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China-Africa “Legal Cooperation” on Investment Dispute Settlement: Current Practice and the Role of Europe

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Key Points:

- There are limitations in the “legal cooperation” within China-Africa dispute settlement.
- Recent China-Africa investment arbitration cases evidence the practice of ad hoc arbitration, contrary to agreed China-Africa “legal cooperation” on a shared commitment that is better controlled and supervised than ad hoc arbitration.
- The flexibility of ad hoc arbitration allows the offer of Western Europe in China-Africa investment arbitration, with some China-Africa agreement preferences.
- The Research Brief suggests greater “legal cooperation” is needed between China, Africa and Europe to clarify the role and extent of Europe in China-Africa dispute resolution.

Introduction

China has been Africa's largest trading partner since 2009 and one of Africa's largest sources of investment.¹ In cognisance of increasing trade and investment cooperation, it is understood that commercial and investment disputes are inevitable. On this basis, Chinese and African jurists met to discuss cooperation in the Forum on China–Africa Cooperation (FOCAC) legal forum in 2009.² Among the various legal topics considered, the discussions included cooperation towards dispute settlement with Chinese and African characteristics.³ A “non-judicial resolution of disputes” was adopted as a fundamental principle in Chinese investment in Africa.⁴ Through this shared commitment, a joint dispute resolution framework was developed as an alternative to Western-based institutions that are mostly based in Europe.⁵ Beginning in 2015, the China Africa Joint Arbitration Centre (CAJAC) branches were established through Cooperation Agreements, to resolve commercial disputes between African and Chinese parties.⁶ However, the effort is an example of the limitations of “legal

cooperation” in China-Africa dispute settlement.⁷

This Research Brief looks at the limitations of China-Africa “legal cooperation” on investment dispute settlement. In particular, the limitations of efforts to resolve investment disputes within the states of China and Africa, with Chinese and African characteristics.⁸ In considering the limitations of “legal cooperation” in China-Africa investment disputes, the Research Brief considers what Europe has to offer. The central thesis is that it is the triangulation of China-Africa-Europe that can best address the needs of China-Africa business. This is an important topic as Chinese trade and investment activity continues to

increase in Africa yet Chinese firms have often reported facing difficulties when involved in legal disputes with African governments or businesses.⁹

The Status of China-Africa “Legal Cooperation” on Investment Disputes

Although it is noted that China-Africa treaties place restrictions on access to arbitration,¹⁰ all China-Africa Bilateral Investment Treaties (BITs) provide for investor-state arbitration and state-to-state arbitration.¹¹ In managing the possibility of arbitration, China-Africa “legal cooperation” aims to facilitate it within the jurisdiction of Chinese and African parties, with Chinese and African characteristics.¹²

¹ See Christine Zhenwei Qiang, Peter Kusek, Victor Steenberg & Brody Viney, *The road to recovery in Sub-Saharan Africa: Capitalizing on transformative opportunities from shifting FDI patterns* WORLD BANK BLOGS (May 27, 2021), <https://blogs.worldbank.org/africacan/road-recovery-sub-saharan-africa-capitalizing-transformative-opportunities-shifting-fdi>. See also Ministry of Foreign Affairs of the People's Republic of China, *China and Africa in the New Era: A Partnership of Equals* (Nov. 26, 2021), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/202111/t20211126_10453904.html.

² See Xinhua, *Chinese, African jurists discuss cooperation in 1st FOCAC legal forum* CHINA.ORG.CN (Dec. 21, 2009), http://www.china.org.cn/world/2009-12/21/content_19105792.htm.

³ “The Dispute Resolution Mechanism with Chinese and African Characteristics” was one of the four special topics of the fifth China-Africa Cooperation Forum Legal Forum held in Luanda Nov. 12-14, Law Yearbook of China (2016) 1:215, <http://www.lawinfochina.com/DisplayJourn.aspx?lib=qikan&Gid=1510197799&keyword=&EncodingName=big5>.

⁴ Dawid Welgemoed, *CAJAC: A New International Arbitration Centre* KEATING CHAMBERS (2017), <http://www.keatingchambers.com/wp-content/uploads/2017/12/DW-CAJAC.pdf>.

⁵ See Jenny Cane, Lindi Nkosi-Thomas & Jean Meiring, *China-Africa Joint Arbitration Centre South Africa* ADVOCATE (Aug. 2017), <https://gcbsa.co.za/law-journals/2017/august/2017-august-vol030-no2-pp45-54.pdf>.

⁶ The CAJAC branches were tailor-made for China-Africa dispute resolution to meet the need for ‘a credible China-Africa dispute resolution mechanism’. The current mandate

of CAJAC is limited to commercial disputes. See China Africa Joint Arbitration Centre, *Introduction*, <https://arbitration.co.za/cajac-afsa/>. (A uniform set of Rules for the resolution of China-Africa disputes has been adopted by all CAJAC centres including CAJAC Johannesburg, CAJAC Shanghai, CAJAC Beijing, CAJAC Shenzhen, CAJAC Nairobi and CAJAC OHADA. See CAJAC Rules, <https://cajacjh.com/>). See also CAJAC Shanghai, *China-Africa Joint Arbitration Centre Shanghai*, http://www.shiac.org/cajac/aboutus_E.aspx?page=3.

⁷ This Brief will not discuss further the limitations of China-Africa legal cooperation on China-Africa commercial disputes. On CAJAC as an example of the limitations of China-Africa legal cooperation, see e.g., Matthew S. Erie, *The Soft Power of Chinese Law*, COLUM. J. TRANSN'L L. (forthcoming), available at SSRN <https://ssrn.com/abstract=4121560>.

⁸ Law Yearbook of China, *supra* note 3.

⁹ Xinhua, *African, Chinese law firms ink deal to boost investments in Africa* CHINADAILY (June 17, 2017), https://www.chinadaily.com.cn/business/2017-06/17/content_29783155.htm.

¹⁰ See Lorenzo Cotula, Xiaoxue Weng, Qianru Ma & Peng Ren, *China-Africa investment treaties: do they work?* IIED (2016), <https://www.iied.org/sites/default/files/pdfs/migrate/17588IIED.pdf>.

¹¹ Won L. Kidane, *Agreements and Dispute Settlement in China–Africa Economic Ties* in ARKEBE OQUBAY, AND JUSTIN YIFU LIN (eds), CHINA-AFRICA AND AN ECONOMIC TRANSFORMATION (2019).

¹² Cane et al, *supra* note 5.

Firstly, the endeavour of China-Africa “legal cooperation” is towards promoting Chinese and African informal and diplomatic means to address investment disputes.¹³ It is considered possible to use investment treaties without filing for arbitration,¹⁴ but where arbitration is needed, the preference is generally for a less formal ad hoc arbitration between the China-Africa disputing parties.¹⁵ Ad hoc arbitration has less third-party interference¹⁶ and is often preferred as parties to the dispute do not need to follow specific arbitration rules but can agree how to conduct proceedings, e.g., the selection of the arbitral tribunal, and agree to make their own procedural rules, adopting internationally recognised rules designed specifically for ad hoc proceedings or adopting a set of institutional rules which may need to be modified.¹⁷ However, in a less formal ad hoc arrangement, parties to the arbitration may

also face drawbacks incurring further expenditure, such as requiring more legal assistance in drafting and having to approach the court to take the arbitration forward.¹⁸ Arbitration seated in China illustrates some of these drawbacks.¹⁹ So, efforts of China-Africa “legal cooperation” on the resolution of China-Africa disputes are expected to be better controlled and supervised than ad hoc arbitration.²⁰

Recent Practice of China-Africa Investment Arbitration

Recent China-Africa investment arbitration cases question the sufficiency of such “legal cooperation”. There have been recent investor-state arbitration claims filed by Chinese investors against African governments, seemingly compromising the “legal cooperation” shared commitment on the resolution of China-Africa

¹³ A shared commitment to developing an alternative to Western-based institutions. *See Id.* “Soft law” is more significant in China-Africa relations than can be expected in the West. *See Won Kidane, China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration*, Kluwer Law International 2012, Seattle University School of Law Research Paper 12-16, available at SSRN <https://ssrn.com/abstract=2019054>. Kidane also writes that “In the case of China and Africa, formalisation means subscribing to the existing international investment rules and institutions created to manage their respective relationships with the North [Western Europe].” *See Won Kidane, China and India’s Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa*, 49 *Loy. U. Chi. L.J.* 405 (2017), <https://digitalcommons.law.seattleu.edu/faculty/793>. *See also e.g.*, Xinhua, Legal forum seeks to boost China-Africa cooperation, *CHINADAILY* (Nov. 27, 2015), https://www.chinadaily.com.cn/world/XiattendsParisclimatconference/2015-11/27/content_22522952.htm (that “some laws, rules and regulations are not just and fair to the developing world”).

¹⁴ *See Cotula et al, supra* note 10 (arguing that investors could refer to an applicable treaty or threaten arbitration to strengthen their position in negotiations with the state).

¹⁵ *See infra* note. Ad hoc arbitration is also provisioned for in China-Africa treaties. *See e.g.*, Won Kidane & Weidong Zhu, *China-Africa Investment Treaties: Old Rules, New Challenges*,

37 *Fordham Int’l L.J.* 1035 (2014). Ad hoc arbitrations in China are generally prohibited, the legitimacy of foreign ad hoc arbitration is recognized. *See also* Falk Lichtenstein & Roxie Meng, *New Draft for Modernising China’s Arbitration Law - Signal for Internationalisation Instead of Decoupling?* CMS LAW-NOW (Sept. 28, 2021), <https://www.cms-lawnow.com/ealerts/2021/09/new-draft-for-modernising-chinas-arbitration-law>.

¹⁶ And Chinese traditional and state-owned enterprises have a preference for more confidential, face-saving negotiated solutions than compulsory third-party dispute resolution. *See Li Ke, A Chinese-African Cross Cultural Perspective on Dispute Settlement and the Belt and Road Initiative: Challenges and Risks Facing Chinese Investors* in JEAN A. BERLIE, (ed.) *CHINA’S GLOBALIZATION AND THE BELT AND ROAD INITIATIVE. POLITICS AND DEVELOPMENT OF CONTEMPORARY CHINA* 179-205 (2020).

¹⁷ *See* United Nations, *Dispute Settlement- International Commercial Arbitration - The Arbitration Agreement*, United Nations Conference on Trade and Development (2005).

¹⁸ Lichtenstein & Meng, *supra* note 15.

¹⁹ *Id.*

²⁰ Welgemoed, *supra* note 4. Such as the efforts to be more “cost-effective and efficient” for Chinese and African parties. For instance, in the resolution of China-Africa commercial disputes, ‘an arbitration run under CAJAC’ was also premised on this basis.

disputes. The claim against Nigeria, *Zhongshan Fucheng Industrial Investment Co Ltd v Nigeria* (2018) is the first known investment treaty won by an investor from mainland China against an African state.²¹ Demonstrating the use of investment treaties in protecting Chinese businesses in Africa, Zhongshan brought an arbitration claim against Nigeria for breaches of the China - Nigeria BIT (2001). The claim relates to certain actions taken by Nigerian state actors and entities that deprived Zhongshan of substantial investment. Early in 2021, following ad hoc arbitration in London under the United Nations Commission on International Trade Law (UNCITRAL) rules, the arbitration tribunal issued a final award of approximately US\$70 million in favour of the Chinese claimant.²² Another relevant claim by a mainland Chinese investor against an African country is the *Beijing Everyway Traffic & Lighting Tech Co. v. The Republic of Ghana* (2021). Everyway has alleged breaches of the China - Ghana BIT (1989). The claims arose out of Ghana's cancellation of a contract, including alleged non-

payment for works.²³ This is a pending case, also reported as an ad hoc arbitration case under UNCITRAL rules.²⁴

These recent China-Africa investment arbitration cases evidence the use of the investor-state arbitration mechanisms as provisioned for in China-Africa BITs.²⁵ Yet, these mechanisms are inconsistent with Chinese and African informal and diplomatic means to address disputes as per “legal cooperation” efforts. Hence, a shared commitment to the resolution of China-Africa disputes with informal and diplomatic means has not entirely translated into practice. In practice, international arbitration is deemed to be the best option available for the resolution of China-Africa investment disputes²⁶ (although ad hoc arbitration can accommodate the ‘informal’ preference to some extent). Secondly, a shared commitment that is better controlled and supervised than ad hoc arbitration has also not translated into practice either. It was believed that CAJAC would strive to be recognised and have its arbitration rules adopted in China-Africa BITs.²⁷ CAJAC ‘offers

²¹ Final Award dated March 2021 but published on Jan. 27, 2022. See UNCTAD, *Zhongshan Fucheng Industrial Investment Co. Ltd. v. Federal Republic of Nigeria*, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1196/zhongshan-fucheng-v-nigeria>. See also Hill Dickinson, *Chinese investor succeeded in investment arbitration against Nigeria: Zhongshan Fucheng Industrial Investment Co. Ltd -v- Federal Republic of Nigeria* LEXOLOGY (Mar. 4, 2022), <https://www.lexology.com/library/detail.aspx?g=22ad75cf-7719-486a-b488-c9685fbbee72>.

²² *Id.*

²³ A commercial arbitration claim followed this investment treaty claim. See Jus Mundi, *Beijing Everyway Traffic & Lighting Tech Co. v. The Republic of Ghana (II)*, <https://jusmundi.com/en/document/decision/en-beijing-everyway-traffic-lighting-tech-co-v-the-republic-of-ghana-representatives-of-the-parties>.

²⁴ Case still pending. There is no institution recorded for this case. See UNCTAD, *Beijing Everyway Traffic and Lighting Technology Company Limited v. Republic of Ghana*, <https://investmentpolicy.unctad.org/investment-dispute->

[settlement/cases/1150/everyway-v-ghana](https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1150/everyway-v-ghana). See also Jus Mundi, *Everyway Traffic v. Ghana (I)*, <https://jusmundi.com/en/document/decision/en-beijing-everyway-traffic-lighting-tech-co-v-the-republic-of-ghana-composition-of-the-tribunal>.

²⁵ All China-Africa BITs provide for State-to-State as well as investor-State dispute resolution procedures. See Uche E. Ofodile, *Africa-China Bilateral Investment Treaties: A Critique* 35 Mich. J. Int'l L. 131 (2013), <https://repository.law.umich.edu/mjil/vol35/iss1/5>.

²⁶ Won Kidane, *China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration*, *supra* note 13.

²⁷ See e.g., Hogan Lovells, *China-Africa partnership for dispute resolutions in Africa* HOGAN LOVELLS PUBLICATIONS (Sept. 2015), <https://www.hoganlovells.com/en/publications/chinafrica-partnership-for-dispute-resolutions-in-africa>. Hogan Lovells is a founding member of AFSA. See AFSA, *Founding Members*, <https://arbitration.co.za/founding-members/>. CAJAC in South Africa was a result of an agreement between AFSA, the Association of Arbitrators, and the Shanghai International Trade Arbitration Centre.

a shared dispute resolution mechanism and building a China-Africa jurisprudence.²⁸ However, CAJAC has not been mandated to resolve investment disputes nor have CAJAC rules been adopted in China-Africa BITs.²⁹ Recent practice is evidence of the usual ad hoc arbitration under the most popular UNCITRAL Rules, designed specifically for ad hoc arbitration proceedings.³⁰ The preference for ad hoc arbitration in the resolution of China-Africa disputes is inconsistent with the commitment to a better controlled and supervised China-Africa dispute settlement process that is more cost-effective and efficient than ad hoc arbitration. A possible explanation, as illustrated by recent practice, is the value of Western Europe in dispute resolution;³¹ that is, making use of Western European legal infrastructure, arbitrators and/or rules in China-

Africa investment dispute resolution, with the flexibility of ad hoc arbitration being used to control its extent within China-Africa agreement parameters.³²

The Way Forward – The Role of Europe

China and Africa should revisit “legal cooperation” discussions on settling cross-border investment disputes. The use of Western European institutions and rules in recent China-Africa investment arbitration suggests the potential need for “legal cooperation” between all three parties, China, Africa and Europe, in the resolution of China-Africa investment disputes.³³

If the China-Africa “legal cooperation” is for a functional purpose, discussions should clarify whether the role of Europe is welcome in China-Africa dispute settlement. If the offer of Europe is

See CAJAC Ushers South Africa into global arbitration arena SOWETAN (Aug. 19, 2015). See also Huiping Chen, *China's Innovative ISDS Mechanisms and Their Implications*, 112 AJIL UNBOUND 207-211 (2018) (Chen writes that CAJAC will help to resolve the difficulties of China-Africa investment disputes).
²⁸ See also The Republic of South Africa, Department of Justice and Constitutional Development, *Address by the Deputy Minister of Justice and Constitutional Development, the Hon. JH. Jeffery, MP at the First China-Africa Joint Arbitration Centre (CAJAC) International Arbitration Conference, held at the Cape Town International Convention Centre, 25 November 2017*, https://www.justice.gov.za/m_speeches/2017/20171125-CAJAC_dm.html.

²⁹ Usually parties to investor-state disputes choose arbitrations under UNCITRAL or ICSID rules. See 2018 International Arbitration Survey: The Evolution of International Arbitration by the School of International Arbitration at Queen Mary University of London. See also Queen Mary University of London & PriceWaterhouseCooper 2013 International Arbitration Survey, *Corporate Choices in International Arbitration: Industry Perspectives, 2013*; Won Kidane & Weidong Zhu, *supra* note 15.

³⁰ Department of Justice and Constitutional Development, *supra* note 29.

³¹ *Zhongshan v Nigeria* is administered via ad hoc arbitration in London under UNCITRAL rules. The arbitral tribunal is chaired by D. Neuberger, an English judge who served as

President of the Supreme Court of the UK. See The Supreme Court, *Former Justices*, <https://www.supremecourt.uk/about/former-justices.html#:~:text=David%20Edmond%20Neuberger%2C%20Lord%20Neuberger,Rolls%20from%201%20October%202009>. There is no administering institution recorded for *Beijing Everyway Traffic and Lighting Technology Company Limited v. Republic of Ghana* (2021). The arbitral tribunal is chaired by S. Brekoulakis, Professor and the Director of the School of International Arbitration at Queen Mary University of London. See Queen Mary University of London, *Professor Stavros Brekoulakis, LLB (Athens) LLM (London) PhD (London)*, <https://www.qmul.ac.uk/law/people/academic-staff/items/brekoulakis.html>.

³² Won Kidane, *The China-Africa Factor in the Contemporary ICSID Legitimacy Debate*, 35 U. PA. J. INT'L L. 559 (2014).

³³ Perhaps not specific to “legal cooperation” but Great Britain is also committed to the BRI, calling it a “vision”. See Brenda Goh, *Britain calls China's Belt and Road Initiative a 'vision'* REUTERS (Apr. 26, 2019), <https://www.reuters.com/article/us-china-silkroad-britain-idUKKCN1S20NZ>; City of London, *Greening the Belt and Road: A UK-China collaboration* (May 18, 2022), [https://www.cityoflondon.gov.uk/supporting-businesses/economic-research/research-publications/greening-the-belt-and-road-a-uk-china-collaboration#:~:text=China%20and%20the%20UK%20are,and%20Road%20initiative%20\(BRI\)](https://www.cityoflondon.gov.uk/supporting-businesses/economic-research/research-publications/greening-the-belt-and-road-a-uk-china-collaboration#:~:text=China%20and%20the%20UK%20are,and%20Road%20initiative%20(BRI)). The UK is reported to be bringing its expertise to the BRI.

welcome in the resolution of China-Africa disputes, its extent should be clearly defined.

In summary, China-Africa “legal cooperation” efforts have endeavoured to facilitate the resolution of China-Africa disputes within the jurisdictions of Chinese and African parties, with Chinese and African characteristics, as an alternative to traditional Western approaches. However, recent China-Africa investment arbitration practice illustrates the choice of ad hoc arbitration proceedings under UNCITRAL rules

and the involvement of Western Europe. Although China-Africa “legal cooperation” had sought to circumvent this, this Research Brief suggests that China and African countries should, contrary to parochial visions of China-Africa “legal cooperation,” embrace the intermediary role of European dispute resolution mechanisms.

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