

**UNIVERSITY OF CAPE TOWN  
FACULTY OF LAW**



**Chinese Investments in Africa: Evaluating, How The  
FOCAC Multilateral Framework Contributes to Legal  
Cooperation.**

By

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Research dissertation presented for the approval of the Senate in partial fulfilment of the requirements for the Master of Laws degree in Commercial Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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## DECLARATION

I, Lee-Anne Paula Frascia, declare that 'Evaluating the FOCAC multilateral framework's impact on China-Africa legal cooperation' is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

I hereby declare that I have read and understood the regulations governing the submission of Master Philosophy of Laws in Commercial Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

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Date: 15 March 2021

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## ABSTRACT

Chinese investments in Africa, are visible in almost all African Countries.<sup>1</sup> In many ways, one could claim, China's commercial activities in Africa has rebranded its image from a dark and desolate continent to an upcoming economic hub. To compliment these commercial activities, the Forum on China-Africa Cooperation (FOCAC) was established in 2000 and played an instrumental role in enhancing the investment relationship between the two sides.<sup>2</sup> However, this increase of investments, inevitably led to the surge of Africa-China investment disputes. The settlement of these disputes, faces many challenges in domestic and international legal frameworks. Therefore, this paper aims to analyse the FOCAC platform's contributions in settling Africa-China investment disputes.

The requirement for an effective dispute settlement mechanism, is also imperative for Africa-China economic relations. This could, ensure that the commercial relationship between the two sides, endures continuously and yields ample mutual benefits. According to the African Development Bank Group, Africa has an infrastructure gap of approximately USD93 billion.<sup>3</sup> Thus, African Countries are reliant on Chinese investments because most of these investments focus on developing roads, railways, bridges, airports amongst others.<sup>4</sup> Infrastructure remains a quintessential component regarding economic stimulation and growth. However, many of these infrastructural investments experiences complexities such as quality control checks, environmental damages, unfair labour practices to name a few.<sup>5</sup> Therefore, it is important to establish a dispute settlement forum, which is affordable, easily accessible, non-bias, fast and reliable inter alia.

Moreover, many benefits are attributable to Africa-China investments such as the creation of employment, building of key infrastructures and transfers of skills to name a few.<sup>6</sup> Considering that, the FOCAC forum significantly boosted economic developments between the two parties, it is worthwhile to investigate its responses to the overwhelming rates of investment disputes.

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<sup>1</sup> Harry Broadman 'Africa's Governing Elite Share The Blame For China's 'Belt, Road' Debt Crisis' available at <https://www.forbes.com>, accessed on 10 February 2021.

<sup>2</sup> Jessica Marsh 'Supplying the World's Factory: Environmental Impacts of Chinese Resource Extraction in Africa' (2015) 28;2 *Tulane Environmental Law Journal* 396.

<sup>3</sup> Economic Brief 'Infrastructure Deficit and Opportunities in Africa' *The African Development Bank Group Chief Economist Complex* September 2010 at 2, available at <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications>, accessed on 18 March 2020.

<sup>4</sup> *Ibid.*

<sup>5</sup> Mark Klaver & Michael Trebilcock 'Chinese Investments in Africa' (2011) 4;1 *Law and Development Review* 168.

<sup>6</sup> *Ibid.*

## ABBREVIATIONS

AALCO	Asian-African Legal Consultative Organization
ADR	Alternative Dispute Resolutions
AfCFTA	African Continental Free Trade Agreement
Africa-China	African Countries and the People's Republic of China
AFSA	Arbitration Foundation of Southern Africa
BIT's	Bilateral Investment Treaties
BRI	Belt and Road Initiative
CAJAC	China-Africa Joint Arbitration Centre
CCP	Chinese Communist Party
CRICA	Cairo Regional Centre for International Commercial Arbitration
CRICC	Cairo Regional Centre for International Commercial Affairs
FDI	Foreign Direct Investments
FOCAC	Forum on China-Africa Cooperation
FTT	Forced Technology Transfer
GATS	General Agreement on Trade in Service
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investments
IIA's	International Investment Agreements
LDC's	Least Developed Countries
MFN	Most Favored Nation Principle
MOFCOM	China's Ministry of Commerce
NCIA	Nairobi Centre for International Arbitration
NEPAD	New Partnership for Africa's Development
NTP	National Treatment Principle
OHADA	Organisation for the Harmonization of Business Law in Africa
PRC	People's Republic of China
RCICAL	Regional Centre for International Commercial Arbitration
SOE's	State Enterprises
TRIMs	Trade-Related Investment Measures
UNCTAD	United Nations Conference on Trade and Development
UN	United Nations
WTO	World Trade Organization

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## 1.1 Background of the Study

“China will work with other countries to build a community with a shared future for mankind, forge partnerships across the world, enhance friendship and cooperation, and explore a new path of growing state-to-state relations based on mutual respect, fairness, justice and a win-win cooperation”<sup>7</sup>

- President Xi Jinping

In the year 2000, the Africa-China partnership reached a Significant milestone when ministers from China and representatives from 44 African Countries attended the first inauguration of the Forum on China Africa Cooperation (FOCAC) in Beijing.<sup>8</sup> This platform serves as the official forum between China and all African Countries with the exception of Eswatini, covering a multitude of areas related to commercial, political and legal relations.<sup>9</sup> The FOCAC platform functions as a multilateral organization, where both parties negotiate and discuss issues pertaining to different interests, such as development and cooperation to name a few.<sup>10</sup> However, no legal obligations arises from this forum, nor are the outcomes of the FOCAC processes legally binding on either side.<sup>11</sup> Therefore, the implementation of investment agreements undertaken at the FOCAC forum, are often concluded bilaterally between China and the respective African countries.<sup>12</sup>

In some ways, one can define investments as every kind of asset such as property, rights and interests of every nature.<sup>13</sup> Chinese investments in Africa are diverse and spreads across many sectors. However, Dr Xiaofang Shen (who is a senior visiting scholar at the John Hopkins University under the China Studies Program), discovered that Chinese investments in Africa are

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<sup>7</sup> Xinhua ‘Full text of Chinese President Xi Jinping's speech at opening ceremony of 2018 FOCAC Beijing Summit’ *XINHUANET* 9 September 2018, available at [http://www.xinhuanet.com/english/2018-09/03/c\\_129946189.htm](http://www.xinhuanet.com/english/2018-09/03/c_129946189.htm), accessed on 20 January 2021.

<sup>8</sup> Ibid.

<sup>9</sup> Timothy Webster ‘China’s human rights footprint in Africa’ (2013) 51;3 *Columbia Journal of Transnational Law* 648.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Johanna Jansson ‘Africa the land of myth and miracle’ available at <https://www.sun.ac.za/ccs>, accessed on 20 May 2020.

<sup>13</sup> Barton Legum ‘Defining Investment and Investor: Who Is Entitled to Claim?’, available at <http://www.oecd.org/investment/internationalinvestmentagreements/36370461.pdf>, accessed on 23 March 2020.

predominantly in the mining, oil and gas sectors.<sup>14</sup> These investments are visible in almost every African Country. China's Foreign Minister Wang Yi, noted that, Chinese investments in Africa have approximately matured by a hundred-fold since the establishment of the FOCAC forum in 2000.<sup>15</sup> Between the year 2009 and 2012, China's direct investments in Africa almost doubled from US\$1,44 billion to US\$2,52 billion with an estimated yearly growth rate of 20,5 percent.<sup>16</sup> Furthermore, China's accumulative direct investment in Africa also increased from US\$9,33 billion to roughly US\$21,23 billion between 2009 and 2012, thus Africa became China's fourth-largest investment destination.<sup>17</sup>

This rapid increase of Chinese investments in Africa, inevitably registered multiple commercial disputes, which includes investment disputes. For instance, in 2006, the Lagos Regional Centre for International Commercial Arbitration (RCICAL), reported an amplification in the number of disputes submitted to its center, which often involved Chinese businesses in Africa.<sup>18</sup> However, the increment of investment disputes between African Countries and China predates the establishment of the FOCAC forum.

According to Moses N. Kiggundu, (a Professor Emeritus and a Distinguished Research Professor of Management and International Business at the Sprott School of Business), illustrated that Africa-China commercial disputes multiplied over many years, prior to 2000.<sup>19</sup> Professor Kiggundu noted that, from 1979 to 1982, the average recorded number of commercial disputes between the two sides amounted to around fourteen-thousand a year, and roughly increased to 1.5 million new cases filed in 1997.<sup>20</sup> This implies that, despite a long history of commercial relations between both parties, the FOCAC facilitation added more investment disputes, thus the necessity to establish a dispute resolution mechanism to assist with the large volume of commercial disputes.

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<sup>14</sup> Xiaofang Shen 'Private Chinese Investment in Africa, Myths and Realities' Policy Research Working Paper 6311 January 2013 at 7, available at <http://documents1.worldbank.org/curated/en/488211468216585858/pdf/wps6311.pdf>, accessed on 15 October 2020.

<sup>15</sup> Ikenna Emewu 'FOCAC at 20:Chinese FM, Wang says Chinese Africa investments grow 100 folds since year 2000 as trade soars to \$208.7b' available at <https://africachinapresscentre.org>, accessed on 12 January 2021.

<sup>16</sup> Weidong Zhu 'Creating a Favourable Legal Environment for the Sustainable Development of China-African Business Relationship' (2014) 2 *Journal of South African Law* 306.

<sup>17</sup> Ibid.

<sup>18</sup> Weidong Zhu 'Arbitration as The Best Option for the Settlement of China-African Trade and Investment Disputes.' (2013) 57;1 *Journal of African Law* 154.

<sup>19</sup> Moses Kiggundu 'China-Africa Legal and Judiciary Systems: Advancing Mutually Beneficial Economic Relations' (2013) 4;4 *Beijing Law. Review* 155.

<sup>20</sup> Ibid.

In reality, most Africa-China investment disputes occur in Africa because China provides the money, albeit there are African countries that are investing in China such as South Africa.<sup>21</sup> It has been noted that many Chinese businesses are reluctant to approach domestic courts in African countries due to fears of corruption, low efficiency, lack of knowledge of the legal processes amongst others.<sup>22</sup> Furthermore, solving Africa-China investment disputes at international litigation forums is often complex, due to the unaffordable high costs involved that many African countries are not able to pay, amongst other issues.<sup>23</sup> Therefore, African countries and China requires a unique investment dispute settlement mechanism to better facilitate their commercial interests. For this to succeed, a solidified legal cooperation between the two sides is paramount.

The FOCAC platform laid the foundation for the FOCAC Legal Forum, which was established in 2009, to support sound legal cooperation between the two sides and to establish a dispute resolution mechanism. The first FOCAC Legal Summit was organized by the China Law Society in 2009 in Egypt, approximately one-hundred jurists and lawyers from China and many African countries participated in this event.<sup>24</sup> This Summit emphasized, strengthening legal exchanges and encouraging Africa-China all-round development which included investment related issues.<sup>25</sup> Moreover, since the formation of the FOCAC platform, it currently holds six core documents which entail the legal and policy frameworks regarding Africa-China trade and investment relations.<sup>26</sup> The central themes addressed in these six documents are based on building a strong Africa-China investment relationship, that mutually benefits both sides and is able to settle investment disputes peacefully amongst others.

To date, one of the most successful projects adopted by the FOCAC Legal Forum, is the China-Africa Joint Arbitration Centre (CAJAC), because it serves as a tangible multilateral dispute settlement body, which assists with settling disputes between the two parties.<sup>27</sup> This platform was established at the 2015 FOCAC Sixth Ministerial Conference by China and 50 African states.<sup>28</sup>

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<sup>21</sup> Zhu op cit note 18 at 150.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> 'Chinese, African Jurists Discuss Cooperation In 1st FOCAC Legal Forum' *Xinhua* 21 December 2009 available at [http://www.china.org.cn/world/2009-12/21/content\\_19105792.htm](http://www.china.org.cn/world/2009-12/21/content_19105792.htm), accessed on 24 January 2021.

<sup>25</sup> Ibid.

<sup>26</sup> Uche Ofodile 'Trade, Empires, and Subjects— China-Africa Trade: A New Fair Trade Arrangement, or the Third Scramble for Africa?' (2008) 41;2 *Vanderbilt Journal of Transnational Law* 522.

<sup>27</sup> Huiping Chen 'China's Innovative ISDS Mechanisms and Their Implications' (2018) 112 *American Journal of International Law* 209.

<sup>28</sup> 'CAJAC update' *Hogan Lovells Publications* February 2016, available at <https://www.hoganlovells.com>, accessed on 15 March 2020.

The formation of CAJAC is a significant milestone concerning Africa-China legal cooperation and if properly implemented, it can be the answer to a long-awaited effective dispute resolution framework for Chinese investments in Africa. It is within this context, this research aims to analyze FOCAC's contributions to Africa-China investment disputes settlements by examining its prospects and challenges.

## **1.2 Common perceptions regarding Chinese investments in Africa**

The rapid escalation of Chinese investments in Africa has drawn international and domestic attention, which is often characterised by stereotypes and criticisms. A document produced by the World bank in 2013, alluded that in general, Western critics often argue that Chinese investments in Africa are actually “State investments” as opposed to investments by private enterprises.<sup>29</sup> State investments may potentially undermine the World Trade Organization (WTO) rules regarding the WTO Anti-subsidy and Countervailing Measures Agreement.<sup>30</sup> However, it appears rather rare for African Countries to settle its commercial disputes through the WTO process. For instance, to date, African Countries have only been involved in three WTO cases and appeared as respondents instead of claimants. Consequently, even though Chinese investments may openly breach WTO rules in Africa, African countries are unlikely to hold Chinese investors accountable through WTO litigating forums.

Chinese investments in Africa are also criticised for lack of transparency, as actual Africa-China investment agreements are not so easily available to the public. This ambiguity, created a vacuum for popular political theories to thrive: such as ‘China colonizing Africa through a debt traps’.<sup>31</sup> The term “debt trap” gained popularity through the former US secretary to the President John Boltman, which continues to cast bad faith on China's investments in Africa.<sup>32</sup> China's seizure of Sri Lanka's port, is repeatedly referenced as a prime example of the consequences that African countries might face, if defaulting on the repayments of Chinese loans used for investments inter alia.<sup>33</sup>

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<sup>29</sup> Shen op cit note 14 at 4.

<sup>30</sup> *WTO Agreement on Subsidies and Countervailing Measures*, 1994 Article 1,

<sup>31</sup> Luke Daniel ‘Debt colonialism: Is China trying to buyout Africa's resources?’ available at <https://www.thesouthafrican.com>, accessed on 29 April 2020.

<sup>32</sup> Lawrence Freeman ‘Chinese ‘debt-trap’ Propaganda Exposed-Time to End Ignorance & Prejudice Against China in Africa.’ available at <http://lawrencefreemanafricaandtheworld.com>, accessed on 8 August 2020.

<sup>33</sup> Barry Sautman, Yan Hairong ‘The Chinese Debt Trap’ and its Sri Lanka Example’ available at <https://iems.ust.hk/assets/publications/thought-leadership-briefs/tlb29/sautman-yan-sri-lanka-cdt-hkustiems-tlb29.pdf>, accessed on 15 June 2020.

Other arguments also suggest that Chinese Foreign Direct Investments (FDI), deprives African Countries of the benefits of FDI such as employment, because Chinese companies import their own workforce.<sup>34</sup> Therefore, the investment relationship between the two parties is considered as asymmetrical and an opportunity for China to exploit African Countries, as opposed to a mutually benefiting agreement often preached by China. However, these arguments mentioned above, are not supported by data and research in the area and has largely been dismissed as Western propaganda.

Conversely, positive perceptions around Chinese investments in Africa, suggests African Countries have more to benefit. This is because, current evidence suggests that there are positive impacts on development, such as employment and key constructed industry infrastructures to name a few. For instance, a popular Chinese Company called Hisense set up an electronics company in Atlantis, South Africa by investing approximately US\$200 million dollars and employs over one-thousand employees.<sup>35</sup> Apart from the company creating employment, it also transfers skills and provides ordinary households in Africa with affordable consumer goods, that most likely increases the livelihoods of many African citizens.

In Ethiopia, the Huajin Group invested an estimated amount of \$10 million to start up a shoe factory, and prior to the set-up of the operation, over 90 employees were sent to China for technical training.<sup>36</sup> Eventually, the shoe factory opened its doors in 2012 and generated a profit in its first year of operations, this led to three-thousand-five-hundred employees making more than two million pairs of shoes the following year.<sup>37</sup> This proves, that not only did this specific Chinese investment in Africa create local jobs, but there was also a transfer of skills.

Another significant example, is the Yuemei Group which invested \$1.2 million in Nigeria in 2006, to create a domestic manufacturing subsidy.<sup>38</sup> As a result, the industrial park had five textile companies that employed over one-thousand local employees.<sup>39</sup> The above-mentioned examples,

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<sup>34</sup> See East Asia Forum Quarterly Volume 4 No.2 April-June, 2012, which is devoted to “China’s Investment Abroad,” featuring a collection of articles by nineteen international and Chinese scholars and policy experts contributing to a wide range of views and opinions on the topic.

<sup>35</sup> ‘Hisense R72Million Investment in Atlantis’ *South Africa Investment Conference*, available at <https://www.jobvine.co.za/insight/company/hisense-south-africa/1409/>, accessed on 20 February 2021.

<sup>36</sup> China and Africa ‘Expanding Economic Ties in and Evolving Global Context’ World Bank available at <https://www.worldbank.org/content/dam/Worldbank/Event/Africa/Investing%20in%20Africa%20Forum/2015/investing-in-africa-forum-china-and-africa.pdf>, accessed on 5 August 2020.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

proves that African countries benefit from Chinese investments through jobs, skills, technology transfers and tax revenue for African governments amongst others.<sup>40</sup>

To this end, Alicia Garcia Herrero a chief economist for Asia Pacific at Natixis, rightfully argues that European investments in Africa is still larger than that of China.<sup>41</sup> In 2011, China's Ministry of Commerce revealed that, its total outbound FDI estimated roughly to U\$74.65 billion but only U\$1.7 billion, which equated to approximately 2.2% was designated to Africa.<sup>42</sup> Herrero indicates that, Chinese investments in Africa receives unnecessary panic, as generally portrayed within the public sphere.<sup>43</sup> In other words, the so called threat, that Chinese investments are dominating Africa's markets, is an exaggeration and acts as negative publicity that could possibly hinder Africa-China investments.

To conclude, it appears that Chinese investments in Africa are viewed with mixed feelings and perceptions. Therefore, it is crucial for the Africa-China discourse to develop and improve a strong legal cooperation mechanism, to address these criticisms, by regulating the commercial activities with a rule-based approach. A strong and improved legal cooperation between the two parties, could settle issues concerning Investor-State disputes regarding state subsidies, protection of Africa's resources, litigate contractual matters and labour contentions inter alia. In return, China could secure itself when investing in African countries without fears of unfair discrimination.

### **1.3 Research Questions**

The main overarching question this paper seeks to answer is; to which extent has the Forum on China-Africa Cooperation (FOCAC) multilateral framework, impacted legal cooperation between the two sides concerning investment dispute settlement?

To answer this question, the following ancillary research questions will be addressed:

1. What are common challenges for the FOCAC platform, when addressing Africa-China investment disputes in Africa?
2. What are the legal strengths and limitations of the China-Africa Joint Arbitration Centre in terms of settling investment disputes between the two parties?

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<sup>40</sup> Ibid.

<sup>41</sup> Alicia Herrero 'China's Investments In Africa: What The Data Really Say, And The Implications For Europe' available at <https://www.forbes.com/sites/aliciagarciaherrero/2019/07/24/chinas-investments-in-africa-what-the-data-really-says-and-the-implications-for-europe/#5696df1d661f>, accessed 12 May 2020.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

## **1.4 Objectives of the Research**

This research recognizes that, the investment relationship between African Countries and China is paramount, in the era of globalization and in terms of Africa's developmental goals. Considering that China is a strategic investment partner for almost all African Countries, there appears to be a void in the legal relationship between the two sides, particularly in the area of settling investment disputes. Therefore, this study aims to assess previous literature regarding Africa-China legal cooperation and to build upon the existing body of knowledge, in a way that may be able to assist with the issues pertaining to investment disputes settlements between the two parties.

The aims of this research can be arranged into three sections. First, the research intends to discuss the theory and history of legal cooperation between African countries and China, within the context of Africa-China investment dispute settlements. This assessment will provide an understanding of the characteristics that shapes the legal relationship between the two sides. Secondly, this study plans to examine the current dispute resolution mechanisms in place, apart from the CAJAC forum and its contributions towards settling Africa-China investment disputes. Lastly, this paper seeks to observe the CAJAC platform's potential to address the impending dispute resolution problems, by mapping out its prospects and challenges whilst recommending possible solutions.

## **1.5 Structure of Research and Research Methodology**

This research, will be based on internet and library study materials. The primary sources will include treaties, case law, official documents of key institutions and articles written by experts and organizations in the Africa-China field. The secondary sources will consist of journals, textbooks, conference papers, working papers, newspaper articles and relevant internet sources.

This study will be structured into five chapters as follows:

*Chapter one* will provide the introduction and background of this study by highlighting the key concerns concerning Africa-China investments dispute settlement. Furthermore, to contextualize Africa-China investments, this section looks at current perceptions around Africa-China investments. To conclude this chapter, the layout and structure of the study will be outlined.

*Chapter two* emphasizes on Africa-China's historical legal cooperation and looks at the scope of legal cooperation within the context of investments between the two sides. Moreover, this chapter borrows from other disciplines, to discuss theories that might explain the motivations behind

Africa-China investments. Lastly, a literature review and a summary of FOCAC Action Plans on Africa-China investments and legal cooperation will be presented.

**Chapter three** discusses the role of laws and policies regarding Africa-China legal cooperation and looks at Africa-China investment disputes through domestic and international litigating forums. The core objective of this chapter, is to identify key weaknesses regarding Africa-China investments, through bilateral cooperation and strengthen the case for a strong multilateral cooperation between the two sides.

**Chapter four** provides a more in depth analysis of the China-Africa Joint Arbitration Centre (CAJAC), by looking at the overview, functions, opportunities and challenges of this body. However, before doing so, this section seeks to understand the extent to which, the FOCAC Action Plans on legal cooperation concerning investments have been implemented on the ground thus far by enlisting the FOCAC Follow up Action Committee's achievements in this discourse.

**Chapter five** furnishes the conclusion of this research and offers pragmatic recommendations, to better facilitate Africa-China's legal cooperation regarding investment dispute settlements.

## **1.6 Conclusion**

In summary, this chapter laid out the structure and the aims of this study, to analyze the Forum on China-Africa Cooperation (FOCAC) contributions to settling Africa-China investment disputes. The establishment of the FOCAC platform, could be considered as a momentous event regarding Africa-China cooperation, especially in the context of investments between the two sides. There seems to be a general consensus which alludes to the notion that, Chinese investments in Africa have rapidly increased since the establishment of the FOCAC organization.<sup>44</sup> However, as investments increased between the two sides, so has investment-related disputes become more prevalent.<sup>45</sup> Therefore, African countries and China recognized the need to strengthen their legal cooperation to better facilitate commercial-related disputes, thus establishing the China-Africa Joint Arbitration Centre (CAJAC) through the FOCAC forum.

The effectiveness of the CAJAC forum to settle disputes has many challenges ahead. However, the CAJAC platform remains a tangible contribution from the FOCAC forum, as a viable avenue that can assist African countries and China in settling their investment disputes.

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<sup>44</sup> Catherine Elkemann, Oliver Ruppel 'Chinese Foreign Direct Investment into Africa in the Context of BRICS and Sino-African Bilateral Investment Treaties' (2015) 13;4 *Richmond Journal of Global Law and Business* 601.

<sup>45</sup> Tso tang Tsietsi 'International commercial arbitration: Case Study of the experiences of African States in the International Centre for Settlement of Investment Disputes' (2013) 47;2 *International Lawyer* 260.

The next chapter, will look at the current literature on Africa-China legal cooperation, observe common perceptions regarding Africa-China investments and provide a brief overview of African countries and China's legal systems to better understand their legal cooperation.

## AFRICA-CHINA LEGAL COOPERATION: A HISTORICAL OVERVIEW OF SELECTED LEGAL ENGAGEMENTS AND FOCAC COMMITMENTS

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### 2.1 INTRODUCTION

The previous chapter discussed the formation of the Forum on China-Africa Cooperation (FOCAC) and observed the increase of Africa-China investments, whilst recognizing the surge in investment disputes between the two sides. As mentioned before, the FOCAC platform plays an important role in managing virtually all aspects of Africa-China relations which includes investments. Through this forum, many investment deals are multilaterally negotiated and both parties prioritize issues important to their developmental needs.<sup>46</sup> For instance, African governments often seek funding from China for infrastructural projects to boost their economies.<sup>47</sup> Whereas, the Chinese government provides funding and contracts for its enterprises in African Countries, in sectors such as construction, oil, manufacturing industries aligning with their developmental objectives.<sup>48</sup> This interlinked web of commercial activities, requires a solid legal framework, which could improve and maintain their commercial relations.

In lieu of the above, the business relationship between African Countries and China is quintessential for both sides, hence, the advancement of legal cooperation constantly featured and is encouraged in the FOCAC Action Plans.<sup>49</sup> This chapter, discusses the definition and scope of legal cooperation, including theories relating to thereof. Secondly, this section presents a literature review, which contextualizes the current Africa-China legal relationship. Lastly, an overview of legal cooperation under the FOCAC process will be outlined.

### 2.2 A General Scope of Legal Cooperation

International legal cooperation, often refers to different Countries governments, working together to improve their collaboration and mutual understanding of the law of their respective Countries, to better facilitate legal matters between the two sides.<sup>50</sup> Today's world, generally operates on a

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<sup>46</sup>Issue Brief 'FOCAC in Perspective' *United Nations Development Program* 21 September 2016, available at <http://www.cn.undp.org/content/china/en/home/library/south-south-cooperation/focac--in-perspective.html>, accessed on 28 May 2020.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> David Haroz, 'China in Africa: Symbiosis of exploitation' (2011) 35;2 *Fletcher Forum of World Affairs* 82.

<sup>50</sup> Michael Havers 'Legal Cooperation: Matter of Necessity' (1987) 21;1 *International Lawyer ABA* 185.

belief that, a functioning and reliable legal system is an important requirement for the political, economic and social well-being of a country's population.<sup>51</sup> The purpose of legal cooperation, is oftentimes to strengthen the rule of law by providing legal support, legal education amongst others, to enhance the collaboration efforts by all Countries involved.<sup>52</sup>

Important to mention that, legal cooperation in itself is largely a broad area. Therefore, this paper is limited to only discussing it, with regards to commercial disputes resolution. When looking at legal cooperation, it is important to distinguish South-South legal cooperation and North-South legal cooperation, which will also be referred to in this section. In order to understand the overall motives and complexities of legal cooperation between African Countries and China, a multidisciplinary approach will be applied by looking at political and economic theories.

### **2.2.1 The Legal Theory On Africa-China Legal Cooperation**

The WTO platform, acts as the primary organization responsible for the regulation of international trade between Nations and one of its main objectives is to ensure trade moves in a free, predictable and efficient manner.<sup>53</sup> Even though, the WTO forum mainly deals with trade, it also looks at investment issues, through the Trade-Related Investment Measures (TRIMs).<sup>54</sup> The WTO platform provides one of the most effective dispute settlement systems, which has been successful albeit some notable weaknesses. Despite the successes of the WTO, many Countries are dissatisfied with this forum and rather options to negotiate commercial matters through regional blocs. For instance, many Global-South Countries complain that multilateral free trade mostly benefits Developed Countries, has become undemocratic over the years and often ignores social or cultural factors.<sup>55</sup> Inevitably, this has seen many Developing Countries of late turn towards regional multilateral trade/investment agreements, thus, increasing South-South trade/investment activities.<sup>56</sup>

This shift from once predominant and traditional North-South commercial cooperation to South-South cooperation, has become significant and visible for the world not to ignore.<sup>57</sup> Consequently, this has necessitated the need to establish stronger governing institutions and legal

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup>The 'WTO in brief' *The World Trade Organization* January 1995 available at [https://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm), accessed on 12 June 2020.

<sup>54</sup>World Trade Organization Agreement on Trade-Related Investment Measures (TRIMs).

<sup>55</sup> Stephen W Schill *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009) 59-60.

<sup>56</sup> James Thuo Gathii 'The High Stakes of WTO Reform' (2006) 104;6 *Michigan Law Review* 1365.

<sup>57</sup> Uche Ewelukwa 'South-South Trade and Investment: The Good, The Bad and The Ugly African Perspectives' (2011) 20;2 *Minnesota Journal of International Law* 513.

frameworks to facilitate this novel surge in the Global South's intra-trade and investments cooperation. Thus, the Africa-China relationship is a great example of South-South cooperation, which then needed a new dispute settlement system that is mindful of its own social, cultural and historic factors, often absent in the WTO framework *inter alia*.<sup>58</sup> Legal cooperation between Countries, is extremely important to establish legal organizations which allows States to regulate their interactions in a just and fair manner. Without legal cooperation between Countries, then institutions like the WTO would perhaps not exist and be able to execute its aims and motives.<sup>59</sup>

With regards to legal cooperation, the WTO forum is more inclusive as it has a wider membership of almost all Countries globally including China and all African Countries, whereas, the Bandung Conference of 1955 and the FOCAC forum is examples of more exclusivity. This is because, the Bandung Conference of 1955 and the FOCAC forum primarily focused on South-South legal cooperation. The term South-South cooperation, often refers to Nations (Developing and Least Developed Countries) formerly colonized by the Global North (Developed Countries), collaborating towards mutually-benefiting goals.<sup>60</sup> It is important to clarify that, the FOCAC platform is not a trade/investment agreement and no legal obligations emanates from participating in this forum for the respective Countries. Its significance lies in the fact that it is the biggest somewhat, international relations organization covering Africa-China cooperation which includes legal cooperation.<sup>61</sup>

The FOCAC platform broadly outlines Africa-China policies and legal frameworks relating to various issues such as the settlement of disputes arising from trade and investments.<sup>62</sup> Even though, South-South legal cooperation appears more symmetric compared to the North-South relationship, within the context of Africa-China cooperation, it is sometimes not the case. This is because, African Countries are normally on the receiving end of China's initiatives, as China takes the lead in directing and shaping the legal cooperation between the two sides. For instance, African Countries frequently featured in China's foreign policies but only in 2006, China produced its first-ever white paper on its commercial cooperation with Africa.<sup>63</sup>

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<sup>58</sup> Schill *op cit* note 55 at 58-59.

<sup>59</sup> 'What is the WTO' *The World Trade Organization* January 1995, available at <https://www.wto.org>, accessed on 18 June 2020.

<sup>60</sup> 'What is 'South-South cooperation' and why does it matter?' *United Nations News* 20 March 2019, available at <https://www.un.org/development/desa/en/news/intergovernmental-coordination/south-south-cooperation-2019.html>, accessed on 23 September 2020.

<sup>61</sup> Ewelukwa *op cit* note 57 at 521.

<sup>62</sup> Ofodile *op cit* note 26 at 522.

<sup>63</sup> 'China unveils white paper on cooperation with Africa' *Xinhua* 23 December 2010, available at [www.china.org.cn](http://www.china.org.cn), accessed on 12 June 2020.

The policies drafted in this white paper, mainly focused on China's prerequisites, which could be interpreted as China's efforts to further increase legal cooperation between the two sides but albeit, through the perspective of Chinese interests. To this effect, it is rather disappointing that, to this day Africa does not have its own and unique policy on China, to reflect its agencies and interests. Nevertheless, overall, it appears as though Africa's interests are somewhat included in the FOCAC process, as China committed to supporting the African Union's policies such as the New Partnership for Africa's Development (NEPAD) and the African Continental Free Trade Agreement (AfCFTA) at many FOCAC Conferences.<sup>64</sup>

African Countries and China, understands the importance and benefits of legal cooperation for the success of their respective interests and collective projects.<sup>65</sup> South-South cooperation has been widely recognized, accepted and even supported by many North Countries. However, it appears as if there is a desire to make it more compatible with the existing North-South Cooperation in terms of legal rules, culture and values.<sup>66</sup> This is because, Western policymakers and analysts often strongly argue, that China seeks to expand its influence and power instead of complimenting the current North-South legal cooperation.<sup>67</sup> In other words, they label China as the "China threat" that seeks to use its soft power to persuade African Countries to have more confidence in the "Beijing Consensus"<sup>68</sup> as opposed to the traditional "Washington Consensus"<sup>69</sup>.<sup>70</sup>

Africa-China's legal cooperation seems to be more equitable and representative when compared to the North-South legal relationship. For instance, the China-Africa Joint Arbitration (CAJAC) was established through a collective effort between the two sides, whereby African Countries contributed to towards the consultations. Therefore, international legal cooperation is

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<sup>64</sup> Adwiliwi Nematandai 'China's Belt And Road & The African Free Trade Agreement Infrastructure Under The New Normal' available at <https://www.nepad.org/>, accessed on 29 November 2020.

<sup>65</sup> Deborah Brautigam 'WILL AFRICA FEED CHINA?' (2015) 71-72.

<sup>66</sup> Tao Wenzhao 'Impact of the Chinese Model in Africa' (2009) 15 *International Studies* 28.

<sup>67</sup> Ibid.

<sup>68</sup> The Beijing Consensus, is a Chinese economic model implemented by Mr. Deng Xiaoping, after the Chairman Mao Zedong era. This model includes political and economic policies, which resulted in the massive economic transformation in China.

<sup>69</sup> The Washington Consensus, is Western economic model, termed by John Williamson in 1989. This model advocated for free market economic principles and encouraged the collaboration between established financial institutions (World Bank and International Monetary) and developing Countries to boost economic development.

<sup>70</sup> Wenwei Guan 'Beijing Consensus and Development Legitimacy: The Evolution of China's Foreign Direct Investment (FDI) Regime From Law & Development Perspective' (2017) 12;1 *Asian Journal of Comparative Law* 116.

essential if African Countries aim to maximize the benefits of Chinese investments in Africa.<sup>71</sup> Primarily because, a strong legal framework which is reliable and embedded with certainty, could assist African States from exploitation or any other unjust practices from Chinese business enterprises.<sup>72</sup>

### 2.2.2 The Economic theory on Africa-China Legal Cooperation

According to McKinsey & Company, an estimate of over ten thousand Chinese businesses are operating in Africa.<sup>73</sup> Many of these economic projects, are directly or indirectly as a result of discussions under the FOCAC process and implemented through bilateral agreements.<sup>74</sup> China funded countless construction projects across many African Countries, joined key economic African Institutions such as the Development Bank and the West Africa Development Bank.<sup>75</sup>

Despite looking at the positive economic contributions, which China added to Africa's overall development, it was not necessarily done out of charity.<sup>76</sup> Instead, China has major economic interests in Africa too, therefore, in order to advance its prosperity goals, it enhanced the Africa-China legal cooperation. Borrowing from International Relations theories such as neoliberalism, Countries often use institutions or organizations to advance their economic interests.<sup>77</sup> For example, during the 1950's, as the international competition for steel production increased, China understood the economic importance of being part of the Bandung Conference in 1955 to further its commercial goals.<sup>78</sup> Through the legal cooperation of the Bandung Conference in 1955, China extended its economic support to many African Countries liberation struggles, so that in return, China would gain easier access to Africa's resources and financial markets to further its own capital ambitions.<sup>79</sup> Therefore, it is in the interest of African Countries to secure its resources and markets, by ensuring it maintains a quid pro quo relationship with China, through a sound legal forum.

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<sup>71</sup> Ibid.

<sup>72</sup> Henry Sanderson & Michael Forsythe *China's Superbank: Debt, Oil and Influence - How China Development Bank is Rewriting the Rules of Finance* (2013) 93-94.

<sup>73</sup> 'Some 10,000 Chinese companies now operating in Africa, report says' *NIKKEI Asia* 10 July 2017, available at <https://asia.nikkei.com>, accessed on 5 March 2020.

<sup>74</sup> 'Bilateral Economic Agreements Are Made at FOCAC 2018' *The International Schiller Institute* 4 September 2018, available at <https://schillerinstitute.com>, accessed on 8 July 2020.

<sup>75</sup> Wade Shepard 'What China Is Really Up To In Africa' available at <https://www.forbes.com>, accessed on 30 September 2020.

<sup>76</sup> Ambrose Du Plessis 'The Forum on China– Africa Cooperation, Ideas and Aid: National Interest(s) or Strategic Partnership?' (2014) 6;2 *Insight on Africa* 113-114.

<sup>77</sup> David Grewal, Jedediah Purdy 'Introduction: Law and Neoliberalism' (2014) 77;4 *Law and Contemporary Problems* 1.

<sup>78</sup> Ofodile op cit note 26 at 514-515.

<sup>79</sup> Ibid

Africa as an economic regional bloc, should aim to evenly develop across the continent, as laid out in its aims and objectives in the African Continental Free Trade Area (AfCFTA) agreement.<sup>80</sup> This is because, the economic progress of the continent as a whole, most likely depends on many African Countries economies being prosperous. Unlike, Africa's dark history of colonialism and exploitation, African Countries should use its economic leverage to ensure it establishes a legal cooperation with China, which allows it to benefit from its resources, regional markets and economies. Thus, a solid Africa-China legal cooperation mechanism not only protects African economies from plunder, but could also put laws in place to prevent unfair competition in the market space. It is true in many ways that countries need strong neighbors to make development an ongoing process. African Countries should not miss the chance to capitalize on the Africa-China cooperation, instead they should take the opportunity to outline its specific requirements to meet its developmental goals and objectives as stipulated in its AU's Agenda 2063.<sup>81</sup>

### **2.2.3 Political and International Relations theories on Africa-China legal cooperation**

The Africa-China cooperation is complex and at times, difficult to distinguish between politics and law. This is because, China and most African Countries share young democracies, thus the separation of powers is not always clear.<sup>82</sup> In practice, some African governments may be reluctant to solve disputes with Chinese State Enterprises (SOE's), as an unfavorable outcome may appear as an attack on their political relations.<sup>83</sup> For instance in Namibia, President Hage Geingob was alleged to be "best friends" with a prominent Chinese investor Mr Jack Huang and it is alleged that he was engaging in illegal activities such as money-laundering, tax evasion inter alia.<sup>84</sup> The general public held strong convictions that Mr Huang was untouchable by the law of the land because he is supposedly the "friend" of the President and has good ties with the Chinese government.<sup>85</sup> This dilemma could be avoided, if there is confidence in a rule based approach to doing business, which clearly separates political affairs from commercial dealings, especially in the context of Africa-China investments and legal cooperation.

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<sup>80</sup> Gbadebo Odularu & Philip Alege *Trade Facilitation Capacity Needs: Policy Directions for National and Regional Development in West Africa* (2021) 16-17.

<sup>81</sup> African Union, Economic Commission for Africa: *MDGs to Agenda 2063/SDGs Transition Report 2016* (2016) 99.

<sup>82</sup> Xia Xinhua, Xiao Haiying 'On Sino-Africa Relationship and Legal Cooperation' (2011) 12 *University of Botswana Law Journal* 175.

<sup>83</sup> Kiggundu op cit note 19 at 165.

<sup>84</sup> 'President's friend arrested' *The Namibian* 2 February 2017 available at <https://www.namibian.com.na/>, accessed on 5 April 2020.

<sup>85</sup> Ibid.

China and several African Countries exists in many international organizations such as, the United Nations (UN), the World Trade Organization (WTO), International Centre for Settlement of Investment Disputes (ICSID) amongst others. However, these organizations mentioned above are legal in some sense but also mired in politics. Therefore, China could increase its political influences in these above-mentioned international organizations by winning over African Countries with investments, so African Countries could vote on pressing issues in China's favor. In other words, China could use its investments in Africa to strategically protect and advance its own political interests.

Through the FOCAC forum, China drafts its political aspirations through numerous FOCAC policies.<sup>86</sup> Therefore, aware of the geopolitics which normally underpin multilateral organizations, legal cooperation in the context of the FOCAC forum provides a space to for African Countries and China to mobilize and strengthen their political ties.<sup>87</sup> On a political level, they often refer to each other as 'friends' due to their shared history of Western aggression, thus, it is generally assumed that both sides tend to frequently overlook legal issues. It is considered that both parties, are reluctant to use the law as a first measure to settle legal issues due to the nature of their political relationship.<sup>88</sup> However, if the Africa-China legal cooperation is properly developed and advanced, it can restrain China's political influence of Chinese enterprises operating in Africa, to avoid immunity for practitioners who participate in bad business practices.

To add on, China generally respects African governments sovereignty by not interfering with their domestic affairs, like the Western Countries often do.<sup>89</sup> In return, majority of African Countries are keen to engage with China, as the commercial relationship between the two sides is less contentious. African governments do not feel the same pressure like it does from the Western Countries to adopt more 'democratic laws', when engaging with China.

### **2.3 Literature review: Africa- China Legal Cooperation and Investment Disputes: A Conceptual and Theoretical Analysis**

Professor Moses Kiggundu reiterated that, the Africa-China legal cooperation predates the 1900s, pointing to the evidence of Hong Kong English law, which was applied in the Gold Coast (now

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<sup>86</sup> Deborah Brautigam *The Dragon's Gift: The Real Story of China in Africa* (2009) 77.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid at 3.

<sup>89</sup> Obert Hodzi *The End of China's Non-Intervention Policy in Africa* (2019) 195.

known as Ghana) in 1874.<sup>90</sup> This implies that both sides, for long understood the importance of legal cooperation to manage their relations. However, the increasing number of Chinese entrepreneurs in Africa, has not been equally matched with easily accessible dispute settlement forums.<sup>91</sup> This is because, in general, African countries have diverse legal systems and China's hybrid legal system, in many instances contributed to more confusion when litigating commercial disputes.<sup>92</sup> Africa is a continent made up of 55 independent Countries with their own legal systems which incorporates their colonial and customary laws. Conversely, China practices a legal system which is based on 'Socialism with Chinese Characteristics' which in some ways incorporates free market and socialist principles.<sup>93</sup>

To counter this problem, African Countries could consider synchronizing their laws with other African States, to simplify their legal systems, which in turn could attract foreign investments from other Countries such as China to name a few.<sup>94</sup> To this effect, in 1993, fourteen former French colonies in West and Central Africa established the "Organisation for the Harmonization of Business Law in Africa" (OHADA).<sup>95</sup> The OHADA forum, comprises of business laws and implements institutions that are adopted by the current sixteen West and Central African member States.<sup>96</sup> China welcomed the OHADA model because, it abridges its legal cooperation with these OHADA member States, when engaging in commercial ventures.<sup>97</sup> As Africa-China legal cooperation increases, so would African legal personal engage with China's legal systems to better understand it.

Won Kidane (an Associate Professor of Law at the Seattle University School of Law), mentions that the "Cultural Revolution" significantly impacted China's approach to foreign investments.<sup>98</sup> The "Cultural Revolution" occurred between the period of 1966 and 1976 under the leadership of Chairman Mao Zedong, and one of its many sentiments evolved around anti-capitalism and embracing Marxism.<sup>99</sup> The "Cultural Revolution" ended in 1976 but its disfavour towards private property ownership, presently endures in a number of ways, which has protection

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<sup>90</sup> Kiggundu op cit note 19 at 155.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> David Kennedy & Joseph Stiglitz *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (2013) 1-2.

<sup>94</sup> Kiggundu op cit note 19 155-156.

<sup>95</sup> Boris Martor, Nanette Pilkington, David Sellers & et al *Business Law in Africa: Ohada and the Harmonization Process* 2 ed (2002) 1.

<sup>96</sup> Ibid.

<sup>97</sup> Kiggundu op cit note 19 at 155.

<sup>98</sup> Won Kidane 'China's Bilateral Investment Treaties with African States in Comparative Context' (2016) 49:1 *Cornell International Law Journal* at 143.

<sup>99</sup> Roderick MacFarquhar & Michael Schoenhals *Maos Last Revolution* (2008) 3-4.

implications for foreign investments.<sup>100</sup> For instance, China currently enforces a very controversial policy called the “Forced Technology Transfer” (FTT), whereby all foreign companies investing in China are obligated to share their intellectual property with Chinese owned companies through Joint-Ventures.<sup>101</sup> Therefore, China’s investments in most African Countries enjoys more private ownership protections, compared to African investments in China, making the Africa-China investment relationship imbalanced.

As previously mentioned, the Forum on China-Africa Cooperation (FOCAC) acts as a diplomatic multilateral platform between the two sides, however, investment agreements are concluded bilaterally through bilateral agreements or through Bilateral Investment Treaties (BITs).<sup>102</sup> The BITs can be defined as an agreement, which outlines the terms and conditions, includes investment disputes between private investments of nationals and companies from one State to another Country.<sup>103</sup> The BITs in China, increased in popularity after the fall of the “Cultural Revolution” as China opened its economy to the rest of the world in 1978, through its “Open door Policy”. Professor Kidane, analysed China-Africa BITs over three periods;

First, During the 1980’s, China signed thirty BITs and most of them were settled with European Countries, whereas, only one Country from Africa (Ghana) signed a BIT with China in this period.<sup>104</sup> According to Article 1, of China-Ghana BIT, “investments” and an “investor” are defined as follows;

*1. The term "investment" means every kind of property, such as goods, rights and interests of whatever nature, and in particular though not exclusively, includes:*

*(a) tangible, intangible, movable and immovable property as well as any other right in rem such as mortgages, liens, usufructs, pledges and similar rights;*

*(b) shares, debentures, stock and any other kind of participation in companies;*

*(c) claims to money or to any other performance having an economic value associated with an investment;*

*(d) intellectual and industrial property rights such as copyrights, patents, trademarks, industrial models and mockups, technical processes, know-how, trade names and goodwill, and any other similar rights;*

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<sup>100</sup> Kidane op cit note 98 at 143.

<sup>101</sup> Jyh-An ‘Forced Technology Transfer in the Case of China’ (2020) 2 *Boston University Journal of Science & Technology Law* 326-327.

<sup>102</sup> Guan op cit note 70.

<sup>103</sup> Kidane op cit note 92 at 142.

<sup>104</sup> Ibid at 144.

*(e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources, Any change in the form in which properties are invested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the Contracting Party in whose territory the investment has been made.*<sup>105</sup>

*2. The term "investor" means*

*(a) natural persons who have nationality of either Contracting Party in accordance with the laws of that Contracting Party;*

*(b) legal entities, including company, association, partnership and other organization, incorporated or constituted under the laws and regulations of either Contracting Party and have their headquarters in that Contracting Party.*<sup>106</sup>

The second period of China-Africa BITs, were signed during the 1990s and indicate that, China only entered into two BITs with European Countries and concluded most of its BITs with African Countries and South Asian States.<sup>107</sup> The most outstanding difference between China-Africa BITs of the 1980's and 1990's, is the dispute settlement clause, as the International Centre for Settlement of Investments (ICSID) is explicitly mentioned as an avenue to settle investment disputes. Even though the China-Egypt BIT also references domestic courts, as a forum to litigate investment disputes, the ISCID opens the platform for Africa-China investment disputes to be settled on an international forum to make it more neutral.<sup>108</sup>

Lastly, in the 2000's, China's BITs were negotiated between more African Countries and South Asian States.<sup>109</sup> Out of the 55 African States, China signed 37 BITs with African Countries but only 21 of them are in force.<sup>110</sup> The high volume of China-Africa BITs concluded in this period, signals that legal cooperation in the context of investments between the two sides increased significantly. Professor Kidane's observations around Africa-China investments, illustrate that BITs between both sides, has steadily progressed since 1978 and the definitions of investor and investments are defined clearly with emphasis put on dispute settlements.

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<sup>105</sup> China-Uganda BIT, Article 1.

<sup>106</sup> Ibid

<sup>107</sup> Kidane op cit note 92 at 144.

<sup>108</sup> Ibid at 148.

<sup>109</sup> Ibid at 149-150.

<sup>110</sup> 'Investment Policy Hub' UNCTAD available at <https://investmentpolicy.unctad.org>, accessed on 27.

China-Africa BITs are common regarding investments but both parties also carry out negotiations through bilateral agreements, which is often governed under international investment law. The Africa-China bilateral agreements, cover a range of areas related to investments, trade, political relations to name a few. Professor Xia Xinhua<sup>111</sup> and Dr Xiao Haiying,<sup>112</sup> rightfully alludes that, Africa-China legal cooperation could be structured into three stages; the first period could be considered from 1955 to 1971 whereby many African Countries and China, signed numerous bilateral agreements concerning cooperation in economic and trade, scientific and technological developments, diplomatic relations, cultural exchanges and medical cooperation to name a few.<sup>113</sup>

The second phase extended from 1971 to 2000 as both parties concluded bilateral agreements with more explicit legal frameworks, such as agreements on mutual promotion and protection of investment, civil, avoiding double taxation and prevention of tax evasion, commercial and criminal judicial assistance.<sup>114</sup> Lastly, in the year 2000, China and several African Countries established the Forum on China-Africa Cooperation (FOCAC), which currently operates in many ways to facilitate Africa-China legal cooperation and legal exchanges.<sup>115</sup>

All three stages mentioned above, illustrates that, Africa-China legal cooperation consistently covered legal relations relating to commerce which includes investments. However, in all three phases illustrated above, there seems to be a lack of emphasis put on multilateral investment disputes settlement mechanisms. Perhaps, this explains the reason as to why the China-Africa Joint Arbitration Centre (CAJAC) is still at its infant stages, despite a long documented legal cooperation between the two sides. Whether looking at Africa-China's legal cooperation through bilateral agreements or BITs, it is apparent that, their legal relationship has significantly progressed over the years. Although Africa-China's legal cooperation, covers a range of interests such as investments, politics, cultural exchanges inter alia, it is still in its initiative stages regarding multilateral investment dispute settlement mechanisms.

Evidence suggests that multilateral legal cooperation between Africa and China, predates the FOCAC forum. The first considered multilateral legal cooperation framework between the

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<sup>113</sup> Xinhua & Haiying op cit note 82 at 176-177.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

two sides, was recorded in 1955, called the Bandung Conference.<sup>116</sup> The 1955 Bandung Conference was held in Bandung, Indonesia and attended by several Asian Countries including China and a handful of African States, to establish a platform for South-South cooperation.<sup>117</sup> The term South-South cooperation, often refers to the collaboration of Countries which were formerly colonized by the West.<sup>118</sup>

The Bandung Conference, occurred in an era whereby, former colonies of the West became independent and other colonized States were seeking their independence.<sup>119</sup> The outcome of this conference produced the ten principles on 'South-South cooperation by providing concrete proposals, which promoted economic, political and cultural exchanges amongst others.<sup>120</sup> More than fifty years since the Bandung Conference, the FOCAC forum further enhanced multilateral legal cooperation between the two sides, by establishing the FOCAC Legal Forum and the China-Africa Joint Arbitration Centre (CAJAC).

Many legal practitioners from African Countries and China met during the First FOCAC Legal Summit, which was held in December 2009.<sup>121</sup> The theme of this forum, emphasized on "Strengthening China-Africa Legal Exchange and Promoting: All-round Development of China-Africa Relationship".<sup>122</sup> Key issues discussed at this forum, included both parties assessing, how their legal systems impacted the China-Africa trade and investment cooperation and the dispute settlement mechanisms around trade and investment.<sup>123</sup> The First FOCAC Legal Forum, was headed by the Executive Vice President Liu Yang of the China Law Society.<sup>124</sup> Among important organizing partners of this event, included China Law Society and the Cairo Regional Centre for International Commercial Affairs (CRICC).<sup>125</sup>

The Vice President, Liu Yang illustrated that, the FOCAC platform could be used as a medium for countries to negotiate common interests, build better understanding of each other's

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<sup>116</sup> Luis Eslava, Michael Fakhri, Vasuki Nesiah *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (2017) 3.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid* at 25.

<sup>119</sup> *Ibid.*

<sup>120</sup> Adriano Timossi 'REVISITING THE 1955 BANDUNG ASIAN-AFRICAN CONFERENCE AND ITS LEGACY' available at <https://www.southcentre.int/question/>, accessed on 8 July 2020.

<sup>121</sup> 'Chinese, African jurists discuss cooperation in 1st FOCAC legal forum' *Xinhua* 21 December 2009, available at <https://www.china.org.cn>, accessed on 19 October 2020.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Xinhua & Haiying op cit note 82 at 177-178.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

legal systems.<sup>126</sup> This could, further enhance and develop Africa-China legal cooperation around trade and spur economic development for both sides. Mr. Yang mentioned three practical ways that the FOCAC forum could be used to enhance China-Africa Cooperation.<sup>127</sup> First, the FOCAC forum could be used as a platform that also engages with other international legal organizations.<sup>128</sup> Secondly, this forum could launch its own law think tank that deals exclusively with Africa-China cooperation. Lastly, this platform could establish a research-based and legal training center for young African legal personnel. Mr. Yang, also reinstated that, legal cooperation between the two sides is extensively broad as it includes many legal exchanges from legal scholars, legal delegations, legal personnel, think tanks amongst others.<sup>129</sup>

In conclusion, there appears to be a long history regarding Africa-China legal cooperation and Africa-China investments. However, less emphasis on establishing a multilateral dispute settlement mechanism between the two sides seems to be the case. Therefore, investment disputes between African Countries and China, are often settled through domestic disputes settlement forums such as courts to name a few. Africa-China multilateral legal cooperation has become pressing issue of concern, especially in the area of investments since the formation of the FOCAC forum and CAJAC.<sup>130</sup> However, more focus is still needed to strengthen the CAJAC forum, so it is able to assist with the high volumes of Africa-China investment disputes effectively.

#### **2.4 A Summary of Legal Cooperation Regarding Investments Efforts in FOCAC Action Plans**

The FOCAC forum adopted Action Plans, which are official documents outlining commitments between China and the member African States concerning economics, social development, international affairs and politics.<sup>131</sup> These Action Plans, are released every three years and contain specific details that are aimed at enhancing Africa-China cooperation.<sup>132</sup> However, these Action plans are not legally binding but they have the capability of shaping policies between China and member African states.<sup>133</sup> These Action Plans are assessed with a follow up committee, to evaluate the progress of the commitments undertaken in these plans.<sup>134</sup>

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<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> 'Full text of Chinese President Xi Jinping's speech at opening ceremony of 2018 FOCAC Beijing Summit' *Xinhua* 3 September 2018, available at <https://www.xinhuanet.com>, accessed on 25 May 2020.

<sup>130</sup> Song Peng 'Necessity and Feasibility of Promoting the Investment and Trade of Environmental Goods within the Framework of the Forum on China-Africa Cooperation' (2016) 6;3 *Journal of WTO and China* 87.

<sup>131</sup> Garth Shelton & Farhana Paruk *The Forum on China – Africa Cooperation A Strategic Opportunity* (2008) 1.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid at 2-3.

In 2003, ministers of foreign affairs and economic cooperation from 44 African member States and China, met in Ethiopia and released the Addis Ababa Action Plan, during the Second FOCAC Ministerial Conference.<sup>135</sup> This Action Plan, makes reference to Africa-China investments but does not mention any plans to establish a multilateral investment dispute settlement forum, which could be accessible for both sides.<sup>136</sup> According to the Addis Ababa Action Plan, under paragraph 4.4.3, it states that;

*“...We are resolved to take concrete measures to continuously promote investment in both directions. China will further encourage and support its strong and viable enterprises of all ownerships to invest in Africa, including through the creation of China-Africa joint ventures aimed at encouraging the transfer of technology and the creation of employment in African countries. Both sides agree to take investment facilitation measures by also focusing on simplification of approval procedures for Chinese companies, which are interested in investing in Africa. African countries are encouraged to conclude with China bilateral agreements on investment protection and on the avoidance of double taxation.”*<sup>137</sup>

In lieu of the above, it implies that legal cooperation with regards to Africa-China investments, is explicitly mentioned but appears tone-deaf to the ongoing investment disputes between the two sides. This is because, it makes no recommendation to launch a multilateral dispute settlement mechanism, despite the increasing number of Africa-China investment disputes. Furthermore, this Action Plan also seems to focus more on Chinese investments interests in African Countries and is less attentive on African investments in China, which presumes that this Action Plan is asymmetrical regarding Africa-China’s investment relationship.

In 2009, representatives of foreign affairs and economic cooperation from China and 49 African member States met in Egypt to adopt the 2009, Sharm El Sheikh, Action Plan during the Fourth FOCAC Ministerial Conference.<sup>138</sup> This Action plan had a more mutually-benefitting tenor compared to the Addis Ababa Action Plan, as it stated under paragraph 4.2.2;

*“The two sides will continue to promote the conclusion and implementation of bilateral agreements on investment promotion and protection, and create a sound environment with a view to scaling up mutual investment. Governments of China and African countries give encouragement and support to their competitive businesses in investing in each other's country so as to raise the level and quality of cooperation for mutual benefit and win-win results.”*<sup>139</sup>

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<sup>135</sup>Forum on China–Africa Cooperation, Addis Ababa Action Plan (2004-2006), available at <https://et.china.org/eng/zfjzlt/t61771.htm>, accessed on 4 November 2020.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup>Forum on China-Africa Cooperation, Sharm El Sheikh Action Plan (2010-2012), available at <https://icassa.sardc.net/docs/>, accessed on 4 November 2020.

<sup>139</sup> Ibid.

Even though the Sharm El Sheikh Action Plan, applied a more reciprocal approach with regards to Africa-China investments, it similarly like the Addis Ababa Action Plan, made no explicit indication to form a multilateral dispute settlement forum. It appears paradoxical that African Countries and China, recognises the importance of the FOCAC forum to facilitate multilateral cooperation but seems to ignore the growing investment disputes between the two sides. A multilateral dispute settlement forum could assist in litigating the high volumes of investment disputes between the two sides but based on the Addis Ababa and Sharm El Sheikh Action Plans, it seems there is no urgency to establish such a forum.

However, shortly after the adoption of the 2009 Sharm el-Sheikh Action Plan, the Africa-China legal cooperation took a turn for the best, as the first FOCAC Legal Forum was established.<sup>140</sup> One of the key objectives of this Legal Forum, was to build a dialogue mechanism for strengthening legal exchanges and to promote the all-round development concerning Africa-China cooperation across different fields such as economics, politics, international affairs to name a few.<sup>141</sup> This forum would act as a parallel forum, which serves as the backbone of the entire Africa-China Cooperation. Thus, this would enhance Africa-China legal cooperation especially in the area of trade and investments.

The Fifth FOCAC Ministerial Conference was launched in China, Beijing in 2012 and released the Beijing Action Plan (2013-2015).<sup>142</sup> This conference was attended by the Chairperson of the African Union (AU) Commission, Ministers of Economic Cooperation and Foreign Affairs from China and fifty African member States.<sup>143</sup> Although this Action Plan draws focus on key areas that stimulate Africa-China investments such as job-creation, technology transfers, industrialization to name a few, like the former Action Plans, no concrete initiatives are expressed to address the increase of Africa-China investment disputes.<sup>144</sup>

The Sixth FOCAC Ministerial Conference was held in 2015 and was attended by a wider audience from China and 50 African member States, to produce the Johannesburg Action

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<sup>140</sup>‘The FOCAC Effect: Tracing Emerging Discourse in Sino-African Educational & Legal Co-operation’ *The China Monitor, Issue 56*, October 2010, available at <https://www0.sun.ac.za/ccs/wp-content/uploads/2010/>, accessed on 23 April 2020.

<sup>141</sup> Ibid.

<sup>142</sup>Forum On China-Africa Cooperation Beijing Action Plan (2013-2015), available at [https://www.focac.org/eng/zywx\\_1/zywj/t954620.htm](https://www.focac.org/eng/zywx_1/zywj/t954620.htm), accessed on 7 October 2020.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

Plan(2016-2018).<sup>145</sup> Among attendees at this Conference, were Heads of State and Government, The AU Commission's Chairperson, Heads of Delegations and Ministers of economic cooperation and Foreign Affairs.<sup>146</sup> Unlike former Conferences, the Johannesburg Action Plan, could be regarded as the most notable event regarding Africa-China's legal cooperation, as it launched the China-Africa Joint Arbitration Centre (CAJAC).<sup>147</sup> The FOCAC Legal forum covers legal cooperation between the two parties, the CAJAC forum provides the first multilateral dispute settlement forum for commercial disputes which includes investment issues and is legally binding on member States.

The Beijing Action Plan (2019-2021) is the latest Action Plan, that was released in 2018 in Beijing, during the Seventh FOCAC Ministerial Conference.<sup>148</sup> Parallel to previous Ministerial Conferences, the attendees included Heads of Delegation, Ministers of Foreign Affairs, Heads of States and Governments from China and 53 African Countries.<sup>149</sup> This Action Plan, in contrast to former Action Plans explicitly recognized Africa's developmental policies such as Agenda 2063.<sup>150</sup> Africa's Agenda 2063 outlines the continents sustainable developmental goals such as poverty eradication, investments, political stability, economic growths amongst others.<sup>151</sup> The Beijing Action Plan (2019-2021) under paragraph 3.2.5 it states that, "*African countries will continue to improve the legal framework and infrastructure, and provide efficient and results-oriented government services wherever possible to create a more enabling environment for attracting investment from Chinese enterprises and for industrial capacity cooperation.*"<sup>152</sup> This reaffirms that both sides are committed to improving their legal frameworks to ensure that there is a conducive environment that deals with investments effectively.

## 2.5 Conclusion

To conclude, this chapter gave an overview of legal cooperation as it relates to Africa-China investments. By comprehending the motives that drives legal cooperation between African Countries and China, this section relied on legal, economic and political theories. These theories,

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<sup>145</sup>The Forum on China-Africa Cooperation Johannesburg Action Plan(2016-2018), available at [https://www.focac.org/eng/zywx\\_1/zywj/t1327961.htm](https://www.focac.org/eng/zywx_1/zywj/t1327961.htm), accessed on 3 March 2020.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup>Forum on China-Africa Cooperation Beijing Action Plan (2019-2021), available at <https://focacsummit.mfa.gov.cn/>, accessed on 5 April 2020.

<sup>149</sup> Ibid

<sup>150</sup> Ibid.

<sup>151</sup> Azubike Onuora-Oguno, Thomas Kleven & Wahab O Egbewole *Education Law, Strategic Policy and Sustainable Development in Africa* (2018) 2-3.

<sup>152</sup> Beijing Action Plan op cit note 142.

broadens one's understanding concerning Africa-China investments because through the literature review it is evident that Africa-China investments and legal cooperation is intrinsically complex.<sup>153</sup> For instance, as mentioned previously, the first Africa-China multilateral legal cooperation was a result of political efforts taken by the former colonized Countries, to establish a collaboration unique to Global South Countries and to focus strong directives that enhances economic development.<sup>154</sup> Hence, a political understanding of Africa-China's relationship, may expand one's perspective when looking at how laws and policies are implemented, especially in the context of investment disputes settlement between the two sides.<sup>155</sup>

The literature review, illustrated that Africa-China legal cooperation has a long history, changed drastically over time and of late has become increasingly common regarding investments. The Forum on China-Africa Cooperation FOCAC was founded in 2000 and only fifteen years later, officially launched the CAJAC as the first multilateral disputes settlement forum, which could assist in settling disputes.<sup>156</sup> More emphasis is still needed to ensure the effectiveness of the CAJAC forum. Nonetheless, even though the FOCAC forum remains a diplomatic platform which makes no binding obligations on China and African Countries, it contributes to enhancing legal cooperation between the two sides.

The FOCAC forum releases Action Plans, which outlines the commitments between the two sides and a follow-up committee assesses the progress concerning its implementations.<sup>157</sup> The Action Plans has consistently over the years highlighted key concerns regarding Africa-China legal cooperation and commitments towards strengthening investments between the two parties. The next chapter will look at the actual legal frameworks which govern Africa-China investments and dispute settlements. The intention of chapter three, aims to look at the existing legal frameworks and its challenges, thus reasserting the importance of the FOCAC forum's contributions towards settling Africa-China investment disputes.

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<sup>153</sup> Silvio Beretta, Axel Berkofsky & Lihong Zhang *Understanding China Today: An Exploration of Politics, Economics, Society, and International Relations* (2017) 16.

<sup>154</sup> Luis Eslava, Michael Fakhri, Vasuki Nesiah op cit note 116.

<sup>155</sup> Beretta, Berkofsky & Zhang op cit note 153.

<sup>156</sup> Hogan Lovells Publications op cit note 28.

<sup>157</sup> Shelton & Paruk op cit note 131 at 84.

### 3.1 Introduction

The preceding chapter discussed the scope of Africa-China legal cooperation, looked at the historical ties between the two sides concerning investments and outlined the Forum on China-Africa Cooperation (FOCAC) Action Plans role with regards to investments. The formation of the FOCAC forum, resulted in the tremendous growth in Africa-China business relations, whereby, both parties significantly benefited through the increase of trade, investments and financial assistance.<sup>158</sup> Chinese investments in Africa, developed the continents infrastructure remarkably with the building of telecommunication networks, dams, ports and railways.<sup>159</sup> In return, many African Countries became a leading investment partner for China's own domestic development ambitions such as 'Made in China 2025',<sup>160</sup> and the Belt and Road Initiative (BRI)<sup>161</sup>.<sup>162</sup> Africa's wealth in natural resources and strategic upcoming markets, attracts Chinese investments particularly in the infrastructural sectors of Africa.<sup>163</sup>

During the 2018 Beijing FOCAC Summit, President Xi Jinping reiterated that, China would collaborate with the African Union (AU) to establish a China-Africa infrastructure plan.<sup>164</sup> The aims of this infrastructure plan would support Chinese companies, that invests in the development of Africa's infrastructure, through the investment-construction-operation programme.<sup>165</sup> Many African Countries welcomed these Chinese investments because they could gain financial and

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<sup>158</sup> Arkebe Oqubay & Justin Lin *China-Africa and an Economic Transformation* (2019) 4.

<sup>159</sup> David Pilling & Emily Feng 'The other side of Chinese investment in Africa' available at <https://www.ft.com/>, accessed on 26 September 2020.

<sup>160</sup> China 2025, is China's aim to shift its economy from being a low-end manufacturer to a high-end producing goods by the year 2025. This project seeks international markets to partner with and to lead in the high-tech industry. <sup>160</sup> Melissa Cyrill 'What is Made in China 2025 and Why Has it Made the World So Nervous?' available at <https://www.china-briefing.com/>, accessed on 28 August 2020.

<sup>161</sup> China's Belt and Road Initiative is China's plan to connect Europe, Africa and Asia through land and maritime networks to boost its economy. <sup>161</sup> 'Belt and Road Initiative' *The World Bank* 29 March 2018, available at <https://www.worldbank.org/>, accessed on 29 June 2020.

<sup>162</sup> Panos Mourdoukoutas 'What China Wants from Africa? Everything' available at <https://www.forbes.com/>, accessed on 27 August 2020.

<sup>163</sup> Ibid.

<sup>164</sup> Full text of Chinese President Xi Jinping's speech at opening ceremony of 2018 FOCAC Beijing Summit' *XinhuaNet* 3 September 2018, available at <http://www.xinhuanet.com/>, accessed on 8 March 2020.

<sup>165</sup> Ibid.

technological developments, to stimulate their economic growth and enhance its global economic competitiveness.<sup>166</sup>

In 1996, China's Ministry of Commerce stated that, its Foreign Direct Investment (FDI) to the African continent roughly amounted to \$56 million, then in 2005, increased to \$1.5 billion and by 2011 multiplied ten times to \$15 billion.<sup>167</sup> Inevitably, this rapid growth of Chinese investments in Africa, resulted in the sharp increase in commercial disputes which includes investment related disputes, thus putting a strain on the current legal dispute settlement mechanisms.<sup>168</sup> Recognizing this legal weakness or rather limitations, as evidenced by the increase of Africa-China investment disputes, the Fourth FOCAC Ministerial Conference in Egypt facilitated a sub-platform.<sup>169</sup> This platform could be considered as the first multilateral legal platform between the two sides since the Bandung Conference in 1955 and focused solely on legal exchanges between African Countries and China.

Although, the FOCAC Legal Forum carries no institutional or legal authority over investment agreements between African Countries and China, this forum, certainly creates and presents a unique environment for both parties to agree overtly on pressing legal issues.<sup>170</sup> For instance, the FOCAC Legal Forum looks at how the legal frameworks could improve concerning dispute settlements, promote the usage of alternative dispute settlement mechanisms such as arbitration, negotiation and mediation.<sup>171</sup>

Considering this background, this chapter analyses the current multilateral legal frameworks, which govern Africa-China investments, with particular emphasis on dispute settlement. In doing so, this section first looks at how policies impact Africa-China's legal cooperation. Lastly, this chapter briefly examines the bilateral legal cooperation between some African Countries and China.

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<sup>166</sup> Shen op cit note 14 at 3.

<sup>167</sup> Ibid.

<sup>168</sup> Kiggundu op cit note 19.

<sup>169</sup> 'Fourth Ministerial Conference of Forum on China-Africa Cooperation' *China embassy* 9 November 2009, available at <http://www.chinaembassy.org.tr>, accessed on 17 February 2021.

<sup>170</sup> Samuli Seppanen 'Chinese Legal Development Assistance: Which Rule of Law - Whose Pragmatism' (2002) 51;1 *Vanderbilt Journal of Transnational Law* 132.

<sup>171</sup> Kiggundu op cit note 19 at 155.

### 3.2 The Impact of Policies on Africa-China's Legal Cooperation

Prior to 1978, China closed most of its law schools under the leadership of Chairman Mao Zedong.<sup>172</sup> During this period, the rule of law was closely associated with the evils of capitalism and a symbol of Western imperialism, which were heavily frowned upon.<sup>173</sup> However, two dominant legal frameworks continued to prevail under this era namely; the formal model which looked at the physical legal literature, which predates thousands of years and is called the Fa.<sup>174</sup> The Fa law, took a very hardline and punitive approach.<sup>175</sup>

Whereas second model referred to a less structured framework, which depended on unwritten customs, norms, ethics inter alia to govern moral behaviors.<sup>176</sup> This model, also referred to as the Li which was more nuanced and flexible.<sup>177</sup> Nonetheless, after the fall of Chairman Zedong, President Deng Xiaoping took office shortly and implemented its "Open door" policy which unlocked China's market to the global economy.<sup>178</sup> It is during this period where many African Countries were also gaining its independence and the legal/investment cooperation between Africa and China immensely increased. The Open-door Policy is in many ways attributable to the rapid increase of Africa-China relations concerning legal cooperation and investments amongst others. Just like the Open-door Policy greatly impacted Africa-China cooperation, so has many other policies from China strengthened Africa-China investments, legal cooperation and trade to name a few.

#### 3.2.1 China Africa Policy

Generally speaking, the Africa-China legal cooperation is predominantly based on policies and less on laws.<sup>179</sup> Perhaps the reason for this could be a cultural preference and way of doing business or because it offers flexibility as opposed to treaties. Policy often refers to the intentions and non-intentions that a government wants to achieve with its citizens in its society.<sup>180</sup> In many countries, policies may be debated at a parliament level and be passed into law if it is consistent

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<sup>172</sup> Shao-Chuan Leng 'The Role of Law in the People's Republic Of China as Reflecting Mao Tse-Tung's Influence' (1977) 68;5 *The Journal of Criminal Law & Criminology* 356.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Leonard Silk 'Economic Scene; The Open Door Policy in China' available at <https://www.nytimes.com/>, accessed on 12 August 2020.

<sup>179</sup> 'Africa in China's Foreign Policy' *Brookings* April 2014 at 19-20, available at <https://www.brookings.edu>, accessed on 24 July 2020.

<sup>180</sup> Hong-lin Yu 'Choice of the proper law vs. public policy' (2008) 1;1 *Contemporary Asia Arbitration Journal* 108-109.

with the laws of the country.<sup>181</sup> Therefore, one could consider policy, as the first step that usually follows the law.<sup>182</sup> On the other hand, the law looks at bringing justice to the society whereas policies aim to shape certain goals.<sup>183</sup>

In the context of Africa-China cooperation, policies plays a major guiding role between the two sides because it shapes all-round development which includes investments.<sup>184</sup> This is reflected in China's 2006 and 2015 Africa Policy Papers, which were released at the respective FOCAC Summits.<sup>185</sup> These China Africa Policy papers, outlines the Chinese government's foreign policies towards African Countries, as well as economic relations and developmental goals to name a few.<sup>186</sup> Therefore, it is imperative to pay attention to China's policies towards Africa because they significantly influence and shape Africa-China investments. For instance, according to China's 2006 Africa Policy paper, under Part III (3), the Chinese government highlights its ideas on Africa-China investment policies by reiterating its support on the Agreement on Bilateral Facilitation and Protection of Investment and the Agreement on Avoidance of Double Taxation with African Countries amongst others.<sup>187</sup>

China's Africa Policies, applies to all African Countries which are members of the FOCAC forum. However, China's Africa Policies are not applied uniformly across the board. China puts more emphasis on its policymaking in African Countries, which are considered as "regional leaders" compared to other African States, which are regarded as "problematic Countries".<sup>188</sup> The term "regional leaders" refers to African Countries such as South Africa, Egypt and Nigeria to name a few, which hold more economic and international political influence on the continent.<sup>189</sup> Whereas "problematic Countries" speaks of Countries such as the Democratic Republic of Congo, Zimbabwe and Sudan amongst others, which are politically unstable or marred with rife conflicts but have strategic resources and minerals.<sup>190</sup> This certainly gives the impression that China's policies towards Africa are aimed to benefit it's self-interest. Rightfully so, as African Countries should not be the personification of a child, which requires all-around parental guidance, likewise, it must formulate a standardized "China Policy" collectively, which outlines its specific needs too.

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<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> Full Text: 'China's second Africa policy paper' *China Daily* 5 December 2015, available at <https://www.chinadaily.com.cn>, accessed on 19 August 2020.

<sup>185</sup> Ibid.

<sup>186</sup> *The White Paper on China's African Policy* (published in China Report 43, 3 of 2007).

<sup>187</sup> Ibid.

<sup>188</sup> Brookings op cit note 179 at 20.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

Even though Africa is made up of 55 Countries, it could perhaps through the African Union (AU) framework, establish a “China Policy” as a collective, to advance its own interests.

### 3.2.3 China Non-Interference Policy & One-China Policy

Apart from China’s 2006 and 2015 Africa Policy Papers, African Countries also welcomes China’s ‘Non-intervention Policy’, whereby China refrains from meddling in the internal affairs of African Country.<sup>191</sup> This Non-Intervention Policy, makes China a more favourable investment partner from the perspective of African governments.<sup>192</sup> This is because, Western Countries generally attach strict conditions for African laws to conform with “democratic values”, before investing in the respective African Country. Paul Collier, in the article “The case for investing in Africa”, submits that Western investments in Africa are influenced and determined by African Countries levels of democracy.<sup>193</sup> In other words, Western companies puts immense expectations on the ways which African governments govern its internal issues, as a prerequisite for receiving investments, whereas, China invests irrespective of the domestic matters in the corresponding African Country.<sup>194</sup> Therefore, China’s Non-intervention Policy in African Countries, contributes to a conducive legal relationship between the two sides especially in the context of Africa-China investments.

However, China’s Non-intervention Policy has some sort of indirect contradictions, in the sense that China refrains from interfering in African Countries local affairs but passively dictates which allies African Countries should abstain from. For instance, eSwatini is the only African Country which is not a member of the FOCAC forum because it maintains close alliances and diplomatic relations with Taiwan.<sup>195</sup> China refuses to recognize Taiwan’s sovereignty under its “One-China” Policy. Taiwan.<sup>196</sup> Consequently, Swaziland misses out on the investment commitments, which the FOCAC forum has to offer. China reiterated its One-China Policy at numerous FOCAC Conferences, thus, many African Countries gradually renounced their diplomatic relations with Taiwan, in order to strengthen its cooperation with China.<sup>197</sup>

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<sup>191</sup> Tilman Pradt *China’s New Foreign Policy: Military Modernisation, Multilateralism and the ‘China Threat’* (2016) 130.

<sup>192</sup> Alula Iyasu ‘China’s Non-Interference Policy and Growing African Concerns’ available at <https://africanarguments.org/>, accessed on 10 December 2020.

<sup>193</sup> Paul Collier ‘The case for investing in Africa’ available at <https://www.mckinsey.com/>, accessed on 12 May 2020.

<sup>194</sup> Ibid.

<sup>195</sup> Isabella Steger ‘One African country is absent from this week’s big shindig in Beijing’ available at <https://qz.com/>, accessed on 7 November 2020.

<sup>196</sup> Larry Madowo ‘eSwatini - Taiwan's last friend in Africa’ available at <https://www.bbc.com/>, accessed on 3 April 2020.

<sup>197</sup> Ibid.

### 3.2.4 China's Politics and its Functions of laws and Policies

Most Western democratic governments demarcate its branches of governance namely; the executive, judiciary and legislative.<sup>198</sup> However, the Chinese Communist Party (CCP) is legislated into China's Constitution. According to Chapter I under Article 1 "*...The socialist system is the fundamental system of the People's Republic of China. Leadership by the Communist Party of China is the defining feature of socialism with Chinese characteristics. It is prohibited for any organization or individual to damage the socialist system.*"<sup>199</sup>. As a consequence many CCP members holds key offices in China's government and influences the process of policymaking in China, even if the law states otherwise.<sup>200</sup> In other words, the implementation of the CCP's policies, are generally more effective compared to the enactment of China's laws because of the influence of the CCP officials, which occupy key positions in China's government.

Traditionally, the CCP used law as a legal instrument to implement its political objectives and to silence divergent opponents.<sup>201</sup> Considering the functions of laws and policies in China, gives one the impression that China is more invested in its policies regarding Africa-China cooperation, which includes investments, hence, the FOCAC forum's foundations are based in large on policies and less on laws. Eric Li, an affluent Chinese investor and political scientist asserted during a Tedtalk, that reforming and implementing policies in China is easier compared to in the US, which reflects real change.<sup>202</sup> This allows, Chinese policies regarding investments in Africa, to adopt more pragmatic approaches, and is not too much reliant on the "black letter of the law" contracts. This is perhaps evident in the massive increase of Chinese investment projects in African Countries, albeit the lack of transparency and lack of access to actual investment agreements, for a thorough examination by stakeholders.<sup>203</sup>

Most Western Countries, strictly governs by the rule of law, which implies that nobody or entity should be above it, thus, making a clear separation between politics and the law of a

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<sup>198</sup> Arnold Burns & Stephen Markman 'Understanding Separation of Powers' (1987) 7;3 *Pace Law Review* 575-576.

<sup>199</sup> Constitution of the People's Republic of China, Article 1.

<sup>200</sup> Jingjing Liu 'Overview of the Chinese Legal System' (2013) 1;1 *Environmental Law Institute* 2-3.

<sup>201</sup> Elizabeth Lynch 'Crossroads: The PRC At 70' available at <https://chinalawandpolicy.com/>, accessed on 4 November 2020.

<sup>202</sup> Eric X. Li: A Tale of Two Political Systems' *TEDtalk* 1 July 2013, available at <https://www.youtube.com/watch?v=s0YjL9rZyR0>, accessed on 7 February 2021.

<sup>203</sup> Richard Hudson 'Chinese Investments in Africa: The Ethics of Transparency' available at <https://sevenpillarsinstitute.org/>, accessed on 5 May 2020.

Country.<sup>204</sup> To that effect, Castellucci argues that the rule of law developed within the framework of Western capitalist, market-based economic systems.<sup>205</sup> Therefore, the concept of the rule of law is often associated with liberal democratic political regimes and China remains a socialist Country with a limited free market.<sup>206</sup> In optimal ways by de facto, one can assert that perhaps some weak legal institutions in African Countries and the authority of the Chinese Communist Party (CCP), hugely influences the Africa-China legal cooperation and Chinese firms bidding for tenders in Africa.<sup>207</sup> In most cases, the Africa-China legal cooperation would entail political undertones, regardless if its policy or law-based.<sup>208</sup> The role of politics is a large determining factor, in the outcome of the ruling by the rule of law regarding Africa-China relations.

Moreover, Chinese companies or investors in African Countries are able to file direct complaints/disputes to Beijing, through the embassy's Office of Economic and Commercial Affairs by bypassing the ambassador.<sup>209</sup> This bureaucratic setup, in some ways denotes that, contentious issues exist between China's politics and economics, which impacts the implementation of China Africa policy.<sup>210</sup> This is because, China's embassies in Africa, houses the Ministry of Commerce's (MOFCOM) and the Office of Economic and Commercial Affairs, and these offices mediate the relationship between the African governments and MOFCOM, rather than the office of the ambassador.<sup>211</sup> Therefore, China's Africa policies concerning economics, which also includes investments amongst others, would be facilitated through these offices. Moreover, China's Africa policies around investments, requires capital, which is authorized by MOFCOM.<sup>212</sup>

### **3.3 Africa-China's Cooperation Regarding Bilateral Dispute Settlement Legal Mechanisms**

The scope of engagement between African Countries and China is complex and dynamic. Partly because, Africa is made up of 55 Countries which all have different legal systems, various capabilities and diverse environments for doing business.<sup>213</sup> Therefore, this creates a web of legal issues, which needs to be untangled for one to understand the frameworks which regulate Africa-China commercial disputes. The Africa-China dispute settlement legal frameworks is diverse, as

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<sup>204</sup> Jeremy Waldron 'The concept and the rule of law' (2008) 43;1 *Georgia Law Review* 11.

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid* at 35-36.

<sup>207</sup> Hudson *op cit* note 203.

<sup>208</sup> Ignazio Castellucci, 'Rule of Law with Chinese Characteristics' (2007) 13 *Annual Survey of International & Comparative Law* 35.

<sup>209</sup> *Ibid*

<sup>210</sup> *Ibid.*

<sup>211</sup> Brookings *op cit* note 179 at 22.

<sup>212</sup> *Ibid.*

<sup>213</sup> See the discussion under Chapter 4 on The Plurality of Legal Systems.

it generally consists of domestic laws of China, the respective African Countries and any other international instruments to which the said Countries may be members of. In accordance with the rules of private international law, the primary location where a dispute may be settled is often decided by the parties to a dispute in their contract, or it could be determined by national courts where the dispute arose.<sup>214</sup> Whereas under international dispute settlements mechanisms, litigations varies from the WTO Dispute Settlement law<sup>215</sup>, ICSID regulations and the China-African Joint Arbitration Centre which deals with mediation and arbitration.

### **3.3.1 Bilateral agreements and Bilateral Investment Treaties, Dispute Clauses.**

Nonetheless, with reference to international investment law, it is grounded on the general sources of international law as stipulated under Article 38 of the Statute of International Court of Justice (ICJ), which includes treaties, custom, general principles of law amongst others.<sup>216</sup> Therefore, although the majority of Africa-China investments commitments are taken multilaterally under the FOCAC process, the implementation of these commitments are often concluded bilaterally through the respective domestic laws of the parties involved.<sup>217</sup> Regarding Africa-China investment agreements, the national laws of China and the particular African Country, could facilitate binding contracts which are facilitated through bilateral agreements or bilateral investment treaties (BITs) amongst others.<sup>218</sup> Bilateral agreements and BITs would often include a dispute settlement clause, which outlines the measures which the disputing party could follow to settle its grievances.<sup>219</sup>

The BITs, is considered as a primary source of international law.<sup>220</sup> However, when looking at the structure of these treaties, its apparent that they often silent on social matters such as environmental and labour issues to name a few. Therefore, BITs have undergone immense scrutiny from developing Countries, some developed Countries and civil society amongst others.<sup>221</sup> As a result Countries such as South Africa, cancelled its BIT's and replaced it with the South African Protection of Investment Act which entered into force in 2018. South Africa, argued

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<sup>214</sup> Alexander Robbins "The State as Pater Familias" (1917) 84 *Central Law Journal* 140.

<sup>215</sup> Mostly trade related only.

<sup>216</sup> Stephan Schill 'International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law' (2017) 19 *Amsterdam Center for International Law* 1-2.

<sup>217</sup> Kidane op cit note 98 at 140.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> Schill op cit note 55 at 2.

<sup>221</sup> Ofodile op cit note 26 145.

that its domestic investment laws are more suitable to regulate investments.<sup>222</sup> Regarding BITs, South Africa made the case that its national investment laws, should complement its local policies such as black economic empowerment, rather than existing in a vacuum, which is apart from the realities of the Countries current standing.<sup>223</sup> Therefore, South Africa refrains from concluding any BIT's in the future, except for cases which has compelling economic and political circumstances.<sup>224</sup> Nonetheless Bilateral agreements and BITs oftentimes resort to settling their investment disputes through domestic courts.

### 3.3.2 Dispute Settlements Through Domestic Courts

Africa-China investment disputes faces many challenges, when using domestic courts such as this the distrust of African courts decisions, the lengthy and expensive court cases, challenges of enforcing judgements inter alia.<sup>225</sup> . In 2005 the United Nations Economic Commission for Africa released a report outlining assessments of the judicial systems and legal performance amongst others and observed that in almost every African Country access to justice is timely and not as efficient.<sup>226</sup> The report suggested that reasons include, the court system is slow and expensive, and access to it is often determined by the social status of the person or persons involved.<sup>227</sup> In some cases the report stated that in Kenya waiting time can be as long as three years for justice.<sup>228</sup> Also, in the case of Mauritius, entrepreneurs could have access to the courts to settle their disputes but the process was so slow and costly that it would be more worthwhile to resort to arbitration using the Convention on the Execution of Foreign Arbitration Awards instead.<sup>229</sup>

Therefore, even though many African Countries provide constitutional guarantees when making use of its local courts, there remains an overarching speculation among citizens that the judiciary is biased and not independent.<sup>230</sup> The report also mentioned that some African Countries had made progress regarding their domestic legal systems such as Namibia, where a sample of experts in Namibia reported that 96 percent of the Country's judiciary system is largely independent, compared to 70 percent for Egypt, 35 percent for Mali, and only 22 percent for

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<sup>222</sup> 'South Africa's Bilateral Investment Treaties' *European Parliament* 19 August 2019 available at [https://www.europarl.europa.eu/doceo/document/E-9-2019-002587\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2019-002587_EN.html), accessed on 20 May 2020.

<sup>223</sup> 'South Africa Declines To Renew Bilateral Investment Treaties With European Union Member States' *Mondaq* 5 October 2012, available at <https://www.mondaq.com/>, accessed on 30 May 2020.

<sup>224</sup> European Parliament op cit note 222.

<sup>225</sup> Kiggundu op cit note 19 at 157.

<sup>226</sup> 'African Governance Report' (published in Addis Ababa: Economic Commission for Africa of 2005).

<sup>227</sup> Ibid.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

Cameroon.<sup>231</sup> The complex and diverse domestic legal systems across Africa, would affect Africa-China legal cooperation and in order to ensure that Africa-China trade and investment disputes are handled efficiently, the Africa-legal cooperation would have to improve the weaknesses in Africa domestic legal systems.

The report highlighted some practical solutions in terms of improving Africa's legal systems such as 1) reducing the delay, cost and uncertainty involved in accessing the courts; 2) restructuring the judicial system to make it more efficient, transparent, and accountable; and 3) updating and upgrading laws to reflect current needs and realities of the financial sectors.<sup>232</sup> These solutions mentioned above can assist Africa-China trade and investments which means less capital is wasted on tedious and timeous legal disputes.

Considering that most Africa-China investment disputes arise in Africa, Chinese businesses should consider investing more time in acquainting themselves with the laws of the particular African Country it intends to invest in. Failure to do so, often leads to disputes which adds on to the existing backlog of Africa-China investment disputes. However, when disputes arise between China and the respective African Country, there are diplomatic and judicial means to settle their disputes amicably.<sup>233</sup> Diplomatic means could include negotiation, mediation, inquiry and conciliation, whereas judicial means could comprise of arbitration and the courts.<sup>234</sup> Importantly, disputes between States can also be settled through non-forcible measures such as sanctions and countermeasures as the use of actual force is often discouraged at all costs.<sup>235</sup>

Furthermore, most African Countries, practises a pluralistic legal system, and, in some cases, Chinese investors are confused about the litigation processes to consult during an investment dispute.<sup>236</sup> The effects of this complex system, increases litigation costs and elongates the time taken to solve the said dispute. Consequently, in some instances, Chinese investors resort to unethical means to settle their disputes such as bribing local officials or cease all business operations.<sup>237</sup> This necessitates the need to, deliberately shift the focus of the FOCAC's legal cooperation's efforts, towards an effective Africa-China dispute settlements mechanism.

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<sup>231</sup> Ibid.

<sup>232</sup> Kiggundu op cit note 19 at 159.

<sup>233</sup> Strydom Hennie, Christopher Gevers, & Laurence Juma *International Law* (2016) 162.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

<sup>236</sup> Kidane op cit note 92 at 150.

<sup>237</sup> Ibid.

Professor Kidane, argues that, informal norms and diplomatic notes cannot adequately regulate complex Africa-China investments.<sup>238</sup>

### 3.3.3 Retaliatory Measures

In as much as, China remains as one of Africa's biggest investment and trading partner, it is worth re-emphasizing the need for a solid Africa-China dispute settlement body to avoid the same US-China economic war. Perhaps this political and economic conflict between two of the world's biggest powers, is a clear sign of the problems, of not having a strong mechanism that effectively settles disputes amicably. The ongoing US-China trade war negatively affects Africa-China investments because the tariff increases implemented by the US has in some ways contributed to the sharp decline in local currencies, commodity prices and major stock exchanges across Africa.<sup>239</sup> Therefore, the US-China trade war has dire consequences for Africa-China investments as China is also expected to curb its exports and generate fewer government revenues.<sup>240</sup>

The duty for States to refrain from using hostile retaliatory measures, means that a strong legal dispute mechanism should be in place. This is even more true, when it becomes evident that Africa-China investments are rapidly increasing as, these high numbers should raise an alarm. China predominantly invests in Africa, thereby, most of the investor-State investments disputes often occur in Africa.<sup>241</sup> Though, African companies also invest in China such as the South African Breweries that runs a joint-venture with a Chinese firm that produces popular Chinese beer brands amongst others.<sup>242</sup> Depending on how successful and resourcefully Africa-China investment disputes are litigated, will have a great impact on future Africa-China- investments.<sup>243</sup>

### 3.4 Solving Africa-China Disputes under Multilateral International Mechanisms

Apart from bilateral dispute settlement forums, Africa-China investment disputes could also be settled through international multilateral platforms such as the International Centre for Settlement of Investment Disputes (ICSID) and the World Trade Organization (WTO) Law to name a few. Unlike bilateral dispute settlement forums, investment disputes litigated under international

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<sup>238</sup> Won Kidane 'China's and India's differing investment treaty and dispute settlement experiences and implications for Africa' (2017) 49;2 *Loyola University Chicago Law Journal* 417-418.

<sup>239</sup> Jesus Cazares 'Africa amidst the Trade War' available at <https://infomineo.com/africa-amidst-the-trade-war>, accessed on 15 December 2020.

<sup>240</sup> Ibid.

<sup>241</sup> Zhu op cit note 18 at 150.

<sup>242</sup> Bo Li 'Africans also investing in China' available at <http://www.un.org/africarenewal/magazine/august-2015/africans-also-investing-china>, accessed on 7 January 2021.

<sup>243</sup> Kidane op cit note 98 at 149.

multilateral forums often gives disputing States less liberties because judges, litigators, costs and judicial decisions involves a third party which is supposed to be neutral and non-bias.

Furthermore, another important distinction to underline concerning these multilateral dispute forums, is the fact that States have more agency to sue other Countries compared to most bilateral domestic dispute forums, which primarily deals with the companies/investors directly. It is imperative to differentiate between State to State investment disputes and State to corporations investment disputes.<sup>244</sup> The difference between State to State disputes and State to foreign corporations is increasingly becoming popular as some Countries in the West politically accuse China of masquerading its State-owned enterprises as private corporations such as Huawei.<sup>245</sup> This could become problematic for Africa-China investments if the US decides to pressure African Countries to also consider banning Huawei which will increase Africa-China investment disputes.<sup>246</sup> Nonetheless, according to the United Nations Conference on Trade and Development (UNCTAD), a trilateral relationship exists in every foreign direct investment (FDI) transaction.<sup>247</sup> The trilateral relationship involves a foreign investor, the foreign investors home State and the host Country.<sup>248</sup>

### 3.4.1 FOCAC-Legal Forum and CAJAC

The first FOCAC-Legal Forum was hosted in 2009 and then in 2010, both by the Chinese Law Society.<sup>249</sup> China and the African member States, agreed to continue strengthening the FOCAC Legal Forum and enhance cooperation in areas of Alternative Dispute Resolution, legal research, training legal professionals and legal services.<sup>250</sup> The establishment of the FOCAC-Legal Forum, arrived nine years after the FOCAC forum was founded, which was as a result of African member States insisting on its formation.<sup>251</sup>

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<sup>244</sup> Ibid.

<sup>245</sup> Paul Sandle & William James 'UK bans Huawei from its 5G network: reaction' available at <https://www.reuters.com/>, accessed on 4 November 2020.

<sup>246</sup> Harriet Kariuki 'The Promise and Peril of Chinese Tech Investment in Africa' available at <https://chinaafricaproject.com/>, accessed on 9 June 2020.

<sup>247</sup> 'Dispute Settlement: State-State UNCTAD Series On Issues in International Investment Agreements' (UNCTAD/ITE/IIT/2003/1).

<sup>248</sup> Ibid.

<sup>249</sup> 'Chinese, African jurists discuss cooperation in 1st FOCAC legal forum' *Xinhua* 21 December 2009, available at <http://www.china.org.cn/>, accessed on 3 February 2021.

<sup>250</sup> Seppanen op cit note 161 at 132-133.

<sup>251</sup> Ibid.

Even though as many times mentioned before, the FOCAC-Legal Forum holds no legal authority regarding the settling of Africa-China investment disputes, it certainly creates a platform to discuss Africa-China investment legal issues.<sup>252</sup> The attendees at the first FOCAC-Legal Forum, included over eighty legal experts from African Countries and China with the task to carry out the Sharm el-Sheikh Action Plan (2010-2012) amongst others.<sup>253</sup> The Sharm el-Sheikh Action Plan, specifically put emphasis on the *“implementation of bilateral agreements on investment promotion and protection, and create a sound environment with a view to scaling up mutual investment. Governments of China and African countries give encouragement and support to their competitive businesses in investing in each other's country so as to raise the level and quality of cooperation for mutual benefit and win-win results.”*<sup>254</sup>

Moreover, the FOCAC-Legal Forums convenes annually and constantly gears some of its efforts towards Africa-China investments issues, whilst advocating for a multilateral Africa-China Dispute Resolution Mechanism to focus on investments amongst others.<sup>255</sup> Nonetheless, perhaps the biggest legal achievement of the FOCAC forum regarding investment disputes settlements, was the institution of the China Africa Joint Arbitration Centre (CAJAC), even though it is still not in force. The CAJAC forum, acts as a multilateral disputes settlement mechanism between African Member States and China.<sup>256</sup> This forum was established in 2015 during the Sixth FOCAC Ministerial Conference in Johannesburg South Africa.<sup>257</sup> China and African member States can utilise the CAJAC forum to arbitrate their commercial disputes which includes investment disputes.<sup>258</sup> The CAJAC forum, primarily deals with settling Africa-China commercial disputes through arbitration.<sup>259</sup> Despite the availability of various litigating channels, which could address investment disputes, oftentimes, it seems that arbitration is the most preferred method to settle Africa-China investment disputes.<sup>260</sup>

In Africa, the settlement of investment disputes through arbitration is encouraged through some centres such as; the Cairo Regional Centre for International Commercial Arbitration (CRICA), the Lagos Regional Centre for International Commercial Arbitration (RCICAL), the

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<sup>252</sup> Xinhua op cit note 249.

<sup>253</sup> Sharm el-Sheikh Action Plan (2010-2012).

<sup>254</sup> Ibid.

<sup>255</sup> Seppanen op cit note 170 at 147.

<sup>256</sup> Chen op cit note 27 at 209.

<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid.

<sup>260</sup> Ibid at 207.

Asian-African Legal Consultative Organization (AALCO) to name a few.<sup>261</sup> Whereas in China, arbitration is governed by the 1994 Arbitration Law, which also includes Opinions, Notices and Replies issued by the Supreme People's Court which serve as a form of judicial interpretation.<sup>262</sup> In 1956, China became a party to the New York Convention, which gave effect to foreign arbitral awards.<sup>263</sup> On the issue of enforcing judgements, roughly thirty African States and China are both parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>264</sup> Whereas, currently only Algeria, Egypt, Morocco and Tunisia have bilateral and commercial judicial treaties with China legal services, training of law professionals and the mechanism of non-judicial settlement of disputes.<sup>265</sup>

Professor Weidong Zhu, from the Institute of West Asia and African Studies, argues that arbitration might be a better option for Africa-China trade and investment dispute settlement.<sup>266</sup> This is because, if these disputes are settled through arbitration, both parties maintain their privacy and can both contribute to the arbitration process.<sup>267</sup> Furthermore, more flexibility exists in settling investment disputes through arbitration compared to the courts.<sup>268</sup> For instance, unlike disputes settled in courts, arbitration allows the disputing Country to choose its arbitrators, decide on the procedural rules, language amongst others.<sup>269</sup> Therefore, if Africa-China investment disputes are settled through arbitration mediums such as the CAJAC forum, instead the courts, then both parties would exercise more liberties through communicating in a language which suits both parties.<sup>270</sup>

Nonetheless, Amidst the rapid increase of Africa-China investment disputes, only at the Fourth FOCAC Ministerial Conference, did both sides agree overtly for the first time to promote the usage of national and regional arbitration to settle their investment disputes.<sup>271</sup> Arbitration remains an appropriate, convenient and effective way to settle Africa-China investment disputes, compared to many other litigation methods.

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<sup>261</sup>The Agreement between the Government of Nigeria and AALCO Relating to the Regional Center for Arbitration in Lagos was concluded on 26 April 1999, available at <http://www.aalco.in/greement/greement%20between%20AALCO%20and%20Government%20of%20Nigeria.pdf>, accessed on 20 July 2020.

<sup>262</sup>Weidong Zhu 'Determining the validity of arbitration agreement in China: Towards a new approach' (2010) 6 *Asian International Arbitration Journal* 45.

<sup>263</sup>Kidane op cit note 98 at 154.

<sup>264</sup>Ibid.

<sup>265</sup>FOCAC Beijing Action Plan (2013-15).

<sup>266</sup>Zhu op cit note 262 at 150-153.

<sup>267</sup>Ibid.

<sup>268</sup>Ibid at 150.

<sup>269</sup>Ibid.

<sup>270</sup>CAJAC Rules, Article 5.

<sup>271</sup>Follow-up Actions of the Fourth Ministerial Conference of the Forum on China-Africa Cooperation.

### 3.4.2 Africa-China investment Disputes under ICSID

The International Centre for Settlement of Investment Disputes (ICSID) is a Washington-based World Bank Group institution that also handles investment disputes through arbitration, mediation, and conciliation.<sup>272</sup> China and more than 50% of African Countries are parties to ICSID. Therefore, Africa-China investment disputes has the option resolve their investment disputes, through this multilateral dispute settlement forum.<sup>273</sup> There are many advantages in settling Africa-China investment disputes with the ICSID, such as, if an investor has a dispute with a host State then ICSID can link investors directly to access a form of dispute settlement.<sup>274</sup> Furthermore, ICSD makes it more probable to enforce final ICSID awards and avails the option to settle the dispute externally from the national courts of the host State.<sup>275</sup>

Through ICSID, investors do not have to depend on their home State to exercise diplomatic protection on their behalf.<sup>276</sup> In spite of the advantages of using the ICSID platform for litigating Africa-China investment disputes, there remains, several issues which makes it less appealing for both sides. For instance, the ICSID forum, lacks diversity in its appointment of qualified Asian and African arbitrators.<sup>277</sup> In as much as the identity of an arbitrator should not be used as a measure of competence, it almost goes without saying that, in the current contemporary times, affirmative selection in many organizations often reflects the character of the institution.<sup>278</sup> Therefore, the deficit of qualified Asian and African arbitrators might reflect a notion of exclusion, which makes ICSID less appealing for Africa-China to settle their investment disputes.

Another issue with using the ICSID platform to settle Africa-China investments, is the sense that it allocates the costs of settling investment disputes between both the claimant and the respondent, even if the respondent is not guilty.<sup>279</sup> This could be a problem for most African Countries, with struggling economies, when obliged to pay huge amounts of money which is unaffordable.<sup>280</sup> Consequently, it would not be in the best interest for many African Countries to approach the ICSID forum regarding Africa-China investment disputes, as China has the second

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<sup>272</sup> Leon Trakman 'The ICSID Under Siege' (2012) 45;3 *Cornell International Law Journal* 605-606.

<sup>273</sup> 'Member States: ICSID' *ICSID*, available at <https://icsid.worldbank.org/>, accessed on 3 February 2021.

<sup>274</sup> Trakman op cit note 273 at 603.

<sup>275</sup> *Ibid* at 604.

<sup>276</sup> *Ibid* at 607.

<sup>277</sup> Won Kidane 'The China-Africa Factor in the Contemporary ICSID Legitimacy Debate' (2014) 35;3 *Journal of International Law* 591-592.

<sup>278</sup> *Ibid*.

<sup>279</sup> *Ibid* at 598.

<sup>280</sup> *Ibid*.

largest economy in the world, and many African Countries are among the poorest economies globally.<sup>281</sup> The CAJAC forum is cognisant of the fact that many African Countries economies are still in its infant stages and therefore under its rules, it suggests that the costs to litigate Africa-China commercial disputes should be reasonable and reviewed.<sup>282</sup> Thus, these are some of the issues and motivations, which persuaded China and most African Countries to establish an arbitration mechanism, which is inclusive, more cost-effective and efficient for the two parties inter alia.<sup>283</sup>

### **3.4.3 China Africa Investments dispute settlement and the World Trade Organization**

Another resolution avenue for Africa-China investment disputes could also include the WTO. Even though, the WTO predominantly deals with trade-related issues, it also deals with investments under its Trade-Related Investment Measures (TRIMs Agreement).<sup>284</sup> Likewise, The WTO's General Agreement on Trade in Services (GATS) makes reference to foreign investments in services, as one of four modes of supply of services.<sup>285</sup> Last but not least, the WTO specifically established a Working Group in 1996, which is responsible for conducting analytical work on the relationship between trade and investment, due to the close correlation between trade and investments.<sup>286</sup>

China and 42 African Countries are member States to the WTO, and, therefore has access to settle their investment disputes through this platform. In general, African Countries has been largely underrepresented regarding filing disputes at the WTO forum, with notable cases only by Egypt and South Africa as defendants and not complainants.<sup>287</sup> This illustrates a pattern, which shows that African Countries do not use the WTO forum to settle their disputes. Reasons could include, Africa's lack of legal expertise and the expensive costs to settle their disputes through this platform to name a few.<sup>288</sup> In lieu of the above, these assumptions could further motivate the reasons, as to why China and so many African Countries are reluctant to litigate their investment disputes through the WTO platform.<sup>289</sup>

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<sup>281</sup> Ibid.

<sup>282</sup> CAJAC Rules, Article 61.

<sup>283</sup> Zithu Twala, Minal Ramnath, & Danni Hofmeyr 'The China-Africa Joint Arbitration Centre' available at <https://www.dentons.com/>, accessed on 15 August 2020.

<sup>284</sup> WTO|Agreement on Trade-Related Investment Measures (TRIMs). Retrieved 29 August 2020, from [https://www.wto.org/english/tratop\\_e/invest\\_e/trims\\_e.htm](https://www.wto.org/english/tratop_e/invest_e/trims_e.htm).

<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

<sup>287</sup> Keisuke Iida 'Is wto dispute settlement effective' (2004) 10;2 *Global Governance* 217.

<sup>288</sup> Gregory Shaffer & Ricardo Meléndez-Ortiz *Dispute Settlement at the WTO: The Developing Country Experience* (2010) 240.

<sup>289</sup> Ibid.

Considering the common issues presented under the ICSID and the WTO forum, when settling Africa-China investment disputes, makes the obvious case that the CAJAC center, is ever so relevant. This is because, the CAJAC forum embraces the understanding of China's rule of law and considers African countries circumstances, which plays a huge role in settling Africa-China investments disputes amongst others.<sup>290</sup> The CAJAC forum, has the opportunity to become the most competitive and effective dispute settlement platform concerning Africa-China investment disputes, since the current multilateral dispute forums presents more obstacles than solutions weaknesses.

### 3.5 Conclusion

To summarise chapter three, policies remain fundamental concerning Africa-China legal cooperation, investments and investment disputes settlements. African Countries, perhaps through the African Union (AU) should consider formulating a "China Policy" which articulates its priorities and developmental goals. Primarily, Africa-China investment contracts are concluded though bilateral agreements or BITs and according to international business law, business contracts often include the choice of law, whereby, both parties can approach the chosen court settle their disputes.<sup>291</sup> However, reasonable suspicions around national courts exists, such as the fear that a domestic court of choice, might rule in the favour of the local party, which undermines the independency of the court.<sup>292</sup>

Therefore, China and African Countries should adopt a unique dispute settlement mechanism, which takes its culture, experiences, international institutions and international investment regulations into account.<sup>293</sup> In as much as, the FOCAC forum holds no legal authority over Africa-China investment disputes, it surely creates an environment which influences and facilitates legal cooperation which affects Africa-China investments disputes.<sup>294</sup> A clear example can be seen with the formation of the CAJAC centre. While the CAJAC centre is not in force of yet, it remains a milestone regarding Africa-China legal cooperation and investments dispute

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<sup>290</sup> 'Inaugural Conference of China-Africa Joint Arbitration Centre - Beijing and Nairobi & Symposium on Dispute Resolution of Sino-African Infrastructure Construction Project Successfully Hosted' *Beijing Arbitration Commission* 31 March 2017, available at <https://www.bjac.org.cn/>, accessed on 26 July 2020.

<sup>291</sup> Cyril Emery 'International Commercial Contracts' available at <https://www.nyulawglobal.org/>, accessed on 13 September 2020.

<sup>292</sup> Ibid.

<sup>293</sup> Ibid.

<sup>294</sup> The International Schiller Institute op cit 74.

settlement because it deals uniquely with China and African States.<sup>295</sup> The CAJAC centre provides a neutral platform for Africa-China investment disputes to be settled fast and effective, which is a huge contribution from the FOCAC forum to enhance investment disputes between the two sides.<sup>296</sup>

However, many challenges continue to exist regarding the settlement of Africa-China dispute under bilateral and multilateral dispute settlement mechanisms. The next chapter provides an institutional analysis of the CAJAC forum and examines the challenges and prospects of the body in an attempt to discover, if it can finally be the solution to the difficulties faced with solving Africa-China investment disputes.

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<sup>295</sup> Jenny Cane, Lindi Nkosi-Thomas & Jean Meiring 'China-Africa Joint Arbitration Centre South Africa' available at <https://gbsa.co.za/law-journals/2017/>, accessed on 13 September 2020.

<sup>296</sup> Ibid.

CHAPTER 4:

CASE STUDY: CHINA-AFRICAN JOINT ARBITRATION CENTER:  
OPPORTUNITIES

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#### 4.1 Introduction

The previous chapter, discussed the role of the policies within the Forum on China-Africa Cooperation (FOCAC) regarding Africa-China investments and also looked at possible issues derived from bilateral and multilateral dispute settlement forums. China and most African Countries, recognised the need to establish an Africa-China dispute settlement mechanism, unique to its cooperation. As a result, the Sixth FOCAC Ministerial Conference produced the Johannesburg Action Plan, which presented the Africa-China investment discourse with a significant breakthrough by establishing the China-Africa Joint Arbitration Centre (CAJAC).<sup>297</sup> The CAJAC forum, offers the Africa-China investments disputes settlement, a long overdue solution.<sup>298</sup>

The formation of the CAJAC platform, was the first and only collaborative Africa-China arbitration centre.<sup>299</sup> Previously, Africa-China investment disputes were settled through either bilateral or commonly used multilateral dispute settlement forums of choice.<sup>300</sup> However, both of these dispute settlement forums presented the resolution of Chinese investments in Africa with numerous challenges, such as perceived bias decisions, corruption, complex legal processes amongst others.<sup>301</sup> On the other hand, international litigation forums often involves high costs, exclusion of Chinese and African representatives to name a few.<sup>302</sup> In lieu of the above, the CAJAC forum aims to address some of the above-mentioned concerns and implement a dispute settlement forum which is unique, to both African Countries and China's laws, legal history and culture.<sup>303</sup> However, the CAJAC forum's effectiveness in arbitrating Africa-China investments disputes, depends on its ability to overcome these common arbitration issues mentioned above.

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<sup>297</sup> Ibid.

<sup>298</sup> Princesse Mabiala 'Chinese Africa Joint Arbitration Center: A Solution to Trade Disputes between Africa and China' available at <https://the Arbitration Brief.com/>, accessed on 19 October 2020.

<sup>299</sup> Ibid.

<sup>300</sup> Ibid.

<sup>301</sup> Susan Franck 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73;4 *Fordham Law Review* 1600.

<sup>302</sup> Leon Trakman & Hugh Montgomery 'The Judicialization of International Commercial Arbitration: Pitfall or Virtue' (2017) 30;2 *Leiden Journal of International Law* 431-432.

<sup>303</sup> Ibid.

Even though, the CAJAC platform was officially established in 2015, it is currently not in force.<sup>304</sup> However, arguably the CAJAC forum is considered as the FOCAC platforms biggest contribution, towards creating a dispute settlement mechanism for African-China commercial cooperation, which includes investments.<sup>305</sup> There are currently five CAJAC centres operating in South Africa, Kenya, Shanghai, Beijing and Shenzhen.<sup>306</sup> These CAJAC centres provide a platform for sharing dispute resolution mechanisms, which will in turn, generate an Africa-China jurisprudence, to assist trade and investment issues between the two sides.<sup>307</sup>

Before looking at the CAJAC forum in depth, this chapter provides a brief historical timeline, which outlines the FOCAC forums achievements which led to the build-up of establishing the CAJAC centre. Secondly, this section examines the functions and objectives of the CAJAC forum. Lastly, general obstacles regarding arbitration in African Countries will be discussed, to assess, how these issues might hinder the CAJAC forum's efforts, when arbitrating Africa-China investment disputes.

#### **4.2 FOCAC: A Historical Timeline Which Assesses The FOCAC Forum's Efforts Geared Towards Investment Disputes Settlement.**

As from early 2000's, most Africa-China investment commitments were pledged through the FOCAC platform.<sup>308</sup> These commitments appeared to reflect in African Countries and China's domestic policies.<sup>309</sup> The Africa-China commitments would be discussed at the FOCAC Ministerial Conferences, documented in FOCAC Action Plans and its implementation monitored by the FOCAC Follow Up Committee.<sup>310</sup> A brief timeline concerning Africa-China investment commitments undertaken through the FOCAC forum, will be outlined to highlight its achievements which eventually formed the CAJAC centre. Specific emphasis will be put on both Africa-China investments, legal cooperation and investment disputes settlement.

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<sup>304</sup> Simla Ramdayal, Minal Ramnath & Zithu Twala 'The China-Africa Joint Arbitration Centre' available at <https://www.jdsupra.com/>, accessed on 2 February 2021.

<sup>305</sup> 'Chinese Africa Joint Arbitration Center: A Solution to Trade Disputes between Africa and China' *The Arbitration Brief* 11 February 2019 available at <https://the-arbitration-brief.com/>, accessed on 4 June 2020.

<sup>306</sup> Ibid.

<sup>307</sup> Emilia Onyema 'Discussion paper' Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa, Addis Abba' available at <https://researcharbitrationafrica.com/>, accessed on 16 July 2020.

<sup>308</sup> Yun Sun 'China's 2018 financial commitments to Africa: Adjustment and recalibration' available at <https://www.brookings.edu/>, accessed on 12 February 2021.

<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

#### 4.2.1 General Overview of The FOCAC Follow-up Committee

The FOCAC Follow-up Committee, comprises of twenty-seven member agencies<sup>311</sup> in China and four<sup>312</sup> African institutions, which deals with the FOCAC forums investment commitments and its implementation.<sup>313</sup> Only four African institutions represents 54 African Countries, whereas 27 agencies represents China, which is one country. Therefore, one could argue that African Countries should be more involved in the FOCAC processes, as the representation of African institutions are far less compared to those of China. The limited participation of African institutions is concerning. This is because, African Countries should strategically position itself in the Follow-up Committee, to address concerns and express its desired outcomes, regarding Africa-China investments in the FOCAC platform. The Follow-up Action Committee, frequently invites China's representatives of the 27 member agencies, to its regular plenary conferences to discuss plans and report on previous FOCAC commitments.<sup>314</sup>

Moreover, the FOCAC Follow-up Action Committee, covers a multitude of diverse government offices and financial institutions, major ministries and administrative branches.<sup>315</sup> However, China's Ministry of Foreign Affairs, Finance and Commerce remains fundamental in the execution of FOCAC policies mandates.<sup>316</sup> Regarding Africa-China investments, China's Ministry of Commerce facilitates the communications between African governments and the Chinese Economic and Commercial Counsellor's Office.<sup>317</sup> Equally so, China's Ministry of Commerce also creates policies which supports Chinese companies to continue investing in African Countries.<sup>318</sup> China's Ministry of Finance, continues to finance many Africa-China investments through authorisations and supervisions over the budget plans.<sup>319</sup> Mounting evidence

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<sup>311</sup> Ministry of Foreign Affairs, Ministry of Commerce, Ministry of Finance, Information Office of the State Council, Ministry of Agriculture, Ministry of Education, Ministry of Culture, Ministry of Health, Ministry of Environmental Protection, Ministry of Science and Technology, Ministry of Land and Resources, National Development and Reform Commission, International Department of CPC Central Committee, Ministry of Transport, Ministry of Industry and Information, Export Import Bank of China, Bank of China People's Bank of China, China-Africa Development Fund, National Tourism Administration, State Administration of Taxation, General Administration of Customs, State Administration of Radio, Film and Television, General Administration of Quality Supervision, Inspection and Quarantine, China Council for the Promotion of International Trade, Chinese Communist Youth League and Beijing Municipal Government, Department of African Affairs and Department of West Asian and North African Affairs of Ministry of Foreign Affairs, Department of West Asian and North African Affairs and Department of Aid to Foreign Countries of Ministry of Commerce, Department of Policy and Legal Affairs of Ministry of Finance.

<sup>312</sup> Department of African Affairs and Department of West Asian and North African Affairs of Ministry of Foreign Affairs, Department of West Asian and North African Affairs and Department of Aid to Foreign Countries of Ministry of Commerce, Department of Policy and Legal Affairs of Ministry of Finance.

<sup>313</sup> Li Anshan, Liu Haifang & et tal *FOCAC Twelve Years Later Achievements, Challenges and the Way Forward* (2012) 20.

<sup>314</sup> Ibid.

<sup>315</sup> Li Anshan, Liu Haifang & et tal op cit note 312 at 21-22.

<sup>316</sup> Ibid.

<sup>317</sup> Ibid.

<sup>318</sup> Ibid.

<sup>319</sup> Ibid at 27.

put forward by the Follow-up Committee has recorded, suggests that the FOCAC forum contributed immensely to Africa-China investments since its inception in 2000.

#### **4.2.2 FOCAC Follow up achievements**

Nonetheless, during the First FOCAC Ministerial Conference in 2000, China signed a Bilateral Investment Protection Treaty with more than twenty African Countries and also set up centres in eleven African States to promote Chinese investments in Africa.<sup>320</sup> However, these figures mentioned above, perhaps gives the impression that it was not as inclusive, as more than 50 percent of African Countries were excluded from both commitments.

The Second FOCAC Ministerial Conference, achieved staggering financial gains, as Chinese direct investments in Africa totalled an estimate of US\$ 1.595 billion by 2005.<sup>321</sup> This increase of Chinese investments in Africa, indicated that the FOCAC forum delivered financial prosperity for many African Countries but unfortunately failed to address common investment issues such as poor labour standards, environmental harm, incomplete infrastructural buildings amongst others. This means that as Africa-China investments rapidly grew, and cases were filed domestically, the investment dispute settlement mechanisms weren't equally expanding.

The Third FOCAC Ministerial Conference achieved 31 mutual investment protection agreements and the China-Africa Development Fund invested over US\$500 million in 27 commercial projects.<sup>322</sup> This was a significant step towards a more inclusive Africa-China legal cooperation and investments, as more than 50 percent of African Countries committed to the protection of Africa-China investments. This would give Chinese investors more confidence to invest in Africa. However, up until this point the FOCAC Ministerial Conferences failed to address issues regarding investment disputes. It is almost as though, both sides pushed and welcomed investment growths between each other but naively excluded talks concerning investment disputes.

However, only during the Fourth Ministerial Conference in 2009, did both sides mention the need for a dispute settlement mechanism.<sup>323</sup> Perhaps, several African Countries should have taken the lead to address the issues around Africa-China investment disputes, since most of these

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<sup>320</sup> First FOCAC Ministerial Conference, Beijing 2000.

<sup>321</sup> The Second FOCAC Ministerial Conference, Addis Ababa 2003.

<sup>322</sup> The Third FOCAC Ministerial Conference, Beijing 2006,

<sup>323</sup> 'The Fourth Ministerial Conference of the China-Africa Cooperation Forum (FOCAC) opens' available at <https://www.fmprc.gov.cn/>, accessed on 14 February 2021.

disputes occurred in numerous African territories. Nonetheless, at the Fourth FOCAC Ministerial Conference, China increased its mutual investment protection agreements with 37 African Countries and established the first FOCAC Legal Forum.<sup>324</sup> Notably, the FOCAC Legal Forum contributed towards strengthening Africa-China's legal cooperation, which is beneficial to settling investment disputes and to diplomatically discuss investment issues amongst others.<sup>325</sup>

Out of all the previous FOCAC Ministerial Conferences, perhaps the Sixth FOCAC Ministerial Conference, could be regarded as the most revolutionary Conference between Africa and China. This is because this Conference, achieved a monumental accomplishment concerning Africa-China investment dispute settlement, by establishing the first Africa-China multilateral dispute settlement mechanism, CAJAC.<sup>326</sup> The CAJAC Centre, was launched to effectively handle commercial disputes between African Countries and China and inaugurated in 2015 in South Africa.<sup>327</sup> Although, the CAJAC centre currently holds 5 centres across Africa and China, it is not yet in force.<sup>328</sup>

#### 4.3 Background to co-building CAJAC

As discussed beforehand under chapter three, Africa-China investment disputes, could be resolved through domestic courts of the respective countries or through international arbitration centres such as the International Centre for Settling Investment (ICSID), to name a few.<sup>329</sup> However, the increase of investment-related disputes and the numerous obstacles these forums presented, called for an alternative dispute settlement mechanism for Africa-China investment disputes. Therefore, on the 15<sup>th</sup> of June 2015, the Johannesburg Action Plan was issued by 50 presidents and ministers of African Countries and China to form the CAJAC forum.<sup>330</sup> This Johannesburg Action Plan,<sup>331</sup> contained a wide-range of various commitments concerning Africa-China cooperation but perhaps the most notable effort, was to advance “non-judicial resolution of disputes.”<sup>332</sup>

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<sup>324</sup> Ibid

<sup>325</sup> Shen op cit note 14.

<sup>326</sup> Ibid.

<sup>327</sup> ‘CAJAC Shanghai’ *China-Africa Joint Arbitration Centre Shanghai* 26 November, available at <http://www.shiac.org/>, accessed on 3 February 2020.

<sup>328</sup> ‘Interviews with Our Editors: Interview with Deline Beukes, CEO of the China Africa Joint Arbitration Centre Johannesburg’ *Kluwer Arbitration Blog* 26 November 2018, available at <http://arbitrationblog.kluwerarbitration.com/>, accessed on 24 August 2020.

<sup>329</sup> See discussion under Chapter 3 at looking at Bilateral Africa-China Dispute Settlement Legal Mechanisms.

<sup>330</sup> Ibid.

<sup>331</sup> ‘Africa and China meet to assess progress in the implementation of FOCAC Action Plan and plan for the future’ *Tralac* 4 August 2016, available at <https://www.tralac.org/news/article/10218-africa-and-china-meet-to-assess-progress-in-the-implementation-of-focac-action-plan-and-plan-for-the-future.html>, accessed on 29 September 2020.

<sup>332</sup> Ibid.

In many ways one could consider the CAJAC platform, as a product of the Beijing Consensus.<sup>333</sup> The Beijing Consensus, is a Chinese Economic model which encapsulates both its economic and political policies.<sup>334</sup> One of the many aims of the Beijing Consensus was to: ‘...review the traditional friendship existing between China and Africa; to observe the latest development trends of international arbitration: and to envision the cooperative prospects of establishing the China-Africa Joint Dispute Resolution Mechanism.’<sup>335</sup> Since China is one of Africa’s biggest investment partners, the establishment of the CAJAC platform could not be more appropriate for authorities, businesspeople and legal practitioners to settle their Africa-China investment disputes.

Currently, two CAJAC centres operate in Africa, which is in South Africa and Kenya.<sup>336</sup> The agreement between Shanghai International Trade Arbitration Centre, the Association of Arbitrators, the Arbitration Foundation of Southern Africa (AFSA) and in the Africa Alternative Dispute Resolutions (ADR) laid the foundation for CAJAC Johannesburg.<sup>337</sup> Likewise, through the guidance of China law society, an agreement between the Beijing Arbitration Commission and the Nairobi Centre for International Arbitration (NCIA) established the CAJAC Nairobi in Kenya.<sup>338</sup> Even though only two CAJAC centres currently exists in Africa, it remains an undeniably big achievement for Africa-China investments. This is because, it provides an unique dispute settlement mechanism for the Africa-China businesspersons, investors inter alia.<sup>339</sup> Perhaps it is not necessary to establish a CAJAC centre for each 55 African Countries, but it could be an advantage for each African region to officiate a CAJAC centre, which effectively deals with its unique regional legal issues.

In 2017, South Africa’s CAJAC centre, passed the International Arbitration Act<sup>340</sup> which positions itself as an important international arbitration hub for the African continent.<sup>341</sup> The

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<sup>333</sup>In 2004, The phrase "Beijing Consensus" was coined by Joshua Cooper Ramo, to frame China's economic development model as an alternative—especially for developing countries—to the Washington Consensus of market-friendly policies promoted by the IMF, World Bank, and U.S. Treasury.

<sup>334</sup> Jun Li & Liming Wang *China's Economic Dynamics: A Beijing Consensus in the making?*(2013) 14.

<sup>335</sup> Saadia Bhatti ‘The China Africa Joint Arbitration Centre: A Natural Step to Sustain the Exponential Growth of Sino African business and trade’ available at <http://blogaila.com/2017/03/22/the-china-africa-joint-arbitration-centre-a-natural-step-to-sustain-the-exponential-growth-of-the-sino-african-trade-saadia-bhatti-esq-mciarb/>, accessed on 23 March 2020.

<sup>336</sup> Hogan Lovells Publications op cit note 28.

<sup>337</sup> Twala, Ramnath & Hofmeyr op cit note 282.

<sup>338</sup> ‘Inaugural Conference of China-Africa Joint Arbitration Centre - Beijing and Nairobi & Symposium on Dispute Resolution of Sino-African Infrastructure Construction Project Successfully Hosted’ *Beijing Arbitration Commission* 31 March 2017, available at <http://www.bjac.org.cn/english/news/view?id=2934>, accessed on 13 June 2020.

<sup>339</sup> Chen op cit note 27 at 210.

<sup>340</sup> South African International Arbitration Act No. 15 of 2017.

<sup>341</sup>Rebecca Browning ‘South Africa’s new International Arbitration Act No. 15 of 2017’ available at <https://globalarbitrationnews.com/>, accessed on 20 January 2021.

CAJAC centre, is likely to gain much more support from South Africa's advances in its arbitration laws. For instance, The South African Law Commission recommended the adoption of the UNCITRAL Model Law, for international commercial arbitrations, which could significantly modernize the South African arbitration legal framework.<sup>342</sup>

The UNCITRAL Model Law deals with numerous matters related to arbitration such as the composition and jurisdiction of the arbitral tribunal, arbitration agreements amongst many others.<sup>343</sup> Furthermore, the UNCITRAL Model Law also considers specific features and particular requirements relating to international commercial arbitration, to boost the effectiveness of arbitration as a method to settle disputes.<sup>344</sup> Therefore, considering that the CAJAC centre makes use of the arbitration laws of the hosting State and mainly focuses on arbitration as a litigating option to solve commercial disputes, means the improvement of South Africa's arbitration laws will in turn benefit the CAJAC centre. Consequently, this platform has the possible potential to position itself, as the most preferred option to settle Africa-China investment disputes, if implemented and managed successfully. This can be achieved, by making the CAJAC centre easily accessible to disputants, secure legitimacy, certainty, expediency and fair costs to name a few.

#### **4.4 Examining the functions and objectives of the CAJAC Platform**

The existing CAJAC centres, represents African and Chinese arbitrators because the CAJAC's arbitral committees are made up of individuals selected by South Africa, Kenya and China.<sup>345</sup> This in many ways, provides the disputants with more confidence and trust, as they are able to choose arbitrators from these diverse arbitral committees.<sup>346</sup> Whereas, compared to other international arbitrating forums, which mainly consists of Western arbitrators, which are perhaps unfamiliar with nature of Africa-China legal cooperation in investment laws as an example.<sup>347</sup>

Currently, the Johannesburg CAJAC centre has been officially hearing matters and is still in the process of setting up many other committees to assist its initiatives.<sup>348</sup> Even though, this platform started by using domestic arbitration legislation of the host county, all CAJAC centres

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<sup>342</sup> Hogan Lovells Publishers op cit note 28.

<sup>343</sup> 'UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' *UNCITRAL* 7 July 2006, available at <https://uncitral.un.org/>, accessed on 7 April 2020.

<sup>344</sup> *Ibid.*

<sup>345</sup> CAJAC Rules, Article 24.

<sup>346</sup> Chen op cit note 27 at 209.

<sup>347</sup> *Ibid.*

<sup>348</sup> Kluwer Arbitration Blog op cit note 327.

including CAJAC Johannesburg, CAJAC Shanghai, CAJAC Beijing, CAJAC Shenzhen, CAJAC Nairobi and CAJAC OHADA adopted a uniform set of Rules.<sup>349</sup> Therefore, instead of China adapting to each African Country's arbitration rules, it could now rely on the uniformity of CAJAC rules, which simplifies legal cooperation between the two sides seamlessly. The actual usage of the CAJAC centre, as a medium to settle investment disputes will depend on the choice of forum and law clauses, as determined by international private law.<sup>350</sup>

The CAJAC arbitrators, are tasked to build a good reputation, which promotes the CAJAC centre as a "best option" to settle investment disputes. This is because, the establishment and existence of a CAJAC centre, does not imply that it shall be the only or automatic mechanism used, to settle the arising disputes. Legal practitioners and disputants involved with Africa-China investments, will have to stipulate a clause in their contracts during the negotiation stages, which specifically chooses the CAJAC centre to settle disputes.<sup>351</sup> With this being said, it is important to reiterate again, that the CAJAC centres will extensively need to market itself broadly and ensure it delivers on its promises regarding settling investment disputes effectively.

#### **4.5 Challenges with African Arbitral Institutions, Which Could Affect The CAJAC Centre's Effectiveness**

Arbitration at large, remains the most preferred method to settle disputes regarding Africa-China investment disputes amongst others.<sup>352</sup> This being said, implies that the CAJAC centre will significantly impact Chinese investments in Africa, by providing a world-class alternative to dispute settlement. However, several challenges may impede the success of this platform, primarily because of issues such as the lack of a uniform and binding CAJAC Constitution, the plurality of African legal systems, low confidence in arbitrators and poor physical infrastructure to name a few.<sup>353</sup> Therefore, in as much as the CAJAC centres remains the FOCAC forums biggest contribution towards an effective Africa-China investment disputes settlement mechanism, it is important to address the abovementioned challenges.

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<sup>349</sup> CAJAC Rules, APPENDIX A: CAJAC CENTRES.

<sup>350</sup> CAJAC Rules, Article 7.

<sup>351</sup> CAJAC Rules, Article 8.

<sup>352</sup> Zhu op cit 18 at 189.

<sup>353</sup> Francis Kariuki 'The Vision of Co-building China-Africa Joint Arbitration Centres in Different Legal Systems' available at <http://kmco.co.ke/wp-content/uploads/2018/>, accessed 30 October 2020.

#### 4.4.1 The plurality of legal systems

To establish a uniformed CAJAC constitution, might sound simple in theory but it is very complex in practice because African Countries refers to many legal sources. Unlike China, Africa comprises of 55 Countries, each with its own distinctive legal systems which ranges across Roman-Dutch law, Civil law, Common law, Customary law, religious laws and hybrid jurisdictions. This is because, each African County has its own unique history, culture and economic situation amongst others, which shaped their current legal systems in place.<sup>354</sup> For instance, some African Countries were colonized by Britain or France and when colonialism ended, the former British colonies adapted the Common Law and the former French colonies adapted the Civil Law.<sup>355</sup> From an ideological paradigm-thinking, Western laws such as the common law is considered more individualistic in its approach, whereas, African indigenous law puts more emphasis on social solidarity and is communal in nature.<sup>356</sup>

Therefore, many African Countries have a multifaceted task of converging its indigenous laws and Western imposed laws, to create a unified legal system.<sup>357</sup> In Africa, several Countries different legal systems coincides with each other, which creates a pluralist legal environment.<sup>358</sup> In Africa, the Francophone Countries, tried to harmonize arbitration laws through its OHADA<sup>359</sup> forum.<sup>360</sup> On the 15<sup>th</sup> of March in 2018, the OHADA Uniform Act on Arbitration officially entered into force, which united seventeen OHADA Countries<sup>361</sup> arbitration laws.<sup>362</sup> Therefore, perhaps if the CAJAC centre establishes a standardized constitution on arbitration, it could simplify Africa-China arbitral issues by engaging with the OHADA centre, instead of dealing with each Francophone Country's arbitration laws. Moreover, apart from Africa's diverse legal systems, many other social factors such as religion, linguistics (Lusophone, Anglophone and francophone) and cultural norms might limit the process of CAJAC establishing a standardization of arbitration laws across the African Continent. This is partly due to the fact that laws defined in one territory might not have the same meaning or application in the next Country. However, Africa's recent

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<sup>354</sup> Kiggundu op cit note 19 at 159.

<sup>355</sup> Gardiol Van Niekerk 'The Convergence of Legal Systems in Southern Africa' (2002) 35;3 *Comparative and International Law Journal of Southern Africa* 309.

<sup>356</sup> Ibid at 318.

<sup>357</sup> Ibid.

<sup>358</sup> Kiggundu op cit note 19 at 159-160.

<sup>359</sup> See, OHADA the French acronym for " Organisation pour l'harmonisation en Afrique du droit des affaires ", which translates to "Organisation for the Harmonisation of Corporate Law in Africa".

<sup>360</sup> Martor op cit note 95.

<sup>361</sup> Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Côte d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Republic of the Congo, Senegal and Togo.

<sup>362</sup> Martor op cit note 95 at 1-2.

developments with its African Continental Free Trade Agreement (AfCTA), might offer a possible solution for African Countries to harmonize their laws.

#### **4.5.2 Low Confidence in African Arbitrators, Competence and their Capacity**

In Africa, there seems to be more confidence put on international arbitrators compared to African arbitrators in general, despite them being adequately qualified and highly skilled.<sup>363</sup> This unfortunate dilemma, was eloquently described by the former Chief Justice Prof. Sam Rugege of Rwanda, when he stated that *"It is clear that there are still challenges to achieving vibrant arbitration, some of them based on perceptions on the skills level and competency of African arbitrators and councils, obviously a lot has to be done to reverse the trend."*<sup>364</sup> Therefore, the CAJAC institution and its stakeholders, must gain the confidence of its disputants. This is achievable, by ensuring the availability of sufficient and qualified arbitrators, which offers efficient and expeditious arbitral services.<sup>365</sup> The CAJAC centres, failure to dissuade negative perceptions regarding African arbitrators, will mean that, this forum cannot be entrusted by investors, to settle Africa-China investment disputes.

African arbitrators are also underrepresented in international arbitration institutions.<sup>366</sup> However, slight changes has been witnessed, such as the recent nomination of Ngozi Okonjo-Iweala, who is an African woman, for the position of the Director-General for the World Trade Organization (WTO).<sup>367</sup> This, signals a rather refreshing and promising change on the acceptance and trust of African people on international litigating platforms. Even though, the WTO Law primarily deals with trade-related matters, its dispute resolution mechanism, to a certain extent, also covers the field of investments and promotes alternative dispute resolutions (ADR) such as arbitration.<sup>368</sup> In some ways, one can argue that, the nomination for Ngozi Okonjo-Iweala shines a positive light for future African arbitrators to aim for positions which increases their visibility and presence in these type legal forums.

#### **4.5.3 Political Instability**

Despite Africa's wealth in resources, growing population and fast emerging economies, it still lists as one of the most political unstable continent. Therefore, the CAJAC centre, will have to find

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<sup>363</sup> 'Africa: Rugege Roots for Arbitration in Dispute Resolution' *allAfrica.com* 4 April 2019, available at <https://allafrica.com/stories/201904040042.html>, accessed on 7 December 2020.

<sup>364</sup> *Ibid.*

<sup>365</sup> *Ibid.*

<sup>366</sup> See discussion under Chapter 3 at looking at Bilateral Africa-China Dispute Settlement Legal Mechanisms.

<sup>367</sup> 'WTO Director-General: Ngozi Okonjo-Iweala' *WTO*, available at [https://www.wto.org/english/thewto\\_e/dg\\_e/dg\\_e.htm](https://www.wto.org/english/thewto_e/dg_e/dg_e.htm), accessed on 12 February 2021.

<sup>368</sup> WTO Dispute Settlement Understanding, Article 21(3)(c).

ways to operate in many African Countries, even with immense levels of political instability.<sup>369</sup> This because, during civil unrests in a country, violence is rife and often arbitrator's/court personnel lives are at danger and they are intimidated to carry out their legal obligations. Thus, courts would find it challenging to conduct legal proceedings or to function administratively under these circumstances.<sup>370</sup> Political instability, raises a myriad of other issues such as tribal wars, terrorism, violence, sexual abuse to name a few, which makes it difficult for almost any country to maintain and govern its legal institutions.<sup>371</sup> In these instances, most African Countries and China would require alternative supporting measures to encourage political stability. These supporting measures could include supporting civil societies which promotes peace and stability, sanction state actors which promotes instability amongst others. In return, these measures could support political stability in the national territory, thus, the legal environment would be conducive and stable for the CAJAC centre, to perform at its optimal best when settling Africa-China investment disputes.<sup>372</sup>

#### **4.5.4 Poor Physical Infrastructures**

The CAJAC centres requires favourable and suitable venues to host its legal proceedings. However, several African Countries, are in a state of dilapidation as a consequence of limited funding for infrastructural development or a result of civil wars to name a few.<sup>373</sup> Therefore, CAJAC operations could be hindered, due to the lack of existing buildings to host its proceedings, thus, this could negatively impact the CAJAC centres performance. Physical structures, not only hosts CAJAC meetings but also archives important information such as recordings of the hearings, transcriptions and technology for African languages and Mandarin interpreters.<sup>374</sup> Therefore, this will need to be addressed to ensure that, the proper documentation of the arbitration cases are safeguarded to assist the building of jurisprudence for CAJAC. With the current global technological advances and internet dependence, infrastructures and electricity is a necessity to keep up with the rest of the world. Therefore, continuous power outages will also affect the timeframe of CAJAC cases being finalized and the functional abilities of it.<sup>375</sup>

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<sup>369</sup> Kariuki op cit note 353.

<sup>370</sup> Ibid.

<sup>371</sup> Ibid.

<sup>372</sup> Ibid.

<sup>373</sup> Ibid.

<sup>374</sup> Ibid

<sup>375</sup> Barry Bateman 'Mogoeng: State of Court Buildings Affects Administration Of Justice' *Eye Witness News* 30 July 2019, available at <https://ewn.co.za/>, accessed on 14 October 2020.

Likewise, public infrastructures such as airports, roads and railways amongst others, would also need to be upgraded, or in some cases even built to ensure that CAJAC arbitrators can travel safely to render their services.<sup>376</sup> For example, the cases referred to the CAJAC centres, could become timeously if arbitrators are constantly late for arbitration meetings due to traffic jams. Limited number of proper roads, inadequate highways or railways, might also endanger the lives of CAJAC arbitrators with accidents, which could demotivate them from doing cases in least developed African Countries.<sup>377</sup>

#### **4.6 Conclusion**

To conclude this chapter, various FOCAC Ministerial Conference's presented notable achievements regarding Africa-China legal cooperation, investments and disputes settlements thereof. As repeatedly mentioned in this chapter and throughout this research paper, the most notable contribution of the FOCAC forum was the establishment of the CAJAC centre. This centre offers many benefits to the Africa-China investment disputes discourse. For instance, African Countries and China are able to choose its own arbitrators, African laws could be harmonized to simply Africa-China arbitration proceedings and it could be easily accessible to both parties amongst others. However, innumerable issues around arbitration itself, needs to be addressed such as Africa's plural legal systems, political instability, poor physical infrastructures and low confidence in African arbitrators inter alia, to ensure the effectiveness of the CAJAC forum.

Even though the CAJAC centre is still in the process of standardizing its laws into an official constitution which could be used in all CAJAC centres, African Countries should take the opportunity to be more proactive in the rule-making process, to secure its priorities. This is because, African Countries should consider its investment needs, since most investment disputes occurs in African States. Furthermore, it is imperative for legal professionals and business people to establish a clause, which explicitly makes provision for investment disputes to be settled by the CAJAC centre. This is because the CAJAC forum, won't by just its virtue be the automatically chosen platform to settle Africa-China investment disputes. The CAJAC forum needs to advertise and market itself, as the best probable platform, which is capable of litigating Africa-China investment disputes and deliver up to its expectations. Nonetheless, the CAJAC platform looks very promising for Africa-China investments disputes settlement and to further strengthen legal

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<sup>376</sup> Ibid.

<sup>377</sup> Ibid.

cooperation between the two sides. The next chapter will provide the final conclusion and possible recommendations to the research.

## 5.1 Conclusion

In several chapters, this research examined the FOCAC forum's efforts, towards Africa-China's legal cooperation in investments and investment disputes settlement. After fifteen years since the inception of the FOCAC forum, it eventually developed the CAJAC center, to assist Africa-China's commercial legal cooperation in disputes settlements.<sup>378</sup> However, this study looked at many FOCAC efforts and events, which contributed to Africa-China investments and disputes thereof, prior to the establishment of the CAJAC center.

First, the study noticed that Africa-China investments increased rapidly between the two sides after the inauguration of the FOCAC platform. To this end, the increase of Chinese investments in Africa led to the inevitable surge of investment disputes, which were not equally matched with alternative dispute settlement forums.<sup>379</sup> Within this context, this research aimed to analyze the FOCAC forum's efforts, towards addressing this problem. Many common perceptions regarding Chinese investments in Africa, were also discussed briefly to set the tone for the rest of this paper.

Secondly, this research defined the scope of legal cooperation within the context of Africa-China investments. In doing this, several theories applicable to the Africa-China legal cooperation were applied; namely political, economic and legal theories. These theories, attempted to go beyond the legal discussion and illustrate, how economics and politics underpins Africa-China legal cooperation.<sup>380</sup> This was further elaborated, through the literature review concerning Africa-China legal cooperation and investment disputes settlements. Supplementary to the literature review, an analysis concerning Africa-China legal cooperation in investments and investment dispute settlements, were studied in the FOCAC Action Plans.

Thirdly, this paper looked at the role of policies regarding Africa-China legal cooperation and investments by discussing key policies such as "One China", "Non-intervention", "Open-door" to name a few. These policies majorly impacted the legal and commercial relationship

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<sup>378</sup> Chen op cit note 27 at 209-210.

<sup>379</sup> Kiggundu op cit 19 at 155.

<sup>380</sup> Beretta, Berkofsky & Zhang op cit note 153 at 17.

between China and African Member States of the FOCAC forum. Furthermore, a discussion on Africa-China's bilateral and multilateral dispute settlement processes was discussed, to identify the weaknesses of the current forums, to promote the relevance of the CAJAC center. Impressively, after almost 15 years since the founding of the FOCAC forum, African Countries and China decided to prioritize its legal cooperation, which eventually resulted in the establishment of the CAJAC arbitration, as a prime institute to solve its disputes.<sup>381</sup> To date, its different CAJAC centers namely; the CAJAC Johannesburg, CAJAC Shanghai, CAJAC Beijing, CAJAC Shenzhen and the CAJAC Nairobi are all in operation but not fully in force. Nonetheless, it remains an astounding contribution of the FOCAC forum towards Africa-China legal cooperation and commercial dispute settlements.

Last but not least, this research, recognized that even though the CAJAC center was a milestone regarding Africa-China commercial dispute settlements, the CAJAC center still faces many obstacles before it can deliver on its promises. For instance, the CAJAC forum should persist in overcoming the plurality of weak legal systems in Africa, low confidence of both Chinese and African arbitrators, competence, capacity and neutrality, poor infrastructure in many African Countries and political instability to name a few.<sup>382</sup> To this end this research provided a case study for the CAJAC to observe its background, functions, weaknesses and strengths. Nonetheless, overall, the FOCAC forum's contributions towards Africa-China investments, legal cooperation and investment disputes settlements, were discussed by looking at the actual achievements documented in its Action Plans.

This study discovered that the efforts of FOCAC's legal contributions, significantly benefited the key beneficiaries, which are businesses in African Countries and China, legal practitioners and citizens in general, who for a long time did not have viable means to solve their investment disputes. This framework, in the uniform rules, embeds clarity of purpose, jurisdiction and other related rules, which are necessary for a unified growth amongst different centers.

In evaluating the dispute resolution mechanism created under the facilitation of the FOCAC framework through legal cooperation. The study acknowledged the uniqueness of the processes, institutions and way of doing business between Africa and China. This recognizes the

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<sup>381</sup> This answers the main Research Question. What extent has the FOCAC multilateral framework impacted Africa-China Legal cooperation concerning investment dispute settlement?

<sup>382</sup> This answers ancillary Research Question. What are the challenges of the FOCAC process in addressing disputes of Chinese Investments in Africa?

project's commitments made in the Action Plans, however, it noted the lack of studies examining the actual impact of the legal exchanges, legal training and other efforts. Furthermore, pragmatic investigations on both Chinese and African businesses' attitude towards the CAJAC institution. This, therefore, creates a gap for further research in the aforesaid areas.

## **5.2 RECOMMENDATIONS**

This research, established that African Countries and China, through the FOCAC process has finally acted on the need to develop a dispute settlement system mechanism through the system of legal cooperation. This resulted, not only in the beneficitation of domestic legal systems such as judicial and mutual assistance, education of legal practitioners and government officials but also in the establishment of the CAJAC platform, which offers alternative dispute resolution to the stakeholders. However, as observed before, there are still on-going challenges of both political, economic and legal nature. It is against this background that this research makes several recommendations.

- a. The FOCAC platform, must be turned into a Regional Trading Agreement or a form of a treaty, which gives its Action Plans more legally binding power on both African Countries and China. The FOCAC stakeholders, can monitor and evaluate the successful implementation of the said efforts in future Action Plans.
- b. African Countries, should lobby the WTO, ICSID and other financial organizations for funding towards building legal capacity, infrastructure. This could be done, to equip some poorer countries who otherwise may benefit less from Chinese funding.
- c. The FOCAC institution, should create more investment networking conferences which African businesspeople can benefit from because African investments in China are far less, compared to Chinese investments in Africa.
- d. The CAJAC platform, should support and offer scholarships for African legal scholars and arbitrators, in order to ensure competence, legitimacy of its workforce. This should especially be implemented for African legal personnel to carry out their studies in

China itself, to better understand the nuances which is sometimes unwritten in legal cooperation.

- e. African Countries, must push for a sui generis policy which allows Africans to open firms and operate in China as Chinese do in Africa. If not, they should create uniform rules which disallows their legal practitioners from practicing in their respective Countries.
- f. African Countries should adopt a standardized China policy, which outlines its demands, priorities, needs, interests and agency. This will allow African Countries to be more involved in steering the direction of the FOCAC forum by equally participating in this forum.
- g. There is a need for university partnerships between China and African Countries, to offer more comprehensive qualifications, as opposed to short courses which do not actually benefit scholars outside from just being informed. Africa-China legal internships, could assist legal practitioners from both Countries to practically engage with real-life experiences which is needed to enhance Africa-China cooperation.
- h. China and African Countries must priorities the rule of law, even if it is Rule by law in the legal cooperation system, to solve African-China international commercial disputes. This is because both Countries has young democracies and require strong institutions to regulate their legal cooperation, since it is still in its infant stages. Therefore, the resolution of disputes between African Countries and China is of importance to ensure it is settled in a more efficient, realistic manner.

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