Chinese Investment in Africa: China’s Empathetic Support of Poor and Despotic Regimes, and the Competition Western Companies Face

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CHINESE INVESTMENT IN AFRICA:
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AND THE COMPETITION WESTERN COMPANIES FACE

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I. Introduction

A. China

After the death of Mao Zedong in 1976, the People’s Republic of China transformed from one of the poorest countries in the world to the second largest economy in the world in 2010. The mechanisms for this rapid turnaround include transformation from a centrally planned command economy to a state led capitalist economy focused heavily on foreign exports. Much of the economic reform was attributed to Special Economic Zones along China’s coast that focused on exporting foreign goods and allowing some foreign direct investment. Between 1975 and 2004, China’s gross domestic product grew at an annual rate of 8.4 percent, with even higher rates in the period after 1990, and their current growth continues to outpace most other nations.¹

China’s transformation has not come without some growing pains. Working conditions in China are often more hazardous than in other large industrial economies considered to be developed countries. China has only begun to protect private property rights in the past 10 years, its legal system is still highly guarded by the state, and market protections and inaccessibility make foreign control of firms in China difficult. As a result China is still widely considered an emerging economy, but regardless of this status it is expected to overtake the United States in total value of economy by gross domestic product (GDP) sometime in the first half of the 21st century.

B. Africa

By far the richest and most developed country in Africa is South Africa, which is considered to be an emerging economy along with the BRIC (the world’s four leading emerging economies, including Brazil, Russia, India, and China). Every other country in Africa is considered a developing country, and they are among the poorest in the world. North African countries tend to have economies tied to the European economy due to their ease of access along the Mediterranean.

In the effort to expand its economy and spread its influence abroad, China has begun to invest in countries around the world, as most developed countries and other emerging countries have. This has been part of a push for globalization that has been facilitated by the World Trade Organization (WTO) and the proliferation of free trade agreements and some of the lower species of trade agreements. Every country is characterized by market differences including differences in legal systems, openness to investment, and political risk related to the stability of investment. Some countries have begun to develop faster in the face of globalization because of their hospitality to foreign direct investment. A large exception to the trend of development in the push for globalization has been many of the nations in Africa, especially in Sub-Saharan Africa. On the Human Development Index, 27 of the 30 lowest scoring countries in the world were in Africa.² In 1981, 42% of people living in sub-Saharan Africa did so on less than US$1 a day; by 1993 that number had elevated to 45% and only in 2004 was that number back below

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1981 numbers, at 41%, while the rest of the world was getting richer and the poorest of the poor in every other region continued to shrink as a percentage of the population.\(^3\)

Much of this comes as an effect of the turbulent history of Africa, especially in the last century. During the colonization of Africa from the late 1800s until World War I, many European nations controlled major parts of Africa that had never been settled as nations but suddenly gained borders under colonial rule. These borders merged many tribes under colonialist banners that paid no attention to regional sovereignty. When most of these nations became independent after World War II, they tenuously kept much of these borders despite their inconsistencies with pre-colonial sovereignty. This led to political instability, aggravated by Cold War conflict, resulting in increases in corruption, despotism, and civil wars.

For many countries looking to invest and trade in Africa, many African countries remain highly risky on political risk indexes.\(^4\) As a result, many large enterprises are wary of doing business with high political risk states for fear that political instability will result in the loss of significant investments. Corruption is also a big issue, where much of the money spent on aid or trade deals is actually in the form of bribes to move deals along at a faster pace (or to get them moving at all). This has not prevented many countries from extending foreign aid and minor levels of investment in Africa. Historically, the United States has been the largest investor in Africa, but in the last few years that title has passed to China.

II. China’s investment strategy in Africa

A. The interrelationship between the Chinese economy and the African economy

In November of 2006, heads of state and foreign ministers from 48 countries met in China for a two day summit on trade and investment.\(^5\) At the summit, Chinese President Hu Jintao promised that China would double aid to Africa by 2009 and that the China would make at least US$5 billion in loans and credits available to the continent.\(^6\) China has since far surpassed this goal and is now Africa’s largest trading partner, surpassing the US in 2009 and remaining ahead since then.\(^7\)

China has several features that African host countries find favorable compared to Western investors. As an emerging country, China can draw on its recent development experiences in a way that rich countries cannot, and this brings a different perspective to the need for foreign aid.\(^8\) China has developed unusually fast in the last half century, and they have an interest in spreading that model outside of their own borders. As one of the most underdeveloped regions in the world, China sees Africa as an opportunity to reuse their own working model and try to emulate their own rapid growth in an underdeveloped region to reap

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\(^3\) See Keenan, supra note 1, at 84.
\(^4\) See e.g. EUROMONEY COUNTRY RISK, http://www.euromoneycountryrisk.com/Home/Return/Countries#supertop (Feb. 15, 2012).
\(^5\) See Keenan, supra note 1, at 91.
\(^6\) See id.
\(^7\) See Alex Perry, China’s New Focus on Africa, TIME MAGAZINE (June 24, 2010), http://www.time.com/time/specials/packages/article/0,28804,2000110_2000287_2000276,00.html.
the benefits of Foreign Direct Investment (FDI), investment in the management of companies in an economy outside the home economy of the investor.

Instead of focusing on aid and relief initiatives, China has accommodated politicians in host countries by investing in infrastructure and creating trade relationships. Politicians favor this type of investment because it shows their constituents that they are bringing money into the county that the citizens will get to benefit from rather than just being spent on narrow relief programs. This is especially important to those politicians who feel their control may be unstable because their country sees them as corrupt or out of touch with national interests. Other nations that take an aid based approach to Africa send supplies and food, and occasionally create trade deals loaded with conditions on spending towards different human rights goals, but they tend to view Africa as a stagnant economic environment where their efforts are mostly unproductive, especially in sub-Saharan Africa. China overlooks the image often placed on Africa as a place of war, poverty, disease, and stagnation that is widely held in North America and Europe, and instead hundreds of thousands of Chinese expatriates seeking new opportunities are pouring into African host countries to start businesses. Most developed nations looking for trade partners and candidates for FDI also try to target relatively stable countries where they have less likelihood of losing their investments to a regime change, but China has worked around this problem by providing insurance for companies willing to take these risks and working directly with the politicians in host countries to ensure that their business is received warmly.

As a showing of mutual respect, China places few conditions on the lines of credit and other wealth it extends to African host countries, and they make major infrastructural investments to the benefit of their hosts and the expatriates launching enterprises on the continent. This stance is embraced not just in oral diplomacy but also by the policies of China’s mainland government. Premier Wen Jiabao, after touring Africa in 2006, acknowledged China was seeking a non-ideological relationship based on equality and non-interference. In January of 2006, the Ministry of Foreign Affairs of the People’s Republic of China released China's African Policy, which explicitly states “In light of its own financial capacity and economic situation, China will do its best to provide and gradually increase assistance to African nations with no political strings attached.”

A key characteristic of many of the major Chinese companies is that most of them are or once were state-owned enterprises (SOEs). This dates back to the establishment of the People’s Republic of China in 1949 when all business entities in China were created and owned by the government. As China opened up commerce with the rest of the world in the 1970s and 1980s, they became concerned with competing in the international marketplace, so during the 1990s and 2000s many SOEs were privatized and went public to compete in the capital markets. While they are publicly traded and listed on stock exchanges, the SOE corporate form is still largely controlled by the central government through the State-owned Assets Supervision and Administration Commission of the State Council (SASAC), which is responsible for placing top executives, approving mergers or sale of stocks or assets, and drafting laws related to SOEs. China has also explained that a key reason for publicly listing SOEs is to stimulate reform of

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9 See id.
10 See id.
While China maintains a relatively large degree of control over SOEs by appointing management and regulating some activities, the regulations are usually only restrictive as far as China’s national interests are at issue. Where enforcement of Chinese regulations on businesses is generally lax, it tends to be even more relaxed with private Chinese companies, partially because China is not as concerned with how they affect China’s international image. China has in the past turned a blind eye to the private sector because of its inferior place in the national economy, and this has caused the private sector to often be bolder and more irresponsible in ignoring the laws governing their behavior. The majority of the Chinese business done in Africa by revenue though is by state owned companies harvesting oil and minerals, but a majority of the businesses run by Chinese companies investing in Africa are privately owned enterprises, largely run by Chinese expatriates.

B. Benefits to China from investing in Africa

Because Africa is such a risky environment for business, the continent remains fertile and underdeveloped. This creates an environment with relatively low competition from the West for China. As one of the few nations willing to invest in Africa, China has gained inexpensive access to a wealth of natural resources, especially oil.

In 1993, China switched from being a net oil exporter to a net oil importer. This huge thirst for oil is of course driven by China’s rapid development and the increasing number of cars bought in China, as well as the demands of being the world’s global export leader. By the time China’s economic growth made the search for oil one of China’s principal strategic interests, the US, UK, and France had concluded so many long term exploration and exploitation deals with key oil producing countries, such as the OPEC countries, that there was little room left for China. This left China with the option to search for oil in places like Sudan and Angola, where other countries had withdrawn or worked under strict conditions. In Sudan, Western companies had left during the 1980s and 1990s because of human rights violations and the civil war, so Chinese (and Indian) companies with fewer developed oil sources and less secured channels of oil importation largely displaced them. Now, China has even greater access to oil and pipeline opportunities in the East Africa region. A proposed pipeline through Kenya and a recent major strike of a new deposit in March of 2012 are several of the opportunities quickly becoming available to China. Over 30% of Chinese oil imports came from Africa in 2011, and more than 70% of African trade with China is in energy. Some of the oil that China pursues in

15 See Keenan, supra note 1, at 93.
16 See id.
17 See id. at 93-94.
18 See id. at 94.
21 EURASIA REVIEW, supra note 11.
Africa is in oil blocs that have been rejected by Western oil companies, and since China lacks the offshore capabilities to reach many of the untapped African deposits, the continental mainland poses greater opportunity. Drilling for oil in Africa also allowed China to secure access to oil via alternative shipping routes that weren’t controlled by the US and its allies in case of the unlikely event the US decided to shut down shipping lanes. So Africa presents not only a great source to quench China’s thirst for oil, but it is also a more secure source further from the reach of its Western competitors.

Chinese manufacturers now also have a hand in many of the major electronics sold in North America and Europe, so mineral resources, especially rare earth metals, are highly sought after by Chinese manufacturers. Just as Africa is a relatively untapped source for petroleum, it is also a relatively untapped source for minerals. For example, the mineral coltan, a key component to the capacitors in many consumer electronics including video game systems, computers, and mobile phones, is one such ore that is greatly needed in electronics manufacturing, and one of the largest sources for coltan in the world is in the Democratic Republic of Congo. As a portion of China’s investment, manufacturing is catching up to mining, which constitute 22% and 29% of investment, respectively. Since Africa is one of the poorest regions in the world, China is able to offer some of the lowest wages in the world in factories it plants in sub-Saharan Africa. Even where there are minimum wage laws above the wages China could pay elsewhere, unemployment is often so high that China is able to get away with paying below national minimum wages.

China also needs something productive to do with all of its money. As a net exporter, China has aggregated over US$3 trillion of foreign exchange reserves, so much of their attention has been turned to finding investment opportunities around the world, and few places are as underdeveloped as Africa. As its investments in Africa begin to show fruit and if the African marketplace becomes more developed, China will gain the benefit of already having an established investment and fewer barriers to entry. When most countries begin developing rapidly, their currency also begins to gain value in world exchange markets, especially if the rate of development is more rapid than in other parts of the world. If China is able to replicate their own meteoric growth in the countries it invests in, then Africa’s various currencies should begin to value rapidly and China will benefit from exchange rates since China tends to collect much more currency than it spends, as the country has continued to make it a policy to attempt to export more than it imports. Competition is again scarce in these markets since so many Western enterprises are unwilling to work with unstable African nations, especially those with more despotic leadership. China’s “non-interference” approach has given it a tremendous amount of access to trade with these regimes, as the less savory regimes find China’s investment comes with so many fewer constraints on their discretion (or as they often view it, sovereignty) than Western deals. However, China’s approach may also be helping to entrench these regimes, ensuring that China will continue to have little competition because of their impartiality in such an environment.

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23 See Keenan, supra note 1, at 94.
24 EURASIA REVIEW, supra note 11.
26 See Rebecca Lowe, Riches and Responsibility, 65 No. 3 IBA Global Insight 14, 16 (2011).
China’s willingness to invest in Africa also creates alliances that it can bring with it to international forums. Following criticisms of China, especially after the Tiananmen Square protests, China has sought to broaden its circle of allies beyond the normal Western powers. One of the few strings that come attached to Chinese investment deals is that the recipient denies Taiwan as the legitimate government in China. This may seem insignificant to US investors, but it has created strong political capital for China, and the number of African states that recognize Taiwan has dropped significantly since China’s summit with the heads of state of Africa in 2006. China refuses to do business with the remaining nations that recognize Taiwan, which is now down to four countries in Africa. But more pressing on a global scale is that Africa’s 53 votes in the UN might be used to side with China on issues like human rights to block criticism of China in places like the UN’s Human Rights Council. Regardless of whatever specific agendas they are seeking in the international forums, China’s voice will be heard louder as it puts more friends in its corner.

C. What Africa gains from China’s investment

In the past few decades, many Western companies preceded China’s investment frenzy by looking to emerging countries as great markets for growth where business is perceived to be more profitable and less risky, but this trend has excluded underdeveloped markets like those in Africa. This left Africa further behind in a world that was largely gaining momentum, so they are in many ways desperate for investment and trade partners. Bilateral trade between China and Africa has been surging at a rate of more than 30 percent per year for eight consecutive years from 2000 to 2008. After a minor setback in 2009 relating to the global financial crisis, bilateral trade jumped from US$100 billion in 2008 to US$127 billion in 2010. Chinese FDI in Africa was US$9.3 billion by 2009, with a quarter of that being invested in South Africa as the largest recipient of Chinese FDI, followed by Nigeria, Zambia, Algeria, Sudan, Democratic Republic of Congo, Egypt, Ethiopia, Tanzania, and Mauritius. By the end of 2010, China had 33 bilateral investment promotion and protection agreements with 33 African countries as well as agreements to avoid dual taxation with 11 African countries. China has also invested in six different industrial parks in the style of Special Economic Development Zones in Zambia, Mauritius, Nigeria, Egypt, and Ethiopia, which led to the creation of over 6000 local jobs.

China has widely developed the infrastructure in its African host countries, both in areas used by Chinese companies, and in inland areas where Chinese companies don’t usually operate. Projects have included infrastructure like telecommunications, roads, bridges, and even the recently completed new conference hall for the African Union. In some places, China has brought its own taste for megaprojects to its African hosts by creating new soccer stadiums in an effort to appease the populace and not just the wealthy beneficiaries of its investments. Stadiums

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27 See Keenan, supra note 1, at 93.
28 Lyman, supra note 21.
29 Id.
31 Id.
32 Id.
33 Id.
34 See Keenan, supra note 1, at 91.
may not be extremely useful to help Africa emerge from poverty, but the roads and other infrastructure China is building have been, and they are making them accessible to more than just the Chinese expatriates who need transportation from factory to port. China is also building hospitals more akin to those in the developed world, a gesture much more favorable to the poor and less advantaged Africans who would otherwise have no access to health care. For a continent as plagued with disease and high mortality rates, moves like this seem to suggest China is keeping Africa’s interests in mind.

African countries have also been extended large lines of credit in addition to being the recipients of infrastructure spending. Much of the credit is for buying Chinese goods, everything from tools and weapons to roads and hospitals, but few others will extend credit in the quantities China will, such as a US$8 billion credit offer to the Democratic Republic of Congo. In an effort to prevent corruption, much of the money invested in Africa is placed in escrow accounts in Beijing, and once a list of infrastructure projects is drawn up the cash is transferred to the Chinese contractors to begin construction.

Following on China’s success in Africa, India has begun to invest in Africa with a strategy similar to China’s. Prime Minister Manmohan Singh in 2011 promised US$5 billion in loans to Africa, and like Chinese loans the Indian loans come with few conditions. Indian investment has focused on areas of traditional strength in Indian development, including services like telecommunications and retail business. Like China, India has a recent history of rapid development that they also seek to emulate in other parts of the world. China and India are both part of the BRIC bloc of countries, which suggests a kinship with developing countries. While each of the BRIC countries is in a different stage of emergence as they transition from developing countries to developed countries, they all are significantly large economies that have a large amount of influence in global markets on prices of global commodities and the trends in global investment.

III. How China’s strategy in Africa is the same as and different from that of Western countries

A. The US’s history of supplying aid to Africa

Much of the aid that has been supplied to African nations by the US in the past century has been conditioned on the US’s need for a certain kind of behavior from Africa. The problem with this policy is that once the US no longer needs this behavior, the aid is cut off. For Example, when the US provided support to Mobuto Seko Seko in the former Zaire during the Cold War, the expectation was that Zaire would not open up its vast and undeveloped mineral and uranium deposits or change its allegiances to favor the Soviet Union. Once the Soviet Union collapsed, the aid money dried up. What aid did continue to flow came with a growing list of conditions, and many leaders who depended on donations to build social programs in Africa suffered from weakened regimes. It was no longer good enough to remain loyal to the

35 Lyman, supra note 21.
36 THE ECONOMIST, supra note 24.
37 EURASIA REVIEW, supra note 11.
38 Id.
39 See Keenan, supra note 1, at 88.
40 See id.
41 See id.
donor, as more conditions began to attach to trade agreements which might dictate how much a state could spend on social services, education, or other programs the donor favors.\footnote{See id. at 95.}

Now the region is so heavily afflicted with civil strife that the political risks associated with investing in Africa are prohibitive for businesses that are worried about losing their investment in a regime change or if a government decides to nationalize all foreign businesses. Insurance is available for businesses that would like to work in Africa in spite of these political risks, but Western enterprises will struggle in comparison to Chinese enterprises in keeping costs low because the Chinese government provides political risk insurance to Chinese companies at no charge as long as those companies act in ways that are consistent with China’s interests.\footnote{See id. 94.}

With all other costs being equal, this allows Chinese firms to pursue much riskier ventures than Western firms\footnote{See id. 94.}.

**B. The legal constraints on US and European enterprises**

One of the reasons Western companies continue to shy away from investing in Africa is the high cost of corruption in African nations. A key concern for many US companies wishing to invest in Africa is the Foreign Corrupt Practices Act of 1977 (FCPA). The FCPA originated as a congressional response to a Securities and Exchange Commission (SEC) voluntary disclosure program in the 1970s.\footnote{See Lucinda A. Low et al., Enforcement of the FCPA in the United States: Trends and the Effects of International Standards, 1588 PLJ/Corp 63, 67 (2007).} Many of the large US companies participating in this program revealed that they had grown their business in developing and developed countries using bribes to government officials.\footnote{See id.} The law was expanded in its breadth and enforcement following amendments to the FCPA in 1998 as the US anticipated accession to the Organization for Economic Co-operation and Development (OECD).\footnote{International anti-bribery and fair competition act of 1998, PL No. 105-366, 112 Stat 3302.} Responsibility for enforcement of the FCPA was given to the US Department of Justice and the SEC, and both have stepped up enforcement and increased the standard of compliance for regulated companies.\footnote{See Low et al., supra note 44, at 67.}

The FCPA seeks to curb foreign corruption by criminalizing the bribery by covered persons given to foreign government officials, political party officials, and candidates for political office in order to obtain business.\footnote{15 U.S.C. § 78dd-1a, 78dd-2a, 78dd-3a (1998).} The FCPA also requires US or foreign companies with publicly traded securities in the US to adhere to prescribed standards of recordkeeping, to maintain internal controls, and to take other steps to ensure investors can obtain a true and complete financial picture of those companies’ activities.\footnote{15 U.S.C. § 78m (2011).} In the wake of the Enron scandal and the enactment of Sarbanes-Oxley in 2002, companies have sought to comply with the FCPA and other ethics and compliance programs with greater urgency.\footnote{Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204.} Amendments to the Federal Sentencing Guidelines for Corporations also provided new details regarding the US government’s definition of an “effective compliance program”.\footnote{Sentencing Guidelines for United States Courts, 69 Fed. Reg. 28,994 (May 19, 2004).}
The United States is not the only country seeking to regulate or block bribes paid to foreign officials. In addition to unilateral measures in various countries, multi-lateral agreements in various conventions have sought to regulate bribery, including the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, sponsored by the OECD, the Inter-American Convention Against Corruption, adopted by the Organization of American States (OAS), the Criminal Law Convention Against Corruption of the Council of Europe, the African Union's anti-corruption convention, and the UN Convention against Corruption (UNCAC). The United States is party to three of these - the OECD, OAS, and UN Conventions. China has only recently passed its own version of the FCPA by amending Article 164 of the People’s Republic of China (PRC) Criminal Law, their existing anti-bribery laws, in February of 2011. This law took effect in May of 2011, providing new controls over corruption that will affect Chinese interactions in Africa.

Depending on the country that a US firm or any other firm affected by an analog of the FCPA wishes to enter, local requirements for doing business could present hazards for potential liability. Since some countries (such as China) require foreign companies to form partnerships or joint ventures with local companies, a US company covered by the FCPA could find itself liable if the firm it partners with is engaged in or has previously engaged in bribery. Partners in a joint venture that are not themselves subject to the FCPA can trigger FCPA liability as agents of the partnership if they take action within the US or if there is knowledge or authorization of their improper actions by the US partner. Mergers and acquisitions of companies doing business abroad raise the risk of successor liability either for the past activities of the target company and for any bribery that is ongoing at the time of acquisition and post-merger. Even winding up a project may involve government approvals or resolution of outstanding issues that may trigger requests for payments that may be improper under the FCPA.

Following the 1998 amendments to the FCPA, a violation by US persons can occur even if the prohibited activity takes place entirely outside of the United States and does not involve the use of any instrument of US commerce. Non-US persons covered as “foreign issuers” or under the “any person” prohibition must still act with the necessary territorial nexus for the US to

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58 See Low et al., supra note 44, at 69.
60 See Low et al., supra note 44, at 73.
61 See id. 72.
62 See id. 73.
have jurisdiction. Any “person,” no matter what nationality, acting within any US territory is covered by the FCPA. The FCPA also covers US companies that try to use foreign subsidiaries as a shield by trying to bury their heads in the sand to escape “knowledge” requirements. The only statutory exception in the FCPA is for payments to government officials who perform “routine governmental action.” The 1988 amendments to the FCPA also added two affirmative defenses for payments that are lawful under local laws and for payments made to reimburse for expenses directly associated with visits to product demonstrations or tours of company facilities or in connection with the execution or performance of contracts.

While the FCPA may seem at first glance to be a possible protectionist measure, many countries have begun to pursue the anti-bribery policies because of the recognition given by economists to the deleterious effects that corruption has on development and by high profile corruption in various countries. Economists now generate corruption indexes based on the costs of corruption both for people seeking to do business in countries with high levels of corruption and the effects it has on the development of these countries. This has drawn the attention not just of rich, developed countries but also developing countries looking to increase the benefits of foreign aid.

The requirements of the various international conventions that the US is a party to mostly mirror the FCPA, but different conventions have some additional requirements or lack some of the exceptions made in the FCPA. While the US is not a party to the Council of Europe Conventions, it does maintain observer status, and the Council of Europe explicitly provides for corporate liability with provisions that require non-natural persons be held responsible for offenses committed for their benefit by a natural person.

World Bank Group (a composite of World Bank and three other institutions) and the two subsidiary institutions the comprise World Bank, the International Development Association, and the International Bank for Reconstruction and Development, have revised their guidelines to include anti-corruption measures. Upon discovery of fraudulent or corrupt conduct by a bidder or, once financing has been granted, by a borrower, the guidelines state that World Bank will reject the bidder’s proposals for awards, cancel the remaining portions of loans already granted to the borrower, and debar the borrower from future World Bank financing, for either a set time period or indefinitely. World Bank has actually banned several mainland Chinese companies from bidding for tender offers in Africa.

Only a few African countries remain that are not parties to at least one major convention banning bribery, but most of Africa still ranks as “highly corrupt” on Transparency International’s Corruption Perception Index. Some countries are signatories to both the UNCAC and the African Union Convention on Preventing and Combating Corruption but have...
been pointed out by Transparency International for having failed to implement international anti-corruption measures, including South Africa, Algeria, Burundi, Kenya, Liberia, Nigeria, Sierra Leone, Togo, and Uganda.\textsuperscript{75} Other countries in Africa have the proper laws in place but fail to enforce them in any meaningful way. Some businesses will continue to argue that bribery may be the only way to do business in countries like this in order to promote development, but often so much money is lost to the process of corruption that only cents on the dollar will reach the poor through food, infrastructure funding, etc. With the stricter enforcement of the FCPA and other measures in the last 15 years, the continued practice of requiring bribes by foreign government officials will do more to keep US enterprises out of corrupt states, limiting timely access by the US to some markets that may emerge in the near future. But corruption is not the only aspect of doing business internationally that makes investing in some African nations hazardous.

The success or failure of China’s anti-corruption measures in the Article 164 amendment remains to be seen. The international legal community believes that the amendment is the result of pressure to fulfill China’s obligations under various international treaties, especially the UNCAC.\textsuperscript{76} The amendment is not as detailed as the FCPA and has not been subject to judicial interpretation, and the original FCPA required years of changes in different arms the government to reach the level of effectiveness it has achieved.\textsuperscript{77} The amendment is so sparse that it lacks any exemptions and defenses, for example details on how gifts and entertainment should be handled or whether employees of state-owned enterprises are “foreign public officials.”\textsuperscript{78} And like many other PRC laws, the amendment provides broad discretion to judicial authorities with respect to interpretation and enforcement.\textsuperscript{79} It is therefore unlikely that the amendment to Article 164 will substantially affect China’s no-strings policy in Africa.

\textbf{C. Congressional human rights protections in US foreign trade policy}

Congress has made several human rights protections in the US’ foreign trade policy. Section 502B of the Foreign Assistance Act of 1961, in keeping with the UN Charter, states “a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.”

The Jackson-Vanik amendment to the Trade Reform Act of 1974 mandates that “most favored nation status” will be denied to any country that does not allow freedom of emigration. Alternatively, a country that does not allow freedom of emigration can still receive most favored nation status if it receives a waiver from the US. This law conflicts directly with provisions of the WTO which says members of the WTO must accord most favored nation status to each other, meaning that whatever country is participating in trade with a party to the WTO must receive all of the trade advantages of whatever nation is most favored by the WTO member. However, it still affects countries like Russia who have not received membership in the WTO. Vice President Biden is currently urging repeal of this law.

\textsuperscript{76} Amendment of PRC Criminal Law to criminalise bribery of foreign officials, ALLEN & OVERY (July 18, 2011) http://www.allenovery.com/AOWEB/AreasOfExpertise/PrintEditorial.aspx?contentTypeID=1&itemID=62309&prefLangID=410.
\textsuperscript{77} GOVERNMENTCONTRACTSLAWBLOG.ORG, supra note 58.
\textsuperscript{78} ALLEN & OVERY, supra note 75.
\textsuperscript{79} Id.
Dodd-Frank also has an impact on US businesses that may wish to follow Chinese enterprises into mining since the act requires US companies to eliminate conflict minerals from their supply chains. This means coltan from the Congo and other resources from areas of conflict, like blood diamonds and other conflict minerals, are off limits to US extractors and manufacturers. This follows on the Kimberly Process and other efforts by the UN to prevent the enrichment of despots and warlords.

D. How China’s policy of non-interference compares to US foreign aid policy

Unlike Chinese investment, Western aid in the past was given with many conditions and easily withdrawn, and this did little to secure a lasting relationship of trade and mutual dependency. Western nations are still remembered bitterly for colonialism when the Europeans settled and created the borders that have led to many of Africa’s current conflicts. Colonialism occurred well before environmentalism and human rights had entered the public conscience or even the international forum, so Europeans are historically viewed as exploiters of Africa’s natural resources. Now, modern Western policies are to extend aid with humanitarian strings attached, and the despotic regimes in unstable sub-Saharan Africa prefer to work with someone who is willing to pay and not place conditions on loans and credit. Even aid that does not come with strings attached is a mixed blessing because of the potential for corruption and concerns over dumping. And in a continent full of subsistence farmers who have aspirations to sell their crops at market, receiving pallets of subsidized American produce can have a stifling effect on escaping poverty.

But the question arises as to how broad China’s “non-interference” policy is. China has certainly sought to appease their hosts with large scale vanity projects like conference centers and soccer stadiums, but these sorts of things are loosely connected with economic development. China also gives much prestige to its hosts’ leaders by granting formal state visits or making high level visits to these countries. If China undertakes a large project, they ignore many of the normal barriers required under Corporate Social Responsibility (CSR) constraints. The absence of benchmarks, preconditions, and environmental impact statements gets the project moving quickly, regardless of the possible problems created by a lack of some due diligence.

Since these deals are often done directly with the host government, there are more opportunities for leaders to enrich themselves. This is because China does not require recipients of trade deals to implement the types of anti-corruption measures many Western governments and institutions require of Western enterprises. How the money in a trade deal is spent is of little concern to the Chinese. As a result, leaders can enrich themselves or entrench their positions of power by doling out the proceeds of improper deals without fear of outside

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80 EURASIA REVIEW, supra note 11.
81 Id.
82 Id.
83 Id.
84 See Keenan, supra note 1, at 96.
85 See id.
86 See id.
87 See id.
88 See id.
On this evaluation, non-interference seems less like neutrality in the sense of not favoring a regime’s policies and more like not interfering with how a regime chooses to operate, ignoring that they might be enabling the regime. The problem is that for the rest of the population of the host country, China is interfering in the nation’s developmental trajectory.

For example, China offered Angola a trade deal in 2004 that allowed Angola to forgo International Monetary Fund (IMF) funds after the IMF had placed increased scrutiny on Angola because of oil revenues disappearing from public accounts. China provided a US$2 billion line of credit backed by oil revenues, but the influx of oil money has done little to change poverty in Angola. Poor people in Angola lack access to clean water, adequate sanitation, or reliable sources of food, but the government used most of its redevelopment funds on repairing the railroad between Benguela and its main mining area 800 miles inland, and the government has delayed elections to prevent democratic interference in how it chooses to spend aid money.

Chinese firms also have a financial advantage over Western firms with respect to the loans created for trade deals. Like other Western nations, China provides subsidized loans when it creates these credit packages to buy Chinese goods, but it does them at below market rates. The effect is that China will gain access to projects that would not otherwise be economically justifiable because of the poor anticipated rate of return or the expense of insuring such a risky investment.

E. The emergence of Corporate Social Responsibility in China

Corporate Social Responsibility is a practice of self-regulation that largely emerged in the second half of the 20th century. Instead of just being in compliance with the law, CSR requires companies to do more than they are obligated to under laws governing product safety, environmental protection, labor rights, human rights, community development, corruption, etc.; and it suggests that companies should consider not only the interests of shareholders but also those of other stakeholders in the enterprise such as employees, consumers, suppliers, and local communities. While CSR is not traditionally associated with Chinese enterprises, China has become increasingly concerned with protecting their international image after scandals like toxic toothpaste and lead paint used on toys emerged in 2007. Thus, with the stigma of “Made in China” shifting not just from inferior quality but also to unhealthy, China has begun to pursue CSR to protect its international exports.

China has begun to incorporate social responsibility into its laws, with the leading example of this practice being traced back to 2006. Article 5 of the Chinese Company Law requires companies to “undertake social responsibility.” In 2008, the SASAC released the Guide Opinion on the Social Responsibility Implementation for the State-Owned Enterprises Controlled by the Central Government (Guide Opinion). The Guide Opinion has had little

89 See id. at 97.
90 See id. at 98-99.
91 See id. at 99.
92 See id. at 99-100.
93 See id. at 119.
94 See id.
95 See Lin, supra note 14, at 64.
96 See id. at 65.
97 See Lin, supra note 14, at 64.
effect on improving human rights, though, and companies like China National Petroleum Company (CNPC) may still satisfy the CSR standards of the Guide Opinion despite allegations of their involvement in the genocide in Darfur. In the wake of the CSR push in China, human rights have largely taken a back seat to traditional sustainability concerns like environmental protection. Implementation is another problem as the Chinese legal system is notorious for lax enforcement. Many Chinese companies also lack third party auditors to review records for CSR issues, and China as a whole lacks civic organizations to hold the authorities and the enterprises accountable. As a result, many critics view China’s CSR policies as window dressing as opposed to a genuine initiative.

F. Legal constraints on Chinese businesses, domestic and abroad

In addition to recent rules mandating some elements of CSR, China is also beginning to pass other laws that regulate corruption and ethical development. As discussed earlier, China recently amended the Chinese Criminal Law with an anti-bribery statute that emulates the UNCAC. With respect to other restraints, though, China’s rules largely apply to state owned and public companies traded on international exchanges.

Many of the large SOEs regulated under the CSR laws in China are traded on the Shenzhen and Shanghai stock exchange, and in 2006 the Shenzhen Stock Exchange released the Guide on Listed Companies’ Social responsibility, an indicator of compliance with Chinese social responsibility laws and guidelines. As of 2011, any listed Chinese company was obligated to publish a CSR code, and the Chinese authorities wanted all SOEs to file CSR reports by 2012.

Zambia is a good example of China’s CSR integration in Africa. There were about 300 Chinese companies in Zambia in 2011, and most of them were privately owned, employing about 25,000 locals in addition to numerous Chinese expatriates. Their standards for good CSR varied, but the general attitude was that even though some companies treat their employees poorly, the big state-owned companies genuinely sought to respect labor laws.

International demand for CSR may play a role in how the level of CSR integration plays out in China. Since China joined the WTO in 2001, causing China to become more integrated with global economy, China not only affects what flows into global markets but must also comply with the demands of the global market. As most of China’s exports are to the developed US and European markets, China must consider the preferences of customers in these markets for socially responsible goods, especially when those demands may cut into Chinese revenue streams.

99 See id. at 74.
100 See id. at 95.
101 See id. at 97.
102 See Lowe, supra note 25, at 16.
103 See Lin, supra note 14, at 77.
104 See Lowe, supra note 25, at 16.
106 See Id.
107 See Lin, supra note 14, at 89.
China’s membership and participation with several international bodies has some effect on China’s behavior in Africa and abroad. As a member of the United Nations, China is also a member of the UN Human Rights Council (UNHRC), the group responsible for issuing the UN’s stances on abuses of human rights. Most of the members of this council are developing nations, and the developed countries in Europe and the US have a relatively small voice. This skews the opinions and acts of the council in favor of policies that favor developing nations, and the US has been at odds with the aims of the UNHRC in the past. The UN defines human rights for the international community in the Universal Declaration of Human Rights. While China is taking an approach to human rights that may be detrimental to parts of the Universal Declaration of Human Rights, economic development is an acknowledged right that China sees as superseding other rights, and its growing body of allies is helping them build assent around that view. Most of the members of the UN are also members of the WTO, IMF, and World Bank.

The WTO is the successor to the General Agreement on Tariffs and Trade, which was negotiated before the UN at the Bretton Woods Conference. The WTO largely acts as a forum for countries to engage in trade negotiations. The aim of the WTO is largely to promote trade by encouraging countries to reduce protectionist barriers and institute free trade agreements or otherwise liberalize trade policies. The WTO’s key responsibility is to promote free trade agreements and other agreements to reduce taxes and promote globalization. The WTO’s interests are in preventing protectionism as a path to the development of poor nations, and thus the WTO is often wary of complaints and laws that nominally protect human rights but are really just vehicles for economic protectionism. If for example a country in Africa that has trade agreements with China were to pass stricter environmental regulations, the WTO would scrutinize the regulation to make sure that the country is not just trying to discriminate against trade with whoever might be affected by the regulation. This is because the WTO generally encourages its members to accord most favored nation status to its trade partners.

When it comes to human rights, though, the WTO is resistant to institute labor standards into WTO rules because they see it as a guise for protectionism in developed-country markets, a smokescreen for undermining the comparative advantage of lower-wage developing countries; and they argue that better working conditions and improved labor rights arise through economic growth, so sanctions imposed against countries with lower labor standards would merely perpetuate poverty and delay improvements in workplace standards. This reflects the consensus of many leading economists including Jeffrey Sachs and Paul Krugman.

The WTO’s leniency toward labor conditions has been favorable for US companies seeking to invest abroad since US companies do not have to bring stringent US labor laws along with them when they invest, although they often bring some CSR standards with them to please their international customer base. International rules on labor standards then are much more relaxed than the stringent enforcement of the FCPA restrictions on corruption. Many anti-globalization activists are of course unhappy with the relaxed labor standards of the WTO,

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resulting in criticism such as the Seattle protests on the WTO in 1999, but the international community has largely written this outrage off as protectionism.

The IMF and World Bank are also organizations that have origins at the Bretton Woods Conference (in the case of World Bank, which is the parent organization of the International Bank for Reconstruction and Development, the organization heads other bodies created after Bretton Woods). The IMF is an international organization where member nations can contribute to a pool of wealth that can be used to lend money out to nations to help with balance of payments needs. The goal of the IMF is to promote financial stability and stability of exchange rates, to help with the development of nations, and to encourage international economic cooperation. Much of the aid that China has supplanted in Africa comes from the IMF, as the IMF often includes restrictions on aid packages that China excuses. The World Bank is an international organization that exists specifically to provide loans to developing nations. However, World Bank also investigates fraud and corruption through their World Bank Integrity Vice Presidency.

H. Legal constraints in Africa

China’s transgressions with human rights issues might be less problematic if there were more reliable recourse available to those affected. China’s legal system is still relatively underdeveloped, though they have some incentive to continue developing it to show the legitimacy of the governing Chinese Communist Party (CCP). However, outsider access is a low priority as it poses less of a threat to the CCP’s sovereignty. China is a party to the Hague Adoption Convention, granting international access to Chinese courts from those parties injured by China abroad. The People’s Court of the People’s Republic of China, the judiciary body in China, is firmly under the control of the state, and any service of process in China must first be handled by the Chinese government and cannot be done by third parties.

While China largely lacks civil society groups that push for progressive policies (due to China’s oppression of freedom of association, Africa does have groups interested in stopping some abuses caused by China. For example, the South African Litigation Committee sought court interference that blocked the offloading and transport of arms bound for Zimbabwe in 2008. Most complaints are ultimately brought in the local legal system, but when cases do end up in court witnesses are often intimidated by their Chinese employers. The economics are also not favorable to those affected by China’s behavior in Africa, so the chances of a case of a poor, underpaid African laborer overcoming the transgressions of a large state-run Chinese employer are dismal.

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111 See Lin, supra note 14, at 93.
113 THE ECONOMIST, supra note 24.
IV. The major criticisms of China’s investment policy

A. The downside of Chinese investment in Africa

Some aspects of Chinese practices make African hosts wary of Chinese investors. Advocates of resource patriotism in Africa are worried Chinese resource companies are not managing national resources sustainably.\(^{114}\) Also of large concern to host countries is the Chinese investors’ preference for shipping over their own workers rather than training native laborers, especially for management roles.\(^{115}\) To the African hosts, this begins to look like late 19\(^{th}\) century colonialism all over again, and potentially expelling the Chinese investors has become a talking point for opposition parties in the different host countries.\(^{116}\) This notably includes the campaign and election of Michael Sata, Zambia’s newly elected president as of 2011. As a member of the leading opposition party before his election, Sata decried China’s practices of ignoring safety and environmental standards, hiring foreign laborers, paying inadequate wages, and corrupting African leaders with no-strings attached deals.\(^{117}\) Now that he is president of Zambia, he continues to contest these policies, but he remains cooperative as many African leaders are because his country depends so much on Chinese support. Over the last 10 years, China has invested over US$2 billion in Zambia, which has a GDP of only $16 billion, and whose chief export is copper, a metal that China leads the world in consuming.\(^{118}\)

In addition, some of the new facilities China has erected for its African hosts have fallen victim to poor construction and rushed work, with a Chinese built hospital in Luanda, Angola, forming cracks and forcing a closure soon after its completion, and a Chinese built road from Lusaka to Chirundu in Zambia (over 81 miles long) being swept away by rains.\(^{119}\) And shoddy construction is not the only blemish that China has produced. Sinopec, a Chinese state-owned oil company, has explored for oil in a Gabonese national park, and another state oil company has created lakes of spilled crude oil in Sudan.\(^{120}\)

Some Western companies complain of anti-competitive business practices by the Chinese investors. In 2009, a deal in the Congo to provide US$9 billion of infrastructure in exchange for 10.5 million tons of minerals was renegotiated to US$6 billion after the IMF deemed that the deal exceeded Congo’s debt obligations.\(^{121}\) Chinese companies also tend to work directly with the host government when making their investments, and the government does not face the strong competitive pressure to use the money efficiently that investment directly into the market would face, so the results can include ill-advised investments, abuse of local populations, or a variety of other socially negative outcomes.\(^{122}\)

Labor conditions are also a concern for critics of China’s policy in Africa, and the problematic conditions often exceed the normal poor standards for sweatshops. Kenneth Roth, executive director of Human Rights Watch, points out that China’s foreign policy is deliberately

\(^{114}\) Cheng & Liang, supra note 29.
\(^{115}\) See Lowe, supra note 25, at 16.
\(^{116}\) See id.
\(^{117}\) See THE ECONOMIST, supra note 104.
\(^{118}\) See id.
\(^{119}\) THE ECONOMIST, supra note 24.
\(^{120}\) Id.
\(^{121}\) See Lowe, supra note 25, at 16.
\(^{122}\) See Keenan, supra note 1, at 90.
agnostic as far as human rights are concerned. In Zambia, workers at Chinese run copper mines do not receive safety helmets until they have worked for two years. Last year when workers at one mine in southern Zambia protested working conditions, two Chinese managers fired shotguns into a crowd, injuring at least a dozen people.

China may also be stifling more rapid development than could potentially be seen in some of its host countries. Since many of the Chinese enterprises that are involved in Africa are state owned, the money goes back to Chinese banks rather than local banks where it can be used to drive local businesses. Even the private companies tend to preferentially use Chinese banks (and probably for good reason as they find it to be more secure), but these banks are setting up branches in Africa to accommodate their expatriates. In theory, these banks are supposed to make loans available to African businesses on the same terms that it does to Chinese businesses, but this is not always the case. Worse than not allowing for distribution of the wealth it gathers, doing business directly with the regimes enriches and in some sense stabilizes the control of the unsavory leaders who will have deeper coffers to fund their tyranny. Where enrichment is not made directly to politicians, corruption is still so high that much of the money that could be used for development is lost in transit.

B. Dealing with dictators and human rights violations

The negative effects of working with Chinese investors go further than poor labor conditions and sharing jobs with Chinese expatriates. International human rights organizations have condemned several Chinese companies for violating human rights, including the state owned CNPC, which is indirectly controlled by the Chinese government, because of its indirect involvement in the genocide in Darfur. China also has a record of blocking or abstaining votes in UN resolutions designed to impose sanctions against the Sudanese government. Roth of Human Rights Watch believes that when Western governments try to secure human rights improvements with economic pressure, China’s no-strings rule gives dictators the means to resist Western pressure. Having a second choice when faced with sanctions that allows dictators to carry on with no economic detriment allows them to more easily ignore scrutiny. Only when the genocide in Darfur had attained widespread international notoriety did China begin voting in favor of UN efforts to stop the conflict.

In addition to no-strings attached investment and credit, China also allows its African hosts to use their credit lines to purchase arms. In 2005, China sold US$8 Million in weapons, aircraft, and spare parts to Sudan, just as Darfur was emerging into the public conscience in the West. China has also sold weapons and provided military training to a number of other countries including Equatorial Guinea, Ethiopia, Eritrea, Tanzania, and Zimbabwe. While arms sales is not in itself a violation of human rights, the number of genocidal wars in Africa’s recent history, resulting in the loss of millions of lives and undermining human development,

123 See Ofodile, supra note 111, at 90.
124 THE ECONOMIST, supra note 24.
125 Id.
126 Id.
127 See Lin, supra note 14, at 66.
128 See Ofodile, supra note 111, at 91.
129 See id. at 90.
130 See id. at 91.
131 See id.
makes arms sales to brutal regimes and groups in Africa a major concern. This is of greater concern if this policy, which is justified as neutrality, is really being used to keep conditions poor enough that Chinese enterprises can continue to exploit Africa’s resources at lower costs relative to countries with greater levels of human development. The status quo in turbulent African host countries provides a level of political risk that is high enough to deter the international oil companies from competing with Chinese corporations for assets in Sudan, yet low enough for China to not put their own operations at risk, especially when China financially backs the party causing the turmoil.

Some of China’s support for African regimes is not entirely a product of recent history. During the Cold War, China established bilateral trade agreements with several African nations and encouraged several revolutions. As relations between China and the Soviet Union deteriorated, China began to take different sides in the revolutions. In conflicts between Ethiopia and Somalia, China and the Soviet Union took different sides. China supported Robert Mugabe’s ZANU liberation army in Zimbabwe’s independence in the 1970s when the Soviet Union supported ZANU’s rival, ZAPU, and the close ties between Mugabe’s regime and China continue to this day. As Robert Mugabe is still in power in Zimbabwe today, China’s support remains an important element of his regime.

C. Resource extraction

1. ENVIRONMENTAL IMPACT

In addition to drilling for oil in a national park and leaving spills in Sudan, China also takes on massive natural resource projects for its African hosts despite the concerns that others have over environmental impact. A telling example is the Merowe Dam in Sudan, a US$2 billion project with China as the lead financier (providing US$520 million) that proceeded after Canada and several European countries refused to take on the project because of environmental and social concerns. As many as 70,000 people were displaced from their homes along fertile Nile areas to more arid locations which would require more irrigation from the Nile. The increased surface area of the Nile that resulted from damming the river will also result in increased evaporation from the river.

While the areas that China is developing in sub-Saharan Africa are already environmentally sensitive, China’s strategy of reaching previously inaccessible resources will further compound the risks to these areas. Like many other areas it regulates, China has increased its own domestic regulations to protect the environment but to questionable effect. In addition to weak environmental regulations, Africa’s low wages and relaxed labor policies allow China to increasingly pursue manufacturing in Africa. To some extent, this means that China is able to export its pollution to someone else’s ecosystem.

132 See id.
133 See id.
134 Lyman, supra note 21.
136 Id.
137 Id.
2. THE “RESOURCE CURSE”

The slow pace of development in Africa is often attributed to a lack of investment in the continent, but this does not explain why past investment has done so little good. This problem traces itself to a well-documented macroeconomic effect originally referred to as the “Dutch Disease,” but now thought of as the resource curse. The resource curse can have effects on developed countries by raising the price of local goods and services and reducing the value of non-resource exports due to effects on foreign exchange markets. This effect is much worse in developing countries though. When the resource extraction industry begins to boom rapidly because of foreign demand, instead of causing domestic industries to spring up with it the resource industry instead imports materials and labor from abroad, creating an enclave with respect to the rest of the economy. Since the local resource industry will need to continue to spend its revenues to import materials and labor in order to fuel its growth, it will be some time before the industry is mature enough to drive money into the local economy.

There is a growing body of evidence that resource wealth has negative effects on the economic development of poor countries, and that resource wealth contributes to weakening of democratic institutions, increases in official corruption, and deterioration in human rights practices. Politician-managers of resource wealth tend to select resource extraction methods that provide high revenues in the short term but lead to significant long terms problems for the environment. This problem is magnified when the nation is unstable because of the large risk of losing power, and the result is behavior that generates greater negative externalities. Thus, when China provides financing for projects that are directed by politicians, the problem is exacerbated and these investments begin to look more like slush funds than investments intended to generate a financial return.

V. Is China’s current investment strategy sustainable?

A. As to China’s monopolies in some countries

Other than the fear of civil upheaval, China has few threats from competitors able to compete for business on its level, at least in aid starved countries that want to avoid the normal constraints that come with international aid. This gives Chinese companies a lot of bargaining power when they go into negotiations, and working directly with politicians gives some assurance that competition will remain sparse. Although China has just recently surpassed the US as Africa’s largest trade partner, the wind is at their backs in a way that the West cannot currently emulate, especially because of legal and ethical constraints in the West.

China’s non-interference policy does not make it immune to civil upheaval, though. Following the collapse of Muammar Gaddafî’s regime in 2011, even China had to face the

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138 See Keenan, supra note 1, at 117.
139 See id. at 105.
140 See id. at 106.
141 Id.
142 See id. at 105.
143 See id. at 115.
144 See id.
145 See id. at 118.
reality that supporting unstable regimes because of the opportunities and contracts they afford may make them vulnerable to losses and closed doors in the aftermath of the collapse of an unpopular autocratic government. In Sudan, China rigidly supported Omar al-Bashir’s government in Khartoum prior to South Sudan’s independence in July 2011. As part of South Sudan’s secession, Sudan will continue to receive the benefits of oil revenue from the large reserves in South Sudan. Sudan is now concerned over the pipeline that may run from South Sudan through Kenya to the Indian Ocean because they believe it may cut them out of the oil trade, and the two states may be heading towards more aggressive armed conflict. And the Arab Spring will continue to have consequences even in places with less despotic regimes where China is heavily invested, such as Egypt where China has established the Suez special economic zone only to see Hosni Mubarak driven out of office towards the beginning of the Arab Spring. Currently Egypt is under military control, and elections later this year should determine their new regime. However, the Arab Spring and other recent upheavals largely occurred in North Africa, while the greater part of China’s dealings with despotic regimes is happening in sub-Saharan Africa.

B. Will they be able to compete with Western investors?

China’s current strategy will likely be more sustainable in Africa than it will in the rest of the world. Developed nations already have strong regulatory systems backed up by international treaties, and developing nations seek to take on the comforts and protections of developed nations once they can afford them. Few regions are run by regimes as desperate for investment as Africa, so most developing nations outside of Africa have more favorable risk and growth environments that cause Western companies to be more willing to work with them. Countries outside of Africa where China’s strategy might continue to work would be the world’s poorest countries, like Haiti.

C. Pressure on China to adopt a more Western style strategy in their laws

Externally, China’s interest in complying with international treaties will cause them to adopt more regulations to come in line with Western style policy strategies. The amendment to Article 164 is an example of China bending to the pressure of its commitments to the UNCAC. They will also have an interest in encouraging publicly traded Chinese enterprises to conform to the standards of the Western world to gain access to capital markets with more regulations. Internally, though, the Chinese government has only enforced regulations where it concerns national interests. The Chinese people often favor this because of the strong sense of nationalism domestically, and this is not likely to change any time soon.

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146 EURASIA REVIEW, supra note 11.
VI. Should the West or the international community push China to adopt a different investment strategy?

A. Are criticisms of China’s strategy justified in light of the facts?

China has cultivated some very vocal allies to champion its non-interference cause. This growing international support would tend to argue that criticisms of this strategy are unjustified because they have gained a partner that puts them on more equal footing, but this is largely at the expense of the non-ruling class in sub-Saharan Africa. The dictators and entrenched regimes in these countries are deeply interested in suppressing the voices of dissent. China’s commitment to international treaties, especially with the UN and the WTO, would tend to show that some of the criticisms of China’s strategy are justified.

B. Which foreign aid policy is better for Africa

The goal of most poor people is to stop being poor, and recognition of this point is important to human rights in developing countries, especially for women in cultures where poverty is mediated by cultural norms and practices. Reflecting the WTO’s policies to prevent economic protectionism in global development, China’s discourse on human rights gives precedence to the right to food, clothing, shelter, and economic development, all of which are areas where Africa needs help. Although the US voted against it and several other wealthy Western nations abstained, the UN General Assembly in 1998 voted to reaffirm the right to development as an integral part of human rights. The right to development can also be found in the UN Charter, the Universal Declaration on Human Rights, and two international human rights covenants. But empowering dictators is not a policy that encourages development, and it is well understood that the presence of dictators and autocrats suppresses development. For China to argue that their no-strings attached policy is pro-development when they are bolstering dictators with arms and financial support is clearly contradictory.

Setting aside the question of whether China’s non-interference policy is sustainable, the question arises as to which policy is better for Africa: pursuing development by sending aid packages or negotiating trade deals with Africans as equals. Economists come out on different sides of the debate. Jeffrey Sachs has advocated increased foreign aid as a way to alleviate poverty, while William Easterly argues that attempts to plan economic development have been unsuccessful. Additionally, it is hard to apply other models of historic development to Africa because most other developing and emerging nations have actively participated in drawing their own borders and managing their own sovereignty, and Western ideas of being a heterogeneous yet united people are not pervasive in nations that rely on in-group status for their cultural identities, like Africa.

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149 See Keenan, supra note 1, at 87.
150 See UN: China’s Involvement in Africa Development Important, CHINA.ORG.CN (Dec. 28, 2005)
151 See Ofodile, supra note 111, at 96.
152 See id.
Some policies might work better in certain African countries that are more democratic, like South Africa. South Africa is much more amenable to modern FDI as evidenced by being the largest recipient of FDI in Africa. Non-interference makes sense in a place like South Africa in the same way it makes sense when investing in a developed country because reform has been more successful and is now a lower priority. But a US company going into Sudan and taking a non-interference policy like CNPC or Sinopec would be appalling to US consumers, drawing costly criticism leading to boycotts and creating legal issues. Whether or not CSR is just window dressing, consumer boycotts can have real impacts on businesses.

Since sending foreign aid has proved relatively ineffective in helping to develop Africa, Western companies should take a more active approach in helping to direct how aid is given. Western firms who are willing to invest in Africa might look to organizations like the IMF or World Bank to help pay for risk insurance for investments in high risk countries instead of dumping aid on the basis that investment will provide a more permanent solution for development. The IMF could of course make these sorts of risk insurance payments available to Chinese companies who are insured by the Chinese government if they are willing to work with the IMF’s conditions. Alternatively, IMF and World Bank could also shift their strategy to providing investments to Chinese companies and taking on the role of active shareholders trying to direct companies to more accountable behavior.

China’s approach varies from the West’s approach not just for the economic reasons discussed, but because China’s government buffers the Chinese people from dissenting against their policies. Internet censorship in China is one of the major questions that Google and Yahoo had to approach in deciding whether it was ethical to do business in China. Although restrictions on freedom of speech that Google has cooperated with in China would be illegal in the US, Google is still able to learn from their participation in China, and as their presence grows they are able to gain more leverage in the power struggle over censorship. What concerns Western companies who might seek to emulate this approach though is the fear of the government shutting down or nationalizing their business.

C. Should Western firms try to take China’s approach?

The US and other Western companies cannot respond to competition from China by directly emulating China’s behavior. This doesn’t mean that some of China’s approach is not a better fit for Africa than the current Western approach. One thing that economists in favor of globalization and human development and development friendly organizations like the UN and the WTO agree on is that free trade agreements will have a positive effect on undeveloped and developing economies. Advocates of free trade and market based approaches to development, as opposed to aid based development, justify their approaches in part by arguing that they will enhance social welfare, improve living conditions of poor people, and otherwise allow poor people to live freer, more secure lives. Western companies will be more economically willing to invest in countries where taxes are lower and costs permit investment, and the influx of wealth should create a more permanent solution than sending over aid.

Aside from the political risks and the costs associated with bribery, Africa is rich with natural resources, untapped labor, and potential for economic development to benefit those willing to invest. China has recognized this, and they are doing much more than dumping foreign aid and food. The human rights atrocities that occur in Africa are often the result of a

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154 See Keenan, supra note 1, at 87.
lack of development and overtaxed ecology, and these problems would exist with or without China’s interference. Unconditioned loans and credits may be irresponsible, especially when made in conjunction with directly negotiating with politicians in economies entirely dependent on natural resources. Any Western company in this line of business is surely aware of this, and that is why so many Western companies have ignored mainland oil in Sudan in favor of costly offshore drilling. But initiating a race to the bottom with China and playing sides with despotic regimes would only stifle development as fears of colonialism would resurface as they have in Zambia, and the international community does not want African nations to respond by closing their economies off to development. Non-interference has created allies for China, but some of these allies can fall out of grace as occurred in the Arab Spring.

Although it is hard to compete with China’s tolerance for political risk because of state subsidized insurance, China’s activity in some African countries will reduce the risks of investing. Those regimes China works with that are more democratic and less corrupt (and importantly more stable) should become easier places to invest in and to try to develop markets for Western goods and to cultivate African labor. Likewise, China’s activities could open Africa hosts up to policies of reducing corruption and promoting free trade. Different nations in Africa have been resistant to free trade agreements, but the African Union is emerging as a legitimate body with the ability to influence the greater African political climate. The African Union is more willing to initiate free trade agreements with those that want to work for the mutual good of Africa. China has worked closely with the African Union in helping to establish their conference center, and this is the type of thing Western bodies can emulate.

Western companies also benefit from the proliferation of Western languages in Africa dating back to colonialism. In Morocco where French is an unofficial second language widely used for commerce, for example, Western companies operating in French speaking markets have been able to cultivate underdeveloped African labor to service the needs of the French speaking world, much as India and the Philippines host call centers that support the English speaking world. Much of the current hostilities toward Chinese companies come from the fact that many of them hire any available Chinese expatriates in favor of local employees and that the managers do not try to share the local language. Zambia has been outspoken that they would like their Chinese managers to share their language with Zambian employees so their employees can integrate better into the business. In this area, Western companies have a better history of cooperating with locals on language.

D. Sweatshops and their role in developing economies

Labor conditions are of great concern in the US, and most developed countries consider fair and safe labor conditions to be a matter of human rights. Especially after the commencement of the New Deal Era, the US has created many regulations on how companies can treat their employees and how they must manage labor conditions. When globalization began to take hold and many multinational companies began to move production overseas, some customers and civil society groups in developed countries began to express outrage over labor conditions in overseas sweatshops. No laws existed prohibiting American companies from contracting with companies engaging in most of these practices abroad, and many people in China, India, and other parts of southeast Asia were lining up to fill factory jobs to manufacture Western goods.
Some economists like Jeffrey Sachs say the problem with sweatshops is that there are not enough in the developing world, and the recent history of the BRIC countries seems to suggest that developing countries do benefit from the presence of industrial labor in conditions that developed economies would consider sweatshops.\textsuperscript{155} Sweatshops are certainly bad if you are able to find more favorable conditions or if your employer could easily provide them to you, but people would not be so willing to take these jobs if they did not find them better than subsistence farming, starving, or prostitution. The presence of sweatshops in developing nations often takes price pressure off of farming and then causes average wages to come up as people are able to move away from an overcrowded subsistence farming market. Many economists thus see the presence of sweatshops in developing countries as a necessary stage of economic development, and until a nation has used industrial labor to develop it does not have the higher average wages and leverage to bring in less dangerous industries and better human rights protections. In this respect, Western companies must remain open to bringing factory jobs to places where people need an alternative to subsistence farming, and investors and customers that are concerned about sweatshop conditions but favor the uplifting of people from poverty need to remain patient as access to better conditions improves. Still, Western companies may be better able to competitively strike deals with African host countries if they are able to offer better conditions for laborers than Chinese competitors seeking to invest.

VII. What approach Western firms should take in competing with China in Africa

The non-interference question goes further than just Chinese investment in Africa. US firms are already involved with Chinese companies that invest in Africa, and they have been implicated for involvement with some unsavory Chinese activity. For instance, Goldman Sachs was acting as CNPC’s investment banker in 1999 when President Clinton issued an executive order blocking US funds from being used in Sudan.\textsuperscript{156} So while overseas human rights concerns are not always the center of discussion in the public forum, they are relevant to foreign policy in a way that makes Western politicians willing to respond even though their constituents are largely unconcerned.

The US is increasingly showing commitment to its policies of preventing corruption of American companies abroad. However, domestic labor standards do not apply abroad, and the legal constraints of the treaties that the US is party to are liberal as to how much Western countries must force their enterprises to enact labor standards abroad. Working with dictators, though, is problematic, whether or not there are constraints preventing companies from doing so, not least of all because of the ethical concerns but because it stifles development and increases instability and political risks. If Western firms want to avoid corruption in Africa, they will want to work with the broader market and not directly through the politicians of host countries. Given the effects that working with politicians in resource rich countries has on human rights that companies must pay attention to, it may be easier for US companies to emulate China’s non-interference policies in labor and manufacturing than in natural resources extraction.

Setting aside human rights concerns that the UN has intervened in, China’s definition of human rights (the right to food, shelter, and wealth) may be a better definition in handling

\textsuperscript{155} Myerson, \textit{supra} note 109.

African development, and the UN and WTO affirm this through their policies on economic development. China and India are both aware of this need because of their own recent histories, so if US enterprises wish to increase the business they do in Africa they will have to pay attention to Africa’s receptivity to this policy and make it work for themselves. Making investments into African infrastructure has also proven a great way to draw the favor of African host nations, and it would certainly help Western firms to overcome the colonialist stigma of solely being interested in pillaging resources.

Western firms have an advantage over Chinese firms in that they were known for spreading their language and integrating better with the locals during the colonial period than the Chinese firms have been in recent times. President Sata of Zambia thinks of this as the human face of capitalism since the British built schools, taught the Zambians English, and tried to bring the British legal system to Zambia.\textsuperscript{157} Chinese managers in Zambia however are thought of as reserved, as many of them do not speak English and live separately in compounds with high security walls, and they tend to go straight home after work rather than going to bars with the locals.\textsuperscript{158} Making it clear to the African people that Western enterprises are interested in integrating with local culture should go a long way towards stable investment in Africa.

A large driver of CSR in China as in the West has been socially responsible investors, so if there is to be a push for stronger human rights in foreign investment in Africa, investors in Chinese enterprises will need to begin speaking up about their concerns. While it may seem like state run companies doing most of the business in Africa that are listed on public exchanges are unlikely to listen, the availability of information about CSR for Chinese companies should result in greater attention to Chinese practices abroad.

\section*{VIII. Conclusion}

On balance, China’s increased focus on Africa should prove to be good for the continent in those countries where the regimes are less despotic because of the reduced risks of doing business. Where China invests in countries that are torn by civil strife and run by dictators, China is acting largely as an agent to suppress growth, but China is not suppressing civil upheaval and will ultimately face the consequences. In the interest of sustaining the standards of the developed world and pushing for better standards in the developing world, the West must continue to force China to create policies for accountability, and this requires parties like the UN to hold China to its treaties. China is still an emerging country, so organizations like the IMF or World Bank could take advantage of China’s lust for capital by investing in publicly traded SOEs in an attempt to better control corporate governance in investment abroad. If the IMF and World Bank still want to pursue development of Africa through development funding, they will have to respect the bargaining power that China has created for African leaders. The IMF and World Bank could also try to emulate China’s process for reducing the costs of FDI in Africa by subsidizing political risk insurance for companies that wish to heavily invest in Africa. International treaty organizations should also act to create better access to and enforcement of the Chinese judicial process as opposed to just forcing China to create laws that lack enforcement.

\textsuperscript{157} See \textsc{The Economist}, supra note 104.
\textsuperscript{158} See \textit{id}.