

2012 危中有机

Opportunity amid crisis

全球 2012 年的经济前景依旧暗淡。但是，对参与中国法律事务的律师而言，2012 年仍是危中有机。以香港为例，现时中国有大量涉外合同指定香港为仲裁地。由于很多外国律师和商人不熟悉中国的法律制度及其真实的运作情况，这一指定香港为仲裁地的趋势应该会继续下去。为了节省成本和时间，并避免不必要的麻烦，香港自然会被视为有效解决商业争端的不错选择。

在本期《商法》第 69 页，我们会探讨目前香港的“仲裁-调解”相结合模式正面临哪些问题。这些问题是否会令人怀疑目前的仲裁-调解模式？又是否会削弱香港在区域内的仲裁业务地位？等香港终审法院对“高海燕、谢和平诉建毅公司”一案作出判决后，以上问题或能得到解答。

鉴于香港拥有较健全的法律制度，加上接壤中国大陆的地理优势，相信香港的仲裁业务能保持其在区域内的竞争力，继续吸引中国涉外合同制定香港为仲裁地。

在本期《商法》第 51 页，我们会报道中国在非洲的投资活动。冈比亚律师事务所 Amie Bensouda & Co 律师 Amie Bensouda 认为：“非

洲对中国而言是很有潜力的合作伙伴，也是中国向世界经济大国的目标攀登时一块重要的踏脚石。”然而，想选好投资项目并确保其顺利进行却仍非易事。去年对中国在非洲的公司而言是颇为坎坷的一年：有些非洲国家爆发了革命，有些非洲国家排斥中国的情绪日益高涨。并非人人欢迎来自中国的投资。

PLMJ 律师事务所高级律师 Rita Assis Ferreira 认为，中国企业若想其境外投资活动成功顺利，就需要“深入了解非洲每个国家独特的文化传统”。中国企业不应过于依赖人脉和政治关系。相反，中国企业应该更加注重法律合规，如此才能确保其权益。

当然，在非洲有所作为的中国公司并不少，您能在本期的特别报道《年度杰出交易》中读到这些企业的成就（见第 19 页）。该报道在 2011 年度涉及中国的交易中甄选出最杰出者，向您介绍各笔交易背后蕴含的专业知识和独到创新之处。

在报道 2011 年度杰出交易的同时，我们亦关注 2012 年的动向。在此新年伊始之际《商法》祝大家在新的一年里龙翔虎跃、幸福安康。



partner and stepping stone for China," says Amie Bensouda of Amie Bensouda & Co in Gambia.

Yet, choosing the right project and making it work is still a challenge. Last year was particularly difficult for PRC companies in Africa due to revolutions in some African countries and anti-China sentiment in

others. Chinese investments were not warmly received by some people.

For outbound investment to be smooth and successful, Chinese companies need to have a "profound understanding of cultural traditions that make each country unique," says Rita Assis Ferreira, a senior associate at PLMJ. Chinese companies shouldn't rely too heavily on political and personal relationships. Instead, they should pay more attention to legal compliance to safeguard their interests.

Many Chinese companies are getting it right in Africa and their achievements are among those highlighted in *China Business Law Journal's* annual Deals of the Year report (page 19). This special coverage celebrates the most significant China-related transactions of 2011 and pays tribute to the legal innovation and practical expertise that guided each deal to fruition.

While celebrating the achievements of 2011, we also look forward to the opportunities that 2012 will bring. And in this spirit we would like to wish all our readers a happy, healthy and successful year ahead.

The global economic climate doesn't look good in 2012.

However, for those participating in PRC-related legal work, there is opportunity amid crisis.

Take Hong Kong as an example. A high proportion of foreign-related contracts in the PRC specify Hong Kong as the seat of arbitration. This trend is expected to continue as foreign lawyers and businesspeople are not familiar with the PRC legal system and how it operates in reality. To save time and cost, and perhaps to avoid opening a can of worms, it naturally follows that one might opt for Hong Kong for speedily resolving commercial disputes.

In *Render unto the mediator*, on page 69, we look into some problems of the current mediation-arbitration system in Hong Kong. Do these problems cast doubt on the current system and make Hong Kong a less attractive and less competitive place for arbitration? A definitive ruling by the Court of Final Appeal in a recent controversial case would help to clear the doubt.

Given that Hong Kong has a well-developed legal system and the geographical advantage of connecting with the mainland, we believe that Hong Kong will remain a strong and competitive centre of arbitration for PRC foreign-related contracts within the region.

In *It's time for Africa*, on page 51, we look at the burgeoning Chinese investments in Africa. "Africa is a promising



年度杰出交易

The deals of the year

2011年是多事之秋。日本地震，阿拉伯世界的暴动，本·拉登、卡扎菲、乔布斯、金正日先后死去，金融危机卷土重来，欧元正濒临崩溃……而2011年的中国却无大事，但其商业及法律界也并非一无作为。《商法》在此为您公布2011年度杰出交易评选的结果。

作者：魏若彬 李俊辰

2011 was full to the brim with news. Japan was hit by an earthquake. Arabs revolted. Bin Laden, Gaddafi, Jobs and Kim died. The euro teetered on the brink of collapse ... China's 2011 was quite calm, but its year in law and commerce was not silent. We now reveal the most significant deals of the year.

By Robin Weir and Richard Li

在全球躁动不安的2011年，中国保持着镇定，继续向前奋进。但在法律及商业领域，2011年的中国绝非无所作为。

在海外上市的中国公司纷纷因会计账目不规范等欺诈指控而遭到当局的严密监管。许多公司是通过所谓的反向并购而实现借壳上市的——这样的手法能够成功，海外金融监管机构显然难逃干系。然而，当对中国的指控出现、政治风向转变时，这些金融监管机构就开始对其先前允准的借壳上市手法表现出强硬态度。中国公司对此已感厌倦，加上思乡心切，于是纷纷在海外退市，这为国际律师事务所带来了新的工作机会。

Amid global turmoil, China kept calm and carried on. But its year in law and commerce was not uneventful.

Abroad, listed Chinese companies came under scrutiny for accounting irregularities and other alleged fraud. Many had listed by the back door, by means of so-called reverse merger – an arrangement in which overseas financial authorities were clearly complicit. Allegations surfaced, the political wind changed, and those same authorities took a hard line against arrangements they themselves had permitted. Fed up and missing home, Chinese companies began to delist, providing a new work stream for international law firms.

面的支持。

富而德律所担任了百事公司的法律顾问。盛德国际律所为康师傅控股提供了法律咨询。

基础设施, 能源和项目融资

1. 中新天津生态城项目

交易金额	经办律所
80亿美元	艾伦格禧律师事务所 君合律师事务所 万商天勤律师事务所

中新天津生态城项目是中国与新加坡政府间最大的战略性合作项目, 选址距天津市中心 40 公里, 距北京 150 公里, 占地 25 平方公里。该项目旨在为中国新建卫星城就可持续发展、环保建筑及交通运输等事务提供示范标准。来自日本、台湾、香港和马来西亚的地产开发商也参与了该项目。

万商天勤律师事务所和君合律师事务所担任投资方的法律顾问, 新加坡艾伦格禧律师事务所为海外法律顾问。

2. 中石化收购高浦能源巴西资产

交易金额	经办律所
50亿美元	Lefosse 年利达律师事务所 Machado Meyer Sendacz e Opice Advogados 文森·艾尔斯律师事务所

文森·艾尔斯律所协助中石化国际石油勘探开发公司签署了新股认购协议, 从高浦能源手中收购了其位于巴西的 30% 上游产业股权。这宗交易于 2011 年 11 月完成交割。中石化除了进行股权投资外, 还收购了高浦能源 30% 的现有公司间债务。这宗于 2011 年 11 月 11 日签署协议的交易, 价值 71 亿美元, 包括 47 亿美元股权和约 3.5 亿美元债权。

这是中石化继去年以 71 亿美元收购 Repsol Brazil 公司之后的又一项投资。

Machado Meyer Sendacz e Opice Advogados 律师事务所担任了中石化的巴西法律顾问。Lefosse Advogados 律师事务所和年利达律师事务所担任了高浦能源的法律顾问。

3. 四川宏达坦桑尼亚合资企业

交易金额	经办律所
30亿美元	佳利律师事务所 欧华律师事务所 K&M Advocates

四川宏达集团与坦桑尼亚国家开发公司 (National Development Corporation) 以 80:20 的股份比例成立了一家合资公司, 建设位于坦桑尼亚境内的综合性煤矿及燃煤发电厂和综合性铁矿及钢铁生产厂两个项目。这两个项目于九月对外宣布, 总投资为 30 亿美元, 成为东非迄今为止投资金额最大的单次交易。

Infrastructure, Power & Project Finance

1. Tianjin Eco-city

Value	Law firms
US\$8 billion	Allen & Gledhill Jun He Law Offices V&T Law Firm

The Sino-Singapore Tianjin Eco-city is the largest strategic co-operation project entered into by the governments of the PRC and Singapore. Located 40 kilometres from Tianjin city centre and 150 kilometres from Beijing, it covers an area of 25 square kilometres and aims to set the standard for newly constructed satellite towns in China in terms of sustainability and environmentally friendly buildings and transport. Property developers from Japan, Taiwan, Hong Kong and Malaysia are also involved.

V&T Law Firm and Jun He Law Offices are legal advisers to the investors. Allen & Gledhill of Singapore is overseas legal adviser.

2. Sinopec acquires Galp Energia's Brazilian assets

Value	Law firms
US\$5 billion	Lefosse Advogados Linklaters Machado Meyer Sendacz e Opice Advogados Vinson & Elkins

Vinson & Elkins represented Sinopec International Petroleum Exploration and Production Corporation in connection with its acquisition from Galp Energia, through new share subscriptions, of 30% of all Galp's upstream interests in Brazil. The deal closed in November. In addition to the equity investment, Sinopec will also acquire 30% of Galp's existing intercompany debt. The transaction, which was signed on 11 November, is worth over US\$5 billion, comprising US\$4.7 billion in equity and approximately \$350 million in debt.

This transaction follows Sinopec's \$7.1 billion investment in Repsol Brazil last year.

Machado Meyer Sendacz e Opice Advogados acted as Brazilian counsel to Sinopec. Lefosse Advogados and Linklaters represented Galp.

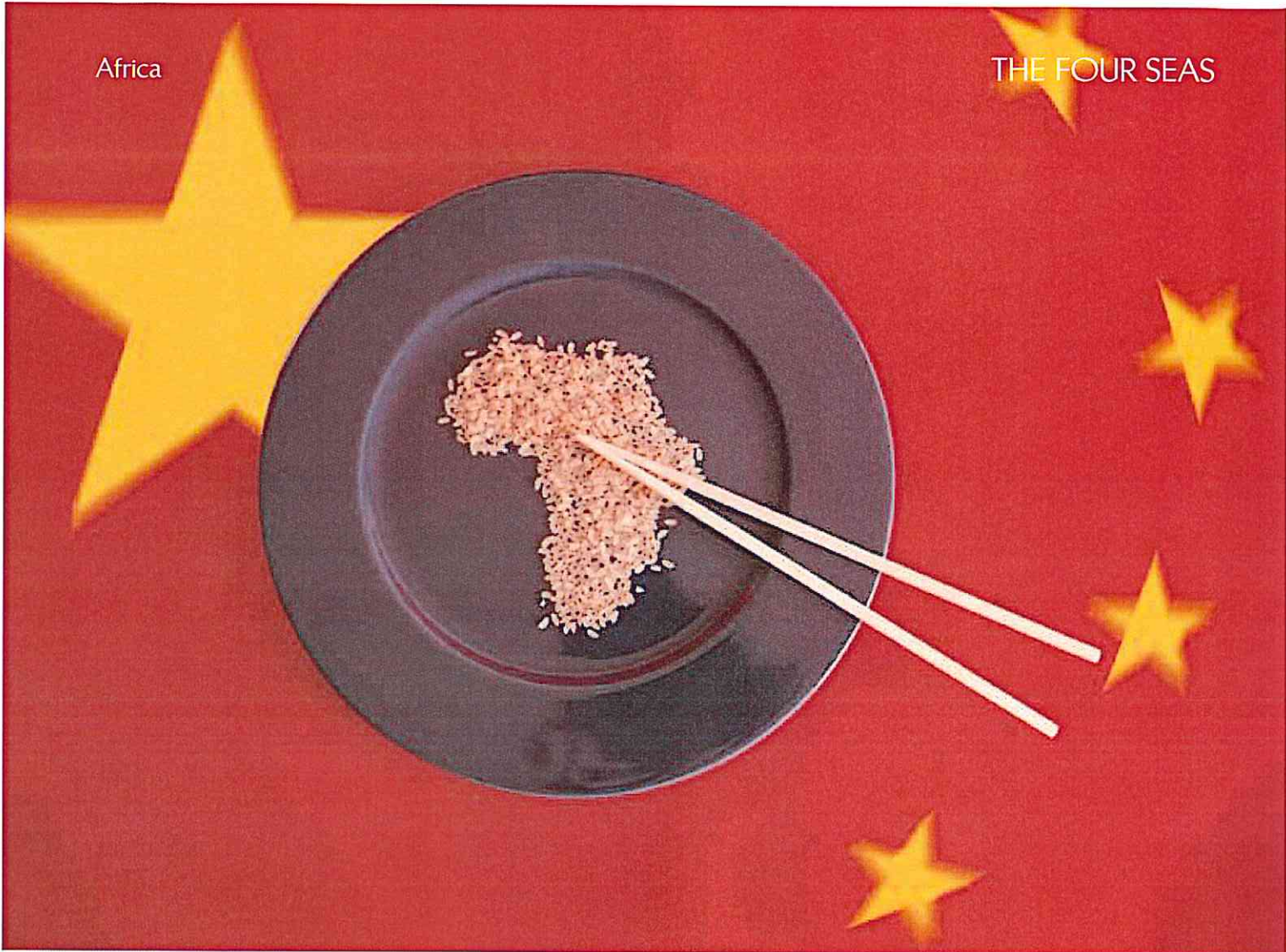
3. Sichuan Hongda Tanzania joint venture

Value	Law firms
US\$3 billion	Cleary Gottlieb Steen & Hamilton DLA Piper K&M Advocates

Sichuan Hongda Group has entered into an 80:20 joint venture with National Development Corporation of Tanzania to implement two projects in that country: an integrated coal mine and power plant, and an integrated iron ore mine and steel mill.

The two projects, with a total investment of US\$3 billion, were announced in September and represent the largest single investment venture in east Africa.

Cleary Gottlieb Steen & Hamilton is US counsel, and K&M



这一刻属于非洲

It's time for Africa

中国在非洲的投资势头发展迅猛, 但想选准投资项目并确保其顺利进行却绝非易事。

作者: Alfred Romann

Chinese investment in Africa is burgeoning, but choosing a project and making it work can be challenging.

By Alfred Romann

西班牙记者 Juan Pablo Cardenal 认为, 想了解中国在非洲的投资情况, 最好的方法是逐个了解中国在非洲各个国家的具体投资情况。Cardenal 曾用了一年的时间周游世界, 搜寻中国在各地留下的活动足迹。他与 Heriberto Araújo 合著的《中国无声的征服 (China's Silent Conquest)》一书的西班牙语版已于 11 月出

The best way to understand Chinese investment in Africa is to examine it on a country-by-country basis, says Juan Pablo Cardenal, a Spanish journalist who spent a year travelling the world searching for China's footprint. Cardenal's book *China's Silent Conquest*, which he co-authored with Heriberto Araújo, came out in Spanish in November and will be published in English in 2012.

事务为中国工商银行提供法律意见。另一家南非律所 Bowman Gilfillan 律师事务所出任了南非标准银行的法律顾问。

交易进行的速度非常之快。吴律师介绍说：“就我们而言，从接到交易指示到最终宣布这项交易，只用了短短五个星期时间。”如何做到保密是最重要的问题之一：消息泄露会导致估价飙升，交易也会因而夭折。

如何做尽职调查也是个难题。吴律师说：“我们一大群中国律师去南非做调查，肯定不利于保密。最终他们同意来北京配合我们的工作。”大部分的尽职调查工作最后是在北京完成的。

该交易得以完成，是依靠复杂的不完全协议安排方式。吴东耀律师说：“从法律角度来看，这种方式很不寻常。”协议安排要求股东间达成一份协议，该协议经法院核准后具有法律约束力。然而在该项交易中，只有一部分收购是通过协议安排的方式完成的，而其余部分是通过直接购买完成的。

为了使这种交易模式取得成功，南非标准银行必须发行新股。中国工商银行从扩充后的股份资本中购买了10%，由于购买的股份都来自既已存在的股本，因此中国工商银行在购买时直接付款给股东。



自然资源—中国在非投资的传统领域

Chinese investment in Africa has traditionally focused on natural resources

The deal made headlines because of its size and because it involved two large financial institutions, neither of which was from a market considered fully developed. In part, the deal also

在非洲寻找法律顾问

PLMJ 律师事务所高级律师 Rita Assis Ferreira 认为，在非洲开展业务“需要深入了解每个国家独特的文化传统”。这一点既适用于律所，也适用于其客户。“中国公司希望找到具有非洲业务经验的律师事务所。”法国基德律师事务所合伙人 Stéphane Vernay 说道。基德律所在阿尔及尔、卡萨布兰卡、突尼斯设有办事处，也在香港、北京等地设有代表处。Vernay 说许多中国公司都认为其在非洲的政治关系及人脉能为其提供保护，但他提醒中国公司不要过度依赖这些关系。“这些关系不一定靠得住，”他说，“法律文件还是很重要的。”

想在非洲寻找法律顾问的公司又有哪些选择呢？诺顿罗氏律所在南非的开普敦、约翰内斯堡、德班这三座城市设有办事处，在坦桑尼亚也有与其他律所联手设立的办事处。此外，诺顿罗氏律所还在北京、上海与香港设有代表处。

总部设于英国的顶级律所大部分都有非洲业务团队，但没有在非洲设立办事处，这一类型的律师事务所包括安理国际律师事务所、富而德律师事务所、年利达律师事务所与史密夫律师事务所。司力达律师事务所通过非洲当地律所在非洲开展业务。高伟绅律师事务所则于2011年末在卡萨布兰卡开设了办事处。

Berwin Leighton Paisner 律所在阿联酋首都阿布扎比组建的业务团队也同时负责北非业务。总部设于英国的 Trinity International 律所有其特定的市场定位，专门从事新兴市场的业

务，特别是非洲业务。柏文国际律所在欧洲、迪拜、香港都设有办事处，在上海设有代表处，也在非洲开展了业务。信安国际律所在赞比亚与其他律所联手设立了办事处。

一批来自葡萄牙、西班牙与法国的国际律所虽然规模较小，但在非洲建立了不错的业务关系。例如葡萄牙 PLMJ 律师事务所，不仅在中国设有代表处，而且在非洲的安哥拉、莫桑比克这两个葡萄牙语国家设有办事处。PLMJ 与安哥拉 Gabinete Legal Angola 律所、莫桑比克 Gabinete Legal Moçambique 律所合作开展业务，两家非洲律所都是 PLMJ 全球法律服务网的成员。PLMJ 全球法律服务网的成员还包括澳门的 DSL 律师事务所和中国大陆的大成律师事务所。

葡萄牙 Raposo Bernardo 律师事务所也在诸多非洲国家开展业务，包括安哥拉、佛得角、几内亚比绍、莫桑比克以及圣多美和普林西比。另外，Abreu Advogados 律师事务所也与安哥拉和莫桑比克的当地律所合作开展业务。虽然两家葡萄牙律所都没有在中国开展业务，但都曾在中非合作项目中提供法律服务。

律所网络也能帮助投资者找到合适的律师事务所。例如，总部设于美国的律所网络 Alfa International 就有145家成员律所，覆盖了埃及、加纳、尼日利亚、南非、赞比亚等国，Alfa International 也通过其成员律所国浩律师事务所覆盖了中国十个城市。非洲律所网络 Africa Legal Network 的成员律所则覆盖了东非十个国家。

[在非洲开展业务]需要深入了解
每个国家独特的文化传统

[Working in Africa requires]
profound understanding of cultural
traditions that make each country
unique



**Rita Assis
Ferreira**
PLMJ律师事务所
高级律师
Senior Associate
PLMJ

下一步,中国工商银行再收购南非标准银行 10% 的股份,不过这次收购的是标准银行增发新股,收购款支付给标准银行。

attracted attention because it was a departure from the traditional Chinese investments in the continent.

Webber Wentzel Bowens advised ICBC on the South African aspects of the deal. Bowman Gilfillan, another South African firm, advised Standard Bank in South Africa.

When the deal happened, it happened quickly. "From us being instructed to announcing the deal was only five weeks," says Ng. Secrecy was one of the most important considerations: a leak could have sent valuations skyrocketing and killed the deal.

Due diligence was also a problem. "A whole bunch of Chinese people going over to South Africa was not ideal for confidentiality. So they agreed to come over to Beijing," where most of the due diligence was done, says Ng.

The deal was made through a sophisticated partial scheme of arrangement, "that is quite quirky, legally speaking," he says. Schemes of arrangement involve an agreement between the shareholders that becomes legally binding when confirmed by a court. In this case, only a portion of the acquisition was done through a scheme, with the rest done through a straight purchase.

For the arrangement to work, Standard Bank had to issue new shares. ICBC bought 10% of the enlarged share capital with money that was paid directly to shareholders as these shares came from existing share capital.

In the next phase, ICBC acquired another 10% of the share



African Legal & Tax

TAX AND LEGAL SERVICES LEADER IN AFRICA

ALT International is a group of African TAX and LAW FIRMS based in 12 sub-Saharan African Countries.

ALT's goal is to demonstrate that there exists in all African countries sharp, qualitative and quantitative expertise, and that this expertise can deliver a better adapted contribution to the analysis of, and search for solutions to the problems being encountered.

That's the reason why ALT, from the beginning, has regrouped African experts (professional lawyers, auditors and consultants) whose goal is to take up the challenge of consulting in Africa, in their respective scope of intervention.

ALT assist and advise public and private companies in law and tax subjects in disciplines like banking & finance, cross-border investment, mining & metals, natural resources, energy, oil and gas mergers & acquisitions, telecom.

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非洲各国纵览 Country by country

《商法》为您报道非洲各主要国家概况。

安哥拉: 在安哥拉,“行动迅速、方向准确是成功的关键。” PLMJ 律所高级律师 Rita Assis Ferreira 说道。该律所在安哥拉设有办事处。安哥拉是非洲最大的石油生产国之一。2002 年该国内战结束以来,中国累计向安哥拉贷款超过 150 亿美元,大部分用于石油和天然气生产。安哥拉较知名的律师事务所包括 Fátima Freitas Advogados 律所及 AVM Advogados 律所。

喀麦隆: 中国长江三峡集团公司于八月宣布与喀麦隆政府签订了水力发电开发项目合约,项目总值 2 亿美元。中喀两国贸易额不断增加,正迅速逼近 10 亿美元大关。喀麦隆较知名的律所有 Henry Samuelson & Co 律所、Akkum & Akkum & Associates 律所及 Nico Halle & Co 律所。

乍得: 2011 年初,阳光国际商务有限公司拟在乍得共和国建立并发展阳光国际工业区,该项目总值 1.5 亿美元,基德律师事务所就该项目为阳光国际提供法律意见。阳光国际的最终母公司为中国石油天然气集团公司。该项目包括在乍得首都恩贾梅纳建造酒店综合大楼,以及在 Djarmaya 建设一个工业及居住区。据基德律所介绍,这是乍得最大的外国投资项目之一,并且表明中国在非洲的投资正跃出石油、天然气及矿产资源等行业。

刚果民主共和国: 五矿资源有限公司目前正在收购 Anvil Mining 公司的进程中。Anvil Mining 是一家总部设于澳大利亚的加拿大公司,该公司在刚果民主共和国经营矿业项目。戴维斯律师事务所、辉皓律所、年利达律所在该交易中担任五矿资源的法律顾问。Lawson Lundell 律所在交易中出任 Anvil 公司的法律顾问。Cassels Brock & Blackwell 律所在交易中担任 Anvil 公司独立董事的法律顾问。司特曼律所在交易中为 Anvil 最大股东托克公司 (Trafigura) 提供法律意见。

埃及: 埃及是中国在非洲的第五大贸易伙伴,合作范围覆盖多个行业。埃及与其他非洲国家相比显得与众不同,该国与中国间的贸易很少起因于开采自然资源的动机。埃及知名的律师事务所包括 DLA Matouk Bassiouny, Helmy Hamza & Partners (贝克·麦坚时的结盟律所), Nadoury & Nahas Law Offices 以及信安国际律师事务所。

肯尼亚: 1963 年,肯尼亚与中国建立外交关系,属于非洲第一批与中国缔结外交关系的国家。南非律师事务所 Coulson Harney 驻内罗毕合伙人 John Sykel 介绍说,肯尼亚与中国签订了一系列惠及中国投资者的税收条约及保护协议。Sykel 说,肯尼亚“被视为战略要地,是地区性的金融、通讯中心与交通枢纽”。肯尼亚的知名律所包括 Bowman Gilfillan, Miller & Co, Naikuni Ngaah & Co, Munyi Kithaka & Company, Wandie & Company 以及 Balala & Abed Advocates 律师事务所。

China Business Law Journal presents a brief guide to some of the key jurisdictions in Africa.

Angola. In Angola, “quick action in the correct direction is vital for success,” says Rita Assis Ferreira, a senior associate at PLMJ, which has an office there. Angola is one of the largest oil producers in the continent. China has lent Angola at least US\$15 billion since civil war ended in 2002, mostly for oil and gas production. Among the better known law firms are Fátima Freitas Advogados and AVM Advogados.

Cameroon. In August, the China Three Gorges Corporation announced a contract with the government of Cameroon to develop hydropower projects worth US\$200 million. Trade between the two countries is growing and is rapidly approaching the US\$1 billion mark. Law firms in Cameroon include Henry Samuelson & Co, Akkum & Akkum & Associates and Nico Halle & Co.

Chad. At the beginning of 2011, Gide Loyrette Nouel advised Soluxe International, a company whose ultimate parent is China National Petroleum Corporation, on its US\$150 million construction and development of the Soluxe International Industrial Zone in Chad. The project consists of a hotel complex in Ndjama and an industrial and residential zone in Djarmaya. According to Gide, this is one of the largest foreign investment projects in Chad and demonstrates how China's investment in Africa is moving beyond oil, gas and other natural resources.

Democratic Republic of Congo. Minmetals Resources is in the process of acquiring Anvil Mining, a Canadian company headquartered in Australia which has mining operations in the Democratic Republic of Congo. Minmetals is being advised by Davies Ward Phillips & Vineberg, Freehills, and Linklaters. Lawson Lundell is counsel to Anvil. Cassels Brock & Blackwell is counsel to Anvil's independent directors, and Stikeman Elliott is counsel to Trafigura, Anvil's largest shareholder.

Egypt. Egypt is China's fifth largest trading partner in Africa, across a range of industries. Very little of this trade originates from natural resource extraction, which marks it out from other countries on the continent. Law firms in Egypt include DLA Matouk Bassiouny; Helmy Hamza & Partners (which is linked to Baker & McKenzie); Nadoury & Nahas Law Offices; and SNR Denton.

Kenya. Kenya was among the first countries in Africa to establish diplomatic relations with China, in 1963. There are a number of tax treaties and protection agreements that benefit Chinese investors, said John Sykel, a Nairobi-based partner at South African law firm Coulson Harney. Kenya “is regarded as a strategic location and the regional financial, communication and transportation hub,” says Sykel. Among the best-known firms in Kenya are Bowman Gilfillan; Miller &