

# Kluwer Mediation Blog

## Is China Leading the Way for Investor-State Mediation?

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### Introduction

China's noticeable absence from ISDS **cases** raises interesting questions about the resolution of investor-state disputes from a Chinese perspective. So far, there have only been 15 ISDS cases brought on behalf of Chinese investors, with China having been on the receiving end of 9 **claims**. One might consider these figures very low, when compared, for example, with the United States which has been a respondent in 23 known cases, with US investors bringing claims in 207 **cases**. How is it then that China, with an economy projected to overtake the US in GDP terms in roughly a **decade**, has so few cases in ISDS? This article seeks to tackle this question by framing it within the Chinese cultural preference for mediation and negotiation. The article begins by looking at historical reasons for the use of mediation in China, followed by an overview of the development of commercial mediation. The article concludes by stating that China has encouraged the use of investor-state mediation and is therefore a keen supporter of this innovative form of alternative dispute resolution.

### The Cultural Preference for Mediation within China

It is well known that mediation and the peaceful resolution of disputes has a long and rich history in Chinese **society**, a history which has its roots deeply embedded in Confucian thought, amid a preference for social stability and conformity, as opposed to confrontation and the formal adjudication of disputes. This is perhaps best emphasised by the longstanding conflict of *Lizhi* ?? (rites and rituals) and *Fazhi* ?? (laws) within Chinese society whereby believers of the former, advocate less formal means of **conflict resolution** and the latter supporting a more formal legalistic resolution of disputes, backed by codified standards associated with the legalist tradition.

The preference for negotiation and mediation as forms of conflict resolution even appears to have permeated into China's political leadership, who have come with up numerous concepts seeming to adopt a non-confrontational style of conflict resolution both domestically and on the world stage. Examples include the Five Principles of Peaceful Coexistence advocated by Zhou Enlai in the 1950s, the concept of a Harmonious Society under Hu Jintao in the 2000s and the emergence of Xi Jinping's China as a mediator/conflict resolver particularly along the **belt and road**. This emphasis on conflict resolution appears to be a fundamental principle of China's international relations perhaps best exemplified by Wang Yi's **speech** at the UN in September 2022. All of this speaks to a China with a deeply embedded cultural preference for the peaceful resolution of disputes, which

may carry over to ISDS and explain why there are so few cases.

### Commercial Mediation in China

Commercial Mediation has developed over the years in China and in the wake of Deng Xiaoping's reform and opening up policy, the China Council for the Promotion of International Trade (CCPIT) set up a mediation centre in 1987 which has since resolved thousands of disputes. In 2019 alone, the CCPIT, received around 3000 cases with over 500 involving **international disputes**. Many other mediation centres have been established in China since the 1980s, and prominent arbitral institutions such as the China International Economic and Trade Arbitration Commission (CIETAC), the Beijing International Arbitration Centre (BIAC) and the Shanghai International Arbitration Centre frequently administer mediation cases in accordance with their own institutional rules. Mediation further developed in 2019 when the Supreme People's Court issued a **notice**, requiring national courts to establish a multi-mechanism dispute resolution service to offer mediation alongside litigation.

The establishment of the China International Commercial Court in 2019 as a '*one stop dispute resolution shop*', to offer a flexible mediation service for commercial disputes, is further evidence of a country that is actively seeking to promote the use of mediation. In addition to these developments, China is one of 55 signatories to the United Nations Convention on International Settlement Agreements Resulting from Mediation (**Singapore Convention**). Although not yet ratified, China's signature alone demonstrates a willingness to support the growth and development of commercial mediation worldwide. China's signature is all the more striking because some pro-mediation countries (for example, New Zealand and until recently the UK) are yet to sign the Singapore Convention. Although by no means perfect, and lacking a formal commercial mediation law, the evidence appears to suggest that China is at least attempting to promote the use of commercial mediation as part of its ongoing economic reforms.

### China and Investor-State Mediation

Before looking at China's approach to investor-state mediation, it is worth remembering that this is still a developing form of alternative dispute resolution, which has yet to attract the widespread use of the international dispute resolution community. Like commercial mediation in the UK in the 1990s, there is still much to be done to promote the use of investor-state mediation and kickstart its application worldwide. Having said this, China has already taken a number of steps to formalise and promote the use of investor-state mediation, which in some ways, makes it a relative innovator within the field.

When it comes to China's historical approach to ISDS, it is notable that most of China's first-generation Bilateral Investment Treaties included the requirement of an amicable settlement period of consultation and negotiations as a precursor to **arbitration**. This was taken one step further with the establishment of an actual mediation mechanism within the 2017 Mainland and Hong Kong Closer Economic Partnership Agreement (**CEPA**). CEPA was a watershed moment for the development of investor-state mediation in China, and the first International Investment Agreement of its kind, because it introduced detailed rules and provisions for the use of investor-state mediation with the support of different Mainland and Hong Kong institutions to administer cases with their respective panels of mediators.

The inclusion of investor-state mediation provisions within CEPA was complemented by investor-

state mediation training in Hong Kong organised by its Department of Justice and the Asian Academy of International Law. The training which has since been regularly undertaken, involves leading mediation consultants from around the world and includes representatives from the Centre for Effective Dispute Resolution (CEDR), the Energy Charter Secretariat, ICSID and the International Mediation Institute. To address the growing interest in investor-state mediation and the notable demand for a cadre of specialised investor-state mediators, specific mediation provisions have been incorporated within the investment arbitration rules of Chinese arbitral institutions. Both CIETAC and the BIAC have included provisions for investor-state mediation within their respective investment arbitration rules.

The appetite for investor-state mediation in China is further demonstrated by the Chinese government's **submission** to UNCITRAL Working Group III in 2020 which encouraged the use of alternative dispute resolution in ISDS and argued that conciliators provide *'More opportunities to adopt creative and forward-looking methods to promote the settlement of investment disputes'*. The Chinese representatives went further by concluding that *'The establishment of a more effective investment conciliation mechanism should be actively explored'*. More recently in 2022, the Chinese government proposed to set up a preparatory office for an **international mediation court** to be based in Hong Kong, a court that is said to:

*'Provide a new platform for the peaceful settlement of international disputes and fully respond to the international community's need for neutral, professional and amicable mediation mechanisms in settling international disputes'*.

Although such a court has not yet been established, it seems likely that it will be equipped to handle an array of international disputes through mediation, and one would assume this includes investor-state matters. The establishment of such a court would fall within China's wider aspirations of becoming an international dispute resolution hub, and a leading provider of dispute resolution services in the Asia Pacific region.

## Conclusion

This post has argued that the notable lack of Chinese involvement in ISDS cases over the years may in some part, be down to a cultural preference for mediation and the peaceful resolution of disputes within Chinese society. Such a preference may result in disputes being settled long before they crystallise into a potential ISDS claim. Having said this, commercial and investor-state mediation have steadily developed in China with both being actively developed and advocated by the Chinese government as part of a wider international dispute resolution strategy. The evidence appears to suggest that China is a keen supporter of investor-state mediation and a potential front runner for its use. It would therefore not be an understatement to conclude that China is one of the major players involved in the development and promotion of investor-state mediation today.

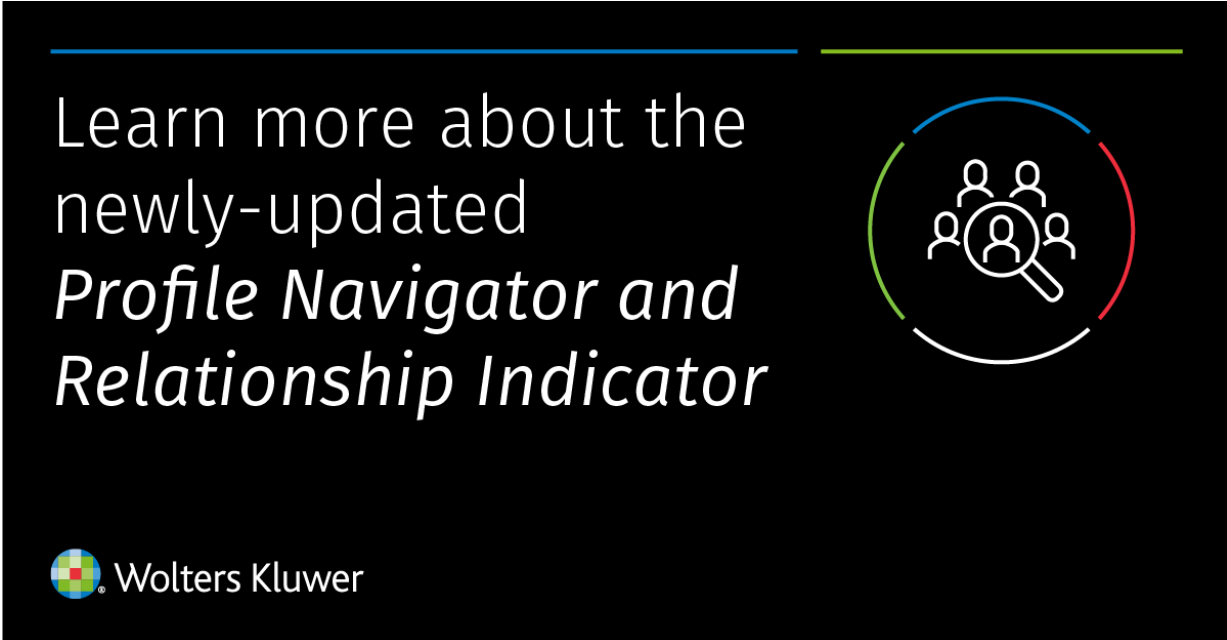
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