

Working Paper No 2011/48 | November 2010

Sino-African State Trading in Services: Added-Value through Angola-Model loaning, GATS commitments or FTAs?

Charlotte Sieber-Gasser

prepared for the 5th Annual TRAPCA Trade Conference
Arusha (Tanzania), 25-26 November 2010

first draft, please do not cite without the authors' permission

Abstract

Despite the increasing volume of trade between China and African countries, not one single conventional free trade agreement (FTA) or economic partnership agreement (EPA) has yet been signed between an African country and China. Initially, Sino-African trade relations were to a very large extent centred on investments secured through bilateral investment agreements (BITs). The more recent Chinese investments on the African continent, however, are more informally based on FDI contracts with the state at the receiving end and a government-owned private company as the investor, or loosely attached to loans commonly known under term 'the Angola-Model'. This rather unusual basis for economic integration and development assistance, outside the trodden path of free trade agreements and ODA, requires further analysis in order to understand how the current legal framework between China and the African continent impacts economic development and national sovereignty, and what kind of distributive consequences it may have.

It is generally agreed that moving up the path of value added production is one possible way to achieve sustainable economic growth, and that African countries tend to lag far behind in this respect. Keys to the emergence of value-added chains are, among others, reliable infrastructure and access to high-quality services. Thus, trade in infrastructural and other services is highly relevant to policies aiming at promoting value added production. As such it is worthwhile analysing the Chinese loans to African governments mentioned above in relation to their impact on the services sector, as

these loans are essentially intended for infrastructural investments and services trade (particularly telecommunication and transportation). Furthermore, contrary to trade liberalisation in goods, Sino-African trade in services might bring more advantages than threats to the African economies by rendering urgently needed basic services accessible to everyone.

In this context, this paper will first attempt to define the general legal character of contracts between African governments, Chinese companies and the China Exim Bank based on the Angola-Model. It will qualify to what extent the mutual legal obligations are of public or of private nature, and explain the respective legal consequences.

The core of the paper will discuss the extent to which the kind of Sino-African services trade currently in place may foster or hinder the emergence and growth of value addition on the African continent. In doing so, the paper will focus on the impact of the recent loan-attached Sino-African infrastructural services trade, as the latter has proven to be an essential aid-for-trade ingredient for value added chain creation and growth. In this context, the paper will benchmark the current achievements of this quite unique partnership between African countries and China with the range of possibilities granted by GATS and the potential advantages slumbering in a Sino-African FTA in services. It will highlight if, where and how African governments could improve the impact on local value added activities by taking advantage of the respective policy space attached to each legal instrument regulating South-South services trade.

Charlotte Sieber-Gasser, MLaw (University of Bern), MA Development Studies (University of Manchester), PhD candidate in law, University of Bern. This paper is written in the context of the research project 'South-South Regional Trade Agreements in Services', funded by the Swiss National Science Foundation (SNSF) National Center of Competence in Research (NCCR) Trade Regulation.

Research for this paper was funded by the Swiss National Science Foundation under a grant to the National Centre of Competence in Research on Trade Regulation, based at the University of Bern's World Trade Institute in Bern, Switzerland.

1. Introduction

This paper is focusing on the services aspect of the Sino-African economic cooperation. It is based on the literature centred on the crucial role of services in the creation of value-added chains: Every value-added chain requires reliable and cheap transportation (to move the commodities and semi-finished goods from one place of production to the next), reliable and cheap telecommunication (to organise the production, manage the value-added chain), access to finance (to build production sights, keep processes up to date), and access to specialist knowledge¹. These basic services provide the soil for value-added production, and are the imminent link between commodity and final product.

China has identified infrastructure and the services sector long ago as an important aspect for economic development. Today, the services sector in China is growing strongly and capable of providing the basis for value-added production². Most of Africa, however, lags far behind in the development of their infrastructure and services sector. With the exception of a few countries, the African services sector is roughly described as weak and fragmented³. It is, thus, not surprising that while China's economy consists of a multitude of different value-added chains that process raw materials into internationally tradable goods, African economies are still to a very large extent depending on the export of commodities⁴.

¹ cf. CHAUDHURI, S. AND KARMAKAR, S. (2008) 'The Liberalisation of Cross-Border Trade in Services: A Developing Country Perspective', In: J. A. Marchetti and M. Roy (eds.), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations*, Cambridge University Press, Cambridge; HOEKMAN, B. AND MATTOO, A. (2007) *Services Trade and Growth*, Paper prepared for a meeting of the Commission on Growth and Development, World Bank, Washington DC; and WHALLEY, J. (2003) *Assessing the Benefits to Developing Countries of Liberalisation in Services Trade*, Working Paper, National Bureau of Economic Research NBER, Cambridge MA.

² cf. AUSTRALIAN GOVERNMENT (2005), *Unlocking China's Services Sector*, Department of Foreign Affairs and Trade, Economic Analytical Unit, Adcorp, Canberra.

³ cf. COLLIER, P. AND GUNNING, J. W. (1999), 'Why has Africa Grown Slowly?', *The Journal of Economic Perspectives*, vol. 13, no. 3, pp. 3-22.

⁴ cf. Ibid.

However, part of China's official aid policy is to support African countries in developing their infrastructure and services sectors. The reasoning behind the Chinese aid policy is based on China's own development experience, in which services and infrastructure were identified as key aspects⁵. Thus, China's support of African economies is directed at infrastructure projects and the development of services sectors, both financially and on the ground.

The aim of this paper is to qualify the legal character of the Chinese engagement in African infrastructure projects and services sectors. The Chinese involvement is often based on state loans provided by the Chinese Exim bank⁶ in return for oil or other commodities, and it is fairly unknown what legal rights and duties are attached to these kinds of agreements. Outlining possible implications of the legal character of the contracts based on this so-called Angola-Model provides the basis for a discussion on the policy-space in the Sino-African economic relationship and on more fundamental, systemic questions concerning the structure of international economic law.

2. Legal Characterisation of the Sino-African Economic Relationship

Legal characterisation has been defined as 'the intellectual operation that consists in classifying a fact, an action, an institution or a specific legal relationship in order to apply the relevant legal regime to it'⁷. It is the legal regime relevant in the case of Chinese engagement in African infrastructure projects that decides upon legal rights and duties, and consequently upon the room for negotiations.

⁵ cf. PANNELL, C. W. (2008), 'China's Economic and Political Penetration in Africa', *Eurasian Geography and Economics*, vol. 49, no. 6, pp. 706-730.

⁶ See [Online]: http://english.eximbank.gov.cn/businessarticle/activities/loan/200905/9398_1.html [Accessed: 4 November 2010].

⁷ PAASIVIRTA, E. (1990), *Participation of States in International Contracts*, Lakimiesliiton Kustannus, Finnish Lawyers' Publishing Company, Helsinki, p. 94.

However, the agreements attached to Chinese investments into the African infrastructure and services sector are not publicly available. Therefore, this chapter attempts to narrow down the legal character of these agreements based on what is publicly available and by outlining the implications of the different legal options. To be very concise in the legal characterisation of Sino-African investment treaties, one would need to have access to both the minutes of the negotiating-process and the actual treaty-texts.

2.1 Sino-African State Trading Based on the Barter System: The Case of Angola

While China respects national sovereignty and pursues a strict non-interference policy in relation to internal conflicts and human rights abuses⁸, it is also willing to find alternative payment arrangements, such as Barter or technology transfers⁹. This makes China a very attractive partner in economic cooperation for the financially poor but commodity rich African governments. In some cases China is the only remaining partner in economic cooperation when the rest of the world decided to boycott a specific government on the grounds of moral or ethical objections¹⁰.

Trading based on the Barter system has a long history on the African continent and is still prevalent¹¹. Chinese officials, thus, seem to have found a common language with African governments when negotiating over commodity backed state loans. While Western countries and companies will expect hard currency in return for their investments or loans¹², the

⁸ cf. DAVIES, M. (2008), *How China delivers Development Assistance to Africa*, Centre for Chinese Studies, University of Stellenbosch, Stellenbosch, p. 57.

⁹ BITZINGER, R. A. (1992), 'Chinese Arms Sales to the Third World', *International Security*, vol. 17, no. 2, pp. 84-111, p. 92.

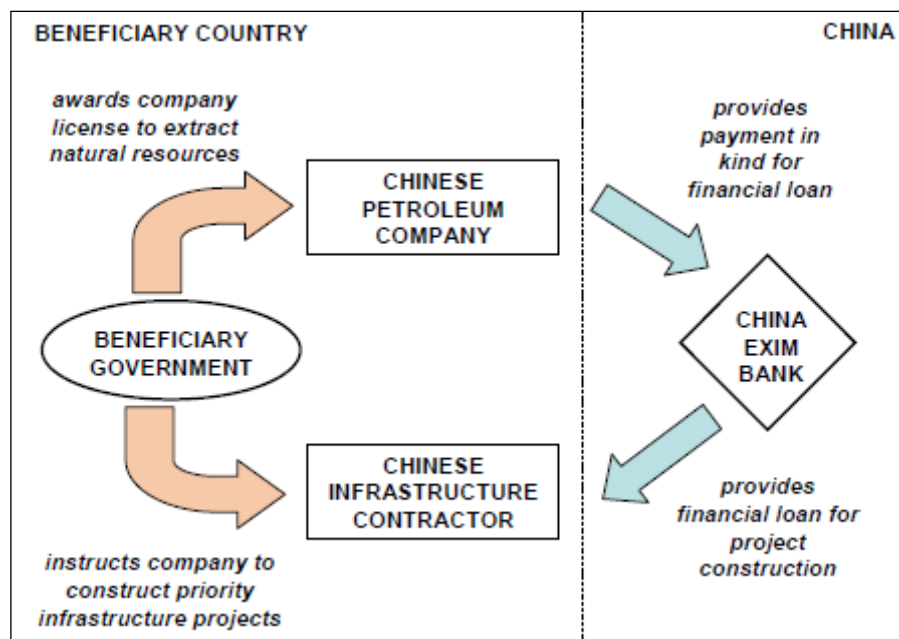
¹⁰ Recent examples would be Angola, Sudan, or Zimbabwe.

¹¹ cf. AZARYA, V. AND CHAZAN, N. (1987), 'Disengagement from the State in Africa: Reflections on the Experience of Ghana and Guinea', *Comparative Studies in Society and History*, vol. 29, no. 1, pp. 106-131, p. 117 and p. 127.

¹² cf. TEUNISSEN, J. J. (2005), 'Clichés, Realities and Policy Challenges of Africa: By Way of Introduction', In: J. J. Teunissen and A. Akkerman (eds.), *Africa in the World Economy: The National, Regional and International Challenges*, Fondad, The Hague, pp. 1-22.

Chinese officials are happy to accept alternative ways of payment. At first glance, this approach seems to meet very nicely the Chinese interest in commodity supply, as well as the African interest in access to finance and strengthening of the economic infrastructure¹³.

These resource-backed financing agreements in Africa have become known as the 'Angola Model'¹⁴. The term is derived from the long history of Chinese investment in Angola. The model describes the typical concessional loan to African governments, of which the China Exim Bank is the sole lender. Such loans are given for infrastructure, social or industrial projects for which Chinese contractors must be awarded and in principle no less than 50 percent of the projects' procurement must come from China. The projects are determined by the local government¹⁵. In exchange for the loan, China typically secures oil or other commodities as collateral¹⁶. The structure of the Angola-Model can be described like this¹⁷:



Source World Bank (2008).

¹³ cf. PANNELL, C. W. (2008), 'China's Economic and Political Penetration in Africa', *Eurasian Geography and Economics*, vol. 49, no. 6, pp. 706-730, p. 711.

¹⁴ DAVIES, M. (2008), p. 53.

¹⁵ See China Exim Bank [Online]: http://english.eximbank.gov.cn/businessarticle/activities/loan/200905/9398_1.html [Accessed: 4 November 2010].

¹⁶ DAVIES, M. (2008), p. 53-4.

¹⁷ FOSTER, V., BUTTERFIELD, W., CHEN, C. AND PUSHAK, N. (2008), *Building Bridges: China's Growing Role as Infrastructure Financier for Sub-Saharan Africa*, The World Bank, Washington DC, p. 43.

In relation to the legal characterisation, the extraordinary aspect of these contracts is the fact that the loans are only indirectly provided by the China Exim Bank by paying the Chinese company for accomplishing the projects agreed to by an African government.

Typically, state loans are based on a contract between two subjects of public law and, thus, part of public international law. In the case of the Sino-African loans under the Angola-Model, at first sight the contracts attached to the state loans are part of private law, because the Chinese company as the final receiver of the loan is not a subject of public law. However, this is disputed:

The ability of Chinese firms to invest in fragile states – such as Angola, the DRC, Sudan and Sierra Leone – is almost certainly linked to the political economy of the Chinese corporate sector. Many Chinese firms investing [in Africa] are partly or wholly state-owned, and reflect the desire of the Chinese government to build a long-term presence in a resource-rich continent.¹⁸

Thus, it could be argued that the fact that the China Exim Bank is wholly state-owned, acts in the interest and on behalf of the Chinese government, and deals with a Chinese company working in Africa arguably in the interest of the Chinese and the African governments, too, accounts for *de facto* public character of the contracts: the contracts are basically part of an agreement between two subjects of public international law, the African state and China.

2.2 Review past Debates: Public or Private International Law?

As mentioned earlier above, it is impossible to conduct a thorough analysis of the legal character of Sino-African investments in the infrastructural sector due to a lack of information about the actual content of the agreements. However, similar problems have been discussed before and might inform the debate in this context.

¹⁸ KAPLINSKY, R., MCCORMICK, D. AND MORRIS, M. (2007), *The Impact of China on Sub-Saharan Africa*, working paper, Institute of Development Studies, University of Sussex, Brighton, p. 41.

With globalisation and the emergence of giant MNCs, new global players joined the circle of nation states: corporations richer than many countries and highly influential on the stage of international politics. This led to a debate about the legal character of MNCs as they were quite clearly object of public international law and often also acting like a subject of public international law, but they were not bound to the rules of public international law. Consequently, their actions were attributed to the sphere of private international law although they often had a very public character¹⁹.

When in the late 70ies and early 80ies the rising MNCs began to invest in developing countries in return for oil-concessions, the term 'economic development agreement' was developed. An economic development agreement was defined as:

Their subject matter is particularly broad: they are not concerned only with an isolated purchase or performance, but tend to bring to developing countries investments and technical assistance, particularly in the field of research and exploitation of mineral resources, or in the construction of factories on a turnkey basis.²⁰ [It] is a broad term for agreements covering direct investment, which characterises the role of the investment, the term implying mutuality of obligation. It's a collaboration of a special type, which cannot reasonably be included in the orbit of some particular internal law. They are viewed as a genus tertius between treaties and contracts²¹.

The Sino-African investments based on the Angola-Model correspond more or less with these early so-called economic development agreements. Although today's Sino-African investments are more sophisticated and bundle more obligations and concessions together, the basic approach is the same: development assistance in return for economic benefits.

¹⁹ On the relationship between foreign policy and corporate interests: ALDEN, C. AND DAVIES, M. (2006), 'A Profile of the Operations of Chinese Multinationals in Africa', *South African Journal of International Affairs*, vol. 13, no. 1, pp. 83-96, p. 85.

²⁰ PAASIVIRTA, E. (1990), p. 96.

²¹ PAASIVIRTA, E. (1990), p. 95.

It has been argued that if the contract is an 'economic development agreement', then it's due to its nature rooted in the international legal system²². Such an agreement aims at securing national interests and deals with the rights and obligations of a public good (e.g. resources). Thus, the body of international law was criticised for its restriction to relations between states claiming that this restriction may be seen as normative, and that it was clear that 'contemporary international law is not exclusively restricted to relations between States, but extends increasingly to individuals and other non-State entities'²³.

However, this viewpoint did not become widely accepted, because there was not enough evidence substantiating the public character of the contracts between the governments of developing countries and MNCs. Also, lifting the legal status of MNCs up to the level of a nation state seemed too far-fetched and not reasonable²⁴.

In contrast, the circumstances are somewhat different in the case of Sino-African investment agreements: While Northern MNCs clearly are a subject of private law and are neither controlled nor owned by a government, the Chinese MNCs are usually wholly state-owned and –controlled. In the particular case of the China Exim Bank, such control and ownership is official. Thus, the contracting party vis-à-vis the African government is not acting like a subject of private law, but like a subject of private law *de facto* doing the job which elsewhere the minister of finance or international economic relations, a subject of public law, would do.

²² PAASIVIRTA, E. (1990), p. 93.

²³ PAASIVIRTA, E. (1990), p. 67.

²⁴ For an illustration of the problem see: THOMPSON, G. (2006), *Tracking Global Corporate Citizenship: Some Reflection on 'Lovesick' Companies*, Discussion Paper, Institute for International Integration Studies, Trinity College Dublin, Dublin, p. 13.

The main arguments against the public character of the economic development agreements do, thus, not apply to the case of Sino-African investment agreements. Therefore, reviewing the debate about the public or private character of such contracts in the specific case of China would be worthwhile as the outcome might turn out to be quite the opposite: the Sino-African investment contracts might turn out to be an ordinary treaty between two states.

2.3 The Implications of Private International Law on the Angola-Model

If the Chinese company receiving paid by the loan was beyond doubt acting as a subject of private law, independent from the Chinese government's interests, it could be argued that the Bank's contracts based on the Angola-Model would fall under the umbrella of private law. The law applying to the contract is, thus, due to its international nature depending on the rules of the relevant conflict of laws (private international law).

In private international law, the contracting parties can choose the governing law of the contract. This is based on the principle of freedom of choice of law, probably the most well known rule of private international law. In absence of a choice of law, a relevant tribunal may determine the governing law. Usually, the choice of law is that of the host country. In our case, this means that the law of the respective African country is applied to the contract. However, it is quite common to de-localise the governing law by replacing the law of the host country with a reference to 'the general principles of law'²⁵.

As the contracts negotiated by the China Exim Bank, African governments and Chinese companies are not publicly available; the choice of law in contracts related to the Angola Model is unknown. It can generally be said that it is to the advantage of the host country if its

²⁵ PAASIVIRTA, E. (1990), p. 56.

own law is chosen. Also, the reference to the general principles of law allows for more flexibility in the content and in the governing of the contract as they require interpretation and are less specific. It would, therefore, be rather to the advantage of the China Exim Bank and the Chinese companies, if the contracting parties agreed to choose only to refer to the general principles of law.

In private international law, the contracting parties cannot only choose the governing law, but also the forum for dispute-settlement²⁶. In the case of choice of forum, more or less the same is true as has been said before: solving a dispute before the courts of the host country tends to be to the advantage of the host country, choosing any other forum is generally in the interest of the other contracting party.

Generally, if the contract falls under the umbrella of private international law, one national law or the general principles of law govern the contract. This means that the only limitations to the content of the agreement stem from the governing law. This law also decides upon the consequences of a breach of contract, which will be treated just like any other breach of contract. In addition, the legal protection of investments and properties based on a contract of private international law tends to be stronger, because bilateral or multilateral investment protection agreements on the state-level will provide for additional protection²⁷.

2.4 The Implications of Public International Law on the Angola-Model

If – what is more likely to be the case here – the contracts between the China Exim Bank, African governments and Chinese companies fall in fact under the governmental framework

²⁶ See relevant rules of applying Conflict of Laws (private international law).

²⁷ See relevant national legislation. China has investment protection agreements with most of the African countries.

agreement of a loan based on the Angola-Model, the contracts would be governed by public international law, too.

In public international law, all ratified conventions and international agreements, particularly also the Vienna Convention on the Law of Treaties (VCLT), the body of international economic law, the principles of public international law and *ius cogens* are relevant for a treaty between two states. The content of the Chinese contract with the African government based on the Angola-Model is, thus, directly restricted by the rules and norms of public international law.

Although this restriction of the content is in the particular case of contracts based on the Angola-Model not directly match-making, it is so indirectly: The two states are allowed to negotiate any kind of deal as long as it does not violate *ius cogens*²⁸. The violation of other obligations of public international law would naturally have consequences, too.

Generally, it is not known whether or not the contracts based on the Angola Model are consistent with public international law up to every detail. Concerns have been raised particularly in reference to human rights, labour and environmental standards, thus, it would at least be worthwhile to remain cautious until such a contract is actually examined properly²⁹.

Furthermore, it is not known if in some cases the contracts based on the Angola-Model amount to a kind of *de facto* preferential access to the African market for Chinese companies.

²⁸ cf. Art. 53 VCLT.

²⁹ Chinese companies on the African continent have repeatedly been criticised for ignoring labour standards, polluting and not respecting standards for the protection of the environment, and for violating human rights standards. However, it has to be noted that these issues are not restricted to Chinese companies, but are a matter of concern in relation to MNCs in general.

If that would be the case, a number of norms and principles of international economic law would be relevant for the legal examination of the contracts: the requirements for PTAs of both GATS and GATT and the principle of MFN³⁰. In order to achieve transparency, a concerned third country could consequently appeal against the contracting of Chinese companies based on the Angola-Model in front of the WTO dispute settlement body³¹.

Finally, it remains open whether or not the contracts meet the formal requirements for state treaties imposed by the Vienna Convention on the Law of Treaties. In particular, the following Norms are of interest in the context of the Angola-Model based loan agreements: observance of obligations independently from a treaty (VCLT 43), absence of consent procured through corruption (VCLT 50), fundamental change of circumstances (VCLT 62), registration and publication of treaties (VCLT 80), and the norms on the conclusion and entry into force of treaties (VCLT Part II).

In addition, due to the public nature of such a contract, the consequences of a breach of contract are different to the ones in private law (VCLT 60)³². A potential breach of contract would not be brought to a national court, but would typically have to be solved through additional negotiations and measures between the parties or in front of a dispute settlement body. Lastly, the fact that such a contract would fall under public international law weakens the legal protection of investments and properties, as a consequence of the hierarchy of the relevant legal texts³³.

³⁰ GATS II and GATS V, GATT I and GATT XXIV.

³¹ cf. GATT XXIII and Agreement on Rules and Procedures Governing the Settlement of Disputes (DSU).

³² See also literature on state responsibility, e.g. DOMINICÉ, C. (1999), 'The International Responsibility of States for Breach of Multilateral Obligations', *EJIL*, vol. 10, no. 2, pp. 353-363.

³³ cf. KOSKENNIEMI, M. (1997), 'Hierarchy in International Law: A Sketch', *EJIL*, vol. 8, no. 4, pp. 566-582.

3. In Particular: Services Trade and the Sino-African Angola-Model

Of particular interest for this paper is the impact of the Angola-Model on the services sector and therewith on value-addition on the African continent. Recent trade statistics show increasing Sino-African trade: African countries tend to export raw materials to China, while importing cheap final products from China³⁴. Given the great interest in and need of resources of China³⁵, Sino-African deals with a negative or short-term impact on the local African economy are somewhat surprising: There might be ways for the African governments to sell their resources in a more value-addition friendly manner to China. One way to do so is through the development and fostering of a strong, reliable local or regional services sector³⁶.

3.1 State of Services Trade Liberalisation between China and African Countries

China has not a single conventional FTA with an African country. Thus, the current state of services trade liberalisation is reduced to the general level of liberalisation achieved through the GATS:

Except for the measures listed in the Annex on Article II GATS (exemptions), each member of the WTO shall be treated no less favourable than any other member with respect to any measure covered by the GATS³⁷.

Beside the list of exemptions, favourable treatment of a single member is possible through entering into an agreement on trade liberalisation in services, which is consistent with the requirements imposed by Article V GATS³⁸. However, such agreements do not yet exist between African countries and China. Thus, the respective level of trade liberalisation

³⁴ OSEI, B. AND MUBIRU, A. M. (2010), *Chinese Trade and Investment Activities in Africa*, Policy Brief, 29 July 2010, African Development Bank, Tunis-Belvédère.

³⁵ cf. e.g. HANSON, S. (2008), *China, Africa and Oil*, Report, Council on Foreign Relations, Marshall Foundation, Virginia.

³⁶ cf. CHEN, M-X., GOLDSTEIN, A., PINAUD, N. AND REISEN, H. (2005), *China and India: What's in it for Africa?*, preliminary draft, OECD Development Centre, Paris.

³⁷ GATS II.

³⁸ GATS V(1) requires (a) substantial sectoral coverage, and (b) elimination of substantially all discrimination. In the case of South-South Agreements, GATS V(3) provides for more flexibility with regard to the conditions set out in GATS V(1).

between China and any other African country currently depends on their membership of the WTO, and on the GATS commitments entered into by the two states respectively.

There have been negotiations with South Africa about an FTA, which have just recently come to a halt. Several impact studies have pointed out that Sino-African trade liberalisation, particularly in the services sector, would have a negative impact on the African economy³⁹. Of particular relevance in reference to services trade liberalisation is the fact that labour costs are so much lower in China than in African countries, and that the Chinese workforce is well-educated⁴⁰. Thus, South Africa is not yet able to compete with China's economies of scale; therefore, a conventional FTA is not in the interest of the country⁴¹.

When the political establishment of a country like South Africa comes to the conclusion that it has not the economic capacity to profit from an FTA with China, it is difficult to imagine that any other – less developed – African country would do so, particularly in the services sector. Consequently, there are no other FTAs – neither in goods, nor in services – between African countries and China currently under negotiations.

3.2 Legal Qualification of the Services Part in the Angola-Model

As has been discussed in Chapter 2, there is evidence pointing towards the public character of contracts based on the Angola-Model. To be able to do a thorough and concise analysis, access to the legal texts would be required. However, the interesting legal question in this

³⁹ cf. e.g. TULL, D. M. (2006), 'China's Engagement in Africa: Scope, Significance and Consequences', *Journal of Modern African Studies*, vol. 44, no. 3, pp. 459-479.

⁴⁰ LENNOX, J. (2010), 'Free Trade with China: A View from the Board Room', Interview, *South African Institute of International Affairs* [Online], Available: <http://www.saiia.org.za/archive-eafrica/free-trade-with-china-a-view-from-the-board-room.html> [Accessed: 2 November 2010].

⁴¹ cf. LANGENI, L. (2010), 'South Africa: Free-Trade Agreement With China Not on Cards', *Business Day*, 7 July 2010, *bilaterals.org* [Online], Available: <http://www.bilaterals.org/spip.php?article17695> [Accessed: 2 November 2010].

context – which can be discussed on a theoretical level – is whether or not the Angola-Model-contracts are consistent with the provisions of the GATS if the latter applied.

The infrastructure projects and supply of services financed by the China Exim Bank have a considerable impact on value-added chains: transportation, telecommunication, technical assistance and knowledge-transfer usually lie at the heart of these projects⁴². However, services provided in the exercise of governmental authority – as part of government procurement – are outside the scope of GATS⁴³. As the exact scope of the GATS provisions on government procurement still remains open for interpretation, there is uncertainty about whether or not a particular policy is excluded from MFN.

In addition, due to on-going negotiations on the accession to the Plurilateral Agreement on Government Procurement (GPA) of China, the current legal framework for government procurement in China might soon change and new obligations might render past negotiating strategies impossible⁴⁴. The legal framework for government procurement is generally highly fragmented and so far only to a small extent regulated on a multilateral level. For instance, some African countries have adopted legislative text based on the UNCITRAL model law on procurement of goods, construction and services⁴⁵, some lenders require their own procurement plans⁴⁶, while in some cases no legislation applies at all. However, this legal fragmentation is likely to diminish in the coming few years as there are ongoing negotiations

⁴² FOSTER, V., BUTTERFIELD, W., CHEN, C. AND PUSHAK, N. (2008), *Building Bridges: China's Growing Role as Infrastructure Financier for Sub-Saharan Africa*, The World Bank, Washington DC, pp. 65-81.

⁴³ GATS XIII, See also: CHANDA, R. (2002), *GATS and its Implications for Developing Countries: Key Issues and Concerns*, Department of Economic and Social Affairs, United Nations, New York, p. 15.

⁴⁴ CHANDA, R. (2002), p. 17-8.

⁴⁵ e.g. Gambia, Ghana, Kenya, Nigeria, Rwanda, Tanzania, aso. [Online], Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html [Accessed: 5 November 2010]

⁴⁶ See African Development Bank [Online], Available at: <http://www.afdb.org/en/projects-operations/procurement/resources-for-businesses/procurement-plans/> [Accessed: 5 November 2010]

on different levels on a multilateral legal framework for government procurement⁴⁷. Possibly, individual examination of the contracts in the infrastructure and services sector would show that not all of them are part of the government procurement, but that some fall under the application of the GATS. Given the legal consequences, such an examination is of considerable relevance.

The Chinese economic entanglement on the African continent related to the Angola Model is multi-fold. Various infrastructure projects listed by the World Bank⁴⁸ in 2008 seem interesting enough for a closer analysis. To name only a few:

(Niger) Tender for 51% ownership of Sonitel, Niger's state telecoms company, and its mobile arm, Sahel Com; Contractor: Zhong Xing Telecommunication Equipment Company Limited (ZTE).

(DRC) Construction of terminals, tower and power control centre at Ollombo Airport; Contractor: China Jiangsu International Economic-Technical Cooperation Corporation.

(Eritrea) Explore and develop minerals in Augaro (Gash-Barka Region); Contractor: China National Geological and Mining Corporation.

In addition to the room for legal interpretation on the GATS application to each of the individual contracts, overall trade between African economies and China has increased immensely during the past ten years⁴⁹. This increase of Sino-African trade is part of China's foreign policy and likely linked also to the high number of infrastructure projects and contracts attached to loans based on the Angola-Model. Arguably, this increase in trade amounts in single sectors and individual countries to *de facto* preferential market access.

⁴⁷ e.g. within the WTO, see: http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm [Accessed: 5 November 2010]

⁴⁸ FOSTER, V., BUTTERFIELD, W., CHEN, C. AND PUSHAK, N. (2008), pp. 65-81.

⁴⁹ cf. CENTRE FOR CHINESE STUDIES (2008), 'China and the Democratic Republic of Congo: Partners in Development?', *The China Monitor*, University of Stellenbosch, Stellenbosch, p. 7.

Furthermore, it is noteworthy that to the contrary of China other major trading partners of African countries – such as the US – base their economic cooperation on a large legal framework of different trade and other agreements⁵⁰. Consequently, examining the level of market access attained through Angola-Model based loans, and discussing the legal consequences of preferential market access independent from trade agreements would be of great interest but exceeds the range of this paper.

3.3 Does the Angola-Model allow more or less Policy-Space than GATS?

Currently, the Angola-Model certainly allows for more policy-space than would be the case if the Sino-African economic cooperation was solely based on GATS commitments. However, as there is considerable concern over the legal nature of individual contracts with Chinese companies involved in infrastructure projects, and the legal framework governing them, these contracts should be very carefully drafted. Also, the accession to the GPA might change the overall application of Angola-Model based loans.

In any case, the main concern in the case of the services sector is the requirement to employ Chinese companies for the loan. Neither is there, thus, any kind of competition in the concerned sectors, nor is it in the interest of sustainable economic growth if the infrastructure projects are entirely executed by Chinese companies and their Chinese employees. Furthermore, it should be considered whether there is a way to use the Chinese interest in raw materials – and also the Chinese commitment to development assistance – to conduct at least a first step of value-addition in the respective African country. Relaxing the requirement to contract Chinese companies for the infrastructure projects paid by the China Exim Bank's

⁵⁰ cf. <http://www.bilaterals.org/> [Accessed: 5 November 2010]

loan would not only serve local sustainable economic growth and value-addition, but also give less reason for concerns over the legality and legal sustainability of such arrangements.

3.4 Does the Angola-Model allow more or less Policy-Space than an FTA in Services?

Generally, GATS V allows for participation in a free trade agreement, if the agreement 1) covers 'substantially all trade', 2) removes 'substantially all discrimination' between the parties of an agreement, and 3) does not raise the overall level of barriers to trade in services to service suppliers from countries outside the agreement⁵¹. The only way to establish a stand-alone sectoral agreement in the area of services consistent with the GATS would be through a waiver from the MFN obligation under GATS IX(3). Such waivers must be justified by exceptional circumstances, should in principle be temporary, and are subject to annual review⁵².

Given the cheap and well-educated workforce and the modern and experienced services sector in China compared with the relatively fragmented services sector in African countries, a Sino-African FTA in services would have to be accompanied by a whole range of countervailing measures to balance both the short-term turmoil in the services sector and impending unemployment of African service suppliers.

However, African economies tend to be in great need of reliable and cheap access to services. Economic cooperation in the services sector with China would certainly increase the quality and lower the prices in the African services sector. However, a Sino-African FTA in services trade would naturally lead to more migration between the two countries and further merge the

⁵¹ GATS V.

⁵² STEPHENSON, S. M. (2000), 'Regional Agreements on Services in Multilateral Disciplines: Interpreting and Applying GATS Article V', In: S. M. Stephenson (ed.), *Services Trade in the Western Hemisphere: Liberalization, Integration, and Reform*, Brookings Institution Press, Washington DC, pp. 86-104, p. 101.

two economies. This said and the need for access to finance aside, services sector liberalisation would probably be more reasonable on a regional level among different African countries, than on a bilateral level with China.

Consequently, the Angola-Model provides also in comparison with a Sino-African FTA in service for more policy-space and bears fewer risks for the local economy. Although, services trade liberalisation *per se* would probably support the emergence of regional value-added chains as well as foster sustainable economic growth nevertheless.

5. Conclusion

Given the concerns over the content and legal character of contracts between the China Exim Bank, African governments and Chinese companies, there is need for more transparency and publicity of the Chinese loans to African countries. Increased transparency would not only be of interest to the international community and third countries, but would benefit particularly the people concerned as these contracts essentially deal with public goods.

As has been outlined and discussed in this paper, depending on the legal character of contracts with Chinese companies, the implications for the content and consistency with the body of international economic law differ greatly. In addition, it is questionable whether these side-agreements really support development in African countries, because of the strict concession to hire Chinese companies and employees for the projects financed by the Chinese loan.

Furthermore, due to the pending accession of China to the GPA, and ongoing negotiations over a multilateral legal framework on government procurement, the Angola-Model based loans to African countries will have to be re-examined in any case: They are not consistent with the requirements imposed by the GPA to date. Therefore, the discussed room for policy and negotiation for African governments related to the different legal instruments of international economic cooperation and integration could be of interest for future negotiations over Sino-African state loans.

Finally, this paper has pointed out the need for further examination into China's *de facto* market access to the African market, and the legal consequences of such market access completely detached from conventional trade agreements.