

INTERNATIONAL ARBITRATION LAW LIBRARY



**CHINA-AFRICA  
DISPUTE SETTLEMENT**  
THE LAW, ECONOMICS AND  
CULTURE OF ARBITRATION

BY WON KIDANE

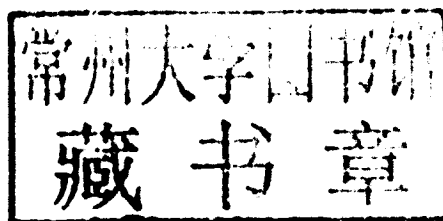


**Wolters Kluwer**  
Law & Business

# **China-Africa Dispute Settlement**

The Law, Economics and Culture of Arbitration

**Won Kidane**



**Wolters Kluwer**  
Law & Business

*Published by:*

Kluwer Law International  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
Website: [www.kluwerlaw.com](http://www.kluwerlaw.com)

*Sold and distributed in North, Central and South America by:*

Aspen Publishers, Inc.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: [customer.service@aspenspublishers.com](mailto:customer.service@aspenspublishers.com)

*Sold and distributed in all other countries by:*

Turpin Distribution Services Ltd.  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
Email: [kluwerlaw@turpin-distribution.com](mailto:kluwerlaw@turpin-distribution.com)

*Printed on acid-free paper.*

ISBN 978-90-411-3674-9

© 2012 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA.  
Email: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com)

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

## **China-Africa Dispute Settlement**

## **International Arbitration Law Library**

*Series Editor: Prof. Dr. Julian D.M. Lew QC*

In the series *International Arbitration Law Library*, the book *China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration* is the twenty-third title.

*The titles published in this series are listed at the end of this volume*

## Foreword

I renewed my acquaintance with Won Kidane in the Spring of 2005, meeting him in Washington, D.C. where he was practicing with Hunton & Williams and working on complex arbitration before the Eritrea-Ethiopia Claims Tribunal. My plan was to recruit him to the faculty of Penn State Law and Penn State's new School of International Affairs. I first had met Won when he was a student at the University of Illinois College of Law, where I was teaching at the time. I had been deeply impressed in my international arbitration and litigation, business transactions, and intellectual property courses by Won's unusually discerning insights and capacity for reflective thinking, and I felt that his potential for significant scholarly and policy contributions was great. At the time, Won already had earned an LL.B. in Civil Law from Addis Ababa University and an LL.M. in International and Comparative Law from the University of Georgia. My colleagues and I at Penn State felt fortunate when Won accepted our offer, and even more so as we witnessed Professor Kidane's rapid progression as a scholar and teacher. We were sad but proud when Professor Kidane departed for the Northwest to join the faculty of Seattle University School of Law.

I was right about Professor Kidane's capacity for significant scholarly and policy contributions. *China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration*, like his other work, makes both. This is a book that offers innovative, insightful and highly useful observations on several levels about the emerging, burgeoning economic exchange between China and the nations of Africa, which has grown from barely USD 10 million annually just 20 years ago to over USD 100 billion annually today, with a remarkable growth rate of over 700 percent between 2001 and 2009 alone.

At the level of global trade relations and the WTO, Professor Kidane carefully examines the implications for both China and African nations of the "developed versus developing nation" and "Western versus non-Western" dichotomies in the

## Foreword

context of a global legal framework whose “Geneva roots stem from Washington and Brussels, not from Addis Ababa or Beijing.” At the level of China-Africa relations, Professor Kidane offers valuable insights about China’s approach to economic engagement with African nations and how China’s approach differs from that of the United States, despite the remarkably similar strategic interests of both. He provides valuable advice about how the terms of bilateral investment treaties with African nations should shift from the investor-oriented provisions typical of U.S. BITS to provisions encouraging sustainable development, good for investors and recipient nations alike. His suggestions for Economic Partnership Agreements between China and African nations are prescient.

Some of Professor Kidane’s most compelling observations and suggestions occur at the level of private commercial relations between Chinese and African entities. What governance and dispute resolution structures will work best in the context of an Africa with 53 sovereign and diverse nations, but whose largely-shared colonial experiences and customary law histories have resulted in similarities in legal cultures and commercial practices and expectations at times remarkably similar to those that emerged from a similar, but hardly colonial, “legal dualism” in China? Here again, Professor Kidane’s observations and prescriptions are brilliant, calling to mind Lawrence Harrison’s and the late Samuel Huntington’s admonition, *Culture Matters*!<sup>1</sup>

*China-Africa Dispute Settlement* is a work rich with information and insights likely to contribute significantly to both the understanding and direction of China-Africa economic, diplomatic and legal relations, at global, national and private actor levels. I am grateful for the opportunity to offer my friend and colleague this brief *Foreword*.

Philip J. McConaughay  
Dean and Donald J. Farage Professor of Law and International Affairs  
The Pennsylvania State University  
Dickinson School of Law  
School of International Affairs  
University Park, Pennsylvania, USA  
September 2011

---

1. Lawrence E. Harrison & Samuel P. Huntington (eds.), *Culture Matters* (Basic Books, 2000).

# Table of Contents

<b>Foreword</b>	<b>xiii</b>
<b>Part I</b>	
<b>Background</b>	<b>1</b>
<b>Chapter 1</b>	
<b>General Introduction</b>	<b>3</b>
1.1. Background	3
1.2. Purpose and Structure of the Book	7
<b>Chapter 2</b>	
<b>Historical Background of China-Africa Economic Relations</b>	<b>9</b>
2.1. Ancient Times	9
2.2. Colonial and Cold War Era	11
2.3. Post-Colonial and Post-Cold War Eras	13
2.4. Conclusion	19
<b>Part II</b>	
<b>The Legal Framework and Dispute Resolution Mechanisms in China-Africa Trade Relations</b>	<b>21</b>
<b>Chapter 3</b>	
<b>The Multilateral Trading System and the Place of China and Africa within It</b>	<b>23</b>
3.1. Introduction	23
3.2. The Legal Framework Governing Trade Relations and the Resolution of Trade Disputes In General	25
3.2.1. Background on the Multilateral Trading System and the Place of China and Africa within This System	26



## *Table of Contents*

3.2.2.	Perspectives on the Conventional and Non-Conventional Sources of Trade Law and the Resolution of Trade Disputes	30
3.2.3.	A Closer Look at the Dispute Resolution Mechanism of the Multilateral Trading System	35
3.2.3.1.	Overview of the GATT/WTO Framework	35
3.2.3.2.	Dispute Resolution in the Multilateral Trading System	38
 <b>Chapter 4</b>		
<b>The WTO Dispute Settlement System and the Barriers Developing Nations Face</b>		
4.1.	Introduction	51
4.2.	Developing Countries and the GATT/WTO Dispute Settlement System	51
4.2.1.	The Role of Developing Countries in the Creation and Functioning of the GATT/WTO Dispute Settlement System	52
4.2.2.	Legal, Economic and Political Challenges	54
4.2.2.1.	Capacity	54
4.2.2.2.	Cost-Benefit	56
4.2.2.3.	Futility	57
4.2.3.	Cultural Barriers: A Critical Consideration	60
 <b>Chapter 5</b>		
<b>Considerations in Trade Dispute Resolution Unique to China-Africa Relations</b>		
Introduction		67
5.1.	Africa's Historical Challenges and Its Proposed Amendments	67
5.2.	China's Role in Dispute Resolution and Its Proposed Amendments	72
5.3.	Africa-China Trade Relations: Their Commonalities, Challenges, and the Need for Alternatives	76
5.3.1.	Overview of the Permissible Scope of Regional/ Cross-Regional Trade Regimes	76
5.3.2.	Dispute Settlement in Regional Regimes (to which African States and China independently belong)	80
5.3.2.1.	Intra-African Arrangements and Dispute Resolution	80
5.3.2.1.1.	SADC	81
5.3.2.1.2.	COMESA	82
5.3.2.2.	China's Regional Arrangements	83
5.3.2.3.	China-Africa in the Context of RTA Exceptions: Soft Law Sources	90

<b>Chapter 6</b>	
<b>Evaluating Regional Options and a Look at the Arbitration Alternative</b>	<b>99</b>
Introduction	99
6.1. Evaluation	99
6.2. Arbitration Alternative under WTO-DSU Article 25	105
6.3. Summary of Conclusions and Recommendations	106
6.3.1. The Trade Relations	106
6.3.2. Shortcomings	107
6.3.3. Recommendations	108
 <b>Part III</b>	
<b>The Legal Framework for the Resolution of China-Africa Investment Disputes</b>	<b>111</b>
 <b>Chapter 7</b>	
<b>The Evolution of International Investment Law</b>	<b>115</b>
7.1. Introduction	115
7.2. The General Evolution of International Investment Law	115
7.2.1. National Treatment versus Duty to Compensate: The Emergence of the Calvo Doctrine and the Hull Formula	119
7.3. International Efforts to Reconcile the Foreign Investment System	124
7.4. The Libyan Oil Cases: Reconciling Compensation within the Framework of Expropriation	126
 <b>Chapter 8</b>	
<b>The Sources and Content of Current International Investment Law</b>	<b>131</b>
8.1. Introduction	131
8.2. Sources of Current Investment Law in General	131
8.3. Structure and Substantive Content	136
8.3.1. NAFTA and Eurasia Energy Charter Treaty	136
8.3.1.1. The Scope of Application and Definition of Investment	136
8.3.1.2. Investment Protection	139
8.3.1.3. Right of Entry and Establishment	141
8.3.1.4. Performance Requirements, Investment Incentives, and Taxation	142
8.3.1.5. Environmental and Labor Standards	143
8.3.1.6. Dispute Settlement	145
8.3.2. ASEAN	147
8.3.2.1. The Framework Agreement's Definition of Investment	147

## Table of Contents

8.3.2.2.	Investment Protection	148
8.3.2.3.	Right of Entry and Establishment	149
8.3.2.4.	Performance Requirements, Incentives and Taxation	149
8.3.2.5.	Environmental and Labor Standards	149
8.3.2.6.	Dispute Settlement	150
8.3.3.	BIT Models	150
8.3.3.1.	Structure, Objectives, and Scope of Coverage	152
8.3.3.2.	Definition of Investment	154
8.3.3.3.	Investment Protection: Rights and Obligations	155
8.3.3.4.	Right of Entry, Establishment and Performance Requirement	157
8.3.3.5.	Environmental and Labor Standards	158
8.3.3.6.	Dispute Settlement	159
8.3.3.6.1.	Dispute Prevention and Negotiated/Mediated Settlement	160
8.3.3.6.2.	Submitting a Case for Arbitration: Standing and Consent	160
8.3.3.6.3.	Rules of Procedure and Applicable Law	161
8.3.3.6.4.	Selection of Arbitrators, and Conduct of Arbitration	162
8.3.3.6.5.	Awards and Enforcement	163

## Chapter 9

<b>The Sources of Law in China-Africa Investment Relations</b>	<b>165</b>
9.1. Introduction	165
9.2. Chinese Investment Law	165
9.2.1. Sources of the Domestic Legal Regime on Investment in China	168
9.2.1.1. Development of the Chinese Legal System	168
9.2.1.2. The Structure of Current Laws and Legal Institutions	176
9.2.2. Current Sources of Domestic and International Investment Law in China	178
9.2.3. Substantive Provisions: Evolution and Content	180
9.2.4. Dispute Settlement Provisions: Evolution and Content	182
9.2.5. China Looks Forward	183
9.3. Africa	188
9.3.1. Evolution of the Existing Laws	195
9.3.2. Current Sources of Investment Law in Africa	196
9.3.2.1. The Contents of Current Investment Law in Africa	197
9.3.2.1.1. COMESA	197
9.3.2.1.2. SADC	198

9.3.2.1.3.	Sampling of Intra-Africa Bilateral Investment Treaties	199
9.3.2.1.3.1.	Bilateral Investment Treaty between Egypt and Nigeria	199
9.3.2.1.3.2.	Bilateral Investment Treaty between Ethiopia and Tunisia	200
9.3.2.1.3.3.	Bilateral Investment Treaty between South Africa and Zimbabwe	201
9.3.3.	Dispute Settlement	203
9.4.	China-Africa	205
9.4.1.	Sources of Law in China-African Investment Relations	205
9.4.1.1.	Multilateral Sources	205
9.4.1.2.	Regional/Cross-Regional Sources	207
9.4.1.3.	Bilateral Sources	210
9.4.1.4.	Dispute Settlement	215
9.4.2.	Summary of Conclusions and Recommendations	217
9.4.2.1.	Summary of the Existing Legal Framework	217
9.4.2.2.	The Competing Paradigms and Competing Interests	218
9.4.2.3.	Important Features for Future Engagement	219
9.4.2.3.1.	Substantive Issues	219
9.4.2.3.2.	Institutional Framework	221

## **Part IV**

<b>The Legal Framework in China-Africa Private Commercial Relations</b>	<b>223</b>
---	------------

## **Chapter 10**

<b>Private Commercial Relations</b>	<b>225</b>
10.1. Introduction	225
10.2. The International Sources of Law Regulating China-Africa Commercial Transactions	226
10.2.1. Sources of Law in General	229
10.2.1.1. Multilateral Treaty Sources	229
10.2.1.2. Regional Sources	235
10.2.1.3. Bilateral Treaty Sources	237
10.2.1.4. Harmonization through Model Laws	237
10.2.1.5. Harmonization Through International Commercial Terms (Incoterms)	242
10.2.1.6. Harmonization Through Restatements	244

## *Table of Contents*

<b>Chapter 11</b>	
<b>Domestic Legal Frameworks</b>	<b>247</b>
11.1. Introduction	247
11.2. China	248
11.2.1. Jurisdiction	249
11.2.2. Conflicts	253
11.2.3. Enforcement	254
11.3. Africa	260
11.4. Summary of Conclusions	265
 <b>Part V</b>	
<b>Arbitration</b>	<b>267</b>
 <b>Chapter 12</b>	
<b>International Arbitration</b>	<b>269</b>
12.1. Introduction	269
12.2. Benchmarking Fundamentals	271
12.3. The Law, Economics & Cultures of Arbitral Institutions	275
12.3.1. The Law of Arbitral Institutions	275
12.3.2. The Economics of Arbitral Institutions	283
12.3.3. The Culture of Arbitral Institutions	286
 <b>Chapter 13</b>	
<b>Arbitration in the United States and Europe: Profiles of Selected Arbitral Institutions</b>	<b>291</b>
13.1. Introduction to Arbitral Institutions	291
13.1.1. Arbitral Institutions in the United States	292
13.1.1.1. The International Centre for the Settlement of Investment Disputes (ICSID)	292
13.1.1.1.1. The Law of ICSID	293
13.1.1.1.2. The Economics of ICSID	300
13.1.1.1.3. The Culture of ICSID	304
13.1.1.2. The American Arbitration Association (AAA)	307
13.1.1.2.1. The Law of ICDR	308
13.1.1.2.2. The Economics of the ICDR	313
13.1.1.2.3. The Culture of the ICDR	315
13.1.2. Arbitral Institutions in Europe	316
13.1.2.1. The International Chamber of Commerce	316
13.1.2.1.1. The Law of the ICC	317
13.1.2.1.2. The Economics of the ICC	322
13.1.2.1.3. Culture of the ICC	325
13.1.2.2. The London Court of International Arbitration (LCIA)	326
13.1.2.2.1. The Law of the LCIA	327

13.1.2.2.2. The Economics of the LCIA	331
13.1.2.2.3. The Culture of the LCIA	333
13.1.2.3. The Permanent Court of Arbitration	336
13.1.2.3.1. The Law of the PCA	336
13.1.2.3.2. The Economics of the PCA	338
13.1.2.3.3. The Culture of the PCA	341

## **Chapter 14**

### **Arbitration in Asia and Africa: Profiles of Selected**

<b>Arbitral Institutions</b>	<b>343</b>
14.1. Introduction	343
14.2. Arbitration in China	345
14.3. The China International Economic and Trade Arbitration Commission (CIETAC)	349
14.3.1. The Law of CIETAC	352
14.3.2. The Economics of CIETAC	358
14.3.3. The Culture of CIETAC	361
14.4. Kuala Lumpur	363
14.4.1. The Law of KLRCA	365
14.4.2. The Economics of KLRCA	366
14.4.3. The Culture of the KLRCA	367
14.5. Africa	368
14.5.1. The Cairo Regional Center for International Commercial Arbitration (CRCICA)	372
14.5.1.1. Law of the Cairo Center	374
14.5.1.2. Economics of the Cairo Center	377
14.5.1.3. The Culture of the Cairo Center	379
14.5.2. The Lagos Regional Center	380
14.5.2.1. The Law of the Lagos Center	380
14.5.2.2. The Economics of the Lagos Center	383
14.5.2.3. The Culture of the Lagos Center	385
14.5.3. Africa-ADR: South Africa	385
14.6. Comparative Evaluation of the Options	386
14.6.1. The Law of the Institutions	387
14.6.2. The Economics of the Institutions	389
14.6.3. The Culture of the Institutions	391
14.7. Conclusion	393

## **Chapter 15**

<b>Summary of Conclusions and Recommendations</b>	<b>395</b>
15.1. Introduction	395
15.2. Conclusions and Future Directions	396
15.2.1. China and Africa's Trade Relations	396
15.2.2. China and Africa's Investment Relations	396
15.2.3. China and Africa's Commercial Relations	397

## *Table of Contents*

15.3. Recommended Institutional Framework for China-Africa Dispute Settlement	397
15.4. Proposed FOCAC Structure	397
15.5. Proposed FOCAC and Trade	398
15.6. Proposed FOCAC and Investment	399
15.7. Proposed FOCAC and Commercial Disputes	400
15.8. Final Conclusion	401
<b>Appendix 1</b> <b>Sharm El Sheikh Summit Declaration</b>	<b>403</b>
<b>Appendix 2</b> <b>Sharm El Sheikh Action Plan</b>	<b>407</b>
<b>Appendix 3</b> <b>IISD Model Investment Agreement</b>	<b>423</b>
<b>Appendix 4</b> <b>CIETAC Arbitration Rules</b>	<b>455</b>
<b>Appendix 5</b> <b>Cairo Center Arbitration Rules</b>	<b>477</b>
<b>Appendix 6</b> <b>KLRCA Arbitration Rules</b>	<b>499</b>
<b>Appendix 7</b> <b>Lagos Centre Arbitration Rules</b>	<b>505</b>
<b>Appendix 8</b> <b>Chinese Arbitration Law</b>	<b>527</b>
<b>Bibliography</b>	<b>543</b>
<b>Table of Cases</b>	<b>563</b>
<b>Table of Legislation and International Agreements</b>	<b>567</b>
<b>Index</b>	<b>575</b>

**Part I**  
**Background**



