

Spring 2023

Trends in China-Africa Economic Relations and Dispute Settlement

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Recommended Citation

Won Kidane, *Trends in China-Africa Economic Relations and Dispute Settlement*, 43 *Nw. J. INT'L L. & BUS.* 291 (2023).

<https://scholarlycommons.law.northwestern.edu/njilb/vol43/iss3/2>

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Trends in China-Africa Economic Relations and Dispute Settlement

*Won Kidane**

Abstract:

The rapid rise in the last two decades of China-Africa economic interactions in trade, investment, construction projects, and loans require sustained inquiry into the substantive rules of engagement and mechanisms of dispute settlement. Evidently, however, it would quickly emerge that the improvements in supranational legal frameworks have not kept pace with the growing scale and complexity of the economic interactions. While trade relations between China and Africa are theoretically subject to the same multilateral World Trade Organization (WTO) rules, they are in practice mostly based on informal unilateral concessions. Moreover, investment relations are partially governed by fragmented and mostly outdated bilateral investment treaties (BITs), and commercial relations are formalized by ad hoc contractual instruments of diverse origin and deployment. Because these economic relations are often orchestrated through confidential and fragmented micro-level contractual instruments unsupported by larger institutional frameworks, two important questions need to be asked: (1) whether the lack of durable legal and institutional commitment is a function of socio-cultural factors, diminished optimism, politics, or just outright pragmatism; (2) whether the contracts-based economic legal ordering that relies on existing rules and institutions is optimal and durable. This article attempts to answer these and related questions.

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INTRODUCTION

The rapid rise in the last two decades of economic interactions in trade,¹ investment,² construction projects,³ and loans⁴ requires sustained inquiry into the substantive rules of engagement and mechanisms of dispute settlement.

Evidently, however, it would quickly emerge that the improvements in supranational legal frameworks have not kept pace with the growing scale and complexity of the economic interactions. While trade relations between China and Africa are theoretically subject to the same multilateral World Trade Organization (WTO) rules, they are, in practice, mostly based on informal unilateral concessions.⁵ Moreover, investment relations are partially governed by fragmented and mostly outdated bilateral investment treaties (BITs),⁶ and commercial relations are formalized by ad hoc

¹ CARI documents data from the best available sources mainly United Nations Comtrade and Chinese Government sources. Recognizing shortcomings of each, CARI's documentation shows that China-Africa trade grew from less than \$20 billion in 2002 to \$200 billion in 2015, reduced to below \$150 from 2017 to 2019 and rose back up to about \$200 in 2019. *See* Johns Hopkins Univ., *Data: China Africa Trade*, CHINA AFRICA RESEARCH INITIATIVE, <http://www.sais-cari.org.data-china-africa-trade> [<https://perma.cc/Q3MB-2JDV>].

² *See id.* CARI data shows that Chinese Foreign Direct Investment (FDI) rose from \$75 million in 2003, to \$2.7 billion in 2019. Incidentally, Chinese investment in Africa exceeded that of the United States since approximately 2014.

³ CARI documents data from the best available sources mainly United Nations Comtrade and Chinese Government sources. Recognizing shortcomings of each, CARI's documentation shows that China-Africa trade grew from less than \$20 billion in 2002 to \$200 billion in 2015, reduced to below \$150 from 2017 to 2019 and rose back up to about \$200 in 2019. *See id.* CARI documents show that the total annual revenues of Chinese companies engaged in construction work in Africa from rose from less than \$5 billion in 2003 to more than \$50 billion in 2015 and declining to a little below \$50 billion between 2015 and 2019. *See* Johns Hopkins Univ., *Data: Chinese Contract Revenues in Africa*, CHINA AFRICA RESEARCH INITIATIVE, <http://www.sais-cari.org/data-chinese-contracts-in-africa> [<https://perma.cc/EJ8J-VBLQ>].

⁴ CARI data shows that as of July 2020, various Chinese lenders have concluded at least 1,077 loan agreements with African states and their instrumentalities representing a value of approximately \$148 billion. *See* Johns Hopkins Univ., *Chinese Loans to Africa Database*, BOSTON UNIVERSITY GLOBAL DEVELOPMENT POLICY CENTER, <https://chinaafricaloandata.org/> [<https://perma.cc/VSE9-EXX7>].

⁵ *See, e.g., Forum on China-Africa Cooperation Beijing Action Plan*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Sept. 12, 2018), https://www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/201809/t20180910_679538.html [<https://perma.cc/6B53-T2GU>] (“3.8.4 China will continue to materialize its pledge of zero-tariff treatment for 97% of tax items from African LDCs having diplomatic relations with China, deliver on this policy upon the bilateral exchange of notes, and take effective measures to make it easier for the recipient countries to benefit from this policy”).

⁶ *See* Won Kidane & Weidong Zhu, *China-Africa Investment Treaties: Old Rules, New Challenges*, 37 *FORDHAM INT. LAW J.* 1035, 1085 (2014).

contractual instruments of diverse origin and deployment.⁷

Because these economic relations are often orchestrated through confidential and fragmented micro-level contractual instruments unsupported by larger institutional frameworks,⁸ two important questions need to be asked: (1) whether the lack of durable legal and institutional commitment is a function of socio-cultural factors, politics, or just outright pragmatism; (2) whether the contracts-based economic legal ordering that relies on existing rules and institutions is optimal and durable.

The closest to a semblance of a legal and institutional framework is the Forum on China-Africa Economic Cooperation (FOCAC), established in 2000.⁹ Over the last twenty years, FOCAC appears to have made no meaningful institutional transformation, retaining largely its initial formation as a forum. For example, the legal content of the most recent FOCAC Beijing Summit of 2018 is almost identical to the content of previous meetings. It states:

Faced with the current severe situation, we firmly uphold multilateralism and oppose all forms of unilateralism and protectionism, support a WTO-centered, rules-based multilateral

⁷ See CHINA AFRICA RESEARCH INITIATIVE, *supra* note 3.

⁸ There has not been any significant international legal development in China-Africa relations in the last decade. Indeed, the only notable new international legal instruments are limited to three BITs, only one of which (with Tanzania) has come into force. See United Nations Conference on Trade and Dev., Chinese Bilateral Investment Treaties on *International Investment Agreements Navigator*, INVESTMENT POLICY HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> [https://perma.cc/BWE2-CR5J]. The only other instrument is the agreement between China and the West African States. See Framework Agreement on Economic, Trade, Investment and Technical Cooperation between the Government of the People's Republic of China and the Economic Community of West African States, China-West Afr. States, Oct. 24, 2012 [hereinafter China-ECOWAS Framework Agreement], <http://treaty.mfa.gov.cn/tykfiles/20180718/1531877002845.pdf> [https://perma.cc/Q8SJ-XZM9]. English version with the author.

⁹ See *About FOCAC*, FORUM ON CHINA-AFRICA COOPERATION [hereinafter FOCAC], http://www.focac.org/eng/ltjj_3/ltjz/ [https://perma.cc/DAU3-VDDW]. See also *Characteristics of FOCAC*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, <https://www.fmprc.gov.cn/zflt/eng/gylt/ltjj/t157576.htm#:~:text=The%20Forum%20on%20China%2DAfrica,category%20of%20South%2DSouth%20cooperation.> [https://perma.cc/NAA3-XHB2]. Describing the Characteristics of FOCAC, the Ministry of Foreign Affairs of the Peoples Republic of China states:

The Forum on China-Africa Co-operation is a platform established by China and friendly African countries for collective consultation and dialogue and a cooperation mechanism between the developing countries, which falls into the category of South-South cooperation. The characteristics of the Forum are as follows: Pragmatic Cooperation: Its purpose is to strengthen consultation and expand cooperation and its focus is on cooperation. Equality and Mutual Benefit: It promotes both political dialogue and economic cooperation and trade, with a view to seeking mutual reinforcement and common development.

trading regime that is transparent, non-discriminatory, open and inclusive, and support the efforts for an open and inclusive world economy. We will work for the normal operation of the WTO dispute settlement mechanism and continue to implement the outcomes of previous ministerial meetings.¹⁰

On the other hand, the political facet of FOCAC is the subject of more sustained discussion, as evidenced by numerous references to the work of the United Nations Security Council.¹¹ Yet it is uncertain if the evidence accumulated in the last decade still supports these assumptions: does China see Africa the same way it did ten years ago, or do the legal developments and disputes tell another story?

This article attempts to answer the above question, including whether China is shaping new rules for China-Africa economic interactions or remains path-dependent as it continues to play by existing rules and utilize existing legal institutions. To answer these questions, it proceeds in eight sections. Following this introduction, Section I gives an overview of the nature and magnitude of the economic relations between China and Africa. Then, Section II discusses the theoretical underpinnings of these economic relations and the evolution of the legal regimes that regulate China-Africa trade and dispute settlement. Section III explores these regimes in further depth. Section IV will offer an analysis of the legal and contractual frameworks that govern China-Africa commercial relations and dispute settlement. Section V evaluates the regulatory and contractual instruments governing China-Africa sovereign loans. Section VI analyzes the dispute settlement rules contained in these China-Africa loans and related instruments. Section VII concludes with a summary of the points discussed.

I. TRENDS IN THE ECONOMIC RELATIONS

China-Africa trade grew from approximately \$10 million in 2002 to

¹⁰ FORUM ON CHINA-AFRICA COOPERATION, <https://perma.cc/CK4Z-QULP> *supra* note 9.

¹¹ It states in particular:

18. We call for necessary reforms of the UN including its Security Council to better fulfill their responsibilities prescribed in the UN Charter and enhance the UN's capacity to deal with global threats and challenges and strengthen global governance. We emphasize that the historical injustice endured by African countries should be corrected, that priority should be given to increasing the representation of African countries at the UN Security Council and other agencies, and that concerted efforts should be made to steer the reform of the international governance system toward better serving the common interests of developing countries. China will enhance communication and coordination with Africa's non-permanent members of the Security Council to jointly uphold the common interests of the two sides and developing countries as a whole. We also call for reforms of international financial institutions including the Bretton Woods institutions." *Id.* at ¶ 18.

\$200 million in 2015. It showed a significant decline in 2016 to slightly under \$150 but resumed its steady growth between 2016 and 2019 to slightly under the 2015 levels of \$200.¹² The significant decline in the amount of investment that occurred in 2016 noticeably interrupted what appeared to be a sustained growth trajectory that lasted for more than a decade. The causes and significance remain matters of speculation.¹³

Albeit similarly uncertain in prospect, the growth of China-Africa investment in the last two decades has been remarkably impressive. CARI data indicated that Chinese FDI in Africa rose from \$75 million in 2003 to \$2.5 billion in 2019.¹⁴ The volume of Chinese investment in Africa surpassed that of U.S. investment in Africa as of the year 2014.¹⁵

According to CARI and the Boston University Global Development Policy Center, between 2000 and 2019, various Chinese lenders signed a total of about 1,141 loan agreements with African public sector borrowers amounting to \$153 billion.¹⁶

Gross revenue from Chinese construction and engineering projects in Africa grew from \$1.1 billion in 2000 to \$46 billion in 2019.¹⁷ CARI

¹² See *Data: China Africa Trade*, CHINA AFRICA RESEARCH INITIATIVE, *supra* note 1, <http://www.sais-cari.org.data-china-africa-trade/https://perma.cc/Q3MB-2JDV>. CARI compiles the data primarily from U.N. Comtrade and Chinese Government sources. CARI confirms that “Currently there are no other sources that are more reliable than those provided by the Chinese government and the U. N.”. The China-Africa Research Initiative of the School of Advanced International Studies of the Johns Hopkins University (CARI) usefully filters and documents the most reliable available data on China-Africa trade, investment, and other types of commercial intercourse. This section relies on this data to demonstrate the trends in economic relations.

¹³ CARI notes that “Bilateral trade has been steadily increasing for the past 16 years. However, weak commodity prices since 2014 have greatly impacted the value of African exports to China, even while Chinese exports to Africa remained steady. Our data includes North Africa.” *Id.*

¹⁴ See Johns Hopkins Univ., *Data: Chinese Investment in Africa*, CHINA AFRICA RESEARCH INITIATIVE, <http://www.sais-cari.org/chinese-investment-in-africa> [<https://perma.cc/ZK9Y-ESW6>]. It appears that it had a particularly impressive growth in 2008 of about \$5.5 billion because of the Industrial and Commercial Bank of China’s purchased shares of South Africa’s Standard Bank. Amy Lam, *ICBC Acquires Stake in Standard Bank*, THE ASSET, (Nov. 9, 2007), <https://theasset.com/article/16600/theasset.com>.

¹⁵ *Id.*

¹⁶ See Kevin Acker & Deborah Brautigam, *Twenty Years of Data on China’s Africa Lending*, CHINA AFRICA RESEARCH INITIATIVE [hereinafter Kevin Acker and Deborah Brautigam], <https://static1.squarespace.com/static/5652847de4b033f56d2bdc29/t/605cb1891cb0ff5747b12167/1616687497984/BP+4+-+Acker%2C+Brautigam+-+20+Years+of+Data+on+Africa+Lending.pdf> [<https://perma.cc/9NWZ-4W7A>].

¹⁷ *Data: Chinese Contract Revenues in Africa*, CHINA AFRICA RESEARCH INITIATIVE, *supra* note 3, <http://www.sais-cari.org.data-china-africa-trade/> [<https://perma.cc/Q3MB-2JDV>] (Regional Dialogue highlights synergies between African WTO membership and AfCFTA. The implementation of the AfCFTA is set to start on 1 July 2020, following the agreement’s entry into force on 30 May 2019. All 44 African WTO members and nine WTO

observes that it was the fourth consecutive year that it had actually declined from a peak of more than \$50 billion in 2015.¹⁸

The most significant recent development in Chinese economic involvement in Africa is the Belt and Road Initiative (BRI) for infrastructure development.¹⁹ While it is still taking shape, its significance and successes will depend on many factors including the legal regimes that it will help shape in the countries where it is implemented.

All of these economic interactions are ordered by transnational legal instruments containing dispute resolution provisions. The following section lays their theoretical foundations.

II. THEORETICAL UNDERPINNINGS AND OVERALL TRENDS APPRAISAL

Contemporary literature appraises China's approach to dispute resolution from a law and development perspective. For instance, Matthew Erie describes China's approach as a "law negative" position in which informal norms prevail in establishing notions of order.²⁰ Along those lines, he writes:

[a]n emphasis on transnational law, and specifically, a corporate-made law—comprised of construction contracts, loan agreements, and arbitral awards—as opposed to transplanting Chinese law into host states or direct intervention in the legal systems of recipient economies, is partly an effect of China's own experience with law and development and partly a result of China's economic ascendance during a period when Asia is globalizing and the centers of globalization of yesteryear, namely, the U.K., Western Europe, and

observers are signatories to the AfCFTA, with 29 having ratified the agreement to date).

¹⁸ *Id.*

¹⁹ For a brief but useful note on BRI, see Pearl Risberg, *The Give and Take of BRI in Africa*, 17 *NEW PERSPECTIVES IN FOREIGN POL'Y* 43, 43 (2019). ("Distracted by worst-case scenarios, the United States is missing an opportunity to support the development of African states and to find an area of common ground with China. China's Belt and Road Initiative (BRI), a multi-billion-dollar infrastructure investment platform, has positive economic implications for developing countries and the United States, but is consistently overshadowed by political and national security concerns.")

²⁰ Matthew Erie, *Chinese Law and Development*, 62 *HARV. INT'L L.J.* 51, 68 (2021), <http://www.sais-cari.org.data-china-africa-trade/> [<https://perma.cc/Q3MB-2JDV>]. In short, the "law negative" view identifies additional sources of norms to the law-focused one above, including technical standards over legal ones, public over private order, and relationships over rules, and, in its more full-bodied form, may discount the role of law altogether. Even the "law positive" view is not so positive. Relying on numerous authorities, Matthew Erie summarizes its characteristics as: "the Chinese approach exhibits a number of features including: (1) pragmatism and flexibility, (2) soft law over hard law (3) integration of Chinese norms into existing international organization, (4) bilateralism over multilateral agreements, and (5) dispute resolution." *Id.* at 64-65.

the U.S., are, to some extent, deglobalizing.²¹

This view interrogates BRI as a singular legal phenomenon. Such inquiry is itself influenced by a particular view of what BRI distinctively represents, perhaps as something akin to the Marshall Plan, which had a more serious post-war institutional and reconstruction task beyond infrastructure.²² The inquiry puzzles over the absence of a “macro-free trade agreement that governs BRI trade; instead, the BRI consists of a latticework of BITs and FTAs with member states . . . there is no overarching set of rules, nor a standard-form BRI contract, and companies, whether state-owned or private, and provincial-level governments have appeared to pursue their own interests in making BRI deals with little or no coordination.”²³ This is cited as evidence of the “law negative” side of the legality spectrum in China Law and Development analysis.

The Action Plan on the BRI by the State Council of the People’s Republic of China updated on March 2015²⁴ gives a fairly accurate sense of the level of attention that the Plan gives to law and legal institutions. The references are few and far between: even when there is reference, it is to existing rules and institutions. The most prominent legal reference is to the UN Charter’s principles of non-intervention and sovereign equality of nations.²⁵ The more specific reference to rules is the following: “The Initiative follows market operation. It will abide by market rules and international norms, give play to the decisive role of the market in resource allocation and the primary role of enterprises, and let the governments perform their due functions.”²⁶ Otherwise, according to the State Council, the BRI is simply “a systematic project, which should be jointly built

²¹ *Id.* at 59-60. Relying on, among others, his own previous writing; Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT’L L. 225 (2020), and Pasha L. Hsieh, *Against Populist Isolationism: New Asian Regionalism and Global South Powers in International Economic Law*, 51 CORNELL INT’L L. J. 683 (2018).

²² The Post WWII Recovery Plan which was more than a mere economic recovery plan. See William F. Sanford, Jr., *The Marshall Plan: Origins and Implementation*, U.S. Dep’t of State, Bureau of Pub. Affs. 1, 7 (1982), https://www.marshallfoundation.org/library/wp-content/uploads/sites/16/2014/05/The_Marshall_Plan_Origins_and_Implementation_000.pdf [<https://perma.cc/5HAD-QKD7>].

²³ Erie, *supra* note 20, at 76.

²⁴ The State Council of China, *Action Plan on the Belt and Road Initiative*, http://english.www.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm [<https://perma.cc/MQ9A-R5EY>] (Mar. 30, 2015, 7:31 PM).

²⁵ *Id.* at sec. II. Section II states: The Belt and Road Initiative is in line with the purposes and principles of the UN Charter. It upholds the Five Principles of Peaceful Coexistence: mutual respect for each other’s sovereignty and territorial integrity, mutual nonaggression, mutual noninterference in each other’s internal affairs, equality and mutual benefit, and peaceful coexistence.

²⁶ *Id.*

through consultation to meet the interests of all.”²⁷

The “law negative” theory in China Law and Development offers another key example of the marginal role that law plays in ordering Chinese transnational economic affairs. This is seen in the use of diplomacy to resolve an impending legal dispute. The case of the expressway in Cameroon is an example. As Matthew Erie describes it: “Rather than go to court to enforce the terms of the contract, the China Harbor Engineering Company went to the Chinese Embassy in Yaounde. The Chinese Embassy mediated the problem by inviting Cameroonian engineers to China to inspect their projects that were built and operated under Chinese standards and explained the differences between Chinese and French standards. . . . The approach of diplomatic intervention worked.”²⁸ Erie concludes: “Of the nonlegal sources, based on my findings, strong government-to-government relations, that may feature a regular role for Chinese diplomats and officials in business transactions, appear to be the most essential, especially in deals featuring SOEs. Such relations may be a precondition for Chinese efforts to create their own transnational law, and necessary but perhaps not sufficient for cross-border ordering.”²⁹

Except perhaps the visibility and curious media and academic scrutiny in the case of China, there is nothing that suggests that pre-escalation diplomatic interventions of the types described above are unique to China. Italian or French contractors go to the Italian or French Embassy or even to the European Union office in the particular jurisdiction, depending on who financed the project in question. American contractors no doubt work with the American embassy of their host country in major projects also depending on the financing. In that sense, it does appear that the Chinese “law negative” appraisal is only accurate inasmuch as it is also accurate in the appraisal of the ordering of transnational economic interactions in general.

It is important to pause and rethink the cultural explanation of why Chinese Law and Development might appear different. What else explains the “law negative”? The answer to this would only be complete if it is examined from the evolution of the transnational “law positive” perspective. Consider what Louis Wells says in *The Evolving International Investment Regime*:

[i]n the rather distant past, the United States and other rich countries would occasionally act militarily or insist on state arbitrations when their investors claimed mistreatment abroad. Later, the United States would threaten (and occasionally act) to cut off aid, vote against

²⁷ *Id.* at Preface.

²⁸ Erie, *supra* note 20, at 101-102.

²⁹ *Id.* at 104.

loans by multilateral financial institutions to offending countries, and cancel trade preferences ...³⁰

The only problem with this proposition is its temporal reference to “the rather distant past” because some of these actions are still occasionally threatened and even taken. That small digression aside, the analysis is furthered by Jeswald W. Salacuse’s suggestion that: “[A]t the end of World War II— what one might call the ‘ancien régime’— failed to adequately protect the foreign investment of their [capital-exporting] nationals from injurious actions by host country governments. . . . The need for such protection was heightened by the prospect of post-war economic expansion and the decolonization of territories that had previously been under the control of capital-exporting states.”³¹ The relevant segment of the historical evolution analysis is completed by Andreas Lowenfeld who writes:

By the early 1960s, following the wave of decolonization in Africa and parts of Asia, and a wave of takeovers of foreign investments throughout the Third World, it had become apparent that it would be very difficult to achieve consensus on the obligations of host countries toward alien investment (read multinational corporations). The leading international aid institution, the World Bank, began to consider how, on the one hand, it could avoid being embroiled in controversies between home and host states concerning expropriations, and on the other hand, how it could assist the resolution of such controversies ...³²

The “law positive” development is thus linked to what Dezalay and Garth call the “gradual legalization” of North-South relations.³³ Legalization, in this sense, signifies the avoidance of illegality or coercion that existed during colonial rule. They argue that “[i]t is not sufficient to conclude with the observation that the result was the economic relations of North and South were gradually ‘legalized.’ While it is true that the dispute came to be handled through the domain of law, law does not exist as a distinctive thing. It is necessary, therefore to explore the set of power relationships implicated by the particular constructions of law that come to be applied within the transnational legal field.”³⁴

The “law positive” theory cannot be understood without

³⁰ JOSE E. ALVAREZ ET AL., *THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS* xvi (2011).

³¹ Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT’L L.J. 427, 436-37 (2010).

³² See ANDREAS LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 536 (2nd ed. 2008).

³³ YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 64 (1996).

³⁴ *Id.*

contextualizing it in transnational and global power relationships and hierarchies. It is not a function merely of contemporary transnational commerce. Five hundred years of history is written into such relationships.³⁵ As such, the “law negative” in China Law and Development analysis misses the most essential ingredient: the nature of the power relationship. China’s global emergence is primarily an economic one – at least thus far. Instead of revealing hegemonic ambition, anecdotes such as the selection of China-centric dispute settlement mechanisms in loan contracts discussed in Section V point to normal economic behavior of greed.

To the extent “law positive” – in the sense of laws and institutions – ordered previous economic and political hegemonic expansions of all types, their diminished significance in the Chinese global economic expansion of the BRI-type is not at all surprising. This is because it is a function of China’s cautious and non-confrontational political and economic approach and fails to mimic the behavior of empires that had found themselves in similarly higher economic positions in previous eras.

Consider the following for more context. On May 24, 2021, CGTN published an article by Tom Fowdy titled: *Ethiopia is Making the Wrong Choices in its Relations with the US*.³⁶ The article comments on Ethiopia’s granting of a telecom license to a US-backed consortium for \$850 million to create a 5G network.³⁷ The losing bidder was a BRI Fund backed by the telecom consortium.³⁸ US funding for the project prohibits the consortium from purchasing Chinese telecom products. Incidentally or not, only a day after the award of the bid to the US-backed consortium, the US issued a barrage of sanctions against Ethiopia. Immediately thereafter, the CGTN

³⁵ Historian Philip Snow writes: “For five hundred years, since the West arrived in the Indian Ocean at the end of the fifteenth century in the person of Vasco da Gama, the story of mankind has been in very large measure the story of the response of Asia and Africa to the alien culture of Europe and, latterly, United States.” PHILIP SNOW, *THE STAR RAFT, CHINA’S ENCOUNTER WITH AFRICA*, XIII, XIII (1987).

³⁶ Tom Fowdy, *Ethiopia is making the wrong choices in its relations with the U.S.*, CGTN [hereinafter Fowdy], (May 24, 2021), <https://news.cgtn.com/news/2021-05-24/Ethiopia-is-making-the-wrong-choices-in-its-relations-with-the-U-S--10wWqzQhH20/index.html> [<https://perma.cc/9CT9-VMGM>]. The same day, Bloomberg published an article. See Samuel Gebre & Loni Prinsloo, *U.S. Sanctions Complicate Vodafone Funding for Ethiopia Entry*, BLOOMBERG (May 24, 2021), <https://www.bloomberg.com/news/articles/2021-05-24/u-s-sanctions-complicate-vodafone-funding-for-ethiopia-entry> [<https://perma.cc/YS5Q-B8XY>]. Two days before that the Wall Street Journal had published an article about the same matter. See Stu Woo & Alexandra Wexler, *U.S.-China Tech Fight Opens New Front in Ethiopia*, THE WALL ST. J. (May 22, 2021), <https://www.wsj.com/articles/u-s-china-tech-fight-opens-new-front-in-ethiopia-11621695273> [<https://perma.cc/C8FK-S6NV>].

³⁷ The International Development Finance (DFC) committed to offer \$500 million in financing. See *id.*

³⁸ See *id.*

published commentary forewarning:

The U.S. is giving with one hand and taking away with the other in Africa and is seeking to impose their strategic designs over the country. Whilst the telecommunications bid was won by a fair corporate auction as opposed to geopolitical means, with the U.S.-led offer much more lucrative than the MTN group one, nonetheless Addis Ababa must be wary in its relationship with Washington and recognize that such investments have obvious political strings attached, which in line with growing sanctions will be leveraged in order to subjugate Ethiopia in line with its foreign policy preferences.³⁹

Having pointed out the consequences of structural adjustment policies of the Breton Wood Institutions of the 1980s, the article concludes:

The U.S. is now targeting Ethiopia as a country of strategic interest, namely because it sits near a critical juncture between the Red Sea and the Indian Ocean, and has a close relationship with Beijing. Whilst promising financing for 5G, it is moving to block other forms of aid and assistance over the Tigray conflict, of which both factors accumulated will allow the U.S. to increase its influence over Ethiopia and subjugate it to its own foreign policy goals.

It is worth noting in contrast, China's lending and investment in Africa do not come with the conditionality that other countries or companies are excluded, and nor does Beijing's dealings on the continent attempt to upend national sovereignty in the way the U.S. has sanctioned Ethiopia's army over fighting the Tigray conflict.

African nations primarily choose China as a partner precisely because it does not leverage national sovereignty or domestic political interference in exchange for financing or aid. In this case, Ethiopia now risks being pulled into a trap by the United States. Addis Ababa ought to reconsider this deal accordingly, if American sanctions do not leverage it altogether.⁴⁰

This brings to bear Weixia Gu's suggestion that: "different from the Washington Consensus, an economic legal order which emphasizes privatization, marketization, liberal democracies, and rule of law, the Beijing Consensus led by China focuses on state capitalism, capacity building, infrastructure development, and authoritarian legality."⁴¹ Leaving

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ WEIXIA GU, DISPUTE RESOLUTION IN CHINA: LITIGATION, ARBITRATION, MEDIATION AND THEIR INTERACTION 2 [hereinafter Gu Book] (Routledge, 2021) (citing Wenwei Guan, *Beijing Consensus and Development Legitimacy: The Evolution of China's Foreign Direct*

aside what she means by authoritarian legality, the idea is that China has a differing sense of the ordering of economic affairs than what is commonly known as the “rule of law” prompted through doctrine and transplants. It seems that China is rather unimpressed with Max Weber’s enthusiasm about the positive correlation between law and development⁴² since, in its own experience, law is almost always a follower of economic progress rather than its forerunner. At least in China, new laws and institutions are often created to address matters that new development and technology bring forth. This experience, coupled with the absence of a colonial hierarchy needing to be modified by law, might be a missing piece in understanding Chinese development laws.

It is, however, suggested that “internally, although China has increasingly stressed the importance of legality” and “comprehensively rul[ing] the country according to law (quanmian yifazhiguo 全面依法治国),” the Chinese legal model is infused with Marxist-Leninist ideology and traditional Confucianism, which share a sense of distrust or unwillingness to confer law a supreme status.”⁴³ Relatedly, “there is no stringent cross-border legal framework or rigid regulatory structure in China’s approach toward the BRI.”⁴⁴

The evidence is clear that there is no purposeful streamlining of laws and legal institutions to separately deal with the BRI. Where, then, would such a thing exist in transnational commerce? The state of transnational ordering of commerce is diffused and fragmented and it is not unique to China. It is a function of the Westphalian conception of the nation state and the principle of sovereign equality of nations of the UN Charter. The fragmentation is ameliorated through treaties and harmonization efforts, in which China is as active a player as anyone else.

At least at this moment in history, what drives China’s normative universe both domestically and internationally is not Marxism or Leninism or Confucianism: it is pragmatism. As Gu further notes: “[i]nstead of having formal law, which is court-oriented, China’s Beijing Consensus has alternatives such as (i) informal alternatives to law (for example, norms, traditions, and interpersonal connections known as *guanxi*) and (ii) the

Investment (FDI) Regime from a Law & Development Perspective, 12 *ASIAN J. COMP. L.* 115 (2017)).

⁴² For Weber’s proposition, See David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 *WIS. L. REV.* 720, 729 (1972) cited in Gu, at 89. See also Gu, at 21. (“There is as such an obvious mismatch between the theories in Washington Consensus and the empirical evidence of law and development in China and East Asia”).

⁴³ Gu, *supra* note 41, at 21, citing Anthony H. F. Li, *Centralisation of Power in the Pursuit of Law-based Governance: Legal Reform in China under the Xi Administration*, 2 *CHINA PERSPS.* 63 (2016); See also ALBERT H.Y. CHEN, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA* 1–4 (4th ed. 2019).

⁴⁴ See Gu, *supra* note 41 at 3.

strong role of the state.”⁴⁵

Without discounting the cultural context, the informal norms appear to be gap fillers in an evolutionary process both domestically and transnationally. For example, in her book, *Dispute Resolution in China*, Weixia Gu notes that “[c]ities in the economically developed regions of China have developed better legal infrastructures with more sophisticated and mature legal systems, while dispute resolution developments in the hinterland and the western part of China are relatively limited.”⁴⁶ Moreover, the numbers tell a more interesting story: domestically, the number of cases that Chinese courts handle per year grew as dramatically as the economic figures. From 2013 to 2018, for example, the number of court cases that the Supreme People’s Court (SPC) handled grew by 60% to 82,383 while the caseload handled by the lower courts also grew by 58.6% to approximately 88.97 million cases.⁴⁷ The Chinese court case growth charts look more or less the same as the Chinese economic measurement charts.⁴⁸ Citing Finder, Gu also notes: “The SPC, within the boundaries of what is politically achievable, is taking concrete steps to expand the judicial transparency and considers international indicators when doing so.”⁴⁹

China’s perceived lack of creative and robust legal infrastructure of the “law positive” type might lie in the nature of China’s relationship with its economic partners and the stage of its economic advancement. Although China had a vertical relationship with the Global North for an extended period of time, its relationship with the Global South has mainly been a horizontal one. Having overcome a subordinate position within the global economic hierarchy, it zealously attempts to avoid the accusation that it might try to replicate the imbalance in its favor in dealing with the Global South. Although it is so far successful in avoiding the entrenchment of structural imbalance through the creation or sponsorship of new institutions and norms at the macro level, there are some signs of micro-level imbalances of a commercial type with the potential to morph into structural ones. Again, the loan agreements discussed in later sections offer a good example of this. Most of them select Chinese law as the governing law and Chinese arbitral institutions as the administering institutions. With this background, the following sections offer specific appraisal of trade, investment and loan agreements.

⁴⁵ *Id.* at 22, citing Tom Ginsberg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC’Y REV. 829, 854 (2000).

⁴⁶ *See* Gu, *supra* note 41 at 11.

⁴⁷ *Id.* at 23.

⁴⁸ *Id.* at 24; table 2.1 and chart 2.1.

⁴⁹ *See Id.* at 27. for a discussion on the five rounds of judicial reform in China; *Id.* at 30-41.

III. CHINA-AFRICA TRADE AND DISPUTE SETTLEMENT

a. Legal Framework

China and 44 African members of the WTO⁵⁰ are legally bound by the WTO's substantive trade rules and mechanisms of dispute settlement. These multilateral rules do not have any specific China-Africa dimension. Theoretically, therefore, for trade that occurs under these rules, China and these African countries follow regulations and can only derogate from these multilateral rules to the extent the rules themselves permit.

With the exception of the very first and only China-Africa Free Trade Agreement concluded between the PRC and Mauritius in January 2021⁵¹ (which will be discussed below), the closest thing to a legal instrument that relates to China's trade and other economic relations with a group of African countries is the China-ECOWAS (Economic Community of West African States) Framework Agreement signed on October 24, 2012.⁵²

⁵⁰ See *Regional Dialogue highlights synergies between African WTO membership and AfCFTA*, WORLD TRADE ORGANIZATION (Feb. 14, 2020), https://www.wto.org/english/news_e/news20_e/acc_14feb20_e.htm [<https://perma.cc/F8BH-KHHQ>].

⁵¹ See Regional Trade Agreements Database, *RTA Tracker*, WORLD TRADE ORGANIZATION, <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> [<https://perma.cc/N28K-NZCS>]; See Free Trade Agreement between the People's Republic of China and the Republic of Mauritius, China-Mauritius, Jan. 1, 2012 [hereinafter China-Mauritius FTA], <http://fta.mofcom.gov.cn/topic/enmauritius.shtml> [<https://perma.cc/BEU4-LE62>].

⁵² Framework Agreement on Economic, Trade, Investment and Technical Cooperation between the Government of the People's Republic of China and the Economic Community of West African States. This Agreement provides in its operative section as follows:

In order to achieve the above purpose, the two parties promised to take (but not limited to) the following measures:

1. Promote enterprises of both sides to strengthen trade ties, encourage and support seminars, trade delegations and mutual visits on official business;
2. Carry out information exchange and training projects on regional and global goods and service trade;
3. Promote trade facilitation and transparency of the business environment and provide necessary support;
4. Encourage enterprises of both sides to expand investment activities and cooperation in (but not limited to) agriculture, forestry, fishery, mining, manufacturing, transportation, communications, construction, finance, business services, and power generation;
5. Encourage companies from both sides to cooperate in the construction of infrastructure projects such as energy, communications, water conservancy, transportation, environmental protection, and water supply and drainage;
6. Explore the feasibility and provide support for cooperation in the planning, construction and operation of cross-border infrastructure projects such as transportation and power;
7. Exchange their respective economic development experience and carry out cooperation in the field of human resource development and training;
8. Encourage the respective chambers of commerce and industry associations to

This indicates that binding China-Africa legal instruments are rare. In practice, as a matter of fact, more than 97% of China-Africa trade in goods occurs under *ad hoc* unilateral concession regimes,⁵³ with doubtful reciprocal legal enforceability.⁵⁴ This is to be contrasted with China's approach towards other regions. China has several Regional Trade Agreements outside Africa. They include agreements with ASEAN, the Asia Pacific Trade Agreement (APTA), with Australia, Chile, Costa Rica, Georgia, Hong Kong, China, Korea, Macao, China, New Zealand, Singapore, Iceland, Pakistan, Peru, and Switzerland.⁵⁵

As indicated above, the only African country that has a binding trade agreement with China is Mauritius. Most notably, the WTO classifies the agreement between China and Mauritius as "East Asia; Africa."⁵⁶ The China-Mauritius Goods and Services Agreement was signed on October 17, 2019, and entered into force on January 1, 2021.⁵⁷ The Ministry of Commerce of the PRC on its official website states that:

In October, 2019, China and Mauritius officially signed the Free Trade Agreement between the People's Republic of China and the Republic of Mauritius. The Agreement officially became effective on January 1, 2021. This is China's first FTA with an African country. Its entry into force will further enhance China-Mauritius mutually beneficial cooperation level, promote China-Africa cooperation, and contribute to a closer China-Africa community of shared future.⁵⁸

Although this statement suggests that China views the China-Mauritius Free Trade Agreement as a part of the promotion of "China-Africa cooperation" and as contributing to "a closer China-Africa

strengthen cooperation and provide consulting, information and other services for the cooperation between enterprises of both sides;

9. Encourage their respective financial institutions to support cooperation in trade, investment, infrastructure construction, etc. between the enterprises of both sides.

China-ECOWAS Framework Agreement, *supra* note 8 at art. 2.

⁵³ See, e.g., Forum on China-Africa Cooperation Beijing Action Plan (2019-2021), MINISTRY OF FOREIGN AFFAIRS (Sept. 12, 2018), <http://focacsummit.mfa.gov.cn/eng/hyqk1/t1594297.htm> [<https://perma.cc/6B53-T2GU>].

⁵⁴ See Regional Trade Agreements Database, *China*, WORLD TRADE ORGANIZATION, <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=156&lang=1&redirect=1> [<https://perma.cc/V3XE-7EBY>]. (Despite the absence of legally binding regional/cross-regional arrangements between China and Africa, China has many binding Regional Trade Agreements with many Asian and other regions.)

⁵⁵ See *id.*

⁵⁶ See Regional Trade Agreements Database, *China - Mauritius*, WORLD TRADE ORGANIZATION, <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=1034>.

⁵⁷ See *id.*

⁵⁸ China-Mauritius FTA, *supra* note 51.

community of shared future,” there is no indication so far that China intends to sign more cross-regional trade agreements with African states individually or in groups.

Prospectively, however, China has shown some interest in linking Africa’s portion of the Belt and Road Initiative (BRI) to the newly adopted African Continental Free Trade Area (AfCFTA):

The idea of linking China’s Belt and Road Initiative (BRI) with the new African Continental Free Trade Area (AfCFTA) appears to be gaining momentum among senior Chinese policymakers. Cháng Hào 常皓, a high-ranking official with the influential National Development and Reform Commission (NDRC)—a powerful body that effectively sets macroeconomic policy in China—spoke at a China-Africa think tank forum on Sunday about integrating the two multinational trade regimes.⁵⁹

There is no further indication as to how this linkage might be legally framed, institutionalized, and operationalized.

b. Dispute Settlement

The nature and volume of the trade relations so far have been such that no China-Africa trade disputes have surfaced. With increased trade and future use of binding instruments, however, trade disputes are inevitable. This is largely because China’s continued soft law⁶⁰ ordering of China-Africa trade⁶¹ cannot be explained by China’s differing outlook on law and legal institutions as it routinely engages with the rest of the world in legal terms. Indeed, China has been one of the most active players in WTO dispute settlement with at least 21 cases as complainant, 45 cases as the respondent, and 188 cases as a third party.⁶²

⁵⁹ Eric Olander, *Can China integrate Africa’s new free trade area with the Belt and Road?*, SUPCHINA (Dec. 8, 2020), <https://supchina.com/2020/12/08/can-china-integrate-africas-new-free-trade-area-with-the-belt-and-road/> [<https://perma.cc/F625-VDBV>].

⁶⁰ See Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 707–08 (2010).

⁶¹ WON KIDANE, CHINA-AFRICA DISPUTE SETTLEMENT: THE LAW, ECONOMICS AND CULTURE OF ARBITRATION (2011).

⁶² See *China and the WTO*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/countries_e/china_e.htm [<https://perma.cc/KY7P-5KZA>]. All of its 25 cases are as against the United States or European Union. See *id.* China’s appearance as a respondent is also mostly between it and the United States or European Union with a few exceptions including Canada, Mexico and Guatemala.; See *id.* (Of the 188 cases that China has shown interest as a third party, there was only one case involving an African state. It was case DS327: Egypt - Anti-Dumping Duties on Matches from Pakistan. The case began on 21 February 2005 and concluded by mutual agreement on 27 March 2006. See *DS327: Egypt — Anti-Dumping Duties on Matches from Pakistan*, WORLD TRADE ORGANIZATION,

With the most recent conclusion of the China-Mauritius Free Trade Agreement, there is now concrete evidence of what trade dispute settlement model China is likely to follow. The following section examines this model in some detail.

c. China-Mauritius Trade Dispute Settlement Rules

The China-Mauritius Free Trade Agreement contains a full-fledged dispute settlement provision. It is contained in Article 15 of the Agreement.⁶³ At a preliminary level, the dispute settlement provision has what is called a fork-in-the road clause even for disputes that may arise out of their WTO agreements. It reads:

ARTICLE 15.3: CHOICE OF FORUM

1. Where a dispute arises under this Agreement and under any other agreement to which both Parties are a party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.
2. The forum selected by the complaining Party in paragraph 1 shall be used to the exclusion of other fora.⁶⁴

This is quite remarkable for its retrospective modification of the dispute settlement mechanism of the WTO as between the two parties. It expressly permits each party to select the specific dispute settlement mechanism enshrined in Article 15 of this particular bilateral Free Trade Agreement. It is even more remarkable because what is provided under Article 15 is an entirely different form of dispute settlement than the mechanism set forth under the WTO's Dispute Settlement Understandings (DSU).⁶⁵

The China-Mauritius Free Trade Agreement adapts an ad hoc arbitration mechanism if disputes cannot be resolved by less adversarial means— i.e., consultation, mediation, and conciliation.⁶⁶ It partially mimics WTO's standing dispute settlement most notably, the arbitration option under Article 25 of the WTO.⁶⁷

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds327_e.htm [<https://perma.cc/U8L2-RCJV>].

⁶³ China-Mauritius FTA, *supra* note 51, at art. 15.

⁶⁴ *Id.* at art. 15.3.

⁶⁵ For comprehensive information about the WTO's dispute settlement mechanism including the text of the Dispute Settlement Understandings, see *Dispute Settlement*, WORLD TRADE ORGANIZATION [hereinafter WTO DSU], https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm [<https://perma.cc/TBP8-TH39>].

⁶⁶ See China-Mauritius FTA, *supra* note 51, at arts. 14(5), 14(6), and 15(4).

⁶⁷ WTO DSU, *supra* note 65 at art. 25.

The arbitration anticipated under Article 15 is *ad hoc* in its strictest form. Under the rules, the claimant would serve a notice of arbitration on the respondent setting forth the specifics of the claim.⁶⁸ Following the claimant's submission of the request for arbitration to the respondent, the dispute settlement rules appear to anticipate that each party would appoint one arbitrator who would select the chair. The actual language of the relevant provision is awkwardly formulated. It reads:

ARTICLE 15.7: COMPOSITION OF AN ARBITRAL TRIBUNAL

1. An arbitral tribunal shall comprise three arbitrators.
2. Within 15 days after the establishment of an arbitral tribunal, each Party shall appoint one arbitrator of the arbitral tribunal respectively.
3. The Parties shall appoint by common agreement the third arbitrator within 30 days after the establishment of an arbitral tribunal. The arbitrator thus appointed shall chair the arbitral tribunal.⁶⁹

Sub-article 2 appears to suggest that the arbitral tribunal is established

Article 25: Arbitration

1. Expedient arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards. *See ibid.*

⁶⁸ China-Mauritius FTA, *supra* note 51, at art. 15(6). Article 15.6 states:

ESTABLISHMENT OF AN ARBITRAL TRIBUNAL

1. If a consultation referred to in the Article 15.4 (Consultations) fails to resolve a matter within 60 days or 30 days in relation to urgent matters concerning perishable goods, after receipt of the request for consultations, the complaining Party may request in writing the establishment of an arbitral tribunal to consider the matter. 2. The complaining Party shall: (a) indicate in the request whether consultations were held; (b) identify the specific measures at issue; (c) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly; and - 124 - (d) deliver the request to the responding Party. 3. An arbitral tribunal is established upon receipt of a request.

⁶⁹ China-Mauritius FTA, *supra* note 51, at art. 15(7)(1)-15(7)(3).

before the arbitrators are appointed. However, it is unclear how that could be the case. It could be a simple drafting error. In any case, the important rule pertains to the default appointment jurisdiction. China and Mauritius have given that authority to the Secretary General of the WTO.⁷⁰ Unsurprisingly, this jurisdiction is exercisable only if the party-appointed arbitrators fail to agree on a chair within thirty days.⁷¹

Duly constituted this way, the Tribunal settles the dispute in accordance with the terms of the Agreement—i.e., “customary rules of interpretation of public international law”⁷² streamlined under the terms of reference that it is required to formulate,⁷³ and the Rules of Procedure set forth in Annex on Rules of Procedure.⁷⁴ Consistent with the WTO’s Dispute Settlement system, the Tribunal’s final disposition comes in the form of a Final Report, which follows the Parties’ comments on the initial report.⁷⁵

The mechanism of enforcement of the Final Report is also identical with the WTO’s enforcement mechanism. The relevant provision reads:

ARTICLE 15.12: IMPLEMENTATION OF ARBITRAL
TRIBUNAL’S FINAL REPORT

1. Where the arbitral tribunal concludes that a Party has not conformed with its obligations under this Agreement, the resolution, whenever possible, shall be to eliminate the non-conformity.
2. Unless the Parties reach agreement on compensation or other mutually satisfactory solution, the responding Party shall implement the recommendations and rulings in the final report of the arbitral tribunal. If it is not practicable to comply immediately, the responding Party shall implement the recommendations and rulings within a reasonable period of time.⁷⁶

If the losing party continues to defy the tribunal following a review finding a non-compliance, and no agreement is reached on compensation, “the complaining Party may suspend the application of concessions or other obligations to the Party complained against.”⁷⁷ Again, consistent with the

⁷⁰ *Id.* at art. 15(7)(4). (If any arbitrator of the arbitral tribunal has not been appointed within 30 days after the establishment of an arbitral tribunal, either Party may request that the Director-General of the WTO designate an arbitrator within 30 days of that request. If one or more arbitrators are designated under this paragraph, the Director-General of the WTO shall be authorized to designate the chair of the arbitral tribunal.)

⁷¹ *Id.*

⁷² *Id.* at art. 15(8)(4).

⁷³ *Id.* at art. 15(8)(2).

⁷⁴ *Id.* at art. 15(9) and Annex on Rules of Procedure.

⁷⁵ *Id.* at art. 15(11).

⁷⁶ *Id.* at art. 15(12).

⁷⁷ *Id.* at art. 15(15)(1).

WTO Rules, the winning party may take suspension measures in other sectors if the suspension relating to the same sector proves inadequate.⁷⁸

As the above discussion indicates, the dispute settlement mechanism that China and Mauritius have included in their FTA is largely modeled after the WTO's dispute settlement mechanism with significant simplification including the use of arbitration and elimination of the appellate mechanism. If this is an indication of a model that China is likely to follow with the rest of its African trading partners in the future, a few of these choices require some reflection.

First, the self-help suspension model as the ultimate trade remedy undoubtedly favors the party with the higher economic power. With all its deficiencies, an arbitral award model for the monetary compensation of injuries and losses may be less sensitive to the balance of trading power. Second, even with the self-help retaliatory model, the China-Mauritius model omits the WTO's attempted accommodation for least-developed countries. Although this is likely because Mauritius is not considered a least-developed country, it is important to note such omission in case this particular FTA serves as a model for future FTA negotiations with least-developed African countries. The omission is what is provided in Article 24 of the WTO DSU. It asks for due restraint in taking retaliatory action as well as seeking compensation from such countries.⁷⁹

⁷⁸ *Id.* at art. 15(15)(3)(b). (“the complaining Party may suspend concessions or other obligations in other sectors if it considers that it is not practicable or effective to suspend concessions or other obligations in the same sector(s)”). For comparison, *see also* WTO DSU, *supra* note 65, at 22(3)(b). (“if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement”).

⁷⁹ WTO DSU, *supra* note 65, at art. 24.

Special Procedures Involving Least-Developed Country Members

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

IV. CHINA-AFRICA INVESTMENT AND DISPUTE SETTLEMENT

Click here to enter text. Although adequate literature appraises the generational development of Chinese BITs⁸⁰ and the existing China-Africa investment treaties,⁸¹ it is important to revisit some of the dispute settlement provisions in light of new cases that could potentially signal emerging trends. China currently has 35 BITs with African states, sixteen of which have come into effect.⁸² Of the seven BITs that China signed since 2010, four are with African states.⁸³ Remarkably, China has only four BITs that have come into effect in the last decade, and one of those is with an African state, Tanzania. The others are with Turkey, Canada and Uzbekistan.⁸⁴ This section examines the dispute settlement provisions of these most recent Chinese BITs.

a. Dispute Settlement Provisions in Recent China-Africa Investment Treaties

China's most recent BIT is with the China-Turkey BIT signed on July 20, 2015, and came into effect on November 11, 2020.⁸⁵ Although it is the most recent BIT, it contains no particular improvements in the formulation of its substantive rules⁸⁶ or the mechanism of dispute settlement.⁸⁷ In fact, a close reading of the dispute settlement provision suggests that no particular attention was given to address any of the contemporary criticisms of the ISDS system in general. That might be because it was concluded in 2015

⁸⁰ Most notably, See NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES (2009).

⁸¹ See, e.g., Won Kidane & Weidong Zhu, *China-Africa Investment Treaties: Old Rules, New Challenges*, 37 FORDHAM INT. LAW J. 1034 (2014); Won Kidane, *China's Bilateral Investment Treaties with African States in Comparative Context*, 49 CORNELL INT. LAW J. 141 (2016).

⁸² See United Nations Conference on Trade and Development, *Bilateral Investment Treaties (China)*, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> [<https://perma.cc/QY6L-F9TV>].

⁸³ *Id.* The seven are with: (1) Turkey (signed in 2013 and came into force in 2020), (2) Tanzania (signed in 2013, came into effect, 2014), (3) Canada (signed in 2012, and came into force in 2014), (4) Democratic Republic of Congo (signed in 2011, not in force), (5) Uzbekistan (signed and came into force in 2011), (6) Libya (signed in 2010, not in force) and (7) Chad (signed in 2010, not in force).

⁸⁴ See *id.*

⁸⁵ Electronic Database of Investment Treaties, *Agreement Between the Government of the Republic of Turkey and the Government of the People's Republic of China Concerning the Reciprocal Promotion and Protection of Investments* [hereinafter China-Turkey BIT], [https://edit.wti.org/wti-filessystem/20200529/509133d6-94dc-43ec-89a8-ace21fb5d278/China%20-%20Turkey%20BIT%20\(2015\).pdf](https://edit.wti.org/wti-filessystem/20200529/509133d6-94dc-43ec-89a8-ace21fb5d278/China%20-%20Turkey%20BIT%20(2015).pdf).

⁸⁶ It contains the usual protection rules such as fair and equitable treatment, most favored nation treatment, national treatment, and non-expropriation in their most ordinary formulation. See *id.* at arts. 2, 3 and 5.

⁸⁷ See *id.* at art. 9.

before the establishment of UNCTRAL Working Group III for ISDS reform in 2017⁸⁸ and took six years to come into effect in November 2020.

In any case, the dispute settlement provision gives an investor who has attempted to resolve the dispute by negotiation and followed domestic administrative procedures for six months⁸⁹ the choice between a national court, ICSID or UNCITRAL arbitration,⁹⁰ followed by a fork-in-the road provision,⁹¹ which requires adherence to one's first choice. It contains a clear choice of law provision, which includes the BIT, the national laws of each contracting state and general principles of international law recognized by both parties.⁹²

What could be considered somewhat unusual is what is contained in paragraph 4 of Article 9. It reads in full as follows:

Notwithstanding the provisions of paragraph 2 of this Article; (a) only the disputes arising directly out of investment activities which have obtained necessary permission, if there is any permission requirement, in conformity with the relevant legislation of the hosting Contracting Party on foreign capital, and that effectively started shall be subject to the jurisdiction of the International Center for Settlement of Investment Disputes (ICSID) or any other international dispute settlement mechanism as agreed upon by the

⁸⁸ *Working Group III: Investor-State Dispute Settlement Reform*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, https://unctral.un.org/en/working_groups/3/investor-state [<https://perma.cc/6FFE-UFQR>] (last visited June 8, 2021).

⁸⁹ China-Turkey BIT, *supra* note 85, at art. 9(1). (Disputes between one of the Contracting Parties and an investor of the other Contracting Party, in connection with his investment, shall be notified in writing, including detailed information, by the investor to the recipient Contracting Party of the investment for domestic administrative review procedures. As far as possible, the investor and the concerned Contracting Party shall endeavor to settle these disputes by consultations and negotiations in good faith.)

⁹⁰ *Id.* at art. 9, ¶ 2. (“If the dispute that an investor of one Contracting Party claiming that the other Contracting Party has breached an obligation under Article 2 through 8, cannot be settled through negotiations or administrative review procedures stipulated in paragraph (1) of this Article within six (6) months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to: (a) the competent court of the Contracting Party in whose territory the investment has been made, (b) the International Center for Settlement of Investment Disputes (ICSID) set up by the “Convention on Settlement of Investment Disputes Between States and Nationals of other States”, (c) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL).”).

⁹¹ *Id.* at art. 9 ¶ 3. (“Once the investor has submitted the dispute to the one of the dispute settlement procedures mentioned in paragraph 2 of this Article, the choice of one of these procedures is final.”).

⁹² *Id.* at art. 9 ¶ 5. (“The arbitration tribunal shall take its decisions in accordance with the provisions of this Agreement, the laws and regulations of the Contracting Party involved in the dispute on which territory the investment is made (including its rules on the conflict of law) and the relevant principles of international law as accepted by both Contracting Parties.”).

Contracting Parties; (b) the disputes, related to the property and real rights upon the real estates are totally under the jurisdiction of the courts of the hosting Contracting Party and therefore shall not be submitted to jurisdiction of the International Center for Settlement of Investment Disputes (ICSID) or any other international dispute settlement mechanism.⁹³

Subsection (a) focuses on the admission of the investment by the host state and obtaining permission under domestic law. This is a useful clarification for at least one set of claims that commonly arise, i.e., offshore indirect transfers of shares of holding companies. It often arises in the context of taxation of offshore transactions. Say, for example, all the shares of Company A — which is a domestic entity — are fully owned by Company B, a foreign company protected under the BIT. If Company B sells all its shares to yet another protected foreign company (Company C) without the permission or even knowledge of the host state, and the host state expropriates the underlying asset based in the host state, Company C must prove that its investment was permitted and admitted by the host. This raises complicated issues, but the provision clarifies that a credible claim may only arise out of an investment admitted and permitted by the host state.

Subsection (b) also unusually denies the arbitrability of rights *in rem*, limiting international arbitration to rights *in personam*. This kind of rule would have significant implications in the China-Africa context, as many China-Africa investments relate to natural resource concessions depending on the formulation of the rights as *in rem* or *in personam* under the domestic laws of the relevant jurisdiction.

Finally, the China-Turkey BIT contains a curious rule on enforcement of arbitral awards under paragraph 9 of Article 9: “The arbitration awards shall be final and binding for all parties in dispute. Each Contracting Party commits itself to execute the award according to its national law.”⁹⁴ This rule may not be limited to mere redundancy. It could invite unintended inconsistencies under both the ICSID enforcement rules⁹⁵, as well as the New York Convention enforcement rules, should the investor choose ad hoc UNCITRAL arbitration.

First, ICSID has a very constrictive rule on enforcement: “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in

⁹³ *Id.* at art. 9 ¶ 4.

⁹⁴ *Id.* at art. 9 ¶ 9.

⁹⁵ *See* ICSID Convention, Regulations and Rules, Apr., 2016, ICSID 15, [hereinafter ICSID].

that State.”⁹⁶ The China-Turkey BIT formulation is slightly different in that “[e]ach Contracting Party commits itself to execute the award according to its national law.”⁹⁷ It does not say that the award must be enforced “as if it were a final judgment of a court.” It leaves it open for the prescriptions of domestic laws. Second, the same provision may also lead to a result that is not anticipated by or even inconsistent with the enforcement rules of the New York Convention,⁹⁸ should the investor choose UNCITRAL arbitration. Given that both China and Turkey are members of the New York Convention, one could presume the enforcement takes place under said convention, — and indeed, even if they were not, any awards may still be enforced in a third country, presuming the latter is a member.

The New York Convention does not leave enforcement of arbitral awards to the discretions of domestic law. It provides that “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”⁹⁹ Although the New York Convention does not directly prescribe rules of annulment under domestic laws, the grounds of refusal of enforcement under Article V codify uniform rules across member states that are often used as grounds of annulment.¹⁰⁰ In any case, the interaction of these matured New York

⁹⁶ *Id.* at art. 54 ¶ 1.

⁹⁷ China-Turkey BIT, *supra* note 85, at art. 9 ¶ 9.

⁹⁸ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 2015, UNCITRAL [hereinafter NY Convention]; ICSID, *supra* note 95, at art. 54 ¶ 1.

⁹⁹ *Id.* at art. III.

¹⁰⁰ NY Convention, at art. V. (“1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent

Convention rules and the new rule under the China-Turkey BIT could lead to unintended controversy related to enforcement. A simple example would be one of the domestic rules permitting the review of arbitral awards for error of law.

The China-Tanzania BIT signed on March 23, 2013 and entered into force just over a year later is the most recent BIT between China and any African state.¹⁰¹ Like the China-Turkey BIT, this BIT is also not particularly responsive to some of the most common criticisms in the formulation of the substantive rules or the dispute settlement mechanism. Most notably,¹⁰² the formulation of the other protection rules such as full security and protection,¹⁰³ most favored nation treatment,¹⁰⁴ national treatment,¹⁰⁵ and the rule against expropriation¹⁰⁶ are very traditional. In contrast, the formulation of the Fair and Equitable Treatment Rule (FET)¹⁰⁷ contains some improvements by way of defining it¹⁰⁸ and excluding claims based on violations of other provisions of the BIT.¹⁰⁹

The China-Tanzania BIT's ISDS provision contains some notable characteristics. First, although it gives the investor four options (domestic court litigation, ICSID arbitration, ad hoc arbitration under UNCITRAL rules or ad hoc arbitration under any other rules as the parties may agree),¹¹⁰ it permits the respondent state to require the investor to exhaust available domestic remedies.¹¹¹ Second, beyond the fork-in-the-road¹¹² and a three-

authority of the country in which, or under the law of which, that award was made. 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”).

¹⁰¹ See *Bilateral Investment Treaties between the People's Republic of China and the Government of the United Republic of Tanzania, China-Tanz., Mar. 24, 2013* [hereinafter *China-Tanzania BIT*].

¹⁰² See *id.* at art. 5.

¹⁰³ See *id.*

¹⁰⁴ See *id.* at art. 4.

¹⁰⁵ See *id.* at art. 3.

¹⁰⁶ See *id.* at art. 6.

¹⁰⁷ See *China-Tanzania BIT, supra* note 101, at art. 5.

¹⁰⁸ See *id.* at art. 5 ¶ 2. (“‘Fair and equitable treatment’ means that investors of one Contracting Party shall not be denied fair judicial proceedings by the other Contracting Party or be treated with obvious discriminatory or arbitrary measures.”).

¹⁰⁹ See *id.* at art. 5 ¶ 4. (“A determination that there has been a breach of another article of this Agreement, or an article of another agreement, does not constitute a breach of this article.”).

¹¹⁰ See *id.* at art 13 ¶ 2.

¹¹¹ See *id.* at art. 13 ¶ 2. (“The other Contracting Party has the right to require the investor concerned to exhaust the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before submitting to international

year statute of limitation rule,¹¹³ it includes specific choice of law rules that respond to issues to the umbrella clause. In this regard, it expressly selects international law as the substantive rule of decision pertaining to all of the external protection principles such as FET and expropriation,¹¹⁴ but domestic law and applicable rules of international law for the determination of issues arising out of contractual commitments.¹¹⁵ Finally, similar to the China-Turkey BIT, the China-Tanzania BIT contains its own rule on the enforcement of arbitral awards that is not the same as the ICSID or the New York Convention enforcement rules.¹¹⁶ As discussed in relation to the China-Turkey BIT above, the questions that arise include asking which enforcement rule applies depending on whether the investor opts for ICSID arbitration (presumably enforceable under the ICSID Convention) or UNCITRAL arbitration (presumably enforceable under the New York Convention).

b. Cases

The extent of Chinese investment in Africa coupled with the number and longevity of the China-Africa BITs in force would have been expected to give rise to a certain number of ISDS cases. For reasons that can only be speculated upon, the number of such disputes is low, totaling only two reported China-Africa ISDS cases. These include one between a Chinese investor and Ghana¹¹⁷ under the China-Ghana BIT of 1990,¹¹⁸ and the other

arbitration.”).

¹¹² See *id.* at art. 13 ¶ 3.

¹¹³ See China-Tanzania BIT, *supra* note 101, at art. 13 ¶ 4.

¹¹⁴ See *id.* at art. 13 ¶ 6. (“When a claim is related to breach of Article 2 to Article 9, the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”).

¹¹⁵ See *id.* at art. 13 ¶ 6 (a-b). (“When a claim is related to breach of Paragraph 2 of Article 14, the tribunal shall apply: (a) the rules of law as may be agreed by the disputing parties; or (b) if the rules of law have not been agreed: (i) the law of the Contracting Party where the investment has been made, including its rules on the conflict of laws; and (ii) such rules of international law as may be applicable.”).

¹¹⁶ See *id.* at art. 13 ¶ 8. (“The arbitration award shall be final and binding upon both parties to the dispute. Each Contracting Party shall ensure the recognition and enforcement of the award in accordance with its relevant laws and regulations.”).

¹¹⁷ See *Chinese Company Sues Ghana US\$55 Million For Wrongful Termination of Contract*, THE HERALD (Feb. 15, 2021), <https://www.theheraldghana.com/general/Chinese-Company-Sues-Ghana-US-55-Million-For-Wrongful-Termination-Of-Contract-19300#:~:text=Chinese%20Company%20Sues%20Ghana%20US%2455%20Million%20For%20Wrongful%20Termination%20Of%20Contract,-February%2015%2C%202021&text=Beijing%20Everyway%20Traffic%20and%20Lighting,China%2DGhana%20bilateral%20investment%20treaty> [https://perma.cc/YS24-XE23] (“Beijing Everyway Traffic and Lighting Tech Co Ltd, served a notice of arbitration on the government of Ghana on February 10, kicking off an ad hoc arbitration procedure under the China-Ghana bilateral investment treaty. The arbitration is described as one of the first known claims by a

one between a Chinese investor and Nigeria under the China-Nigeria BIT of 2001.¹¹⁹ Although these cases are ongoing and no records of proceedings are publicly available, their very initiation is indicative of what is to come.

Click here to enter text. The proceeding against Ghana is particularly interesting because the China-Ghana BIT—as a first-generation Chinese BIT—limits international arbitration to the resolution of a dispute pertaining to the quantum of damages.¹²⁰ The China-Nigeria BIT—a second-generation BIT—does not contain such a limitation.¹²¹ The details of these proceedings would be interesting to see if the records become available once the proceedings are concluded.

V. CHINA-AFRICA LOAN AGREEMENTS AND DISPUTE SETTLEMENT

CARI's China-Africa loan data estimates that between 2000 and 2019, several African states signed approximately 1,141 loan commitment instruments for an aggregate of U.S. \$153 billion.¹²² About 80 percent of such loans went to financing infrastructure development projects such as

mainland Chinese investor against an African country, seeking the colossal US\$55 million from Ghana after its contract to develop an intelligent traffic management system for Accra was replaced by other Chinese contractors.”). *See also* Alison Ross, *Chinese Company Brings Claim Against Ghana*, GLOB. ARB. REV. (Feb. 11, 2021), <https://globalarbitrationreview.com/chinese-company-brings-claim-against-ghana> [<https://perma.cc/D2UX-7PV9>] (“A Beijing-based construction company has brought one of the first known claims by a mainland Chinese investor against an African country, seeking US\$55 million from Ghana after its contract to develop an intelligent traffic management system for Accra was canceled and it was replaced by other Chinese contractors.”).

¹¹⁸ *See* Bilateral Investment Treaties between the People's Republic of China and the Government of the Republic of Ghana, China-Ghana, Oct. 12, 1989, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/737/download> [<https://perma.cc/5VSS-NUTW>] [hereinafter China-Ghana BIT].

¹¹⁹ *See* Bilateral Investment Treaties between the People's Republic of China and the Government of the Federal Republic of Nigeria, China-Nigeria, Aug. 27, 2001, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3366/download> [<https://perma.cc/YQ45-LYAV>] [hereinafter China-Nigeria BIT].

¹²⁰ China-Ghana BIT, *supra* note 118 at art. 10. (“Settlement of Dispute on Quantum of Compensation”).

¹²¹ China-Nigeria BIT, *supra* note 119, at art. 9 ¶ 3. (“If a dispute cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article it may be submitted at the request of either Party to an ad hoc arbitral tribunal.”).

¹²² *See Loan Data*, China Africa Research Initiative, <http://www.sais-cari.org/data> [<https://perma.cc/X8PJ-FHFJ>]. CARI indicates that “[s]ince 2007, SAIS-CARI researchers have collected, cleaned and analyzed publicly-available data to create a database on Chinese lending to Africa. The data sources include official government documents, contractor websites, fieldwork, interviews, and media sources.” *Id.* It further indicates the transitioning of the management of the Chinese Loans to Africa Database to the Boston University Global Development Policy Center as of March 29, 2021. The new data center is available at <https://www.bu.edu/gdp/> [<https://perma.cc/7FZ7-R9P2>].

roads, energy, and telecom.¹²³ Each of these loan commitments is made in loan agreements. Each of the infrastructure and related projects are also ordered by contractual instruments, all of which have dispute settlement provisions. This Section profiles these loan contracts, and their dispute settlement provisions in comparative context.

a. China-Africa Loan Contracts

In March 2021, a collaborative research project of AidData¹²⁴ at William & Mary,¹²⁵ the Center for Global Development (CGD),¹²⁶ the Kiel Institute for the World Economy,¹²⁷ and the Peterson Institute for International Economics (PIIE)¹²⁸ published a compilation of 100 Chinese loan agreements accompanied by a useful study titled *How China Lends: A Rare Look Into 100 Loan Contracts With Foreign Governments*.¹²⁹ This study's main conclusions are:

First, the Chinese contracts contain unusual confidentiality clauses that bar borrowers from revealing the terms or even the existence of the debt. Second, Chinese lenders seek advantage over other creditors, using collateral arrangements such as lender-controlled revenue accounts and promises to keep the debt out of collective restructuring (“no Paris Club” clauses). Third, cancellation, acceleration, and stabilization clauses in Chinese contracts

¹²³ See Kevin Acker and Deborah Brautigam, *supra* note 16, at 6. Acker and Brautigam conclude:

Despite decreasing over the past years, and falling below US\$ 9 billion in 2019 for the first time since 2010, Chinese finance will continue to be an important source of infrastructure finance for African countries. The data on Chinese lending to Africa from the past 10 years shows that Chinese financiers adapt to changing economic and political conditions in Africa as they learn from experiences with borrowers in debt distress and debt restructuring negotiations. Rather than continuing to blindly dump finance into countries with debt issues, Chinese financiers have shifted away from these countries -- albeit belatedly in some cases, such as Zambia -- and towards borrowers with stronger economies and debt management.

¹²⁴ AIDDATA, <https://www.aiddata.org/> [<https://perma.cc/26CA-LAVS>].

¹²⁵ WILLIAM & MARY, <https://www.wm.edu/> [<https://perma.cc/TRZ7-345H>].

¹²⁶ CENTER FOR GLOBAL DEVELOPMENT, <https://www.cgdev.org/> [<https://perma.cc/QB73-G22F>].

¹²⁷ KIEL INSTITUTE FOR THE WORLD ECONOMY, <https://www.ifw-kiel.de/> [<https://perma.cc/B7L3-KSF5>].

¹²⁸ PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, <https://www.piie.com/> [<https://perma.cc/DVD6-RLPH>].

¹²⁹ Gelpern, A., Horn, S., Morris, S., Parks, B., & Trebesch, C., *How China Lends: A Rare Look into 100 Debt Contracts with Foreign Governments*, AIDDATA, Mar. 21, 2021, <https://www.aiddata.org/publications/how-china-lends> [<https://perma.cc/A3RD-8NZP>] [hereinafter *How China Lends*]. (Translated version at: https://www.cgdev.org/sites/default/files/HowChinaLends_ZH-CN.pdf) [<https://perma.cc/47VN-E2ZK>].

potentially allow the lenders to influence debtors' domestic and foreign policies. Even if these terms were unenforceable in court, the mix of confidentiality, seniority, and policy influence could limit the sovereign debtor's crisis management options and complicate debt renegotiation. Overall, the contracts use creative design to manage credit risks and overcome enforcement hurdles, presenting China as a muscular and commercially savvy lender to the developing world.¹³⁰

The study has made 100 contracts—almost half of which with African sovereign borrowers, available in a searchable database¹³¹—with data organized by lender, borrower, sector or contract clause.^{132 133} The following section looks into the dispute settlement provisions of these loan contracts in a comparative context.¹³⁴

¹³⁰ *Id.* at 2. The study presents its *raison d'être* as follows:

China's loan agreements—sight unseen—are the subject of intense debate and controversy. Some have suggested that Beijing is deliberately pursuing “debt trap diplomacy,” imposing harsh terms on its government counterparties and writing contracts that allow it to seize strategic assets when debtor countries run into financial problems (e.g., Chellaney 2017; Moody's 2018; Parker and Chefitz 2018). Senior U.S. government officials have argued that Beijing “encourages dependency using opaque contracts [...] that mire nations in debt and undercut their sovereignty” (Tillerson 2018). At the opposite end of the spectrum, others have emphasized the benefits of China's lending and suggested that concerns about harsh terms and a loss of sovereignty are greatly exaggerated (e.g., Bräutigam 2019; Bräutigam and Kidane 2020; Jones and Hameiri 2020). This debate in large part is based on conjecture. Neither policymakers nor scholars know if Chinese loan contracts would help or hobble borrowers, because few independent observers have seen them. Existing research and policy debate rests upon anecdotal accounts in media reports, cherry-picked cases, and isolated excerpts from a small number of contracts. Our paper seeks to address this gap in the literature.

See id. at 4.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 13. (“47 percent of the loan agreements in the sample are with government borrowers in Africa, and another 27 percent are with government borrowers in Latin America and the Caribbean. The remaining loans in the sample were made to government borrowers in Eastern Europe (11%), Asia (10%), and Oceania (5%).” The breakdown of the 47 percent is contained in Appendix 1, Table 1A on p. 50. Benin (5 contracts), Botswana (1), Cabo Verde (2), Cameroon (23), Congo, Dem. Rep. (1), Cong. Rep. (1), Ghana (4), Malawi (1), Sierra Leone (3), and Uganda (2). This makes the actual number of available African contracts 43).

¹³⁴ As indicated in *How China Lends*, the only developing country that has made its loan documents public is Cameroon. *How China Lends* has usefully retrieved 142 of them for use. The source of the comparative look is essentially this collection of loan instruments with 28 different creditors. The breakdown of lenders appears to be 8 banks, 10 creditor agencies from 10 different countries, 11 inter-governmental organizations. *See id.* at 16. This study has provided the details in a tabular form at Appendix I, Table A2. Cameroon's

However, as a preliminary matter, the study concluded that “contracts differ significantly by geographic region. In fact, our analysis of Chinese contracts reveals that the lending terms are highly standardized, and largely predetermined by the identity of the creditor and the type of lending instrument.”¹³⁵ As such, any regional variability analysis is unnecessary. Instead, the African loan contracts are analyzed on their own accord in comparison with non-Chinese lenders to African sovereign borrowers.

b. Dispute Settlement Provisions in China-Africa Loan Contracts

The published loan contracts include at least forty-three contracts between Chinese lenders and eleven African countries. A few versions of dispute settlement provisions are used repeatedly across these contracts. The majority of these loan contracts are signed by China Exim Bank, which mostly used one of three different models referred to as Model I, Model II, and Model III for purposes of this article. This section profiles these different dispute settlement provisions followed by a profile of dispute settlement provisions in loan contracts of non-Chinese lenders in a comparative context.

The first and perhaps less frequently used dispute settlement clause is Model I of the China Exim Bank. It is invariably contained in a relatively brief contract under a provision titled miscellaneous. An example of this is contained in Botswana housing (Gaborone) Project Loan Agreement with China Exim Bank signed in 2003.¹³⁶ The provision reads:

ARTICLE 9: MISCELLANEOUS

9.1. The Borrower may not assign any of its rights or obligations hereunder in any way, manner or form to any third party whatsoever without the prior written consent of the Lender.

9.2. This Agreement is legally independent of the Commercial Contract or lending Agreement. Accordingly, any claims or disputes arising out of the Commercial Contract or Onlending Agreement shall not affect the obligations of the Borrower under this Agreement.

9.3. The Agreement as well as all rights and obligations arising hereunder shall be governed by and construed in accordance with the English Law.

released loan instruments are available at <http://dad.minepat.gov.cm/>.

¹³⁵ *How China Lends*, *supra* note 132 at 14.

¹³⁶ See Government Concessional Loan Agreement Between the Government of the Republic of Botswana and the Export-Import Bank of China for the Botswana Housing (Gaborone) Project, Bots.-China, Mar. 25, 2003, https://www.documentcloud.org/documents/20484977-bwa_2001_430 [<https://perma.cc/4VC7-ZW5S>].

9.4. All disputes arising in connection with this Agreement shall be settled by friendly negotiations. If no solution is found through negotiations, the disputes shall be settled by arbitration. Arbitration shall be submitted to the China International Economic and Trade Arbitration Commission.¹³⁷

A significantly modified version of this provision (Model II) is more frequently used by China Exim Bank. An example of Model II is contained in the following contract between Cabo Verde and China Exim Bank:

¹³⁷ Article 8(1) states:

If any of the following events occurs, the Lender may, by written notice to the Borrower, suspend or terminate making further advances under this Agreement, and/or declare the drawn and unpaid principal amount of the Loan as well as the interest accrued thereon and fees therefrom shall become immediately due and payable without further demand, notice or other legal formality of any kind: (A) The Borrower, for any reasons whatsoever, fails to pay any due amount of principal, interest, Commitment Fee or Management Fee as agreed in this Agreement; (B) Any representation or covenant made by the Borrower in Article 6 and 7, and other provisions of this Agreement, any certificate, document, material delivered pursuant to this Agreement is found to be untrue or inaccurate in any material respects; (C) The Borrower is in breach of any other terms, conditions or covenants made under this Agreement and does not remedy such breach within 30 days after receipt of written notice of breach from the Lender; (D) Material deterioration of the financial conditions of the Borrower or significant change with respect to the Project, either of which, in the opinion of the Lender, may have material adverse effect on the ability of the Borrower to repay the Loan; (E) The Borrower is in default of any of its other debt obligations, or any charge, guarantee or other security obligation now or hereafter created by the Borrower becomes enforceable, or the Borrower decides not to pay its debts generally; (F) There are force majeure in the Recipient Country such as serious natural calamity, war or other social unrests, which may jeopardize the normal environment for the Project implementation; (G) There occurs any change in the laws and government policies in the country of either the Lender or the Borrower, which makes it impossible for either the Lender or the Borrower to perform its obligations under this Agreement; (H) There is any fact pertaining to the project other than force majeure, which may jeopardize the smooth implementation of the Project. *Id.* at art. 8(1).

ARTICLE 8: MISCELLANEOUS

8.1 The Borrower hereby irrevocably waives any immunity on the grounds of sovereign or otherwise for itself or its property in connection with any arbitration proceeding to Article 8.5 hereof or with the enforcement of any arbitral award.

8.4 This Agreement as well as the rights and obligations of the parties hereunder shall be governed by and construed in accordance with the laws of China.

8.5 Any dispute arising out of or in connection with this Agreement shall be resolved through friendly consultation. If no settlement can be reached through such consultation, each party shall have the right to submit such a dispute to the China International Economic and Trade Arbitration Commission (CIETAC) for arbitration. The arbitration shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award shall be final and binding upon both parties. The arbitration shall take place in Beijing.¹³⁸

The second China-Cabo Verde loan agreement contains the exact same governing law and dispute settlement provisions.¹³⁹

In Cameroon, the China Exim Bank used a slightly modified version of Model II and the more elaborate Model III reproduced below¹⁴⁰:

ARTICLE 14: GOVERNING LAW AND JURISDICTION

14.1 Governing Law — This Agreement and the rights and obligations of the parties hereunder shall, in all respects, be governed by and construed in accordance with the laws of China.

14.2 Good Faith Consultation — The parties hereto undertake to use their best effort to resolve any dispute arising out of or in connection with this Agreement through consultation in good faith and mutual understanding, provided that such consultation shall not prejudice the exercise of any right or remedy of either party here by any such party in respect of any such dispute.

¹³⁸ Government Concessional Loan Agreement on the E-Government Project Phase 2 of Cabo Verde, Cape Verde-China, Aug. 8, 2012, https://www.documentcloud.org/documents/20488119-cpv_2017_452 [<https://perma.cc/4VC7-ZW5S>].

¹³⁹ See Government Concessional Loan Agreement on Cape Verde Social Housing Project, Cape Verde-China, art. 8(1)-8(5), Feb. 15, 2012, https://www.documentcloud.org/documents/20488117-cpv_2012_453 [<https://perma.cc/RQ6D-KDR8>].

¹⁴⁰ Government Concessional Loan Agreement on the Mekin Hydropower Project, Cameroon-China, Jan. 07, 2010, https://www.documentcloud.org/documents/20485533-cmr_2010_168 [<https://perma.cc/C3MQ-V7R5>].

14.3 Submission to Jurisdiction — Any dispute arising out of or in connection with this Agreement shall be resolved through friendly consultation. If no settlement can be reached through such consultation, each party shall have the right to submit such dispute to the China International Economic and Trade Arbitration Commission (CIETAC) for arbitration. The arbitration shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award shall be final and binding upon both parties. The arbitration shall take place in Beijing.

14.4 Waiver — The Borrower irrevocably and unconditionally waives any objection which it may now have or hereafter have to the choice of CIETAC to resolve any dispute arising out of or relating to this Agreement. The Borrower also agrees that the arbitral award against it made by such arbitral tribunal shall be final and conclusive and may be enforced in any other Jurisdiction and that a certified or otherwise duly authenticated copy of the Judgement or Award shall be conclusive evidence of the fact and amount of its indebtedness.

14.5 Waiver of Immunity — The Borrower irrevocably and unconditionally waives, any immunity to which it or its property may at any time be or become entitled, whether characterized as sovereign immunity or otherwise, from any suit, jurisdiction of any arbitral institution or arbitral tribunal, judgment, arbitral award, service of process upon it or any agent, execution on judgment, enforcement of arbitral award, set off, attachment prior to judgment, attachment in aid of execution to which it or its assets may be entitled in any legal action or proceedings or arbitral proceedings with respect to this Agreement or any of the transactions contemplated hereby or hereunder.¹⁴¹

All eighteen Cameroonian loans are from the China Exim Bank, which used the models randomly without any discernible chronological pattern.¹⁴² Similarly, China Exim Bank has used Model II in its loan contracts with the Republic of Congo.¹⁴³

¹⁴¹ Preferential Buyer Credit Loan Agreement on the Matgenic Company Rehabilitation Project, Cameroon-China, Mar. 24, 2010, https://www.documentcloud.org/documents/20485530-cmr_2010_167 [<https://perma.cc/7GQ9-QGLE>].

¹⁴² See Preferential Boyer Credit Loan Agreement Between the Government of the Republic of Cameroon and the Export-Import Bank of China for the Douala Water Supply (Phase 2) Project, Cameroon-China, 2009 (Using Model B In 2009); Government Concessional Loan Agreement Between The Government Of The Republic Of Cameroon and The Export-Import Bank Of China for the Social Housing Units Project, Cameroon-China, Jan. 12, 2011 (Using Model A in 2011); and Buyer Credit Loan Agreement Between the Government of the Republic of Cameroon and the Export-Import Bank of China, Cameroon-China, 2015 (Using Model iii in 2015).

¹⁴³ Government Concessional Loan Agreement on Congo Transformation of National

Chinese lenders seem to have negotiated fundamentally different loan agreements in their four loan contracts with Ghanaian agencies. One of these four does not even have a dispute resolution clause,¹⁴⁴ and another relatively recent commercial loan agreement between the Government of Ghana and Sinohydro in 2018¹⁴⁵ contains a radically different one:

ARTICLE 6: GOVERNING LAW

This MPSA [Agreement] shall be governed by and construed in accordance with the laws of Ghana.

ARTICLE 7: DISPUTE RESOLUTION

7.1 All disputes arising in connection with this MPSA or the execution thereof shall be amicably settled through negotiations between the Parties. In the event that no settlement is arrived at within sixty (60) days after a dispute arose, the dispute shall be submitted by either Party to Arbitration.

7.2 In the course of arbitration proceedings, the Parties may continue to perform their respective obligations under the MPSA with the exception of the part of the MPSA under Arbitration.

7.3 The language of the Arbitration shall be English. The number of arbitrators shall be three (3). Each Party shall nominate one arbitrator. The two arbitrators shall appoint a third arbitrator who will be the President.

7.4 The place of Arbitration shall be London, United Kingdom. It shall be conducted in accordance with the UNCITRAL Rules. The arbitration process will be administered by the London Court of International Arbitration (LCIA).¹⁴⁶

Yet another Ghana loan agreement contains the following dispute resolution provision:

Analog TV into Terrestrial Digital TV Project, Congo-China, May 20, 2017, https://www.documentcloud.org/documents/20488108-cog_2017_454 [<https://perma.cc/LDU2-5RJQ>]. The four published China Exim Bank loans to the Democratic Republic of Congo (DRC) are all in French and as such not included in this study.

¹⁴⁴ Facility Agreement for Financing the Supply of Electrical Materials and Equipment for the Electrification of 1,033 Communities in Ashanti Brong Ahafo, Eastern, Volta and Western Regions, Phase I, Ghana-China, Dec. 11, 2017, https://www.documentcloud.org/documents/20495130-gha_2017_484 [<https://perma.cc/ZK8T-CTNT>].

¹⁴⁵ See Joint Memorandum for the Approval of Commercial Agreement for the Construction of Priority Road Infrastructure Projects – Phase I, Ghana-China [hereinafter Ghana-Sinohydro Loan Agreement], July, 2018, https://www.documentcloud.org/documents/20488279-gha_2018_483 [<https://perma.cc/85MN-XP7N>].

¹⁴⁶ *Id.* at arts. 6-7.

ARTICLE 12: GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the laws of the Republic of Ghana.

ARTICLE 15 DISPUTE RESOLUTION

15.1 Any disputes or controversy that may arise regarding the interpretation or implementation of this Agreement shall be firstly settled amicably by the Parties through negotiations.

15.2 Any dispute that shall remain unresolved after a period of thirty (30) days shall be referred to arbitration.

15.3 Where a dispute is referred to arbitration, the Parties shall appoint a single arbitrator or failing agreement, each Party shall appoint an arbitrator, and the two shall appoint a third arbitrator.

15.4 The arbitration shall be conducted in accordance with the Alternative Dispute Resolution Act, 2010 (Act 798).

15.5 The place of arbitration shall be in a third country other than the original countries of either of the Parties.¹⁴⁷

None of these different dispute resolution clauses are with the China Exim Bank, which appears to use one of its three models consistently. Indeed, even in Ghana, the China Exim Bank used Model II of its dispute resolution clause in at least one of Ghana's loan contracts, selecting Chinese law and CIETAC.¹⁴⁸

China Exim Bank also used Model II in Malawi¹⁴⁹ and two contracts with Sierra Leone.¹⁵⁰ Sierra Leone's third contract with China Exim Bank

¹⁴⁷ Joint Memorandum for the Seller's Credit Facility Agreement Between the Government of the Republic of Ghana and Poly Changda Overseas Engineering Corporation Limited for the Military Housing Project, Ghana-China, arts. 12, 15, Mar., 2018, https://www.documentcloud.org/documents/20488282-gha_2019_485 [https://perma.cc/X7XQ-U2X2].

¹⁴⁸ Government Concessional Loan Agreement on Polytechnics, Technical and Vocational Training Centers Upgrading Project, Ghana-China, art. 8, 2015, https://www.documentcloud.org/documents/20488273-gha_2015_482 [https://perma.cc/27QP-ESL3].

¹⁴⁹ See Government Concessional Loan Agreement for the Malawi International Conference Centre and Business Hotel Project, Malawi-China, art. 8, May 12, 2015, https://www.documentcloud.org/documents/20488742-mwi_2009_419 [https://perma.cc/2YPH-KZVP].

¹⁵⁰ See Government Concessional Loan Agreement for the Sierra Leone National Optical Fiber Backbone Project, Sierra Leone-China, art. 8, Aug. 14, 2012, https://www.documentcloud.org/documents/20488797-sle_2012_466 [https://perma.cc/CKD5-6Q6J]; Government Concessional Loan Agreement for the

and the Industrial and Financial Bank of China contains a radically different dispute settlement clause. It not only selects English law as the governing law, but also selects English courts as the forum for the resolution of disputes:

38. GOVERNING LAW

This Agreement and all non-contractual obligations arising out of or in connection with it shall be governed by English law.

39. ENFORCEMENT

39.1 Jurisdiction of English courts (a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute relating to its existence, validity or termination of this Agreement or any non-contractual obligation arising out of or in connection with this Agreement) (a “Dispute”). (b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary. (c) This Clause 39.1 (Jurisdiction) is for the benefit of the Finance Parties only. As a result, no Finance Party or Secured Party shall be prevented from taking proceedings relating to a Dispute to any other courts with jurisdiction. To the extent allowed by law, the Finance Parties and Secured Parties may take concurrent proceedings in any number of judications.¹⁵¹

It also contains a comprehensive waiver of the sovereign immunity clause.¹⁵² This particular contract is unique in many ways. First, with hundreds of pages in length, it is remarkable in the matters that it covers, ranging from environmental and social laws (art. 18.19) to anti-corruption laws (art. 18.26).

Concluded on June 22, 2020, Rwanda’s only available loan contract is notable for being the most recent of all available contracts as well as for using China Exim Banks Model II Contract.¹⁵³ Uganda’s two loan agreements with China Exim Bank use two different models. Ironically,

Dedicated Security Information System Project, Sierra Leone-China, art. 8, May 17, 2011, https://www.documentcloud.org/documents/20488795-sle_2011_467 [https://perma.cc/NC3A-P7LL].

¹⁵¹ Sinosure Covered Facility Agreement, Sierra Leone-China, 2017, https://www.documentcloud.org/documents/20488803-sle_2017_468 [https://perma.cc/BG2D-4ERV].

¹⁵² *Id.* at art. 40.

¹⁵³ See Government Concessional Loan Agreement on Nyabrongo II Hydropower Plant Project, Rwanda-China, art. 8, June 22, 2020, https://www.documentcloud.org/documents/20509406-rwa_2020_528 [https://perma.cc/AC9G-CCND].

while the first, concluded on February 3, 2016 uses Model III¹⁵⁴, the second one, concluded on January 16, 2019, uses Model II.¹⁵⁵

c. Africa's Loan Contracts with Non-Chinese Parties

AidData has made public 142 loan contracts between Cameroon (the only country that has made its loan contracts publicly available) and several non-Chinese lenders including the International Bank for Reconstruction and Development (IBRD), International Development Association (IDA), the African Development Bank, the Indian Exim Bank and others. These contracts employ different types of dispute settlement provisions.

The IBRD and IDA¹⁵⁶ of the World Bank have a similar, consistently-used model. IBRD's General Conditions of Contract are incorporated in each individual loan contract. One such example is the Loan Agreement between Cameroon and the World Bank concluded on June 7, 2017.¹⁵⁷ The very first operative provision incorporates the General Conditions (as defined in the Appendix) by reference,¹⁵⁸ while the General Conditions contain an elaborate but unique dispute settlement provision.¹⁵⁹ The choice of law — or rather, the deliberate lack thereof — is perhaps the most remarkable aspect of the IBRD loan agreement's dispute settlement provision. It reads:

8.01 Enforceability — The rights and obligations of the Bank and

¹⁵⁴ See Buyer Credit Loan Agreement for Planning & Economic Development, Uganda-China, art. 15, Feb. 3, 2015, https://www.documentcloud.org/documents/20488824-uga_2016_487 [<https://perma.cc/4Z25-PTMB>].

¹⁵⁵ See Government Concessional Loan Agreement on Bridging the Demand Supply Balance Gap Through the Accelerate Rural Electrification Programme Project, Ghana-China, art. 8, Jan. 16, 2015, https://www.documentcloud.org/documents/20488887-uga_2019_486 [<https://perma.cc/E2RA-WA4A>].

¹⁵⁶ See International Development Association, *What is IDA?*, <https://ida.worldbank.org/about/what-is-ida> (last visited June 12, 2021) [<https://perma.cc/ZAZ4-2JNS>]. “The International Development Association (IDA) is the part of the World Bank that helps the world’s poorest countries. Overseen by 173 shareholder nations, IDA aims to reduce poverty by providing zero to low-interest loans (called “credits”) and grants for programs that boost economic growth, reduce inequalities, and improve people’s living conditions. IDA complements the World Bank’s original lending arm—the International Bank for Reconstruction and Development (IBRD). IBRD was established to function as a self-sustaining business and provides loans and advice to middle-income and credit-worthy poor countries. IBRD and IDA share the same staff and headquarters and evaluate projects with the same rigorous standards.” *Id.*

¹⁵⁷ Loan Agreement for the Electricity Transmission and Reform Project, Cameroon-Int'l Bank for Recons. and Dev., June 7, 2017, <https://perma.cc/9Q39-8XCY>.

¹⁵⁸ Article 1.01. states the General Conditions (as defined in the Appendix to this Agreement) t. *Id.* at art. 1(01).

¹⁵⁹ See General Conditions for Loans, INT'L BANK FOR RECONSTRUCTION AND DEV. (Mar. 12, 2012).; See also Revised IBRD and IDA General Conditions, WBG (June 22, 2017).

the Loan Parties under the Legal Agreements shall be valid and enforceable in accordance with their terms, notwithstanding the law of any state or political subdivision thereof to the contrary. Neither the Bank nor any Loan Party shall be entitled in any proceeding under this Article to assert any claim that any provision of the Legal Agreements is¹⁶⁰

This is interesting because the loan contract lacks reference to any domestic state law and will presumably be governed by international law.

The arbitration provision is reproduced as follows for comparative context:

8.04 Arbitration — (a) Any controversy between the parties to the Loan Agreement or the parties to the Guarantee Agreement, and any claim by any such party against any other such party arising under the Loan Agreement or the Guarantee Agreement which has not been settled by agreement of the parties, shall be submitted to arbitration by an arbitral tribunal as hereinafter provided (“Arbitral Tribunal”). (b) The parties to such arbitration shall be the Bank on the one side and the Loan Parties on the other side. (c) The Arbitral Tribunal shall consist of three arbitrators appointed as follows: (i) one arbitrator shall be appointed by the Bank; (ii) a second arbitrator shall be appointed by the Loan Parties or, if they do not agree, by the Guarantor; and (iii) the third arbitrator (“Umpire”) shall be appointed by agreement of the parties or, if they do not agree, by the President of the International Court of Justice or, failing appointment by said President, by the Secretary-General of the United Nations.¹⁶¹

This provision allows the tribunal to select the seat of the arbitration,¹⁶² draw its own rules of procedure,¹⁶³ and make a provision on the enforcement of the awards that is not necessarily a model of clarity.¹⁶⁴

Most Cameroonian loan contracts are with the IDA,¹⁶⁵ which uses a dispute settlement provision that is almost identical to the IBRD. The provision is contained in its General Conditions Development Credit

¹⁶⁰ See Revised IBRD and IDA General Conditions, WBG (June 22, 2017). (June 1994) at sec. 8.01. See also, e.g., Thomas M. Klein, *External Debt Management*, THE WORLD BANK. Although loans from private lenders to a sovereign will usually be governed by the law of another jurisdiction, loans from international institutions, such as the World Bank, are normally governed by public international law.

¹⁶¹ *Id.* at art. 8(04)(a-c).

¹⁶² *Id.* art. 8(04)(f).

¹⁶³ See *id.* at art. 8.04(g).

¹⁶⁴ See *id.* at art. 8.04(k).

¹⁶⁵ See, e.g., Financing Agreement between the Republic of Cameroon and the International Development Association for the Community Development Program Support Project (Feb. 3, 2016) (on file online at https://www.documentcloud.org/documents/20488039-cmr_2016_242) [<https://perma.cc/A38S-8RK7>].

Agreements.¹⁶⁶ Most notable is 10.03(k):

The Association shall not be entitled to enter judgment against the Borrower upon the award, to enforce the award against the Borrower by execution or to pursue any other remedy against the Borrower for the enforcement of the award, except as such procedure may be available against the Borrower otherwise than by reason of the provisions of this Section.¹⁶⁷

The other model the Cameroonian loans employ is the African Development Model, with its special¹⁶⁸ and general conditions.¹⁶⁹ It is significantly different from the World Bank Models in several respects, but most importantly, it selects the UNCITRAL arbitration rules, assigns the authority for default appointment of the chair of the arbitral tribunal to the Secretary General of the Permanent Court of Arbitration,¹⁷⁰ and expressly selects international law as the governing law.¹⁷¹

Another model used in Cameroon's non-Chinese loans is the Deutsche Bank S.A.E.¹⁷² This contract is peculiar not only for its selection of English law as the governing law, but also for its unusual fusion of a forum selection clause with an arbitration clause. In that regard it selects English courts as the default forum while at the same time specifically providing for arbitration under the ICC Rules in London.¹⁷³ To be sure, the jurisdiction of such an ICC arbitral tribunal is neither exclusive nor concurrent. It is formulated in such a way that disputes arising out of the loan agreement go to English courts, provided that such disputes do not, for unspecified reasons, fall within the jurisdiction of the arbitral tribunal.

Finally, the Indian Exim Bank also offers its own unique dispute

¹⁶⁶ See General Conditions Applicable to Development Credit Agreements, INT'L DEV. ASS'N sec. 10.03 (Jan. 1, 1985), https://www.documentcloud.org/documents/20513305-gc_ida_1985_a2004 [<https://perma.cc/6N37-DTPG>].

¹⁶⁷ *Id.* at 10.03(k).

¹⁶⁸ See Loan Agreement between the Republic of Cameroon and the African Development Bank for the Rumpi Area Participatory Development Project (Jan. 8, 2004) (on file online at https://www.documentcloud.org/documents/20485033-cmr_2004_30) [<https://perma.cc/MM6S-7SJQ>].

¹⁶⁹ See General Conditions applicable to Loan, Guarantee and Grant Agreements of the African Development Bank and the African Development Fund, AFR. DEV. BANK AFR. DEV. FUND (Feb. 2009), https://www.documentcloud.org/documents/20513300-gc_afdb_adf_2009 [<https://perma.cc/F57B-VK6C>].

¹⁷⁰ *Id.* at sec. 10(04)(c).

¹⁷¹ *Id.* at sec. 10(05).

¹⁷² Individual Loan Agreement between the Republic of Cameroon and Deutsche Bank S.A.E.k (Sept. 13, 2016) (on file online at https://www.documentcloud.org/documents/20488059-cmr_2016_505) [<https://perma.cc/AWK2-AFG9>].

¹⁷³ See *id.* at arts. 33-34.

settlement model.¹⁷⁴ It not only selects Indian law as the applicable law but also selects Mumbai as the seat of the arbitration and the Indian Arbitration Act of 1996 as the applicable procedural law.¹⁷⁵ This is comparable to the China-Exim Bank's three models that select Chinese law and Chinese forum. Neutrality does not appear to be a consideration in either case.

d. A Comparative Summary

The Chinese and non-Chinese loan instruments profiled above not only have their own choice of law, forum, seat, venue, institution and rules of procedure, but also their own waivers of immunity and mechanisms of enforcement of court judgments or arbitral awards. Although there is some diversity across these loan instruments in terms of their choice of law, arbitral rules and institutions, in the China-Africa loan composition the selection of non-Chinese law and non-Chinese forum appears to be the exception. The non-Chinese loan instruments are as diverse as the number of lenders, though, notably, the Indian Exim Bank's approach is strikingly similar to the Chinese Exim Bank's in its choice of law and seat selection.

Financial institutions, such as the World Bank and the African Development Bank are remarkable for elevating the loan agreements to the level of a public international law treaty governed by international law and granting the important default appointment authority to the ICJ president in the case of World Bank, and the Secretary General of the PCA in the case of the ADB.

Finally, contrary to what is often suggested, it could be safely concluded that the Chinese loan contracts offer no evidence that China orders its affairs any differently than others. These contractual instruments are remarkable only for their similarity to non-Chinese loan instruments, especially as far as choice of law and dispute settlement are concerned. Albeit similar in all material respects, this conclusion would not be complete without emphasizing the unilateral choice of law and forum by the creditor in most of the Chinese loan agreements, particularly by the most important lender, i.e., the China Exim Bank.

VI. CHINA-AFRICA PROJECT CONTRACTS AND DISPUTE SETTLEMENT

Beyond trade, investment, and loan agreements, Chinese enterprises operate mining, petroleum, construction, engineering and other types of commercial projects worth hundreds of billions of dollars in all parts of

¹⁷⁴ See Dollar Credit Line Agreement between The Government of the Republic of Cameroon and the Export-Import Bank of India (Apr. 20, 2009) (on file online at https://www.documentcloud.org/documents/20485432-cmr_2009_190) [<https://perma.cc/6QPR-R3DW>].

¹⁷⁵ See *id.* at 23.

Africa. The construction projects alone were estimated at approximately US \$46 billion in 2019 alone.¹⁷⁶ All of these China-Africa projects are implemented through a web of thousands of contractual instruments, presumably each with its own dispute settlement provision. Indeed, dispute settlement planning for project contracts is more important than in trade, investment and loan agreements as these mining, construction and other types of projects are more prone to disputes. Further, they demand more immediate resolution for specific projects to succeed.

The texts of these project contractual instruments are difficult to find as most are confidential or have no particular reason for disclosure or publication. The very few that could be accessed relate to mining and hydrocarbon operations. These contracts offer a small window through which certain general observations could be made.

The first example is the Chambishi Mine Development Agreement between the Government of the Republic of Zambia and China Nonferrous Metal Industries Foreign Engineering and Construction Corporation (Group).¹⁷⁷ This mining contract has an elaborate dispute settlement clause.

As a preliminary matter, the chosen applicable law is Zambian law supplemented with international law where relevant.¹⁷⁸ The core of the dispute settlement provision states:

GRZ and NFCA [the Chinese party] hereby consent to submit to the International Centre for Settlement of Investment Disputes (the Centre”) any Dispute for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “Convention”). Arbitration shall be held in London, or such other place as the Parties may agree in writing.¹⁷⁹

It further states that “[a]ny arbitration proceeding pursuant to this Agreement shall be conducted in accordance with the arbitration rules of the Centre in effect on the date on which the proceedings instituted.”¹⁸⁰ It also provides for the irrevocable waiver of immunity, including for purposes of enforcement of arbitral awards,¹⁸¹ while limiting the waiver for

¹⁷⁶ See China Africa Research Initiative, *Data: Chinese Contract Revenues in Africa*, <http://www.sais-cari.org/data-chinese-contracts-in-africa> (last visited June 13, 2021) [<https://perma.cc/Z8LD-L3QH>].

¹⁷⁷ Contract between The Government of the Republic of Zambia, NFC Africa Mining PLC and China Nonferrous Metal Industry’s Foreign Engineering and Construction Corporation (June 29, 1998) (on file online at <https://www.resourcecontracts.org/contract/ocds-591adf-3064471719/view#/>) [<https://perma.cc/SV8H-3TRU>].

¹⁷⁸ *Id.* at art. 20(1).

¹⁷⁹ *Id.* at art. 19(2).

¹⁸⁰ *Id.* at art. 19(5).

¹⁸¹ *Id.* at art. 91(7).

purposes of execution to specific properties located outside of Zambia.¹⁸²

A more recent but similar resource contract is one between the Government of the Republic of Liberia and China Union Mining Co.¹⁸³ Like the Zambian mining agreement, it is also governed by local law with international law playing a supplemental role.¹⁸⁴ The arbitration clause stipulates the use of UNCITRAL Rules, with the arbitration administered by the ICC in Singapore and conducted in the English language.¹⁸⁵ Most notably, the contract constrains the tribunal's power to award specific performance.¹⁸⁶ Another good example is the petroleum production sharing agreement between Sonangol and China Sonangol International.¹⁸⁷ The dispute resolution provision stipulates Angolese substantive law as the governing law,¹⁸⁸ Portuguese as the language of the arbitration, and Luanda as the seat of the arbitration.¹⁸⁹ Otherwise, it is an *ad hoc* arbitration with a waiver of immunity¹⁹⁰ and operating under UNCITRAL Rules with the default presiding arbitrator appointment authority given to the ICC.¹⁹¹

The above examples show that details are negotiated on a case-by-case basis, despite having generally similar structures. While both the Angolese and Liberian models select the respective country's domestic law as the governing law and UNCITRAL Rules administered by the ICC, they differ on the selection of the seat; one selects its own capital (Luanda), the other a more neutral forum (Singapore).

A look at another example confirms the observation that the dispute settlement provisions in these contracts with African states lack uniformity, even when they are incorporated in the same or similar model contracts. Consider the CAMAC Energy Kenya Limited mining concession agreement.¹⁹² Although the contract itself appears to be the same model, its

¹⁸² *Id.* at art. 19(8).

¹⁸³ Min. Dev. Agreement Between the Gov't of the Republic of Liberia, China-Union (Hong Kong) Mining Corp., and China-Union Inv. (Liberia) Bong Mines Corp., (Jan. 19, 2009), (on file online at <https://www.resourcecontracts.org/contract/ocds-591adf-6387856838/view#/text>) [<https://perma.cc/9S4S-J928>].

¹⁸⁴ *Id.* at sec. 29.

¹⁸⁵ *Id.* at sec. 26.1(a)–26.5.

¹⁸⁶ *Id.* at sec. 26(8).

¹⁸⁷ Prod. Sharing Cont. Between the CIE Angola Block 20 LTD, BP Expl. Angola (Kwanza Benguela) Ltd., and China Sonangol Int'l Holding Ltd., (2012), (on file online at <https://www.resourcecontracts.org/contract/ocds-591adf-0014595575/view#/pdf>) [<https://perma.cc/J4A5-BLUD>].

¹⁸⁸ *Id.* at art. 41(4): The arbitration tribunal shall decide according to the Angolan substantive law.

¹⁸⁹ *See id.* at art. 41(5): The arbitration tribunal shall be set up in Luanda, shall apply Angolan law, and the language of arbitration shall be Portuguese.

¹⁹⁰ *Id.* at art. 41(6):

¹⁹¹ *Id.* at art. 41(3).

¹⁹² Prods. Sharing Cont. Between the Gov't of the Republic of Kenya and CAMAC

dispute settlement clause is markedly different. While consistent with the previously profiled two contracts in selecting the law of the host state as the governing law,¹⁹³ it diverges from both by selecting the ICSID Secretary-General as the default appointing authority. It further adds to the diversity by selecting a third country in Africa as the seat of the arbitration.¹⁹⁴

VII. CHINA-AFRICA COMMERCIAL DISPUTES

Cross-border deals often grapple with transnational legal regimes that make dispute resolution difficult. Beyond the common jurisdictional, cultural, and other legal problems that all transnational commercial deals face, the China-Africa deals face additional complexities because they are relatively new, too hastily created, and often shaped by a combination of evolving yet fragmented domestic legal regimes and emerging transnational harmonization regimes.¹⁹⁵

a. Court Litigation

Although there are no specific statistics on the percentages of China-Africa commercial cases that are resolved by domestic court litigation or alternative means of dispute resolution such as arbitration, it seems reasonable to assume that a significant proportion of them are resolved through court litigation. For example, Oxford Professor and expert in this

Energy Kenya Ltd., Kenya-Camac Energy Kenya Ltd., arts. 40–41, (2012), (on file online at <https://www.resourcecontracts.org/contract/ocds-591adf-8841781775/view#/pdf>) [<https://perma.cc/ZJP6-BDSK>].

¹⁹³ *Id.* at art. 40.

¹⁹⁴ *Id.* at art. 41.

¹⁹⁵ Matthew Erie, *Chinese Law and Development*, 62 HARV. INT'L L.J. 51, 52-60 (2020) (discussing the complexity of China-Africa deals). As Matthew Erie reports:

The CICLA survey reports provide two main insights. First, survey respondents indicated that “the unstable legal system” and “incomplete legal systems of host states” were major risks. Second, respondents self-reported the frequency of their legal disputes. The main errors committed by Chinese enterprises are inadequate information gathering and due diligence as well as a lack of familiarity with the legal systems of host states; consequently, the self-reported figures of legal conflicts are high. For example, 50 percent of respondents in the 2015 survey report state that they were involved in civil lawsuits or arbitration, and nearly 8 percent were involved in criminal lawsuits. In 2016, the number of firms involved in criminal lawsuits doubled, but then fell in 2017 (Table). There are a number of areas of law that appear problematic, including anti-trust investigations, environmental protection investigations, limits on foreign capital, labor, tax, intellectual property, and choice of law concerns. Another area of difficulty is public procurement. For example, in Eastern Europe, Chinese firms have committed public tender violations in such mega-projects as a highway in Poland¹⁵⁸ and a railway between Budapest and Bucharest. In part because of such frictions, investor-state disputes involving Chinese enterprises will no doubt multiply in the near term.

area, [Click here to enter text](#). Matthew Erie, reported that a survey conducted by the China Institute of Corporate Legal Affairs (CICLA) found that “50 percent of respondents in the 2015 survey report stated that they were involved in civil lawsuits or arbitration, and nearly 8 percent were involved in criminal lawsuits.¹⁹⁶ Given this, there is enough evidence to conclude that a substantial number of China-Africa disputes are indeed resolved through court litigation in China, Africa, and elsewhere.

b. Arbitration and Selected Institutions and Rules

The majority of Chinese loans and other commercial contracts discussed above choose CIETAC in Beijing. Many others opt for UNCITRAL. Few select ICC rules. Even fewer choose other institutions such as the ICSID and the LCIA.¹⁹⁷

In 2020, there were 3615 domestic and foreign-related cases spanning seventy-six jurisdictions,¹⁹⁸ nine of which are in Africa, including Algeria, Congo, Egypt, Ethiopia, Mauritius, Nigeria, Sudan, Tunisia and Zimbabwe.¹⁹⁹ CIETAC provides limited information about these cases and only discloses the general industry types. Of these cases, at least 136 are classified as non-financial loan contracts, 275 as financial, and 336 as construction disputes.²⁰⁰ These numbers are not differentiated between domestic and foreign cases.²⁰¹

Anecdotally, it appears that CIETAC awards are slowly making their way into the African judicial arena for enforcement. One example of this is a high court case in Tanzania for the enforcement of a CIETAC award.²⁰²

The other arbitral institutions do not publish data classified by China-Africa parties, although each publishes data by country or region in general terms. Evidently, some of these institutions are already overseeing some China-Africa cases. A good example is a \$2.3 billion deal between a Nigerian and a Chinese party, which was reported by GAR in January 2019 as being administered by the ICC.²⁰³

¹⁹⁶ *Id.* at 82-83.

¹⁹⁷ *See* sec. V(b) *supra*.

¹⁹⁸ CIETAC Statistics at <http://www.cietac.org/index.php?m=Article&a=show&id=17437&l=en> [<https://perma.cc/HSZ3-WH4M>].

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *See id.*

²⁰² *See, e.g.*, In the High Court of Tanzania (Commercial Division) at Dar Es Salaam Misc. Commercial Application No. 48 [2020] 6 (Tanz.).

²⁰³ *Tribunal hears claim over Nigerian-Chinese hydropower project*, GLOBAL ARBITRATION REVIEW (Jan 11, 2019), <https://globalarbitrationreview.com/tribunal-hears-claim-over-nigerian-chinese-hydropower-project> [<https://perma.cc/U9UX-WSQL>].

c. Developing China-Africa Institutions and Rules

Efforts are being made to create dispute settlement centers with a specific focus on Africa. The most notable of these are the China-Africa Joint Arbitration Centers in China and Africa. The CAJAC is a collaborative effort of the Arbitration Foundation of Southern Africa, Association of Arbitrators Southern Africa, Africa ADA, and Shanghai International Economic and Trade Arbitration Commission (also known as the Shanghai International Arbitration Center or SHIAC).²⁰⁴

The CAJAC has China-Africa specific jurisdiction although it does not exclude consent-based jurisdiction over parties that fall outside of the territorial scope. Although there is indication that some China-Africa project contracts along the Belt and Road Initiative are reported to have selected CAJAC,²⁰⁵ there are no reports of China-Africa cases being administered by CAJAC as of this writing.²⁰⁶

In June 2017, under the same coordination of the China Law Society, the Beijing International Arbitration Commission and the Nairobi Centre for International Arbitration (NCIA) set up the China-Africa Joint Arbitration Centre, CAJAC – Beijing and CAJAC – Nairobi.²⁰⁷

The others are CAJAC Shenzhen Court of International Arbitration and CAJAC – OHADA.²⁰⁸ There are now six CAJACs. They are: CAJAC Johannesburg under the auspices of the Arbitration Foundation of Southern Africa (AFSA); CAJAC Nairobi under the auspices of the Nairobi Centre for International Arbitration (NCIA); CAJAC Beijing under the auspices of

²⁰⁴ See details about CAJAC at http://www.shiac.org/CAJAC/aboutus_E.aspx?page=3 [<https://perma.cc/2YAX-AUQU>].

²⁰⁵ 一带 一路工程项目 争议解决机制调研报告, Yidai Yilu Xiangmu Zhengyi Jiejue Jizhi Diaoyan Baogao Belt and Road Project Controversy Resolution Mechanism Report, Beijing International Arbitration Center, 1, 18.

²⁰⁶ See <https://perma.cc/W5LW-42JT>CAJAC Johannesburg, <https://cajacjhb.com/> (last visited Sep. 12 2023).

²⁰⁷ See *New Chapter for China-Africa Arbitration Cooperation- Inauguration of China-Africa Joint Arbitration Centre Nairobi Center and the First Nairobi Nationwide Dispute Resolution Conference*, BEIJING ARBITRATION COMMISSION AND BEIJING INTERNATIONAL ARBITRATION CENTER, <https://www.bjac.org.cn/english/news/view?id=3250> [<https://perma.cc/QYZ9-4MT9>].

²⁰⁸ See CAJAC Shenzhen, <http://www.scia.com.cn/index.php/En/Index/service/id/19.html> [<https://perma.cc/UE3Q-5XVF>] (last visited Sep. 12, 2023). (“In December 2015, the 51 member countries of the Forum of China-Africa Cooperation published an Action Plan and decided to set up the China-Africa Joint Arbitration Centre (CAJAC) in order to settle potential disputes for natural and legal persons in China and Africa via an appropriate mechanism. It was also hoped that it could promote and encourage the growth of trade and investment between China and Africa. The CAJAC consists of 6 members, including the Arbitration Foundation of Southern Africa (AFAS), the Shanghai International Arbitration Center, the Beijing International Arbitration Center, the Shenzhen Court of International Arbitration, the Nairobi International Arbitration Centre and the Organization for the Harmonization of Business Law in Africa (OHADA).”).

the Beijing International Arbitration Centre (BIAC); CAJAC Shanghai under the auspices of the Shanghai International Arbitration Centre (SHIAC); CAJAC Shenzhen under the auspices of the Shenzhen International Court of Arbitration (SCIA)²⁰⁹

Asked about the genesis of these CAJACs, the CEO of CAJAC-Johannesburg on November 20, 2018 stated:

In June 2015, the Beijing Consensus, reflecting the views of Chinese and African stakeholders, was signed in Beijing and the decision was taken to establish, with immediate effect, a Sino-African arbitration mechanism to facilitate, safeguard and enhance Sino-African trade and investment.

In December 2015 the Forum on China-Africa Cooperation (FOCAC) representing 50 African States and China, agreed to a program of mutual cooperation and committed to the establishment of CAJAC.

CAJAC is therefore not an arbitration authority standing by itself, but an integral part of the support structure specially crafted to foster trade and investment between China and Africa.²¹⁰

Uniform Rules of CAJACs have been adopted by all six centers in 2020.²¹¹

As Mr. Beukes has confirmed, some China-Africa contracts²¹² have already selected CAJACs. It would seem that it will only be a matter of time before cases are referred to these centers. The following section examines the salient features of the newly adopted Uniform Rules of CAJAC.

²⁰⁹ Princesse Mabiala, *Chinese Africa Joint Arbitration Center: A Solution to Trade Disputes between Africa and China*, THE ARBITRATION BRIEF (Feb. 11, 2019), <https://the Arbitration Brief.com/2019/02/11/chinese-africa-joint-arbitration-center-a-solution-to-trade-disputes-between-africa-and-china%EF%BB%BF/> [<https://perma.cc/XKP5-AWN5>].

²¹⁰ Sadaff Habib, *Interview with Deline Beukes, CEO of the CAJAC-Johannesburg*, KLUWER ARBITRATION BLOG (Nov. 26, 2018), p. 1, <http://arbitrationblog.kluwerarbitration.com/2018/11/26/interviews-with-our-editors-interview-with-deline-beukes-ceo-of-the-china-africa-joint-arbitration-centre-johannesburg/> [<https://perma.cc/XKP5-AWN5>] [hereinafter Sadaff Habib *Interview with Deline Beukes, CEO of the CAJAC-Johannesburg*].

²¹¹ See China-Africa Joint Arbitration Centre (CAJAC) Rules, https://cajacjhb.com/wp-content/uploads/2020/10/CAJAC_Rules_2020.pdf [hereinafter CAJAC Uniform Rules] [<https://perma.cc/5AYT-M9P4>].

²¹² Sadaff Habib *Interview with Deline Beukes, CEO of the CAJAC-Johannesburg* at question 6. (“we are aware that CAJAC clauses are being incorporated in commercial contracts by banks, financial institutions and in other commercial contracts.”).

d. The Uniform Rules of CAJAC

The necessity for China-Africa focused dispute settlement has long been acknowledged; some scholars have even proposed specific African Union-based Centers.²¹³ However, China-Africa policymakers have chosen a diffused semi-autonomous structure that leverages existing institutional capabilities in China and Africa. It is a unique design that could potentially address the concerns that some have expressed as “stranger justice” in European capitals.²¹⁴

i. Structure of the CAJAC

Structurally, the CAJAC “operates through its accredited Centers in China and Africa.”²¹⁵ Although there is no publicly available information about the official accreditation system or process, the few references to accreditation in the public arena would suggest that the accreditation comes from the 51-member FOCAC. The first such suggestion is in the Uniform Rules themselves. The very first provision reads:

1.1 The China Africa Joint Arbitration Centre (CAJAC) has been established at the instance of the Forum of China Africa Cooperation (FOCAC) to administer the resolution of international disputes arising between Chinese and African entities having the principal residence, place of business, or nationality located in China or a country in Africa.²¹⁶

The description by the Arbitration Foundation of South Africa (AFSA), umbrella to CAJAC-Johannesburg, would confirm this suggestion. It reads in pertinent part:

In December 2015, the fifty-one nation state members of the Forum of China Africa Cooperation (FOCAC) published an Action Plan in which it was resolved to establish the China Africa Joint Arbitration Centre (CAJAC) in order to facilitate and encourage the growth of trade and investment between China and Africa by providing for an appropriate mechanism to resolve disputes which might arise between Chinese and African entities whether natural, legal, public or private. AFSA was given the responsibility, in partnership with the Shanghai International Arbitration Centre (SHIAC), to establish the China-Africa Joint Arbitration Centre (CAJAC), initially operating out of Johannesburg and Shanghai. CAJAC Johannesburg was launched in November 2015 and the CAJAC partnership has since grown to include the Beijing International Arbitration Centre

²¹³ See Kidane, *supra* note 61.

²¹⁴ WON KIDANE, *THE CULTURE OF INTERNATIONAL ARBITRATION* (2017).

²¹⁵ See CAJAC Uniform Rules, *supra* note 211, at art. 1(2).

²¹⁶ *Id.* at art. 1(1).

(BIAC), the Shenzhen International Court of Arbitration (SCIA) and the Nairobi Centre for International Arbitration (NCIA), and OHADA the interstate Business Organisation and dispute resolution authority in West and Central Africa.²¹⁷

CAJAC also has a Guiding Committee. Its status, composition, and responsibilities are not yet clear although the Uniform Rules state that the Rules themselves come into force on a date fixed by the CAJAC Guiding Committee.²¹⁸

The rules indicate that each CAJAC has its own Secretariat, which administers the arbitration, but CAJAC does not have a court of arbitration of the kind that the ICC has.²¹⁹ In terms of the allocation of cases among the different Centers, the rules indicate that when the parties' choice is not clear, the "Centre which accepts the request for arbitration shall administer the case."²²⁰ This leaves many matters unclarified including the possibility of concurrent filings because it does not have the traditional temporal priority rule such as the "court first seized of the matter" rule. It simply says, "Center which accepts the request." The possibility that more than one could do so is not a matter only for the imagination, particularly in a situation where the Chinese party may want a center in China to administer the case while the African party wishes an African center to administer the matter. Under ordinary circumstances, neither Center would have the disincentive to decline accepting. It will only be a matter of time before rules such as this one are tested in reality. This rule is also likely to invite an element of unnecessary competition and court involvement for injunctions and counter-injunctions of the type that the *Elektrim* court handled in the United Kingdom.²²¹ This matter also spills into the jurisdiction realm discussed below.

ii. Jurisdiction of CAJAC

The overall jurisdiction of the CAJACs is geographically predetermined. They can only administer cases for the "resolution of international disputes arising between Chinese and African entities having the principal residence, place of business, or nationality located in China or a country in Africa."²²² The place of incorporation and the principal place of residence are the two major determinants. This means, for example, a dispute between an African state and a company incorporated in Hong

²¹⁷ THE ARBITRATION FOUNDATION OF SOUTHERN AFRICA (AFSA), <https://arbitration.co.za/a-brief-history/> (last visited June 13, 2021).

²¹⁸ CAJAC Uniform Rules, *supra* note 211, at art. 67.

²¹⁹ *See id.* at art. 1(4).

²²⁰ *See id.* at art. 1(3).

²²¹ *See Elektrim SA v Vivendi Universal SA* (2007) EWHC 571 (Comm) (U.K.).

²²² CAJAC Uniform Rules, *supra* note 211, at art. 1(1).

Kong that does not have a place of business in China or Africa may not be accepted by the Centers even if they have an agreement selecting one of such Centers. This rule is not included under jurisdiction but under the structure of the institution. The jurisdictional provision is limited to the question of arbitrability and the choice of law for that.

The jurisdiction of the Center under the Uniform Rules, “[w]here a party approaches a CAJAC Centre in terms of an arbitration agreement to resolve a dispute in terms of that agreement or the parties to a dispute approach a CAJAC Centre to resolve a dispute, that Centre shall have jurisdiction if the matter is arbitrable under the law of the place of arbitration agreed to by the parties or failing which under the mandatory law applicable at the domicile of that Centre.”²²³

Read with the previous provision that says any Center that accepts the filing would have jurisdiction, a party that worries about the question of arbitrability under the laws of one Center’s jurisdiction would simply file the case where the arbitrability laws are more forgiving as long as the other Center accepts it.

The power to decide on the jurisdiction of the Center to administer the case is split between the Center that is seized of the matter and the arbitral tribunal, if it is constituted.²²⁴ The Rules give the Center or the tribunal a delegated jurisdiction, where “[t]he arbitral tribunal may make its decision on jurisdiction either during the arbitration proceedings or in the arbitral award.”²²⁵

There appears to be a concurrent, albeit temporally staggered, authority to decide the jurisdiction of the Center to administer the case—on determination if the parties are from China or Africa—as well as the jurisdiction of the tribunal—regarding whether the arbitration agreement is valid. The Rules appear to conflate these issues in one provision, giving the appearance that either one can decide either jurisdictional question as long as the Center authorizes the tribunal. For example, there does not appear to be a need for authorization from the tribunal to the Center for it to decide the validity of the agreement.²²⁶ This is a question that is typically left for the tribunal.

iii. Arbitrators, Tribunal, Representatives, and Seats

Perhaps the most impactful feature of the CAJAC will be its exclusive

²²³ *Id.* at art. 2.

²²⁴ *Id.* at art. 9(4).

²²⁵ *Id.* at art. 9(3).

²²⁶ *See id.* at art. 9(1). The rules on the allocation of jurisdiction between the Center and the tribunal appear to anticipate that both would have jurisdiction to decide this question. This is not a common formulation and even appears to be an erroneous formulation given the fact that CAJAC does not even have a court of arbitration.

reliance on arbitrators on a joint roster, as Article 24 of the Uniform Rules seems to suggest.²²⁷

Although the roster has not been made public yet, it is fair to expect that it will consist of a fairly diverse pool of qualified arbitrators, without regard to nationality but with consideration of China-Africa connections and expertise. Although the provision on the roster contains no reference as to the exact qualifications, it is a broadly permissive provision on representatives that is indicative of the absence of unnecessarily restrictive appointment rules.²²⁸

Under the Rules, the Center's role in the appointment of arbitrators is unusually robust. For example, Article 26 states that "[u]nless otherwise agreed by the parties, within fifteen (15) days from the date of receipt of the Notice of Arbitration, the Claimant and the Respondent shall each appoint, or entrust the CAJAC Centre to appoint, an arbitrator, failing which, the arbitrator shall be appointed by the CAJAC Centre."²²⁹

This is problematic for at least three reasons. First, fifteen days is usually too short to identify the right arbitrators and get their consent and clear conflict issues under all circumstances. Second, it puts the Respondent at a serious disadvantage because the Respondent is presumably being forced to select arbitrators without the benefit of knowing the Claimant's appointee. Third, the Center steps in far too quickly as a matter of a default rule to make the appointment on behalf of the parties; the Claimant would have had more time to think about arbitrators before even filing the Request for Arbitration.

Equally problematic is the Center's default jurisdiction to appoint the presiding arbitrator, which states:

Unless otherwise agreed by the parties, within fifteen (15) days from the date of the Respondent's receipt of the Notice of Arbitration, the parties shall jointly appoint or jointly entrust the CAJAC Centre to appoint the presiding arbitrator, failing which, the presiding arbitrator shall be appointed by the CAJAC Centre. Where any party expressly waives in writing the right to jointly appoint or jointly entrust the CAJAC Centre to appoint the presiding arbitrator, the presiding arbitrator shall be appointed by the CAJAC Centre, not subject to the above time-limit.²³⁰

The default appointment power is triggered too quickly. There are no adequate safeguards in the Rules except regarding the parties' agreement. The parties' agreement does not usually contain any guidance on this,

²²⁷ *Id.* at art. 24.

²²⁸ *Id.* at art. 22.

²²⁹ *Id.* at art. 26(2).

²³⁰ *Id.* at art. 26(2).

which is often the reason why there needs to be a reasonable level of consultation with the parties by the Center before making this extremely important appointment. The temporal scope is simply not long enough to conduct any meaningful work to identify an acceptable chair.

All of these rules are obviously operationalized in relation to the *lex arbitri loci*, which under Article 4 of Rules on the place of arbitration, is determined on the basis on which the Center accepts the Request for Arbitration.²³¹

iv. Proceedings

The Rules require the Claimant to attach “*all* evidentiary materials in the support of the claim and for the identification of the Claimant” with the Request for Arbitration,²³² but only requires the Respondent to provide “evidentiary materials in support of the defense.”²³³ It is clear that both parties would subsequently have sufficient opportunities to develop the evidentiary record, but the use of “*all*” and the mandatory “*shall*” in the provision could in some cases lead to controversy about the timeliness of evidentiary filing.²³⁴ Moreover, the pleading standard that the provision adopts seems unnecessarily and impracticably exhaustive for an initial arbitral pleading.

Interestingly, while the Rules recognize that “each party shall bear the burden of proving the facts upon which its claims” rely,²³⁵ it gives the Tribunal a broad power to assign the burden of proof.²³⁶ This is obviously a matter for the applicable law; this provision may make sense if it is interpreted to mean that the applicable law leaves room for discretion in the assignment or perhaps for shifting the burden of proof, which is a serious matter in arbitration and litigation.

Although the Rules are not extraordinary by any measure, they contain some traces of inspiration from the CIETAC Rules. The Rules pertaining to evidence offer the best indication of this. One such example, which appears to be unique to Chinese arbitral institutions, is the formulation of the consequences of failing to meet the burden of proof.²³⁷

More importantly, the Rules appear to lean in the investigative and

²³¹ See *id.* at art. 4(2).

²³² *Id.* at art. 10(3).

²³³ *Id.* at art. 13(3).

²³⁴ *Id.* at art.10(3).

²³⁵ *Id.* at art. 39(2).

²³⁶ *Id.*

²³⁷ Compare *id.* at art. 30(3), and CIETAC Arbitration Rules art. 41(3), <http://www.cietac.org/Uploads/201902/5c6148b100105.pdf> [<https://perma.cc/ZD2G-Y5J3>] [hereinafter CIETAC Rules].

inquisitorial direction.²³⁸

At first, this gives the impression that the consent of both parties would be required to empower the tribunal to conduct its own investigation, which includes hiring its own expert.²³⁹ A close reading suggests, however, that the tribunal can appoint an expert if one party requests even if the other opposes the appointment because the rule says: “where a party requests and the tribunal agrees.” This suggests that the tribunal needs the request of only one party to appoint an expert.

The corresponding CIETAC Rule is clearer. It gives the discretion to the tribunal where the parties fail to agree, stating that “[u]nless otherwise agreed by the parties, the arbitral tribunal may adopt an inquisitorial or adversarial approach in hearing the case having regard to the circumstances of the case.”²⁴⁰

v. Confidentiality

As a matter of general rule, the arbitral proceedings “shall not be open to the public unless the applicable law otherwise requires.” It is unclear what law this provision refers to, but most likely such reference is to the *lex arbitri* of the place of arbitration. The Rules seem to subject the “oral hearing” to a different rule, stating:

Where an oral hearing is not to be open to the public, the parties and their representatives, witnesses, interpreters, arbitrators, experts consulted or appraisers appointed by the arbitral tribunal, persons recording the oral hearings, staffs of the CAJAC Centre and other relevant persons shall keep any substantive or procedural matters relating to the case confidential, unless otherwise stipulated under the applicable law.²⁴¹

CIETAC’s confidentiality rule is again simpler and focuses only on the hearing: “[h]earings shall be held in camera. Where both parties request an open hearing, the arbitral tribunal shall make a decision.”²⁴²

A clear and more complete confidentiality rule would cover all records of proceedings and allocate the power to keep the records and the hearing confidential to the parties, as well as provide a default rule if they disagree. In any case, ambiguity relating to confidentiality rules in arbitration rules is not uncommon.²⁴³

²³⁸ CAJAC-Uniform Rules, *supra* note 211, at art. 41(1).

²³⁹ *See id.* at art. 42(1).

²⁴⁰ CIETAC Rules, *supra* note 237, at art. 35(3).

²⁴¹ CAJAC Uniform Rules, *supra* note 211, at art. 63(3).

²⁴² CIETAC Rules, *supra* note 237, at art. 38(1).

²⁴³ *See, e.g.*, ICC (2021), <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/>; UNCITRAL Arb. Rules (2021),

vi. Award Scrutiny

Award scrutiny is a feature primarily associated with a few arbitral institutions, such as ICC and CIETAC. The CAJAC appears to have followed in their footsteps by providing:

The arbitral tribunal shall submit its draft award to the CAJAC Centre for scrutiny before signing. The CAJAC Centre may suggest modifications on the form of the draft award and may also draw the attention of the arbitral tribunal to substantive issues without affecting its independence.²⁴⁴

Both the ICC²⁴⁵ and CIETAC use more or less the same language on award scrutiny.²⁴⁶

e. *China International Commercial Court (CICC)*

Finally, a remarkable judicial innovation is unfolding in China—the China International Commercial Court (CICC).²⁴⁷ Although it is described by some as an insurance policy for Chinese investors²⁴⁸, it is officially created

[t]o try international commercial cases fairly and timely in accordance with the law, protect the lawful rights and interests of the Chinese and foreign parties equally, create a stable, fair, transparent,

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf.

²⁴⁴ CAJAC Uniform Rules, *supra* note 211, at art. 51.

²⁴⁵ See ICC Rules [hereinafter ICC Rules] art. 34, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_34 [<https://perma.cc/2AM8-DRA6>]. ICC Rules Article 34: Scrutiny of the Award by the Court: before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

²⁴⁶ See CIETAC Rules, *supra* note 237, at art. 51. Article 51 states: Scrutiny of Draft Award: The arbitral tribunal shall submit its draft award to CIETAC for scrutiny before signing the award. CIETAC may bring to the attention of the arbitral tribunal issues addressed in the award on the condition that the arbitral tribunal's independence in rendering the award is not affected.

²⁴⁷ The Supreme People's Court, *Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court*, CHINA INTERNATIONAL COMMERCIAL COURT [hereinafter CICC Rules] (June 27, 2018), <http://cicc.court.gov.cn/html/1/219/208/210/817.html> [<https://perma.cc/C9QK-CE64>].

²⁴⁸ See, e.g., Lance Ang, *International Commercial Courts and the Interplay Between Realism and Institutionalism: A Look at China and Singapore*, HARV. INT'L L.J. (2020). Available at <https://harvardilj.org/2020/03/international-commercial-courts-and-the-interplay-between-realism-and-institutionalism-a-look-at-china-and-singapore/> [<https://perma.cc/3VGY-8TW2>].

and convenient rule of law international business environment, and provide services and protection for the ‘Belt & Road’ construction, according to the Law on Organization of the People’s Courts of the People’s Republic of China, the Civil Procedure Law of the People’s Republic of China and other laws [].²⁴⁹

The judges are selected from among senior Chinese judges with proficiency in both Chinese and English, even though all cases are adjudicated in Chinese.²⁵⁰ The CICC Provisions permit the application of foreign law where the parties have selected the applicability of such by agreement²⁵¹ and provide for mechanisms of its ascertainment of foreign law.²⁵² One of the ways of ascertaining foreign law that has gotten attention—and perhaps has also caused confusion—and has perhaps caused confusion whether the CICC appoints foreign judges like its Singapore counterpart²⁵³—is the appointment of the International Commercial Expert Committee (ICEC).²⁵⁴ More pertinently, the CICC has already appointed four prominent African jurists to its panel of experts.²⁵⁵ Under its Provisions, their expertise would only be needed if a dispute that selects the law of their specific country is brought before the CICC.

Unlike Singapore—which is unconstrained by any sense of geopolitical and cultural competition—the boundaries of Chinese law and legal institutions are less flexible in accommodating innovations such as the inclusion of foreign jurists within the judiciary. As such, the CICC is a branch of the Supreme People’s Court (SPC), and all judges must be Chinese nationals.²⁵⁶ It appears that representatives of parties must also be members of the Chinese bar. While it seems that evidence may be submitted in English when the parties agree,²⁵⁷ the language of the proceedings is in Chinese, and presumably the judgment is also issued in Chinese.

²⁴⁹ CICC Rules, *supra* note 247.

²⁵⁰ *See id.* at art. 4.

²⁵¹ *Id.* at art. 7.

²⁵² *Id.* at art. 8.

²⁵³ Comprehensive information about the Singapore International Commercial Court (SICC) is available on its official website at <https://www.sicc.gov.sg/> [<https://perma.cc/3LAS-AP45>]. The SICC has several foreign judges who exercise direct judicial function. See at <https://www.sicc.gov.sg/about-the-sicc/judges> [<https://perma.cc/C53C-2C2G>]. For comparison with CICC Rules, *See* Ang, *supra* note 251.

²⁵⁴ *See* CICC Rules, *supra* note 247, at art. 8(4).

²⁵⁵ *See* Jevans Nyabiage, *China’s Top Court Appoints Four Africans to Legal Team for Handling Belt And Road Disputes*, S. China Morning Post, Dec. 14, 2020, <https://www.scmp.com/news/china/diplomacy/article/3113694/chinas-top-court-appoints-four-africans-legal-team-handling> [<https://perma.cc/VX3X-FXYC>].

²⁵⁶ CICC Rules, *supra* note 247, at art. 4.

²⁵⁷ *Id.* at art. 9.

The CICC represents a remarkable development in line with institutions like the SICC and some other similar European commercial courts.²⁵⁸ It appears to be proceeding with all deliberate speed. Ironically, although CICC is a judicial institution, its most significant innovation is not a judicial one; it is ADR. The CICC credibly internationalizes ADR, streamlines intra-ADR escalation, and provides concrete judicial support for enforcing outcomes of mediation, interim measures, and arbitral awards in ways rarely seen anywhere else.²⁵⁹

VIII. CONCLUSION

China's seeming lack of formality in regulating transnational economic affairs can be attributed more to the developmental stage of the Chinese legal system as a whole than anything else. Its economic development has been extraordinarily fast, leaving little time to create and refine legal doctrine that aligns with its current stage of economic advancement. For trade, China uses the WTO and conventional regional rules and institutions.²⁶⁰ For investment, it uses treaties that closely resemble those used by other nations with some modifications.²⁶¹ For loan contracts, it uses contract models that are not significantly different from what other states and institutions use; for project contracts, likewise.²⁶² The lack of creative legal adventurism has not only helped China's relatively harmonious economic progress but may have also unintentionally reassured others that China plays by existing rules.

The creation and refinement of culturally appropriate yet modern legal infrastructure is a difficult undertaking that requires a long time to materialize and mature. For example, the German Civil Code of 1896 famously took decades to complete after the Napoleonic Code of 1804.²⁶³ China has just recently adopted a Civil Code of its own on January 1, 2021,

²⁵⁸ For a discussion of other international commercial courts with similar characteristics, see Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA J. INT'L L. 225 (2020).

²⁵⁹ Singapore's agglomeration of the various dispute settlement processes is the most stable one. See Weixia Gu, *China's Law and Development: A Case Study of The China International Commercial Court*, 62 HARV. INT'L L.J. 67 (2021); Man Yip, *The Singapore International Commercial Court: The Future of Litigation*, 12 ERASMUS L. REV. 82, 83 (2019); Michael Hwang, *Commercial Courts and International Arbitration—Competitors or Partners?*, 31 ARB. INT'L 193 (2015).

²⁶⁰ See Sec. III(b) *supra*.

²⁶¹ For discussion of Chinese investment treaties, see generally Won Kidane, *China-Africa Bilateral Investment Treaties in Comparative Context*, 49 CORNELL INT. LAW J. 141 (2016).

²⁶² See Sec. (VI) *supra*.

²⁶³ See MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 41 (3d ed. 2007). The writings of German jurist Karl Llewellyn who fled Germany are believed to have significantly influenced American legal thought. See *id* at 43-44.

which has been decades in the making.²⁶⁴ The “law negative” phenomenon is thus primarily an indication of a gap in the stage of development of Chinese law. Nonetheless, China is actively participating in the development of international law through treaty-making and consolidation of custom and general principles of law in the areas of trade, investment, and commerce through its participation in dispute settlement. China has shown no interest in deviating from existing norms and institutions. All evidence so far indicates that China will continue to play by existing rules while refining and harmonizing its laws and legal institutions. There is no indication that China will engage in any creative exercise of legal normative development for hegemonic purposes or otherwise.

The conclusion would be incomplete without acknowledging the statistically significant frequency of China-centric dispute settlement choices in Chinese loans and other instruments. The selection of Chinese law and Chinese arbitral institutions is the same one-sidedness that Africans have been resisting in dealing with their more traditional Western economic partners. China must resist that temptation. The creation of the CICC and the appointment of African jurists on the panel of experts is a very welcomed development. The creation of the CAJAC is an even more welcomed and imminently useful development. However, this initiative will not succeed without genuine and sustained attention to its growth. The negative economic and goodwill consequences of the real or perceived lack of neutrality in dispute settlement cannot be overstated.

At the most practical level, economic relations between China and Africa continue to grow, albeit not as rapidly as anticipated ten years ago. The number of disputes referred for formal resolution has also remained relatively low and indeed lower than expected. The development of rules and institutions evolved at a slower pace than expected. The question remains whether China views Africa the same way that it did ten years ago. The developments discussed in each section of this article tell a story of path-dependency, reduced enthusiasm, and a measure of optimism that is increasingly more cautious.

²⁶⁴ The Civil Code of the People’s Republic of China is available at http://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html [<https://perma.cc/8JN4-KZXP>]. The Civil Code was passed at the third session of the 13th National People’s Congress on May 28, 2020, and took effect on January 1, 2021.