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U.S.-China Legal Cooperation – Part I: The Role of Actors and Actors' Interests

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Introduction*

Soon after the political leadership of the People's Republic of China (PRC) had decided to follow a path of "reform and opening up" in modernizing the Chinese economy it became evident that modernization could not be limited to the area of economics. As a prerequisite for this process to be successful, the legal system needed to be adjusted as well. After the years of the Cultural Revolution (1966 to 1976), characterized by extreme legal nihilism and the destruction of nearly the entire legal system and legal profession,[1] the legal system had to be built up basically from scratch. There was a special need for laws governing the many new forms of economic transactions[2] but the government also attempted to adjust the Chinese legal system to international legal standards. This means, on the one hand, in the course of the Chinese legal reform process, foreign (i.e. western) legal norms or entire legal systems were to a very large degree used as guidelines for the design of specific Chinese laws as well as for the reconstruction of the Chinese legal system. On the other hand, this reliance on foreign models as "examples of best practices" also gave western governments – as well as non-governmental actors – the opportunity to directly influence the Chinese legal reform process by offering legal advice and cooperation programs to the Chinese government. Thus, the Chinese legal reform process can also be conceived of as an example of "exporting" legal norms and concepts from one jurisdiction to another.

The "export" or – in other words – the "migration" of legal norms[3] is the topic this first part of a three-part analysis of American-Chinese legal cooperation. The concept originated in the area of comparative legal studies and is in that context mainly concerned with firstly, detecting so-called "legal transplants" – i.e. legal norms and concepts which originate in one jurisdiction and have been "exported" or "transplanted" to another – in certain jurisdictions and, secondly, with analyzing how the "exported" legal norms and concepts may have changed or may have been adjusted to the new legal, social and political environment in the very process of migration.[4] But, it is the author's impression, one question which is central to the process of the migration of legal norms so far has not been adequately considered in the scholarly discussion. This is the question of *how* legal norms and concepts exactly *do migrate* – what one can conceive of as the "channels" used for the migration of legal norms and concepts from one jurisdiction to another. It was mentioned above that the Chinese legal reform proc-

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[1] The "Anti-Rightist Campaign" 1957 marked the beginning of the decline of the post-1949 Chinese legal system. Having taken Mao Zedong's policy of "letting one hundred flowers bloom" as an opportunity to air their critique with the existing political and legal system, lawyers – who until then had been quite successful in representing their clients in civil, economic, and criminal cases – became a target for political campaigns and subsequent persecution. Law offices were forced to shut down and the Ministry of Justice disbanded. During the following years of the Cultural Revolution, the remains of the Chinese legal system as it had developed since the foundation of the People's Republic of China in 1949 were destroyed. University law schools were closed and members of the legal profession – lawyers in particular – were sent to the countryside to "learn from the peasants" or became victims of political turmoil (Peerenboom 1998: 15). At the beginning of the Reform and Opening up period, there were no more than 381 law offices and 3000 full-time lawyers left (Peerenboom 1998: 17, note 67).

[2] For example Joint-Venture Law (1979),Civil Procedure Law (1979), Contract Law (1981, rev. 1999), General Principles of Civil Law (1983), Trademark Law (1983, rev. 1993) etc.; see Wang, James 1999: 156.

[3] The terms "export", "migration", and "transplantation" of legal norms may be used – and, in this paper, are used – interchangeably. Their common meaning can be circumscribed as "the moving of a rule or a system of law from one country to another, from one people to another." (Watson 1974: 21).

[4] On „legal transplants" see the work of Alan Watson (Watson 1974; 1996)

ess was (and still is) accompanied and – presumably – influenced by a diversity of foreign legal cooperation and advice measures. Chinese-western legal cooperation of this sort is provided by national governments, non-governmental organizations (NGOs), international organizations (IOs) and academic institutes as collective actors. Furthermore, on an individual level, Chinese and western legal experts, judges, lawyers, legislative staff, administrative personnel, scholars and students are participating in the different programs. Given the fact that "laws do not have wings"[5] one can conceive of these different actors involved in Chinese-western legal cooperation measures as being the "channels" in question which are crucial to the migration of legal norms and concepts.

But, introducing collective and individual actors as the independent variable in trying to explain the process of the migration of legal norms and concepts, one must also take into account that these actors' actions are typically driven by certain *interests*; this means, these interests should be conceived of as influencing the process of legal transplantation as well. Therefore, besides identifying the actors involved in Chinese-western legal cooperation measures, it is important to figure out these actors' interests as the driving forces for their engagement as well.

As the first part of a three-part analysis, this working paper sets out to present the theoretical foundations upon which to build the discussion of the importance of actors and actors' interests in the process of legal transplantation and thus in the endeavor of U.S.-PRC legal cooperation itself.

The second part of the analysis[6] provides an overview of the general political background of U.S.-PRC legal cooperation and describes legal cooperation measures financed and implemented by American governmental actors. Finally, the third part of the analysis[7] deals with selected legal cooperation projects run by important private actors, such as the Ford Foundation, the Asia Foundation as well as by university law schools and the American business community. Additionally, the third part also includes several appendices which provide a comprehensive overview of the legal cooperation measures implemented by American private as well as governmental actors.

1 Actors' Interests and the Transplantation of Legal Norms and Concepts

In comparative legal studies the assumption is widely held that over time a certain convergence between different national jurisdictions will be achieved by the spread of technically and dogmatically 'superior' legal norms and concepts. This means, in the long run, a harmonization of all national jurisdictions along the lines of generally accepted legal principles – and, finally, the development of a 'droit commune de l'humanité' – is anticipated. This development is basically thought to be guided only by the persuasiveness of the legal norms and concepts in question.[8]

Practical experience, however, gives a very different impression of the process of legal transplantation. There exist only very few cases where a thoroughly conducted study of foreign legal norms and concepts as well as in-depth analysis of their jurisdictions of origin anteceded

[5] Schauer 2000: 19.
[6] Schulte-Kulkmann/Heilmann 2005a
[7] Schulte-Kulkmann/Heilmann 2005b
[8] Zweigert/Kötz 1996: 2-3; Schauer 2000: 19.

the 'import' of these norms.[9] Thus, the question arises, what might be the decisive reasons for a legal norm being transplanted – if not the norm being regarded as technically and dogmatically superior to others.

This paper wants to stress the importance of (collective as well as individual) *actors* for the transplantation of legal norms and concepts. Since "laws do not have wings",[10] they instead depend on actors' actions for their migration; the transplantation of legal norms and concepts should thus be conceived of as a function of collective and individual actors' actions. This means, however, that actors' interests as the general incentives for their actions do exert some influence on the process of legal transplantation, too.[11] This assumption can be made for individual as well as for collective actors (for example nation states).

Against this theoretical background, the paper proceeds by analyzing which types of interests different actors supposedly might try to advance in the course of Chinese-western legal cooperation. Parts II[12] and III[13] then will try to provide some empirical evidence derived from the analysis of U.S.-PRC legal cooperation for the suggestions made here on the theoretical level.

1.1 Economic Interests

Economic interests are of great importance for American-Chinese legal cooperation as well as for Chinese-Western legal cooperation in general. One reason for western governments trying to export legal norms to the PRC legal system is a concern for helping to bring about a legal system in the PRC which resembles the own national jurisdiction, thus being a familiar and conducive legal environment for national corporations trying to start their businesses in China.[14]

But, legal cooperation is not only conducive to the donor nations' economic interests with regard to the advantages of generating similar legal environments as described above. Furthermore, in the process of bargaining and preparing legal cooperation measures between the PRC and western donors, a variety of contacts between individuals in the respective national bureaucracies, legal and business communities etc. develop. These contacts between individuals as well as between institutions subsist much longer than the legal cooperation measures themselves and can be revitalized if it comes to negotiate for example economic cooperation with the Chinese side at a later time. Good personal relationships with Chinese ministry officials or members of the business community can thus constitute a great advantage for western governments or individuals trying to forge economic cooperation with the PRC.[15]

Furthermore, supporting the education and qualification of legal and administrative personnel by legal cooperation measures furthers western donor states' special interests as well. Qualified Chinese jurists and civil servants are a vital precondition for the effective protection and effectuation of western corporations' legal rights. This means, legal cooperation in the area of commercial law and law enforcement aims for no small part at facilitating market entry for corporations from the donor countries' home jurisdictions and thus at improving their economies' general performance and competitiveness as well.[16]

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[9] Sacco 1991: 4.
[10] Schauer 2000: 19.
[11] Schauer 2000: 19; Interview 08/2002
[12] Schulte-Kulkmann/Heilmann 2005a
[13] Schulte-Kulkmann/Heilmann 2005b
[14] Röhl/Magen 1996: 46; DeLisle 1999: 276.
[15] Interview 08/2002
[16] Tomsa 1997: 1000; Xu 1999: 1; Woodman 2004: 30.

This is especially true with regard to the implementation of WTO rules and regulations. To date, the PRC still does not live up comprehendingly to her WTO commitments, mainly as to the abolition of trade barriers and the impartial execution of administrative decisions. These shortcomings often result in major disadvantages for foreign businesses operating in the PRC as well as in disputes about breaches of WTO commitments between the PRC and fellow WTO member states. Thus, legal cooperation measures directed at adjusting the Chinese legal system, mainly in the area of administrative law, to WTO regulations and at educating Chinese administrative personnel in properly executing legal provisions in accordance with WTO principles improves business conditions for foreign firms and at the same time eradicates causes for conflict between the PRC and other WTO members. Therefore, legal cooperation measures related to WTO issues serve the interests of both the Chinese side and the donors. Consequently, legal cooperation in this area constitutes an important aspect of American-Chinese legal cooperation, too.

Non-governmental actors involved in American-Chinese legal cooperation might pursue economic interests of their own, too. Especially business lawyers from one jurisdiction representing their clients in the PRC lobby extensively in order to achieve a development of the PRC legal system – or at least of the areas of the Chinese legal system relevant to their work – along the lines of their own and their clients' home jurisdiction.[17] For the clients such a development means, again, the advantage of conducting business in a legal environment they are quite familiar with. For the counsel, this implies a special competence to represent clients in a legal system which resembles their home jurisdiction. This results in certain competitive advantages compared to foreign counsel with no reason to claim a special familiarity with the Chinese legal system due to its similarity to their respective home jurisdictions.

1.2 Foreign Policy Interests

A different, yet equally important set of interests driving American-Chinese as well as Chinese-western legal cooperation in general can be identified as certain foreign policy interests. With regard to the PRC, the most important of these interests pursued by western nations is improving the human rights situation in the PRC and supporting rule of law and, eventually, a democratic transformation.

But, due to the international status of the PRC as a permanent member of the United Nations Security Council and a rising regional power as well as the importance of the Chinese market for foreign businesses and their products, western governments more often than not feel uncomfortable in exerting open pressure on the PRC government in order to improve the human rights situation.[18] As far as the U.S. is concerned, legal cooperation therefore very often is conceived of as an instrument for covertly introducing human rights and rule of law related ideas into the PRC. Then, one hopes, these "seeds" planted in "patches of sunlight"[19] might develop a life of their own and spread through the Chinese legal system, not to be controlled by the Chinese government, and initiate a transformation of the legal and, finally, the political system of the PRC, veering towards a more democratic and rule of law oriented system. But, while the "Trojan Horse" strategy[20] of legal cooperation measures directed, in the long run, at

[17] DeLisle 1999: 207; cf. Interview 11/2002

[18] This becomes evident, for example, with regard to the European Union's (EU) human rights policy vis-à-vis the PRC. Some attempts by the EU to sponsor a resolution criticizing the human rights situation in the PRC at the annual UN Commission for Human Rights in Geneva failed because some governments of EU member states refused to support such a resolution which they thought would have been harmful to their economic relations with the PRC (Friedrich 1998: 41-42).

[19] Stephenson 2000: 14, citing a U.S. government official.

[20] The term "Trojan Horse Strategy" is used by Stephenson 2000.

political change in the PRC is of course not appreciated by the Chinese government, this strategy is indicative of another important function of legal cooperation in the area of rule of law and human rights where western donor states' foreign policy interests and those of the PRC government converge.

It has been mentioned that western governments in general feel uncomfortable in bespeaking human rights problems in the PRC at the official government-to-government level. Given the perceived economic and strategic importance of the PRC, many western governments shy away from putting a strain on their bilateral relationship with the PRC by openly criticizing the Chinese government's human rights record. But, on the other side, the general public in the U.S. as well as in Europe – even more than ten years after the Tiananmen incident – is still very aware of the problematic human rights situation in the PRC and thus expects their respective governments to put pressure on the PRC government to improve this situation. This means, western governments on the one hand have a strong interest in a good bilateral relationship with the PRC due to economic and strategic considerations and have no interest in burdening this relationship by straightforwardly criticizing the PRC human rights situation. On the other hand, such a criticism is exactly what a majority of the electorate in western nations expects of their respective governments. This means, due to domestic political considerations, these governments can not omit discussing human rights in their bilateral relationships with the PRC. Against this background legal cooperation programs are suitable instruments for furthering both ideals and interests in dealing with the PRC.

By initiating Human Rights Dialogues at the diplomatic level as well as legal cooperation programs covering not only technical legal aspects but human rights and rule of law aspects, too, it is possible to relocate questions and discussions concerning the PRC human rights record from the official diplomatic sphere to the working level involved with the legal cooperation programs. Dislocating the discussion of human rights issues from the official bilateral level to the working level for the western governments as well as for the PRC has the advantage that there is no longer a need to explicitly rebuke the human rights problems in the PRC and by this insulting the Chinese side. This means that the general bilateral relationship and official high-level meetings between PRC government representatives and their western counterparts are no longer burdened by the open articulation of human rights criticism by the western side. This sort of criticism is instead to be aired in the scope of the legal cooperation measures. This atmospheric improvement is conducive to furthering the areas of the relationship between the PRC and western states which are thought to be most important to both sides: especially economic and strategic cooperation. On the other hand, with regard to the public in western nations expecting their respective governments to exert pressure on the PRC in order to improve the human rights record, governments can hint at the different legal cooperation programs as important measures initiated to improve the PRC human rights situation and thus living up to correspondent public demands. This means, legal cooperation programs are important instruments for western governments for fulfilling the electorate's expectations to plead for an improvement of the Chinese human rights record which simultaneously further the economic and strategic relationships with the PRC in accordance to the respective national interests.

Thus, as should have become clear, with respect to reconciling interests and morals, offering and participating in legal cooperation programs is of a certain advantage for the Chinese side as well as for the western donor governments and thus in the foreign policy interests of both. The Bill Clinton-Jiang Zemin "Rule of Law Initiative" which will be discussed in Part II of

the analysis[21] constitutes one prominent, albeit ineffective, example for the U.S. government trying to reconcile interests and "morals" by initiating legal cooperation measures with the PRC.

1.3 Prestige

Another important driving power for the migration of legal norms is prestige. Prestige may exerts an influence in some different respects.

For one, prestige is an incentive for donors to offer legal cooperation measures in order to export their own legal system or parts thereof. The fact that a legal system – partially or as a whole – is being copied by other legal systems results in this system being regarded as "leading": "A system can be considered *leading* whenever it is – wholly or in part – considered, discussed, copied or adopted in a larger number of other systems than any other legal system at that historical moment."[22] It only seems quite natural that the U.S. as well as every other nation has an interest in its own legal system being regarded as "leading" since this seems to imply a certain quality of the statutory framework, organization of the judiciary, implementation of laws, legal education and research and so forth, thus adding to the nation's general esteem. But, it has to be pointed out, prestige does not necessarily result from a "leading" legal system because this system is to be regarded as qualitatively "better" than any other legal system. Indeed, eventually quite to the contrary, one has to pay attention to the fact that the definition of a "leading" legal system given by Mattei only refers to a *quantitative* measurement of "leadership": "A system […] copied or adopted in a *larger number of other systems than any other legal system* at that historical moment."[23] This definition does not imply that the adoption of one legal system by many other systems results from this system's *superiority* compared to non-leading legal systems – indeed, as this article wishes to point out, there are many reasons for a legal system or parts thereof being transplanted *apart* from its superiority.[24] This means, if one nation is able to export its legal system to a great number of other legal systems – relatively regardless of the quality or of its appropriateness to local circumstances in the importing nation – then this implies that the exporting nation is able to *exert influence* of one sort or another on other nations. Consequently, the successful transplantation of legal norms is also an indicator of *power* – meaning that the nation which is home to the momentarily "leading" legal system is able to exert influence and power on other nations, too. This can be regarded as the reason why the successful transplantation of a nation's legal system in itself might be perceived as *prestigious* – because for a nation possessing a "leading" legal system means to be "powerful" in at least some respects, too.

In a very similar sense, this prestige argument holds true for non-state actors as well. These actors – be they universities, private foundations, partisan organizations or professional organizations – also try to further the export of their respective nation's legal system because if the nation itself is regarded as being powerful due to possessing a leading legal system then being an organization belonging to a powerful nation will improve the esteem of this organization with regard to foreign organizations as well, hence improving its prestige, too.

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[21] Cf. Schulte-Kulkmann/Heilmann 2005a

[22] Definition by Ugo Mattei (Mattei 1994: 201; author's emphasis)

[23] Mattei 1994: 201; author's emphasis

[24] One has to make it quite clear that there is no absolute standard for the measurement of one legal system's superiority compared to that of another legal system. One legal system can be regarded as 'superior' to other systems in very different senses. A legal system can be superior because it is dogmatically coherent, because statutes are drafted clearly and non-contradictorily, leaving no area or question untouched, etc. Or a legal system can be regarded as superior because this system seems to be especially suitable to the conditions found in an importing nation, thus the transplantation of this system will be preferred to that of another nation's legal system.

Thus, trying to export their respective legal systems in order to make these systems "leading" legal systems and thereby generating national and/or organizational prestige can be regarded as an important reason for the U.S. as well as for many other countries to initiate legal cooperation with the PRC.[25] Furthermore, members of private as well as governmental organizations working in the area of legal cooperation with the PRC indicate that another reason for being engaged in legal cooperation programs is the fact that they think it important not to "lose ground" to donors from other nations with regard to influencing the areas of the Chinese legal system receptive to the transplantation of legal norms. This seems to be especially true with regard to legal cooperation measures provided by western European donors on the one hand and the U.S. on the other hand. Individuals from Germany and from the European Union (EU) in particular very often hold a critical view to the predominance of American legal norms in certain areas of the Chinese legal system and would advice their government or the EU to take more efforts to rein in this influence.[26] Here, it becomes obvious that offering legal cooperation measures to the PRC is perceived in a sense as a competitive endeavor and that the successful transplantation of certain legal norms into the Chinese legal system is – again – perceived as being accompanied by an increase in general influence.

But, on the other hand, the efforts to export the own legal system in order to make this system a "leading" one and thus to gain prestige also accounts for some of the flaws which can be identified with regard to western-Chinese legal cooperation in general. Since every donor state and its national organizations are tempted to spread their respective legal systems in order to gain prestige, this very often results in an over-supply of legal cooperation measures.[27] This effect is aggravated by the fact that Chinese counterpart organizations are eager to cooperate with as many western donors as possible. On the one hand, this very often means additional benefits for the Chinese side provided by the respective western legal cooperation programs.[28] These benefits for one can take the form of 'travel rents': Nearly every western-Chinese legal cooperation program offers so-called 'study tours' to destinations in the country running the program to Chinese participants. By participating in cooperation programs offered by different donors this means for the Chinese side the opportunity to send more – generally high-level – participants abroad in the course of the programs. Very often, these study tours are thus taken as leisure trips and remunerations for higher ranking cadres not exclusively interested in studying foreign legal systems in their respective countries of origin.[29] Donors in general are very much aware of this problem[30] and try to take counter-measures such as mak-

[25] Cf. Schauer 2000: 19.

[26] Cf. Interviews 01/2003; 02/2003; 03/2003; 05/2003. The German newspaper *Frankfurter Allgemeine Zeitung* (*FAZ*) even warned against leaving it to the U.S. to influence the Chinese economic law through legal cooperation and urged to increase German efforts and impact in this field ("Deutschland nimmt Einfluss auf chinesisches Wirtschaftsrecht" [*Germany exerts influence on Chinese economic law*], *FAZ*, 22.02.2002).

[27] Schauer 2000: 20; cf. Interview 08/2002; Woodman 2004: 41.

[28] Interview 08/2002

[29] Interview 02/2002

The value of study tours as opportunities for Chinese participants to learn more about the donor nation's legal system in practice very often is flawed by the fact that, firstly, these tours are usually only very short; a stay of about two weeks does not leave much room for thoroughly acquainting the Chinese participants with the foreign legal system. Secondly, when fixing the programs for the tours, foreign donor organizations are careful to calculate enough time for shopping and sightseeing at the request of the Chinese side. Thus, the opportunity to study a foreign legal system only seems to be second-rate. Anecdotal evidence adds to this argument: Very often some study tour destinations which are proposed by donors because of being important and interesting due to the fact that they harbor important judicial institutions (high-level courts, research institutes, renown legal scholars and university institutes etc.) are rejected by the Chinese counterparts. The reason for this rejection very often lies in the fact that some of the Chinese counterparts already participated in prior study tours to the same locations and now wish to take the tour as an opportunity to come to know different touristy attractive parts of the donor country.

[30] Interviews 04/2002; 06/2003

ing sure that not only politically high-ranking Chinese participants with only limited interests in learning about foreign legal systems (and a greater interest in going abroad as a leisure activity) but some Chinese legal professionals with a substantial legal interest, too, are participating in the study tours.[31] Nevertheless, the fact that the expensive and at the same time very contentious study tours are part of nearly every western cooperation measure offered to the Chinese side implies that western donors are eager to 'sell' their own programs to the Chinese side and thus have to make sure that the program is not less attractive than the programs offered by other donors. Given the over-supply of cooperation programs already mentioned, Chinese counterparts such as the National People's Congress, the State Council's Bureau of Legislative Affairs, the Supreme People's Court and its associated National Judges College, the Chinese Academy of Social Sciences, the National School of Administration – to name only the few Chinese institutions most regularly participating in Chinese-western legal cooperation programs – can chose amongst the programs offered. Against the background that western donors are trying to spread their respective legal systems, thus bringing them into a 'leading' position and gaining prestige, this means every donor will make sure that the programs offered will not be rejected due to being less attractive than other donors' offerings.

Another – albeit intangible – benefit for Chinese institutions cooperating with a variety of western donors lies in the possibility for these institutions to gain prestige and influence themselves. In the PRC, different institutions are usually committed with drafting certain pieces of legislation and competences are not clearly confined. In this situation, if one institution can present a draft worked out with the help of foreign experts in the course of a legal cooperation program, then plausibly more authority will be accredited to this draft than to other proposals worked out only with domestic intellectual input. Thus, being able – with foreign help – to deliver high quality results in – and this aspect is equally important – relatively short periods of time is advantageous for the respective Chinese institution and, of course, for the individuals responsible for the respective tasks and thus a certain incentive to seek cooperation with foreign experts in the course of legal cooperation programs.[32] Since every new western cooperation partner adds to the Chinese institution's esteem, seeking prestige on the side of the Chinese participants in legal cooperation measures aggravates the problem of over-supply and double-efforts, too.

Chinese-western legal cooperation in general is not only flawed by an over-supply of cooperation measures but also by the absence of coordination amongst different measures.[33] It can be observed that many western donors are cooperating with the same Chinese institutions in the same areas of the law or even working on the same pieces of legislation. This is, for one, legitimate due to the fact that the Chinese side is trying to learn about as many foreign legal systems as possible in order to find out which legal framework is most appropriate for the

[31] Amongst these mechanisms are a careful design of the tour programs as well as prudential selection of Chinese participants. In some cases, the final decision as to which Chinese participants are admitted to the study tours rests with the western donor. The "EU-China Legal and Judicial Co-operation Program", for example, seems to be quite successful in selecting appropriate candidates for study tours, thus preventing these measures from being only touristy activities (for a detailed description of the EU program's approach to selecting Chinese participants see Schulte-Kulkmann 2003: 542).

[32] Cf. Interview 02/2002

[33] So far, there exists no comprehensively institutionalized coordination mechanism between the different donors offering legal cooperation measures to the PRC (Interview 08/2002). If there is any coordination or exchange between different programs, all this depends on individuals working with the respective programs and privately exchanging views with their counterparts (Interview 02/2002).
One exception to the aforementioned is a bi-annual "Donor Roundtable" organized by the Ford Foundation in Beijing. This Roundtable invites every donor organization active in the area of legal cooperation programs in the PRC to participate and to share information about current projects as well as experiences with other donors (Interview 11/2002; Woodman 2004: 42)

specific Chinese circumstances.[34] Correspondingly, most of the donors are actually trying to realize a comparative approach in advising on certain areas of the law. This approach is usually implemented by integrating legal experts from different jurisdictions as lecturers into one legal cooperation program. But, much more could be gained from a comparative approach of legal cooperation if there were some degree of coordination between the different western donors themselves. By this, it would be possible not only to get a comparative view on substantive legal issues but also on different methods of and approaches to advising on legal reform, thus initiating an exchange of experiences amongst the donors. This would be of help for the Chinese recipients, too, since coordination in this sense could result in donors offering programs tailored more closely to the specific Chinese needs. Moreover, much more legal cooperation could be offered to the PRC if scarce financial resources were not spent on double efforts in the same areas as is currently done due to the lack of coordination. But, coordination could also result in the success of legal cooperation measures not palpably attributable to one specific donor. This means that the merits would have to be shared with no possibility to figure out each donors exact share in the success. This seems to be unacceptable to donors with regard to their strive to gain prestige but also because every donor depends on public or private funding. Since the donor is held responsible for the successful use of these funds by the general public (in case of tax money) or by private financiers, there is an obligation to establish a clear causal relationship between the funds invested and the results attained[35] in order to legitimate the use of resources. This is not possible in case that there is more than one donor engaged in certain legal cooperation measures, thus making any coordination or even cooperation amongst donors nearly impossible.

Prestige, described as facilitating the export of legal norms – and thus sought by different donor nations – not only results from a nation's legal system being a "leading" one. There are other aspects, not necessarily directly related to the area of law, which account for a legal system being regarded as 'prestigious' and thus being preferably imported by nations such as the PRC. For one, a nation's position as a large and dynamic economy may have a prestigious effect on its system of economic law, too.[36] Here, it is tempting to draw a connection between that nation's economic success and the 'design' of its economic law, thus making this area of the law especially attractive to other nations aspiring to develop their economies equally successfully and therefore trying to import a legal system or legal norms conducive to this endeavor.

In the same vein, the laws of a country highly credited by the international community – be it because of its economic performance or due to its high esteem as a politically influential power in the international or regional context – are more readily imported, too. Here the im-

[34] Interview 08/2002

[35] To be sure, everyone working in the area of legal cooperation is perfectly aware that there exists no such thing as a 'clear causal relationship between a legal cooperation measure and the legal reform results achieved', for example a draft law becoming a bill after extensive consultation by the donor. There is always a great diversity of different factors influencing the course of legal reform in the PRC. Whereas this truth is totally plausible to everyone working 'on the ground', the home offices of most organizations engaged in legal cooperation with the PRC are exactly looking for the aforementioned causal relationships when measuring the 'success' of the programs. One reason for this attitude is that it is much more effective to search for – and very often establish – such a causal relationship if one has to 'proof' the 'success' of a certain program and assure further funding (by private donors or by the government) than if one tries to figure out the many different factors which usually account for legal reforms in the PRC (very much the same as in any other state) developing along one path or another. This is even more true as the addressees of these explanations are usually individuals in ministries or the general public who are not familiar with circumstances in the PRC and thus not receptive to multi-dimensional assessments of a program's possible impact, but the more receptive to the establishment of a clear causal relationship between program input and output (cf. Woodman 2004: 28; 39).

[36] DeLisle 1999: 281/282; Schauer 2000: 14.

porting nation may, on the one hand, hope to gain the respect of the 'reference' nation and, on the other hand, to become as much respected as the reference nation due to being connected to a powerful and influential country via the same legal regime.[37] These mechanisms might be described as "passive export" or "import without export" because the 'donor' nation is not actively engaged in spreading its own legal system or legal norms, for example through legal cooperation measures;[38] these norms migrate exclusively due to the esteem ascribed to them by importing nations.[39]

The above statements should have illustrated that there exist a variety of interests which influence the proposal of legal cooperation measures as well as the transfer and adoption of legal norms in the course of western-Chinese and, in particular, American-Chinese legal cooperation programs. Furthermore, the importance of different interests for the import and export of legal norms implies that the process of legal transplantation is almost always closely related to power in a more general sense. On the one hand, donors tie the importing nation down to them because by importing a legal system or certain legal norms, the importing nation develops a certain "intellectual dependency" on developments in the areas of legislation, legal philosophy and jurisprudence occurring in the exporting nation's legal system.[40] But, on the other hand, this same phenomenon very often results in importing countries referring to the legal systems of relatively unimportant and powerless nations as sources for legal transplants exactly in order to avoid becoming dependent on a nation much more powerful than the importing nation itself. This implies an important *caveat* to the above argument about a legal system's prestige being conducive to its export: prestige – defined above as very often resulting from the nation of origin's (economic and/or strategic) power may also work as a hindrance to exporting this legal system due to importing nation's fears of becoming dependent on a much more powerful nation.[41]

Nevertheless, the importance of the specific interests of actors' in transplanting legal norms and concepts is just one aspect of the transnational dimension of legal transplants this paper is interested in. Emphasizing actors' interests improves the understanding of *why* there are processes of legal transplantation. But – if one does not accept the notion of an 'invisible hand' guiding the migration of legal norms – than the next question inevitably relates to *how* the transplantation of legal norms is executed. In order to develop a better understanding of the process of legal transplantation, it seems to be important to analyze the *interaction between Chinese and western legal experts* participating in legal cooperation measures and the possible impact of this interaction on the process of legal transplantation. This article tries to point out that *networks* developing between legal experts are important channels for the transplantation of legal norms and concepts. Thus, by emphasizing the importance of contacts between legal experts from different jurisdictions, the understanding of the process of legal transplantation should be extended by a *transnational dimension*. This transnational dimension is to be explained below.

[37] Cf. DeLisle 1999: 283; Schauer 2000: 11. Watson (1974), too, points out the possibility of law being imported due to the "authority of its model" (Watson 1974: 90) – "as contrasted with quality" (ibid.: 89).
[38] The terms „passive export" and „import without export" are used by DeLisle 1999: 212.
[39] On the importance of "authority" in a broad sense for the migration of legal norms see Watson 1974: 57ff.
[40] Hirsch 1981: 26.
[41] Cf. Röhl/Magen 1996: 44; Interview 03/2003

2 Interaction between Actors and the Transplantation of Legal Norms and Concepts – the Transnational Dimension

Legal experts participating in legal cooperation programs fulfill different roles. There are long-term or short-term experts who consult on legislative drafting and training of judicial and administrative personnel, and western legal academics working as lecturers at Chinese universities. Furthermore, legal experts participate in legal cooperation measures as program coordinators, members of ministries, government agencies and courts on the Chinese as well as on the western side. In the course of the work of the legal cooperation programs a variety of contacts develop between participating western legal experts and their Chinese counterparts. These contacts can be regarded as a specific form of transnational relations.

Following a proposal by Keohane and Nye, 'transnational relations' can be defined as "contacts, coalitions, and interactions across state boundaries that are not controlled by the central foreign policy organs of governments."[42] Interactions between western and Chinese legal experts can be described as 'transnational relations' in this sense since these contacts are cross-border in nature and are not (completely) controlled by national foreign policy organs. This is true even in case that legal experts are participating in governmental legal cooperation programs since these experts regularly appear in their capacity as individual members of the legal profession. They put forward their own views regarding the topics of the cooperation and do not necessarily follow the official standpoint of the nation sponsoring the legal cooperation measures in question. This independence is at least true for western legal experts participating in the programs. But, even for Chinese legal experts it becomes more and more possible – at least in the area of academic exchange if not in public discussion – to emancipate themselves from the PRC government's official view and to put forward their respective standpoints in open discussions with their western counterparts.[43]

Furthermore, interactions between Chinese and western legal experts are conducive to "the movement of tangible or *intangible* items across state boundaries."[44] This means, transnational relations between legal experts, developing across national – and even cultural – borders like a spider's web, are important channels for the distribution of "non-substantial" objects such as – in our case – legal norms and concepts.[45]

The interaction between Chinese and western legal experts continuously increases alongside the broadening of the range of legal cooperation programs offered to the PRC by the U.S. as well as by other western donors. This is a first step towards the development of a "global net of legal communication",[46] possibly bringing about a "globalization" of expert opinion[47] in certain areas of the law. This process of globalization is especially important with regard to the PRC being more and more integrated into the international economic system and thus being obliged to adjust the Chinese legal system to internationally accepted legal rules and standards which are the foundations of this international economic regime. The accession of the PRC to the WTO in 2001 further highlights this requirement.[48]

[42] Keohane/Nye 1973: xi.
[43] Interviews 02/2002; 12/2002; 07/2003
[44] Keohane/Nye 1973: xi; author's emphasis.
[45] Risse-Kappen 1995: 4; Picciotto 1996: 95.
[46] Teubner 1998: 238.
[47] Lampton 2001: 10.
[48] Lampton 2001: 10-11.

3 Summary

Summarizing the aforementioned remarks, one can thus conclude that western legal experts in their capacity as "creative ideologists" and "symbol traders"[49] are to be regarded as carriers of legal norms and concepts, introducing these legal norms and concepts to importing nations such as the PRC via transnational exchanges with their Chinese counterparts in the course of legal cooperation programs. Thus, the transnational influence on the transplantation of legal norms derived from the variety of contacts between western and Chinese legal experts is of importance for understanding why legal norms and concepts originating in Western legal systems are transplanted into the Chinese legal system in the first place. Transplantation of legal norms can be regarded as a "consequence of this interpersonal cooperation" between legal experts in the course of legal cooperation programs.[50]

Furthermore, this leads to the conclusion that different interests of – collective and individual – actors can be regarded as driving the process of legal transplantation; but, alongside the influence of these different interests, for the process of legal transplantation to be realized there should have been developed transnational channels between legal experts from both the importing as well as the exporting nation which further the migration of legal norms. In the end, with regard to the success of legal cooperation programs in exporting legal norms into recipient nations, not only the insistence of the donor to export elements of the law – for example in order to live up to its economic interests – or the willingness of the recipient to import foreign law due to the law's prestige or because of the above mentioned economic interests sufficiently explain the process of transplantation. Transnational networks between legal experts are necessary for the transfer of legal norms, too; absent these channels the migration of even the most prestigious legal norms and concepts is hindered significantly.

Part II of the analysis[51] is committed to describing in detail the legal cooperation efforts of different U.S. actors with Chinese partners. The description should help to work out the different interests effective in the legal exchange efforts provided to Chinese partners by different U.S. actors. Furthermore, it remains to be seen whether the claim that the development of transnational exchanges between American and Chinese legal experts is conducive to the transplantation of legal norms and concepts can be substantiated by analyzing the empirical evidence provided by the description of U.S.-PRC legal cooperation measures.

[49] Terms introduced by Picciotto 1996: 106.
[50] Schauer 2000: 18 (note 18).
[51] Schulte-Kulkmann/Heilmann 2005a

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