenges brought about by the association with China arise from the lack of African agency and the capacity to regulate Chinese economic activities in the continent. China is a resource-hungry partner looking to extract raw resources from Africa to feed its modernization programme. Themes of the debt trap emerged as ideas of how China has engineered its funding to give loans to African countries with the long-term view that the nations will default on their loans and China will move in to claim critical state assets. Literature suggests that Chinese investments in Africa are motivated by the need for raw material resources, a new consumer market and cheap labour from Africa's young unskilled population. However, none of these factors carry any sustainable benefits for Africa's economic development.

[808] The animals are symbolically used by foreigners to contrast Chinese Characteristics as a foreign partner. The dragon reflects the demonic characteristics of the evil dragons as perceived by foreigners. The panda reflects a peacefully cuddly animal. Both animals are culturally symbolic animals in China

[809] See section 2.4 Chapter 2

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Panda-huggers laud the Chinese model and presence in Africa as an alternative model to the West. Chinese investments in Africa are perceived as key to unlocking Africa's economic potential, primarily through infrastructure development. Literature also shows that China has invested in diversified sectors beyond extractive industries. Over ten thousand Chinese companies have invested equally in agriculture, telecommunication, and manufacturing, including the mining sector.[810] China's investments in the continent have contributed to improved infrastructure, skilled labour through various scholarships improved the 'Made in Africa' brand, and other benefits.

Each opposing position has a valid argument, requiring a move from a non-binary lens and looking at China as a complex partner. These contradictory views show that the investment relationship extends beyond traditional FDI drivers defined as market-seeking, resource-seeking, or efficiency-seeking. Chinese companies have invested in non-infrastructure or extractive projects in landlocked, minimally developed African countries that do not have attractive investment incentives. However, China is enamoured with Africa and its historical, ideological relation and unthinkingly invests in the continent. China is looking at Africa as a strategic partner to popularise its ideas and ideologies on governance and legal reforms. Africa's fixation with the doctrines that bound the continent and China in the 1950s is no longer applicable.

Outside their shared ideologies, African leaders are turning to the Chinese economic development and foreign policy approach, termed 'the Beijing consensus.'[811] The model presents an alternative partner from a developing state. In this partnership, African leaders have exhibited more agency than what has been reported by observers. The Chinese economic miracle represents what African economies can achieve in an abbreviated period outside the terms set by Western funders. With China's funding, African countries have secured financing and investment and delivered projects on time and under budget. African governments are, therefore, consistently looking to attract Chinese investments to turn around domestic economies and have more leverage with international partners.

Engaging with China requires understanding the Chinese government's agenda, centuries-old approaches, methods of influence, and the possible effects these investments will have in Africa. The current research sought to determine whether Chinese investment would influence Africa

[810] Sun, Jayaram and Kassiri (n 291).
[811] Ramo (n 11).

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through the host nations' policies, laws, and regulatory environment. The lens of Watson's legal transplant concept offers a way to determine the possible influence of Chinese policy, law, and regulation.

The literature review highlighted Africa as a big part of China's domestic economic growth, geopolitical strategy, and export destination for Chinese culture. However, of more importance, Africa is essential to China's geostrategy, as outlined in its key policies and multilateral agreements with African countries. Literature reflects that both sides share a mutual interest in reversing hegemony and forging new reform without colonial characteristics. However, the challenges of repeating colonial practices and implementing neo-colonial economic and legal reforms that are not sustainable still loom large on the horizon.

7.2.2 Global South Private transplant

Increasing economic activity between China and Africa means increasing legal conflicts and challenges. Since opening up, China has made significant reforms in its legal system to comply with international legal systems. However, since becoming a net capital exporter in 2015, China has moved from becoming a law importer focused on compliance to becoming a law exporter focused on changing global south contributions.[812] As Africa's biggest trading partner and key investment destination, China is expanding its partnership with Africa to include legal cooperation and reforms that could change the global hegemony to include developing nations' perspectives. This could result in a new form of legal transplant not covered by eminent scholars. A transplant between developing nations is novel and could contribute to new developments in international law.

Chapter 3 evaluated the concept of legal transplant as a tool to project how China could become a net legal exporter in Africa. Watson re-introduced the theory of legal transplant in his seminal work in 1974.[813] The Chapter examined two prominent but different legal scholars' positions on legal transplants. Watson and other legal historians define a successful transplant as independent of social context. By contrast, legal sociologists, beginning with Montesquieu, consider the social and political aspects post-transplant, which deems the transplant to have failed if rejected, changed, or amended to fit the local content. Chapter 3 reviewed the arguments for and

[812] See Chapter 4.
[813] See Chapter 3 section 3.3.

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against the legal transplant, how it takes place, and whether it is possible. In addition, Chapter 3 identified other extensions of the theory, such as framing the concept of 'borrowing'. However, through an analysis of various arguments in Chapter 3, it becomes evident that most scholars believe that legal transplants do happen during legal reforms, although to varying degrees. The general agreement is that the host country will usually borrow laws from sponsor countries and bend aspects of these laws to adapt to local conditions. Legal interpretations influenced by domestic social norms will create a variance when the laws are adopted word for word for the sake of convenience.

Table 16 below is an analysis of the literature review illustrating different dimensions of legal transplants.

Table 16 Types of legal transplant

Type	Sponsor / Supply side	Host / Demand side	Motivation for transplant
1	Developed country	Developed country	Harmonization of systems Convenience from drafting new laws Prestige Geographic proximity / shared borders
2	Developed country	Developing nation	Prestige Colonial relations
3	International organization	Developing and developed nations	Setting international standards
4	Developing nation	Developing nation	Common history Common norms and culture Prestige deficit Reversing hegemony Geographic proximity / shared borders
5	Developing nation	Developed nation	Hegemony shift Sovereignty

Source: Author's own construction

Historically the fifth type of legal transplant between developing nations was more common in Asian countries due to their shared history, culture, and geographic proximity. The neighbouring countries shared borders, resulting in years of trade between the regions. Over the years, it became easier to develop common regulations to harmonize trade. However, globalization and multilateral organizations have increased the advent of legal transplants beyond immediate borders and shared

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culture. For the first time in history, developing nations that do not share borders and cultures are borrowing laws from each other to the exclusion of regulations from more developed legal sources.

This study explored legal influences between developing nations that do not have a common border, history, or culture. Commercial laws in Africa find their origins in colonial and pre-colonial common law, civil law, and Arabic law. The fourth legal transplant concept synthesizes this new phenomenon and establishes its application to study and explore this relationship under unique circumstances. A mini case study in cyber law development was undertaken to test the prospects of legal transplants through FDI between developing nations. The analysis established a new trend of legal influence and opportunities from the Chinese legal system related to outbound investment in Africa.

7.4 Civil law with Chinese characteristics

The Chinese legal system stands apart from the global legal landscape owing to its distinctive characteristics. China's government deems its legal system to be complete in all legal aspects.[814]

Modern Chinese law's evolution began after the imperial era ended in the late 1800s. After the Qing dynasty, China engaged in an international benchmarking study to bring a legal system that would deal with the burgeoning developments and provide legal guarantees to foreign investors who occupied China. This exercise helped China to edge out the English law they were exposed to in the ports transactions[815] which not compatible with Chinese norms. Scholars studied and borrowed from the Japanese legal system and the Germanic civil code to develop China's new legal system. During the twentieth century, China underwent political instability, with power changing hands to different leaders. Until the early 1970s, China had an inward focus attitude, borne during the tributary era, that assumed foreigners would always come to China owing to its superior culture and wisdom. However, in the 1970s, China was poor and recognized that FDI could help relieve poverty and return the country to a healthy economic status. Consequently, China began to co-opt FDI from neighbouring countries. This process involved becoming part of the international global system, allowing China to export its products and, in return, attract cash

[814] See Chapter 4 section 4.2

[815] During the clash between the Qing dynasty and Britain , Britain introduced and imposed the barter system to circumvent the lack of silver coins for payment systems. During the opium war China signed treaties that favoured Britain, Trade through Canton and Shaghai ports was governed by the British legal system.

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flow. During this period, China also attracted Asian investors who wanted to set up manufacturing companies to sell to the vast population in China and leverage cheap labour to export cheaply from mainland China. As a result of pressure from Asian businesses and local municipalities, policymakers had to consider making room for foreign investors and developing a regulatory framework for FDI that was investor friendly.

Under Deng Xiaoping's vision, China established SEZs as a new initiative to open up its market and develop policies to attract investors. SEZs became policy sandboxes to test more liberal and investor-friendly regulations, allowing access to parts of Chinese markets. Each policy that restricted foreign business in China was first relaxed in the SEZ to test how it worked; if it yielded positive and harmonious results, it was promoted before it was applied nationwide. The pattern for FDI policy followed the pattern of restrictive law, relaxing regulation in the policy sandbox, and then encouraging a practice that ultimately led to the formulation of laws and policies that encouraged investment. This has been evidenced by the decreasing number of industries on the SEZs' negative list and increasing numbers on the positive list. However, while China was opening up, it retained central planning in crucial industries, which resulted in a socialist market economy. The central government still closely manages FDI through various policy instruments, even inside the SEZs.

As the new capital exporter, China is in a stronger position to set the terms of trade for investments. China realized that it could use its new position to become a norm exporter and change the global hegemony in rulemaking. In contrast to the United States, China has decided to use soft power to influence its international partners to adopt its governance ideologies rather than the hard power used to promote Western democracy. China has used its outbound investment to influence and engage developing nations and international organizations. Along with its investment projects, China has invested in cultural projects such as Confucius Institutes and language schools and has even funded non-essential projects that President Xi Jinping termed 'vanity projects' in Africa.

However, China argues that it does not intend to transplant its laws or governance to other countries — as developed nations have done — and advocates for a non-interference model. In contrast to these assertions, China continues to apply its regulations to Chinese companies

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overseas, especially in SEZs and SOEs.[816] This presents a new model of transplant whereby private companies facilitate transplants and government activities. Consequently, the divisions are blurred between private companies and state agencies. Large-scale private companies are incorporated or aligned to the central command system domestically and internationally. Through their five-year plans, the government sets goals and plans for the whole nation, including private enterprises.[817] Commercial enterprises are simply an instrument of central government rules and objectives. While China may not be interested in interfering in foreign relations with other countries in the interest of sovereignty, it expects its companies to enjoy the same sovereignty and have legal guarantees in foreign markets.

The analysis of China's OFDI literature which was presented in this study, demonstrates that China has effected this legal supervision of its African foreign markets through financial support, SEZs or capacity-building in law-making.[818] In contrast to the forceful legal development aid in foreign countries by the global north, China has used soft power to encourage African countries to adopt and borrow some of China's legal and governance practices and approaches.

7.5 Africa law imports

The history of the continent with legal borrowing can be traced back to the pre-colonial period with Arab law-from Europe's colonial era to the most current trends. During these periods, laws were imposed in parts of the continent without societal consideration. Each colony transplanted laws according to its interests and domestic legal laws. After the colonial period, African policymakers began with legal reforms that focused on preserving human rights. Commercial laws established before independence made it easy for African countries to continue trading with the former colonizers. As detailed in section 5.2.1 of this study, for the developed nation, sustaining the legal systems also made it easy to continue extracting resources from the continent and to exert some level of economic control.[819]

However, because legal colonies occupied various countries on the continent, Africa has a pluralistic system. The colonial overhang has made it difficult for most African countries to reform

[816] See Chapter 4 section 4.4.
[817] See Chapter 4 section 4.5.1.2.
[818] See Chapter 4 section 4.5.3.
[819] See Chapter 5 section 5.2.1.

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their legal systems at the national level or to develop a harmonious legal system that facilitates trade between nations. Various regional economies have tried to harmonize trade laws at the regional level, with the Organisation for Harmonisation of Business Law in Africa (OHADA) presenting a good example. The AFCTA may also be the next hope for African countries to harmonize their pluralistic systems.

The study of China's growth and its implication for African development is a new phenomenon with new areas of research emerging. The present research focused on a new area related to legal developments to understand how Chinese investments influence investment law reforms in Africa. The study presented African countries as a bloc, based on how they present themselves and engage with China at FOCAC. The researcher is mindful that Africa consists of countries with varying legal and pluralistic legal systems as a consequence of historical colonial relations. The plural legal system and varying economic circumstances have made it difficult to reform domestic law and reform continental level laws. Establishing the FOCAC has created a joint base for Africa to coordinate its FDI interests with a single partner and one legal system.

As a growing investment partner in Africa, China presents a new alternative. Africa's interests are shifting away from former colonies as a crucial trading partner and developing investment attraction strategies to attract former colonies. On the other hand, colonial ties have made it easy to attract investment. Most African countries are now actively pursuing Chinese investors and openly promoting a 'look East' policy, as mentioned earlier. In return, China is looking at Africa as a perfect sandbox first to try its outbound foreign investment policies and geopolitical influence. Out of mutual interest and co-dependence for economic growth, China and African countries created the multilateral platform FOCAC to facilitate their mutual interests. As a result of its success and the competition perceived by Western countries on Chinese activities in Africa, FOCAC has triggered African summit fever. All the major economies have an African summit[820] (see Table 17). This table represents nine partnership summits recognised by the African Union.

[820] The African Union has generally discouraged the attendance of summits by all African state leaders with one international partner. For this reason, the Banjul formula was adopted to manage the number of state leaders attending the India–Africa summit. The formula made provision for the African Union to choose 20 African leaders to attend such summits (15 country leaders plus five regional leaders). That being said, without the ability to enforce such directives without encroaching on states' sovereignty, African states and foreign partners have simply ignored the Banjul formula.

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Table 17 Major African summits with G20

Group	Country	Summit	Date Established
G20 countries			
Group 1	United States	United States–Africa Leaders' Summit	2014
	Australia	(Australia–Africa Week) not a summit	
	Canada Summit	No Summit in Place	
	Saudi Arabia	Saudi-Africa Summit	Proposed 2023
Group 2	India	India–Africa Forum Summit	2008
	Russia	Russia–*Africa Summit*	2019
	South Africa	N/A	
	Turkey	Turkey–Africa Partnership Summit	
Group 3	Argentina	Under Africa–South America Summit	2006
	Brazil	Under Africa–South America Summit	2006
	Mexico	N/A	
	Nigeria	N/A	
Group 4	France	Franco-African Summit	1973
	Germany	Compact with Africa	2017
	Italy	Italy–Africa Ministerial Conference[821]	2016
	United Kingdom		
Group 5	China	Forum On China–Africa Relations	2000
	Indonesia	Indonesia Africa Forum[822]	
	Japan	Tokyo International Conference on African Development	1993
	South Korea	N/A	
Others	European Union	AU–EU partnership	2000
	Singapore	Africa Forum Singapore	
	League of Arab States	Africa Arab Summit	1977

Source: Author's own construction

At the beginning of FOCAC, there was no legal framework to support state-facilitated trade and investments. Both sides relied on international and domestic systems to resolve legal conflicts and establish legal guarantees to safeguard investment in host countries. However, given the unique nature of developing nations and the under-representation of developing nations' interests, FOCAC established a legal forum to fill the legal investment lacuna in this relationship. The legal

[821] Available at Italy Africa Ministerial Conference https://www.ispionline.it/it/node/17977, and at https://www.esteri.it/mae/en/sala_stampa/archivionotizie/comunicati/2018/10/italia-africa-alla-farnesina-si-apre-il-25-ottobre-la-conferenza-ministeriale.html.
[822] Available at https://kemlu.go.id/maputo/en/news/568/indonesia-africa-forum-iaf, and at https://www.thejakartapost.com/adv/2018/04/09/iaf-an-historical-milestone-in-indonesia-africa-ties.html.

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forum further explores institutionalizing and formalizing itself to give legitimacy, legal recourse, and weight to resolutions that come out of the forum. The creation of the China–Africa Joint Arbitration Centre as an alternative dispute resolution mechanism is an example of tangible outcomes of legal cooperation under FOCAC that could promote the sharing of arbitration laws between China and host countries in Africa.

However, unlike Africa, China has speedily reformed to develop a unique legal system with Chinese characteristics. As a result, discussions in the forum are often initiated, sponsored, and activated by China.[823] These arrangements present the challenge of a one-way transplant from China to Africa. Given the continent's lack of capacity to fund law reform, China has assisted in the process in areas of law that are of prime interest for investment security. Lack of capacity could lead to African countries moving from colonial legal transplants to wholesale transplant of legal reforms with Chinese characteristics.

The impact of Covid-19 has been most detrimental to African economies, with major economies looking to provide economic aid to Africa. This may create another round of African digital summit fever. African countries desperate to save their economies will actively participate in future summits to negotiate self-serving bilateral agreements. A Chinese FDI regulatory framework by African countries can become a benchmark for dealing with the new major economies offering investment to boost African economies following the Covid-19 pandemic.

7.6 Mini case study: ICT and cyber regulation

Chapter 6 provided an analysis of Chinese ICT investments' influence in Africa in a new sector that is fast developing: cyber security laws and regulation. The Chapter reviewed official speeches and media reports to identify incidents that indicate a novel approach. While case studies do not offer a sample size that presents a generalisability of behaviour, they provide information that can be used to draw and identify a new pattern of legal reform in Africa's cyber security laws. Chapter 6 shows how China can influence attitudes toward existing laws and the prospects of how China will export its legal norms in the future.

[823] See Chapter 5 section 5.7.4.

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A new area of law affected by Chinese investments is in the cyber sphere, which did not have legislation during the colonial period. Africa, as the last frontier to develop cyber laws, is the first to have the opportunity to create its own uniquely African eccentric laws and philosophies. However, unlike Asian countries, African countries are lagging far behind in the ICT industry and therefore have a limited voice and capacity to forge a new path. Again, Africa will have to export a significant aspect of legislation and legal practices. However, for the first time, Africans have an alternative between Western hegemony and sovereign China.

The current policy of looking East for new economic partnerships means taking a different path from the Western approach. Asian governments have an ideology on cyber law that contrasts with the model of the West. In 2013, China introduced cyber sovereignty as a new model for cyber governance. Although only twenty African countries currently have a form of cyber regulation, law, or policy, it is evident that African countries are adopting China's cyber sovereignty approach. However, the model has faced criticism when applied by authoritarian governments for political gain, thus shifting the blame to China. Ultimately, it remains to be seen whether this model will be helpful to African countries or minimize its agency.

7.7 Conclusions

This study has shown that Chinese outbound foreign investment drivers are not limited to resource-seeking, profit-seeking, or market-seeking motives. As a growing economy, China has been modernizing all aspects of its government to retain its position as a global leader. First, China recognized the need for a uniquely Chinese legal system aligned with its governance ideologies. Once the Chinese legal system was slowly reformed, a socialist market system was established, accompanied by China's position as a major economy. The nation is now poised to export its laws and governance, and it is also determined to take centre stage again as the geopolitical influential economy.[824] Africa is a strategic partner in this pursuit. Africa offers resources, a consumer market, 53 votes in various multilateral platforms, and a prime market to promote Chinese laws and governance.

[824] Nkwanyana (n 759); Dai Mochinaga, 'The Digital Silk Road and China's Technology Influence in SouthEast Asia' [2021] Council on Foreign Relations <http://www.xinhuanet.com/politics/2016-04/25/c_1118731175.htm.>.

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Analyses of drivers of Chinese investment in Africa have previously ignored state interest as an influence, nor have they considered the impact of state regulations, policies, and laws on their host countries. China has developed laws to regulate inbound and outbound FDI to protect state interests. While Africa is perceived as an unknown business destination with considerable risk, Chinese investments are escalating as encouraged by the state. In areas of law where African states cannot support Chinese investment and provide legal guarantees, China has facilitated legal development assistance to provide the needed capacity and mitigate legal risks. However, China has also promoted its ideologies in Africa about global hegemonies and sought support from African countries. In some respects, Africa has benefitted from capacity support to reform laws to attract foreign investments. On the other hand, African countries are missing the opportunity to fully engage in and enforce local laws, making excessive concessions to attract Chinese investments, leading to a race to the bottom for legislation.

FDI advantages of the new partnership are evident in the transfer of technology and investments in diverse sectors such as ICT, manufacturing, and agriculture. China provides access to funding, and African countries that lack legal development capacity receive financial financing and education to reform new laws to attract investment. In the geopolitical stratosphere, China is pushing to reverse homogenous Western power to make more room for developing nations. However, while China is still classified as a developing nation, African countries must recognize that China is one of the leading global economies with shared ideologies in history. Economically, China has far surpassed Africa. With its new economic muscle, China is geared to lead the world and export new rules of engagement that may not always be suitable for the continent's economic development.

7.8 Reflection on the Study

The basic approach in this thesis was to explore the possible impact of Chinese foreign investment laws, policies, and regulations on African economic development. The study's objective was to formulate a theoretically sound conceptualization of FDI policy and law regulation in the Africa–China partnership. The theory is formed against the backdrop of asymmetric power relations, a mutual interest in investment, and the geostrategic position of developing nations.

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This study makes several contributions to academia and policymaking in China and Africa in knowledge, theory, policy formulation and application. To begin, the research consolidated separate, dispersed literature on China and Africa from multiple disciplines and organized the information into themes. The literature analysis assists in understanding the drivers of Chinese investments in Africa. Moreover, it contributes to Chinese African legal cooperation knowledge, which preceded growing economic relations. However, there is very little scholarly information on how legal reforms and development affect their economic ties and policy. With this in mind, the study provided a new analytical perspective to literature and Africa China legal discourse. After that, the study contributes to the theory of legal transplants by introducing a third order of transplant which happened between developing nations, in which the transplant was carried out by the private sector on behalf of the government. Furthermore, the study introduces comparative analysis theories in 'Law in Context' and 'Law in Action' to the evolution of China–Africa's legal reforms and cooperation in shaping international law and domestic investment laws.[825] Finally, recommendations are made for policymakers in China and Africa to develop a legal framework to support south–south legal cooperation and sustainable investments.

7.8.1 Contribution to China–Africa knowledge

The fact remains that African states support a 'look East' policy which promotes adopting the China model; However, in comparison to China, African states are not taking a long-term view of the impact that the China model will have on their development. African states need to consider transplanting this model as the Chinese have by 'stepping on one stone at a time to cross the river'. The Eastern economic success is not an overnight success but a combination of steps, the first of which is defining the positionality of China in the world. China has defined itself as a superior culture and the centre of the world, hence the self-reference to the country as the Middle Kingdom.

Second, China has always held the view that the world is in awe of China and seeks to learn from and implement its models overseas. Mao advocated that foreign relations should be such that

[825] The concept of law in action refers to the way in which laws are actually applied an enforce in society. This includes the processes an procedures that are followed when a law is violated, as well as the mechnisms that are in place to resolving disputes and enforcing legal decisions. The concept of law in action also encompasses the role of legal institutions in interpreting and enforcing the laws. However, in practice , the concept involves a range of actors, processes and institutions working together to ensure the laws of society are observes and upheld. The concepts also includes way in which laws are adapted or amended over time to reflect changing circumstances. Under this research it relates to the new relationship between the global south countries as a new sources of international law.

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the value of foreign things should only be accommodated to enhance the already superior Chinese culture. African leaders need to recognize that a partnership with China historically and currently has to offer African nations peer or competitive advantage to countries and nations. Both African and Asian nations are marginalized as races or developing nations. Peer and true brotherhood relations could help both sides to challenge this marginalisation.

Third, China has applied a consistent method of being restrictive, then regulating and encouraging in introducing new policies to attract FDI or any foreign policies. This ethos is often captured in China's 'first do, then do better' idiom. China has regularly used policy testbeds to test foreign principles on a smaller scale before adopting them nationally. Beyond Asia, China uses Africa as a foreign policy sandbox to push its geopolitical agenda of changing the hegemony and its ability to market its products and services internationally.[826] While Africa will also benefit from the change, it should manage the rising new power in a staggered process of first testing Chinese investments by increasing restrictions, especially those with unknown terms, with a long-term view of regulation, before allowing liberal investments in Africa.

This study highlights the pattern that China has followed domestically in its foreign investment law evolution. China has established a blueprint for inbound FDI law to apply to its outbound FDI law to protect Chinese investments. It is essential to understand Chinese interests and to negotiate contracts that harmonize these interests with African laws and African interests, to attract Chinese investment. This research draws attention to patterns of FDI law reforms for both sides that can be studied for the best outcome for a successful shared future.

7.8.2 Contribution to legal theory: legal transplants

The study identifies a new order of legal transplant. Historically legal transplant took a top-down approach, with countries borrowing from advanced legal systems facilitated by governments and lawmakers. This research explores legal transplant between new legal systems, with the process facilitated through FDI by private sector companies carrying out state interests.

[826] Ye (n 479).

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7.8.3 Contribution to China–Africa legal cooperation

The current study analyses the benefits and drawbacks of Africa-China legal cooperation. The paper traces various points in which legal cooperation was officially recommended as part of China's international relations policy. Since the establishment of FOCAC in 2000, legal cooperation has been recommended under various action plans. In Chapter 4, the research maps clearly point-out the different areas in which legal cooperation was considered.

The study also considers the impact of Africa-China legal cooperation on the legal systems, frameworks, and ideologies of African countries, including unintended consequences. China's technical legal training by China's ICT companies has been abused by authoritarian governments to undermine civil liberties in the continent.

7.9 Proposals for the development of a legal cooperation framework

Finally, this study's overarching work aim was to provide a foundation for policymakers to implement the recommendations which follow.

7.9.1 Recommendations for Africa

China presents a new opportunity for African policymakers. Chinese officials recommend that African countries do not 'copy and paste' the Chinese model for prosperity. However, the same caveat should apply to Chinese multinationals who copy and paste the China model into their operations in Africa. The following recommendations should be applied in the continent to ensure that Chinese FDI will result in a race to the top in investment law reforms in Africa rather than a race to the bottom scenario.

1. Invest in the study of Chinese laws the same way that China has invested in the study of African laws. Leverage funding of Chinese education programmes.
2. Develop a database or repository of Chinese law studies by various think tanks, universities, and departments at the level of regions, countries, and at the African Union level.
3. Adopt a similar strategy for developing nations to develop a skills pool of returning African students from China or introduce the study of Chinese law into African universities.

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4. Co-host Chinese law conferences and learning visits to curate the content to benefit African policymakers and scholars equally. Actively create a curriculum that serves African interests.

5. Governmental legal functions in African nations should be strengthened so that governments can receive better guidance on the effects of legislation imported or accepted from other nations.

6. Avoid a wholesale approach to transplants. This requires increased knowledge of Chinese laws, such as contract law or cyber security laws, to identify areas of law that may not be suitable for African society. This can be achieved through increased legal exchanges in higher education, legal practitioners' exchanges, and empirical research of investment law in action. Chinese SEZs offer a special opportunity to study the attitude of Chinese companies towards the law in Africa and the attributes of Chinese economic laws which they export to their operations.

7.9.2 Recommendations for China

China has repeatedly advocated for Africa to chart its own path and not necessarily copy the Chinese model. However, research shows that China has actively influenced legal developments in Africa through soft power. To protect its investments, China has also ensured legal guarantees in areas where African law reforms were lagging. The study shows that Chinese policymakers and multinationals have a significant influence on law reforms in Africa and are in a stronger position to define the partnership.

1. Cautiously support legal aid to ensure that it benefits broader society and is sustainable rather than supporting authoritarian regimes.

2. Create stronger terms and recourse for guiding principles on OFDI. Violation of local laws by Chinese companies attracts more negative attention than violations by other foreign companies. A slap on the wrist reminds Chinese companies of an old Chinese saying that the mountains are high, the seas are wide, and the emperor is far off in Beijing.

3. Establish regulatory Africa–China law offices in Africa to offer education and a regulatory capacity. For example, China has recently introduced Chinese language classes to the South African police, which is a step in the right direction.

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4. Co-establishing Africa-China mediation centres as an alternative dispute resolution. Mediation is a preferred alternative form of dispute resolution in African and Chinese cultures in contrast to a litigious Western culture. This could create the capacity to bridge issues related to labour relations and other commercial disputes.

7.10 Research gaps

African countries are not homogenous; However, under FOCAC, African countries participate as a bloc. This study has provided a systematic review of the legal aspects of Africa–China investment relations for the first time. Given that African countries and China have pluralistic legal systems, further literature and imperial analysis are required to measure the influence that Chinese investments have had in African countries. This would require a more in-depth analysis of China's strategic vision reports, such as China Standards 2035 and the China 100-year policy documents.

More detailed research could focus on specific laws that influence foreign investment attraction and regulations, such as environmental laws, procurement guidelines, and localization policies. Further studies could also focus on China and a single country or specific industries such as ICT infrastructure, construction, and mining. The current study took a generalized approach. Therefore, focused research with case study sample sizes that represent the population of Chinese investments could provide more in-depth information. The current study took a more general approach. Future research could focus on more specific studies in the following areas:

A. Technical legal transplant case studies:

The current research landscape lacks a comprehensive investigation into China's technical legal training programmes for African officials, with a focus on the training content. A deeper investigation into China’s technical legal training content: What topics and areas were covered in the Chinese training programmes? Did they focus on data governance principles, regulatory frameworks, or specific technological tools? Investigating the training content of China's technical legal education, particularly concerning data governance principles, regulatory frameworks, and technological tools, is a critical research gap that warrants attention. Closing this gap would enhance Africa’s understanding of China's legal system and its capacity to address the legal challenges arising from the digital era.

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Moreover, comparative studies that analyse China's technical legal training content in contrast to other countries legal education could highlight potential strengths and weaknesses. This would facilitate a better understanding of how different jurisdictions approach legal training in the context of technology and data.

B. A Socio-legal approach

The research relied on publicly available media interviews of stakeholders such as government officials, business leaders, and law-makers. Future research using a more socio-legal approach could help understand the broader societal impact of cyber sovereignty in African countries, considering the implications for human rights, economic development, and regional cooperation. In various parts of the continent, the model has been used to suppress dissenting voices. Overly strict cyber sovereignty measures may encourage tech-savvy individuals to find ways to circumvent the controls, leading to an arms race between the government and tech communities. Interviews could reveal how the balance between lawmakers and end-users is manifesting and whether a cyber law with African characteristics will emerge from this negotiation.

C. Microfocus study

This research adopts an exploratory approach, analysing Africa as a collective entity engaging with China through multilateral platforms such as BRI, FOCAC, and BRICS. In addition to these multilateral agreements, China also enters into bilateral agreements with individual countries. Drawing from the insights gathered in this study, a more rigorous examination of China's legal influence in Africa should be conducted at the country level. Furthermore, the sphere of cyber governance emerges as a new area of influence worth exploring. To achieve this, a comprehensive industry analysis and a detailed case study at the company level can be undertaken. For instance, country-specific investigations in South Africa may focus on exploring Huawei's training programmes, interactions with policymakers in the continent, and the company's strategies for navigating the regulatory landscape. Undertaking such micro-level case studies would enhance Africa’s understanding of China's legal impact on African nations and provide valuable insights for future research.

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7.11 Personal reflections and concluding remarks.

Committing to doing a research study on China and Africa has been a challenging and engaging journey, clarifying the limitation and expertise the author assumed she had in China. News on China infiltrates media, social media, and policy discussions. Sometimes, filtering, validating, and shaping content founded on sensationalism into scholarly information was a Sisyphean task. Tim Clissold wrote that in the early 1990s, every businessperson positioned themselves as a 'Mr China', meaning a China expert. With the growing media coverage of China, more people provide analysis and a point of view on China's international relations than ever before.

This thesis has focused on law in context. The research has benefitted from the author's experience in China representing various private companies, think tanks and the South African government as a senior official. Writing this research was the consolidation of knowledge from experiencing the evolution of Chinese and African relations in a professional capacity and from listening to anecdotes of ambassadors who were in office when FOCAC was established. The author's experiences were substantiated by studying Chinese law and living in China to understand the legal attitude of Chinese policymakers and law enforcement officials. The completion of the research opens a new Chapter in tracking and following China's OFDI policies, laws and regulations and its influence on the ideologies of law-making in Africa with a particular focus on future industries and areas of law such as cyber governance in Africa.

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