

## Book Review

### China-Africa Dispute Settlement: Logic Reading for Choosing Arbitration

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The establishment of Forum on China-Africa Cooperation (FOCAC) in 2000 has witnessed the rapid growth of China-Africa business relations. For example, when the FOCAC was established in 2000, the trade volume between both sides reached over USD 10 billion, which was only USD one billion in 1980. In less than 10 years the trade volume between both sides has reached over USD 100 billion in 2008. After five years it has surpassed USD 200 billion and the in 2014 the trade volume between both sides was USD 220 billion, twenty times the number of that in 2000 when the FOCAC came into operation. According to the statistics from the Department of the West Asian and African Affairs of the Chinese Ministry of Commerce, the trade volume between China and Africa in 2016 went down a bit compared with those of the previous years, which was USD 149.2 billion, making China still the largest trading partner in Africa in eight consecutive years; but in the same year, the Chinese FDI to Africa in non-financial sector was USD 3.3 billion, and the financial amount of the newly signed project contracts was USD 82 billion, increasing 14 percent and 8 percent respectively, compared with the same period in 2015.<sup>1</sup> In the FOCAC Johannesburg Action Plan (2016-2018) adopted at the FOCAC Johannesburg Summit on 3-5 December 2015, the Chinese government announced that it would make great efforts to increase the trade volume between both sides from USD 220 billion in 2014 to USD 400 billion in 2020, and the Chinese FDI stock to Africa from USD 32.4 billion in 2014 to USD 100 billion in 2020.<sup>2</sup> Doubtlessly, with the complementarity in their economies, the implementation of the Belt and Road Initiative and the emphasis on the industrial capacity cooperation between both sides, China-Africa trade, investment and private commercial transactions will enter into a new stage.

The booming business relations between both sides will nevertheless result in quantities of various disputes, especially those in trade, investment and private commercial transactions. For example, with the development of trade between China and South Africa after the normalization of their

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<sup>1</sup> The statistics are available at: <http://xyf.mofcom.gov.cn/article/date>, last accessed 16 November 2017.

<sup>2</sup> The Forum on China-Africa Cooperation Johannesburg Action Plan (2016-2018) is available at [http://www.focac.org/eng/ltada/dwjbzjjhys\\_1/t1327961.htm](http://www.focac.org/eng/ltada/dwjbzjjhys_1/t1327961.htm), last accessed 16 November 2017.

diplomatic relation in 1998, the International Trade Administration Committee of South Africa has filed dozens of anti-dumping complaints against the Chinese products in just five years, the largest number of complaints it has ever brought against a foreign country;<sup>3</sup> For the disputes arising from investment, especially those from Chinese investment in Africa, it is difficult to collect them due to the confidentiality or the private settlements by the parties involved. But there are still some reports revealing such disputes arising in Africa, one of which was the dispute between China National Petroleum Corporation and Chad resulting from its oil exploration there;<sup>4</sup> compared with the trade and investment disputes, the disputes arising from private commercial transactions are more common and frequent. According to the case studies that I have made in the past few years, the courts from China and African countries has dealt with many civil and commercial cases involving the parties from the other side, the subject matter of which covering contracts, unjust enrichment, torts, recognition and enforcement of judgments and arbitral awards, etc.<sup>5</sup>All the disputes between both sides require proper solution for the sound and smooth business relations for the long run. The questions is how to find the proper solution for such disputes between China and Africa?

It is against this background that we can say that the coming out of the book *China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration*<sup>6</sup> written by professor Won Kidane is just like a timely rain for those who are thirsting for the proper solution of China-Africa disputes. The book contains five parts and covers various issues, ranging from the historical background of China-Africa economic relations, the dispute resolution mechanisms in China-Africa trade relations, the legal frameworks for the resolution of China-Africa investment and private commercial disputes, to arbitration. Through this book the author tries to make it clear to the readers why arbitration is the best choice for the settlement of China-Africa disputes, what factors should be taken into account when choosing the suitable arbitral institution for settling such disputes, as well as how to create an arbitral institution specifically designed for China-Africa disputes based on the economic situation, the legal culture and legal tradition between both sides.

As for the first question, Professor Won Kidane firstly analyzed the shortcomings and unsuitability in the existing dispute resolution mechanisms in China-Africa trade relations, investment and private commercial relations. The China-African trade relations are currently regulated by the multilateral WTO trading system, but due to the substantial obstacles in law, politics, money and culture as professor Won Kidane classified in Chapter 6 of his book, the WTO's system of dispute settlement

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<sup>3</sup> 'A Brief Introduction of China's Export of Key Products to South Africa', available at <http://www.mofcom.gov.cn/aarticle/i/jyjl/k/200302/20030200068144.html>, last accessed 18 November 2017.

<sup>4</sup> 'For Chad and China, Oil Spill Challenges An Already Faltering Partnership', available at <http://www.ibtimes.com/chad-china-oil-spill-challenges-already-faltering-partnership-1386923>, last accessed 18 November 2017.

<sup>5</sup> Weidong ZHU, 'A Brief Analysis of the Disputes Arising from China-Africa Civil and Commercial Transactions', *Journal of Cambridge Studies*, 3 (2012), pp.74-84; Weidong ZHU, 'Keeping it Legal', *Chinafrica*, 7 (2017), pp.21-32.

<sup>6</sup> Won Kidane, *China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration*, (Wolters Kluwer, 2012).

is inconvenient for resolving China-Africa trade disputes, so “these challenges are real and the two sides must seek meaningful alternative”<sup>7</sup>, while the arbitration under Article 25 of the Dispute Settlement Understanding of WTO may be a good option “because it allows party-arranged arbitration within the WTO’s dispute settlement framework”.<sup>8</sup> The dispute resolution mechanisms in China-Africa investment and private commercial relations are quite different from those in the trade relations, which are mainly governed by the bilateral or domestic legal regime instead of multilateral system. After a careful examination of the bilateral investment treaties concluded between China and African countries, professor Won Kidane rightly pointed out, “no existing BIT properly addresses the concerns that associate international investment with lax environmental principles, poor labor standards, and general corruption. Most importantly, none of the BITs outlines a systematic, culturally appropriate, and cost effective mechanism of dispute resolution within a proper institutional framework”.<sup>9</sup> And we cannot neglect such a fact that although 33 BITs currently existed between China and African countries, only 18 of them have come into effect.<sup>10</sup> Therefore, the effective BITs cover a very limited number of African countries.

It is even worse when we come to the bilateral treaties in China-Africa private civil and commercial relations. So far, there are only four bilateral judicial assistance treaties in civil and commercial matters between China and Algeria, Morocco, Tunisia and Egypt. Obviously, all these countries are located in North Africa.<sup>11</sup> The bilateral judicial assistance treaties plays a very important role in the cross-border civil and commercial dispute settlements, because such treaties will make arrangements for such important issues as the ascertainment of jurisdiction, choice of law, service and taking evidence abroad, the recognition and enforcement of foreign judgements and arbitral awards. Considering the increasing large quantities of cross-border civil and commercial disputes arising from both sides, the manifestly insufficient bilateral judicial assistance treaties in civil and commercial matters will definitely cause great inconvenience for the smooth settlement of such disputes. Thus, as Professor Won Kidane has rightly pointed out, “the legal framework to resolve the disputes that arise in these private relations are limited to domestic court litigation, or party arranged

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<sup>7</sup> Won Kidane, op.cit., p.107.

<sup>8</sup> Won Kidane, op.cit., p.395.

<sup>9</sup> Won Kidane, op.cit., p.397; He made a thorough examination of the bilateral investment treaties between China and African countries Chapter 9 of his book, pp.210-222. For the challenges facing China-Africa BITs, also see generally Won Kidane, Weidong ZHU, ‘China-African Investment Treaties: Old Rules, New Challenges’, *Fordham International Law Journal*, 37 (2014), pp.1035-1085.

<sup>10</sup> The African countries that have effective BITs with China are Ghana, Egypt, Morocco, Mauritius, Zimbabwe, Algeria, Gabon, Nigeria, Sudan, South Africa, Cape Verde, Ethiopia, Tunisia, Equatorial Guinea, Madagascar, Mali, Tanzania and Congo.

<sup>11</sup> For an analysis of the legal framework regulating China-Africa business relationship, see Weidong ZHU, ‘Creating a Favorable Legal Environment for the Sustainable Development of China-Africa Business Relationship’, *Tydskrif Vir Die Suid-Afrikaanse Reg*, 2 (2014), pp. 35-48.

mechanisms such as mediation and arbitration”, but “the litigation in Chinese courts or in the courts of individual African countries is cumbersome for at least one of the parties.”<sup>12</sup>

Then based on his observation of the shortcomings and unsuitability of the current dispute resolution mechanisms in China-Africa trade, investment and private commercial relations, Professor Won Kidane seeks to find a proper dispute settlement mechanism most suitable for China-Africa disputes in light of the legal culture and the attitude from the governments of both sides. From his analysis of the legal culture in China and Africa, he noticed that both sides in their legal culture and legal tradition emphasize the restoration and maintaining of social harmony of community, therefore, the people from both sides traditionally would rather settle their disputes through arbitration or mediation than resort to litigation.<sup>13</sup> On the other hand, nowadays both Chinese government and African governments attach great importance to arbitration as the dispute resolution to settlement China-Africa disputes, which can be seen from the relevant arrangements in the Action Plans adopted at the FOCAC Ministerial Conferences. For example, the Sharm el Sheikh Action Plan (2010-2012) adopted at the fourth FOCAC Ministerial Conference announced “the two sides agreed to properly handle trade differences and frictions through friendly consultation under the principle of mutual understanding and mutual accommodation”, and “to encourage the usage of national and regional arbitration organs in resolving contractual conflicts between Chinese and African enterprises”;<sup>14</sup> In the Beijing Action Plan (2013-2015) adopted at the fifth FOCAC Ministerial Conference, both sides agreed to increase cooperation in the mechanism of non-judicial dispute settlement,<sup>15</sup> and in the Johannesburg Action Plan (2016-2018) adopted at the sixth FOCAC Ministerial Conference both sides promise to work together to establish a China-Africa Joint Arbitration Centre.<sup>16</sup> As can be seen from the above analysis, arbitration as a mechanism of dispute settlement not only was rooted deeply in the legal tradition and legal culture of both sides, but also was well recognized by the governments from both sides. Thus, Professor Won Kidane concluded that arbitration is the best available option for resolving disputes in China-Africa trade, investment and private commercial relations.<sup>17</sup>

If arbitration is the best available option for China-Africa disputes, the next question will naturally be which arbitral institution may be resorted to in arbitrating such disputes. Professor Won Kidane made a survey about some selected arbitral institutions from America, Europe, Asia and Africa, such as the International Center for the Settlement of Investment Disputes (ICSID),<sup>18</sup> the American

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<sup>12</sup> Won Kidane, *op.cit.*, p.397.

<sup>13</sup> For the analysis of the Chinese legal culture and legal tradition, see Won Kidane, *op.cit.*, pp.168-176; for the analysis of the African legal culture and legal tradition, see Won Kidane, *op.cit.*, pp.188-195.

<sup>14</sup> Paras. 4.4.7 and 4.4.8 of Sharm el Sheikh Action Plan (2010-2012).

<sup>15</sup> Para.2.4.4 of Beijing Action Plan (2013-2015).

<sup>16</sup> Para.6.2.6 of Johannesburg Action Plan (2016-2018).

<sup>17</sup> Won Kidane, *op.cit.*, p.395.

<sup>18</sup> In one of his articles, Professor Won Kidane also analyzed the suitability of the ICSID in settling the investment disputes between African governments and the Chinese investors based on the empirical studies on some ICSID cases involving African states. According to his findings, the ICISD is not a suitable platform to settle China-Africa

Arbitration Association (AAA), the International Chamber of Commerce (ICC), China International Economic and Trade Arbitration Commission (CIETAC), the Cairo Regional Center for International Commercial Arbitration (CRICA), and evaluated whether they are suitable for resolving the disputes in the context of China-Africa economic relations by focusing on the law, the economics and the culture of such arbitral institutions. In his book, the law refers to an institution's substantive and procedural rules including its structure. The economics measures the costs of arbitration associated with a particular institution, from administrative and arbitrator fees to taxicab fares. The culture is contextualized within an institution's general profile and encompasses legal tradition, history, language, background of arbitrators and parties and their representatives.<sup>19</sup> The result of his exploration revealed the difficulty in making a choice from the selected arbitral institutions as they have their own advantages and disadvantages. For example, in terms of economics and culture, the arbitral institutions in Asia and Africa are much cheaper and more culturally suitable than those in Europe and America mainly because of arbitrator fees, attorney's fees, and administrative fees; while in terms of neutrality and expertise, the European and American arbitral institution seems to be a better choice.<sup>20</sup> Furthermore, the identity of the parties, the location, and nature of the business venture, the amount of money invested, etc., are also important factors in selecting the appropriate arbitral institution in a particular case.<sup>21</sup> As a result, perhaps the long-term solution for China-Africa disputes "would be to create an appropriate institution that could resolve most of the dilemmas and address most of the problems".<sup>22</sup>

Accordingly, how to create an appropriate institution for China-Africa disputes has become a question that all the concerned participants in China-Africa economic relations must keep in mind in business transactions or in decision-making. As a legal scholar with both civil law and common law background and a legal practitioner with much experience in dealing with China-Africa economic transactions, Won Kidane offered his unique and insightful answer to this important question. He proposed that the Forum on China-Africa Cooperation be transformed into an intergovernmental organization through an Economic Partnership Agreement (EPA). The transformed FOCAC will consist of a Conference of the States, a Secretariat, a Dispute Settlement Body and an Appellate Body. The Secretariat will exercise the administrative role. As the highest political organ, the Conference of the States will also serve as a Dispute Settlement Body whose jurisdiction will not be limited to trade but will be extended to investment and private commercial disputes.<sup>23</sup> As Professor Won Kidane explained, he drew much inspiration from the experience of WTO and the BIT Model

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investment disputes due to the background of the arbitrators, the location of arbitration, the cost and convenience of arbitration, etc. See generally Won Kidane, 'The China-Africa Factor in the Contemporary ICSID Legitimacy Debate', *University of Pennsylvania Journal of International Law*, 35 (2014), pp.559-673.

<sup>19</sup> Won Kidane, *op.cit.*, p.291.

<sup>20</sup> Won Kidane, *op.cit.*, p.393.

<sup>21</sup> Won Kidane, *op.cit.*, p.393.

<sup>22</sup> *Ibid.*

<sup>23</sup> Won Kidane, *op.cit.*, pp.397-398.

provided by the Institute of International Sustainable Development (IISD) in designing the FOCAC dispute settlement mechanism. In his opinion, such a dispute settlement mechanism will to some extent avoid the challenges brought about by the consideration of the law, politics, money and culture that China-Africa economic relations are facing.<sup>24</sup> He explains in detail about the designing and operation of the FOCAC dispute settlement mechanism in his book which can serve as a guideline for the future development.<sup>25</sup> Just as he wrote, “in resolving their disputes, China and Africa have different available options, none of which are entirely appropriate for reasons discussed in detail throughout this book”, and “as such they must explore new options”.<sup>26</sup> So the new FOCAC structure that he proposed as one possible option for settling China-Africa disputes will have to be tested in future.

As can be concluded from the above analysis, *China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration* is very rich in its content, covering a wide range of topics such as the historical background of China-Africa economic relations, the legal culture and legal tradition in China and Africa, the legal framework for regulating the China-Africa disputes arising from the trade, investment and private commercial relations. It will definitely become a very useful reference book for those who are interested in China-Africa relations and China-Africa dispute settlement; The book also provides the readers with some innovative and interesting ideas, such as the transformation of FOCAC into an intergovernmental organization with its Conference of Parties serving as the Dispute Settlement Body, the inclusion of some substantive provisions, for example, the labor standards, the environment protection, and the crackdown on corruption, in the future China-Africa BIT, the emphasis on legal culture and legal tradition in designing the dispute settlement mechanisms for those disputes occurring in the China-Africa economic relations, so it will extend and deepen our understanding of China-Africa dispute settlement; and lastly, the proposals put forward throughout the book are based on the realities of China-Africa economic relations and have taken account of the legal culture and legal tradition of both sides, so they are of highly relevance for the policy-makers between both sides, which has well evidenced Professor Won Kidane’s “potential for significant scholarly and policy contribution was great” as Professor Philip J. MacConaughay mentioned in his foreword to this book.<sup>27</sup>

However, as a Chinese legal scholar and a good friend of Professor Won Kidane, I would like to point out that it is regretful that the book did not notice the latest legal development in China. For example, the book made many references to the Chinese Civil Procedural Law of 1991, in fact, when the book was published in 2012, this law has been revised;<sup>28</sup> and on 28 October 2010 the conflict of

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<sup>24</sup> Won Kidane, *op.cit.*, pp.398-399.

<sup>25</sup> For a detailed analysis of his proposal, see Won Kidane, *op.cit.*, pp.395-402.

<sup>26</sup> Won Kidane, *op.cit.*, p.402.

<sup>27</sup> Won Kidane, *op.cit.*, foreword, p.xiii.

<sup>28</sup> The Civil Procedural Law of the People’s Republic of China was last revised on 31 August 2012 and on 28 October 2007 it went through its first revision. The Chinese version of the revised Civil Procedural Law is available at the

laws in China, namely, the Law on the Application of Laws of Foreign-related Civil Relations has been adopted by the Standing Committee of the National People's Congress, which has come into effect on 1 April 2011 just before the publication of this book. I would also like to mention to the readers that now the China International Economic Trade Arbitration Commission has adopted its new Arbitration Rules of 2015<sup>29</sup> and the Arbitration Rules of 2005 mentioned in this book has been repealed. Considering the accessibility of the Chinese legal information and the language barrier, I think that Professor Won Kidane has actually done a very great work in his analysis of the Chinese legal framework. Furthermore, as an ordinary reader of his book, I think if the book collected some judgments or arbitral awards involving parties from either China or Africa, it would be more relevant and practical for the policy-makers, the legal practitioners, the economic operators and the scholars who are interested in China-Africa business relations.

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official website of the Chinese National People's Congress: [http://www.npc.gov.cn/wxzl/gongbao/2012-11/12/content\\_1745518.htm](http://www.npc.gov.cn/wxzl/gongbao/2012-11/12/content_1745518.htm), last accessed 18 November 2017.

<sup>29</sup> The English version of Arbitration Rules of 2015 can be found at the CIETAC website: <http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en>, last accessed 18 November 2017.