

Promoting FOCAC more maturely in the next decade

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1 INTRODUCTION

There have been more than 60 years of friendly cooperation in economy and trade between China and African countries (hereinafter referred to as “Sino-African” countries) since the People’s Republic of China was founded in 1949. They have formed some practical cooperation mechanisms, like various bilateral mixed committees mainly responsible for the concrete implementation, coordination and supervision of bilateral trade, investment, technology and financial aid. However, the Sino-African cooperation framework in economy and trade has undergone significant change with the establishment of the Forum on China-African Cooperation (FOCAC) in 2000. This new mechanism is still at a primary stage, experiencing many vital challenges in building stronger Sino-African legal relationships on the basis of current co-operative relationships.

2 THE CURRENT SINO-AFRICAN COOPERATION MECHANISM

2.1 The establishment of FOCAC and its follow-up mechanism

After the cold war, at the suggestion of some of African countries, China initiated a FOCAC ministerial conference in Beijing in 2000 in order to further strengthen Sino-African cooperation in the new world situation and mutually deal with the challenges arising from economic globalisation. On 10 October 2000 the first Ministerial Conference was held in Beijing, with more than 80 ministers from 44 African countries and representatives from 17 international and regional organisations and China attended the meeting. The Sino-African countries finally adopted the Beijing Declaration of the Forum on China-Africa Cooperation and the China-Africa Cooperation in Economic and Social Development Programme and established FOCAC.

According to the China-Africa Cooperation in Economic and Social Development Programme, both China and Africa agreed to establish joint follow-up mechanisms at all levels. In July 2001 the Procedures of the Follow-Up Mechanism of FOCAC (hereafter “Procedures of the Follow-Up Mechanism”) was adopted in a ministerial consultation meeting in Lusaka, which specified the framework for future development. In April 2002 the Procedures of the Follow-Up Mechanism formally took effect after member states concluded their approval procedures. The Procedures of the Follow-Up Mechanism stipulated that the Ministerial Conference would be held every three years alternately in China and in African countries, while the Senior Officials’ Meeting would be held one year and a few days before the Ministerial Conference. African ambassadors and the Secretariat of the Chinese Follow-Up Committee should keep regular consultation. On 12 July 2006 the Secretariat of the Chinese Follow-Up Committee signed a Memorandum of Understanding on Strengthening Consultation and Cooperation with the New Partnership for Africa's Development (NEPAD), which further promoted cooperation towards organisation and institutionalisation in future.

So far China has established the Chinese Follow-Up Committee of FOCAC, composed of 27 ministerial units. The Committee is nominally co-chaired by the ministers of Foreign Affairs and of Foreign Trade and Economic Cooperation, with their section leaders as co-chairs. It is mainly responsible for coordinating different Chinese departments’ relations while implementing various follow-up actions. The Secretariat of the Follow-Up Committee, which is responsible for daily affairs, is established within the Africa Department in the Ministry of

Foreign Affairs but composed of members of the Ministries of Foreign Affairs, of Foreign Trade and Economic Cooperation and of Finance. The chief of the Africa Department in the Ministry of Foreign Affairs takes the position of the secretary-general. Certain African countries, such as Ethiopia, Zambia and Sudan, have also established corresponding FOCAC follow-up committees.

The main functions of FOCAC are to hold regular meeting and bilaterally consult on major trade issues. So far, four Ministerial Conferences and eight sessions of the Senior Officials' Meeting have been held in Beijing, Addis Ababa and Sharm-el-Sheikh respectively and have adopted documents including the Beijing Declaration of the Forum on China-Africa Cooperation, the China-Africa Cooperation in Economic and Social Development Programme, the Forum on China-Africa Cooperation: Addis Ababa Action Plan (2004-2006), the Forum on China-Africa Cooperation: Beijing Action Plan (2007-2009), the Declaration of Sharm-el-Sheikh of the Forum on China-Africa Cooperation, and the Forum on China-Africa Cooperation: Sharm-el-Sheikh Action Plan (2010-2012).

The facts indicate that FOCAC is an important forum and a legal mechanism for both China and African countries to cope with tough challenges, to realise south-south self-reliance and to promote south-south cooperation in a new era. There has also been great progress in trade, investment, financial aid, technology transfer and other fields of cooperation since FOCAC was founded. The Sino-African countries have coordinated their negotiation positions in essential multiple trade forums (such as the WTO Doha Round) and strengthened collective dialogues and consultations on issues such as the promotion of a new international political and economic order and other major issues in the 21st century.

2.2 FOCAC institutions

The Ministerial Conference, which is the central FOCAC institution, meets once every three years and is responsible for consultation, discussion and adoption of important international documents. The Senior Officials' Meeting is composed of member states' deputy ministers, department chiefs and ambassadors. It is mainly responsible for executing the decisions of the Ministerial Conference and member states' leaders, supervising the activities of working groups and the Secretariat, preparing for the Ministerial Conference and guiding the informal meetings of member state's leaders and follow-up actions.

2.3 NGOs supporting FOCAC

In addition, a number of forums have been founded to support FOCAC's actions. These are mainly are organised by NGOs and include the following:

FOCAC Women's Forum was founded in Cairo in October 2009 with the aim of helping to enhance the role of women in promoting economic and social development and enriching Sino-African friendship.

The China-Africa Industrial Cooperation and Development Forum was founded in Beijing in November 2009 with the theme of "Equality, Trust, Cooperation and Win-win". It is aimed at promoting and deepening Sino-African strategic partnerships, strengthening investment in the respective industrial fields, striving to resolve the impact of global financial crisis on Sino-African industries, establishing long-term Sino-African industrial and trade relations, and building an information and communication platform for Sino-African industrial projects and industrial enterprises.

The Forum on China-Africa Cooperation – Legal Forum was founded in Beijing in October 2010, aimed at exchanging views on legal affairs and exploring approaches to enhancing legal cooperation. It is expected to develop into a platform that will serve the development of Sino-African relations over an extended period.

The China-Africa Think Tanks Forum (CATTF) was founded in Zhejiang in October 2011. Its aim is to establish links among Chinese and African think tanks, as well as scholars from other parts of the world with an interest in Sino-African relations, with a view to conducting dialogues, exchanges and studies on Africa's political and economic situation, Sino-African relations and related issues. The Zhejiang Normal University and its Institute of African Studies and the China-Africa Business School will be the Standing Secretariat. The Forum will meet annually in China or Africa.

3 MAIN CHALLENGES FACING FOCAC MECHANISM

3.1 FOCAC is only a primary loose organisation at present

Generally speaking, an international economic organisation refers to an inter-governmental organisation founded by certain countries to realise specific goals

through treaty arrangement.¹ In essence it is a formal arrangement crossing international borders to set up institutions and promote cooperation in the economic or other relevant fields.² It is characterised as a permanent and fixed international conference, providing institutionalising frameworks for diplomatic multilateral talks and formulating regulation of the economic field. At the same time it is generally included within an international mechanism and is an important symbol of this mechanism, while such inclusion is also an important condition for maintaining and further developing the organisation itself.

FOCAC, however, lacks certain features of an international economic organisation. On the one hand, the parties participating in FOCAC are the heads of member states and governments, foreign ministers and other senior government representatives. These delegates act in their own official positions, thus vesting FOCAC with “intergovernmental” properties. Moreover, from the contents of the main documents adopted so far by FOCAC, it is clear that the main coordination issues are of an economic nature. For example, the China-Africa Cooperation in Economic and Social Development Programme stipulates that the areas of cooperation include trade (the avoidance of double taxation, cooperation in ocean-shipping and air-freight transport, etc), financial cooperation and aid (gratuitous aid, preferential and interest-free loans, debt relief etc), services, tourism, agricultural cooperation, the exploration and utilisation of natural resources and energy sources, technology transfer and other aspects indirectly affecting the economy such as environmental management and biodiversity.³ The above two aspects are essential features of an international economic organisation: qualified participating parties with the purpose of achieving economic objectives.

On the other hand, FOCAC is comparatively lacking in two other important features of an international economic organisation, namely *permanent institutions* (especially a secretariat) to carry out continuously the functions of administration, research and information exchange, and *formal and key economic*

¹ Chen An (eds.). *Problems of International Economic Law* (2nd ed) Beijing, Higher Education Press (2007) 218.

² Lawrence Ziring et al (eds) *International Relations: A Political Dictionary* Santa Barbara, Abc-Clio Inc. (1995) 327.

³ The FOCAC also deals with certain non-economic issues such as arms control and anti-terrorism. However, the starting point and main objective is the strengthening of Sino-African economic cooperation.

agreements (i.e., fundamental documents or charters) stipulating the economic targets, the composition of structures and modes of performance between China and African countries.

Thus, although China has established the Chinese Follow-Up Committee of FOCAC and set up a Secretariat, and certain African countries have also established FOCAC follow-up committees, which can be seen as providing a degree of “permanency”, all these institutions were set up separately by either China or by African countries and do not form a joint standing body. In other words, FOCAC has not established joint institutions such as a Council of Ministers, a Committee of Ambassadors, a Consultative Assembly or a joint secretariat. FOCAC regularly holds Ministerial Conferences and Senior Officials’ Meetings, but the “conference” mechanism emphasises occasional consultation and discussion in contrast to the nature of a sustainable and permanent organisation.

In addition, FOCAC has not adopted any legally binding founding document. However, the major documents thus far adopted do express or imply the existence of FOCAC tenets, institutional structures, the scope of their functions and procedures, and even certain rights and obligations of member states. For example, the Beijing Declaration of the Forum on China-Africa Cooperation stipulates that the goal of FOCAC is “to vigorously advance Sino-Africa cooperation in trade and economy, finance, agriculture, health, science and technology, culture, education, human resource exploration, transportation, environment, tourism and other fields, to promote their mutual development.” However, these documents are not compulsory and binding international treaties, even though they have strong legal influence.

Having said that, given that FOCAC meetings are held periodically and regularly, rather than on an accidental or temporary basis, can we identify FOCAC as what may be termed a “conference” type of international economic organisation? The question is worth discussing. The term “conference” organisation suggests a form of organisation whereby certain countries solve specific economic problems through regular international meetings. These meetings do not have any fixed standing bodies but are held on certain regular patterns and form a continuous and stable consultation system to deal with the problems concerned.

Thus, some scholars have argued that “[s]uch international conference can also be seen as a kind of international economic organisation if it held regularly, and the international economic activities can be adjusted unceasingly by treaties and

agreements.”⁴ Others suggest that international economic organisations in a broad sense may include international conferences that are held regularly. For example:

“Although these conferences have no fixed standing body, [and] no treaty as its legal basis, they also can be regarded as an international economic organisation”;⁵

“Some regular and institutionalising international conferences can be regarded as an informal international economic organisation because they have formed a certain diplomatic consultation and coordination mechanism[s] with the character of stability and continuity in discussing about economic issues”;⁶

“The ‘forum’ type of organisation is also a kind of intergovernmental organisation in [a] large sense. Being different from the agreement organisation, it mainly [involves] that certain countries use the form of forum to coordinate members’ standpoints, and set common policies or rules, but usually does not have [a] standing body with the capability to operate, and also lacks [a] conditional organization charter.”⁷

In short, although FOCAC may thus be regarded as a “conference” type of international economic organisation, it is still only an undeveloped and loose organisation due to its lack of permanent institutions and fundamental documents, as opposed to a regular international economic organisation.

3.2 Fundamental documents of FOCAC lack of legal binding force and stability

The basic framework of FOCAC is embodied in the Beijing Declaration of the Forum on China-Africa Cooperation, the China-Africa Cooperation in Economic and Social Development Programme and the various Action Plans referred to above,⁸ constitute the basic principles of cooperation. These documents are “soft law”, though they have strong international legal influence.

A treaty, on the other hand, refers to a statement of rights and obligations in the course of intercommunication determined by two or more international legal

⁴ Guo Yu *Law of International Economic Organizations* Beijing: Peking University Press (1999) 2.

⁵ Song YongXin, Song HaiYing. *Introduction to the Law of International Economic Organizations* Zhejiang: Zhejiang University Press (2000) 5.

⁶ Tian JiauGu. (eds) *International Economic Organization Law* Beijing: China Legal Publishing House (2000) 5.

⁷ Zeng LingLiang, Rao Geping (eds) *International Law* Beijing: Law Press (2005) 314.

⁸ Under 2.1 at 3 above.

subjects (for example, governments) under international law. Whether it takes the form of a joint communiqué or a declaration, it will refer to conference documents or negotiation records that the international parties issue publicly during or after the meeting. Not all joint communiqués or declarations are identified as international treaties; it will depend on what the parties' statements in the communiqué or declaration are and whether these statements stipulate specifically that they constitute, alter or abolish the legal rights and obligations in contained in those documents or records.⁹

In contrast to the procedure for the conclusion of treaties, the fundamental documents of FOCAC did not stipulate the necessary provisions such as government approval, time frames and procedures for signature as a formal international treaty, nor were they approved by member states' domestic procedures.

Secondly, the background to the drafting of these fundamental documents make it clear that the Sino-African countries initially did not want to enter into a binding treaty. For example, the Beijing Declaration of the Forum on China-Africa Cooperation was titled the "Beijing Communiqué" when it was first drafted by China's Preparatory Committee of FOCAC. However, certain African governments felt that the role of FOCAC was to the future of Sino-African development cooperation and that the term "Communiqué" did not reflect the importance of the first FOCAC Ministerial Conference. The title of the document was therefore changed to "Beijing Declaration".

Thirdly, the contents of these documents are relatively imprecise. Their texts are very short and most of them are limited to describing the basic principles of FOCAC without mentioning the member states' specific rights and obligations. For instance, the Beijing Declaration has only ten clauses, the China-Africa Cooperation in Economic and Social Development Programme has only twenty clauses, including the Preamble, and the Addis Ababa Action Plan has just six clauses including the Preamble. In these few clauses the Sino-African countries merely set up a preliminary framework to strengthen bilateral and multilateral cooperation in trade and investment and to require the enactment of appropriate legal frameworks for these purposes, but without clearly specifying the countries' respective rights and obligations. There is also no provision for a dispute

⁹ Wang Tieya (eds.). *International Law* Beijing: Law Press (1995) 404-405.

resolution mechanism and relief measures should violations taken place or disparities arise.

Finally, the words and expressions used in these documents are open-ended and lacking in binding force. Terms such as “welcome”, “appreciate”, “be determined” or “appeal to” were selected to convey the parties’ intentions as to their arrangements for economic cooperation and development,¹⁰ rather than terms such as “shall” and “must” which create binding obligations.

Though constituting soft law rather than international treaties, however, it has been noted that these documents are not without legal effect. Since member states bear no legal responsibility for implementing them, such documents can easily be adopted to reflect the intentions and wishes of the relevant countries in respect of a particular issue or problem before achieving consensus by way of legally binding norms.¹¹ Thus, goals and general obligations are expressed in broad and vague terms while seldom mentioning specific regulatory measures and time-schedules required for realising these goals. Nevertheless, FOCAC documents are understood as representing the intentions and wishes of the Sino-African countries and if any member violates their provisions, that state will bear international moral condemnation. But, at the same time, the documents’ lack of legal binding force means that the predictability and stability which they create are comparatively weak.

4 TOWARDS A MATURE FOCAC

To change the current undeveloped FOCAC mechanism into a mature one in the next decade, it will be necessary for Sino-African countries to endeavour to strengthen and build its capacities. Although the existence of an international mechanism does not necessarily depend on an international organisation, and many mechanisms can play a role without the support of a corresponding

¹⁰ For example, Art 8 of the Beijing Declaration says: “We *welcome* the laudable efforts made by certain middle income countries and other bilateral initiatives by donors aimed at the cancellation of African official debts. We *appreciate* the recent enhancement of the Heavily Indebted Poor Countries (HIPC) initiative ... We *strongly appeal to* the relevant international financial institutions and creditor developed countries to adopt more concrete measures aimed at debt relief” Clause 4.4.3 of the Addis Ababa Action Plan says: “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 ...” (emphasis added).

¹¹ Wang Tieya (eds) *International Law* Beijing: Law Press (1995) 456.

international organisation, the latter can provide the discussion procedures, venues and conveners (in particular a secretariat) and clarify the various norms or rules applicable to the international mechanism. At the same time, such clarification can have a bigger impact because an international organisation also serves an information centre, which makes it easier to shape the member states' common expectations while, at the same time, providing support to the realisation, consolidation and development of various international mechanisms.

FOCAC is currently regarded as the Sino-African countries' high-level meeting mechanism and is gradually becoming a useful means for discussing and solving international issues. However, the relationship among member countries is merely that of a temporary bilateral or multilateral contact among "powers" preceding the establishment of a permanent government organisation.¹² The South Commission pointed out very early that "[o]ne of the chief shortcomings of South-South cooperation has been weak organization and lack of institutionalized technical support, both at the international level and in most countries."¹³ Therefore, in order to further develop the Sino-African countries' cooperation mechanism, to establish relevant norms in economic exchanges and to perfect the specific international orders, it becomes especially urgent to enhance the institutionalisation of FOCAC as well as signing basic legally binding documents.

4.1 Strengthening FOCAC institutionalisation

4.1.1 Establishing permanent Sino-African cooperation institutions

It would be beneficial for the Sino-African countries to set up permanent decision-making institutions and executive bodies. Of course, this should include other necessary affiliates such as a dispute resolution body and sub-commissions or expert committees to institutionalise the present loose structure of FOCAC and transform the "conference" international economic organisation into a normal permanent organisation. Suggestions for the functioning of the various components are discussed below.

The Sino-African Council of Ministers: The Council should comprise, on the one hand, senior officials of China's Ministry of Foreign Affairs and Ministry of Foreign Trade and Economic Cooperation (the numbers to be decided by China

¹² Liang Xi *International Organization Law* Hubei: Wuhan University Press (1993) 16.

¹³ South Commission *The Challenge to the South: The Report of the South Commission* Oxford: Oxford University Press (1990) 149.

and African countries together) and, on the other, a member of the government of each African State. The office of the President of the Council of Ministers should be held alternately by a Chinese senior official and an African government member. The Council should as a rule meet once a year on the initiative of the President and whenever it seems necessary, in a form and a geographical composition appropriate to the issues to be addressed.

The functions of the Council of Ministers should be to lay down the general framework of Sino-African cooperation, to conduct political dialogue, to adopt policy guidelines and take decisions necessary for the implementation of the provisions of future Sino-African agreements, in particular as regards development strategies as provided for by these agreements or any other relevant area or procedures, to issue annual cooperation reports, to examine and resolve any issue liable to impede the implementation of these agreements, and to ensure the smooth functioning of the consultation mechanisms.

The Council of Ministers should conduct an on-going dialogue with representatives of the social and economic partners and other actors of civil society in China and African States. To that end, consultations may be held alongside its meetings.

The Secretariat of the Council of Ministers: A joint secretariat could have two offices, one located in Beijing and the other in Addis Ababa (since the headquarters of African Union is located here, making it easier for African countries to coordinate and cut down expenses). The Secretariat's main functions would be to assist the Council of Ministers, the Committee of Ambassadors and the Consultative Assembly, as well as to carry out routine contact work.

The Committee of Ambassadors: The Committee of Ambassadors could comprise, on the one hand, Chinese representatives to African countries and, on the other, the head of mission of each African State to China. The office of Chairperson of the Committee of Ambassadors should be held alternately by Chinese representatives and heads of mission representing African states, designated by the African states. The Committee of Ambassadors should meet regularly, in particular to prepare Council sessions and whenever it proves necessary.

The Committee would assist the Council of Ministers in the fulfilment of its tasks and carry out any mandate entrusted to it by the Council. In this context, it would monitor implementation of Sino-African agreements and progress towards achieving the objectives set therein.

The Consultative Assembly: It would be advantageous to transform the present Senior Officials' Meeting of FOCAC into a Consultative Assembly. Such an assembly would be composed on a basis of parity of Chinese members on the one hand and representatives designated by the African states on the other. The Consultative Assembly would, through dialogue, debate and concerted action, consider ways and means of strengthening Sino-African cooperation and furthering the objectives of future Sino-African agreements, submit to the Council of Ministers any conclusions and make any recommendations it considers appropriate, organise regular contacts with representatives of Sino-African countries' economic and social partners and other actors of civil society in order to obtain their views on the attainment of the objectives of future Sino-African agreements, and generally to promote better understanding between the peoples of China and African States.

As a consultative body it should meet at least once a year. The proceedings of the Consultative Assembly should be prepared by a Joint Committee. The Consultative Assembly could set up sub-committees on issues such as trade, investment and financial and technical assistance, which could be turned into joint negotiating panels in the future. In addition it could set up ad hoc consultative committees to undertake specific activities as it may determine.

Dispute Settlement Mechanism: Any dispute arising from the interpretation or application of Sino-African agreements should be submitted to the Council of Ministers. Between meetings of the Council of Ministers, such disputes should be submitted to the Committee of Ambassadors. If the Council of Ministers fails to settle the dispute the Council could, at the request of either of the parties concerned, establish a good offices procedure, the result of which would be transmitted in a report to the Council at its next meeting.

If the dispute is not settled, the Council of Ministers could initiate an arbitration procedure at the request of either Party. Two arbitrators could be appointed by the parties within thirty days, one by each side. The two arbitrators could then appoint a third arbitrator within two months. Should the latter not be appointed with that time, he or she could be appointed by the co-Presidents of the Council of Ministers from among eminent persons providing every guarantee of independence. The decision of the arbitrators should be taken by majority vote, as a rule within five months.

4.1.2 Setting up auxiliary institutions

In addition to the above, it would be beneficial for Sino-African countries to set up joint auxiliary institutions; for example, centres on agriculture and rural technology cooperation or industrial development, which would be responsible for information exchange, research and training, technology transfer and other related activities. It may also be advisable for China to establish a Sub-Saharan Regional Trade Office in a major African city (such as Johannesburg).

4.2 Signing a basic Sino-African cooperation agreement

To overcome the present FOCAC lack of international legal binding force, it would be necessary to enter into a basic cooperation agreement concretely stipulating the economic cooperation mechanisms between China and African countries. Such a cooperation agreement should not only set out the Sino-African cooperation principles and the joint institutions discussed above, but should also tackle the concrete issues and arrangements in trade, investment, finance, agriculture and technical cooperation, clearly stipulating the reciprocal rights and obligations. China also can take the opportunity to include the relevant Chinese commitments to African countries in specific areas of trade and financial aid in this cooperation agreement.

4.3 Strengthening the development of Sino-African civil society

The role of civil society in trade and economic cooperation should not be neglected. In the context of FOCAC “civil society” refers to non-governmental organisations, small to medium-sized businesses, chambers of commerce and representatives of other groups in China and Africa that are interested in the successful application of FOCAC and helping participating companies and entrepreneurs to find new markets and new partners. Besides the abovementioned FOCAC Women’s Forum, the China-Africa Industrial Cooperation and Development Forum, the Forum on China-Africa Cooperation--Legal Forum and CATTF, it is necessary to build other relevant Sino-African NGOs for consultation and communication purposes. This would offer another good platform to thoroughly discuss cooperation issues and find practical solutions.

5 CONCLUSION

After more than ten years of development, FOCAC's trajectory in the immediate future is towards a more mature, effective cooperation mechanism and organisation that will be stable in the long term. Though the political element remains vital, the tendency towards institutionalisation is unavoidable. Suitable institutionalising innovations include establishing a joint FOCAC Council of Ministers, a Joint Secretariat, a Committee of Ambassadors, a Joint Consultative Assembly and sub-commissions, as well as entering into a basic cooperation agreement with legal force. In addition, it is important to strengthen the development of Sino-African NGOs. While doing so, however, it will be important to consider other complex issues; for example, how to define the scope of African member states of FOCAC and how to lower the African countries' fiscal burden arising from such institutionalisation. All these issues require thoughtful reflection by stakeholders.

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