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MEDIATION AND INTERNATIONAL INVESTMENT: A CHINESE PERSPECTIVE

WANG Guiguo and HE Xiaoli

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MEDIATION AND INTERNATIONAL INVESTMENT: A CHINESE PERSPECTIVE

WANG Guiguo* and HE Xiaoli**

The most important feature of the contemporary world is globalization with a high degree of economic interdependence among nations, which includes breaking down national economic barriers as well as the increasing cross-border economic exchanges and transactions of goods, services, and capital, not only in a large scale but also at a high frequency. The spread of market economy across the globe has created a global market, which effectively allocates resources and distributes them at a global level. It was the development of technology relating to information, transportation, and communications, such as the internet and teleconferencing, that enabled the effective and smooth transnational transactions and exchanges at reduced transaction costs.

Globalization is a dynamic process that involves the flow of goods, services, capital, and technology, as well as culture. Meanwhile, it also promotes the homogeneity and interaction of different cultures. Understanding different cultures is vital for global business, including investment. Ignorance of cultural dimension may lead to difficulty, if not impossibility, in achieving successful business. Apart from the lack of awareness of different cultures, insufficient communication between transaction parties also causes misunderstandings and conflicts.¹ It is possible, for instance, for a Chinese company to sign a contract with no understanding of its terms. Moreover, discrepant conceptions of different people, organizations, and governments are also major sources of conflicts.

A significant aspect of international economic exchanges is investment, which has become part of development policies of many countries. In fact, some of the regimes may even rely on foreign direct investment for their effective control. In these circumstances, most countries, if not all, try to improve their investment environment by accepting, *inter alia*, investor-state arbitration in order to compete for foreign direct investment. However, recent arbitration decisions are not up to the expectations, to say the least, of investment host countries. This article analyzes the contemporary issues relating to international investment, and considers whether mediation can serve as an alternative for resolving investment disputes. In this regard, it will examine the Chinese culture and practice in resolving disputes involving foreign investors and the Chinese government to determine if the Chinese experience could be adopted as an Asian value in promoting foreign direct investment.

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1. For discussion on the differences of contract practice, see generally Philip J. McConaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA. J. INT'L L. 427 (2001), and Chunlin Leonhard, *Beyond the Four Corners of a Written Contract: A Global Challenge to U.S. Contract Law*, 21 PACE INT'L L. REV. 1 (2009).

I. ISSUES OF GLOBALIZED INVESTMENT LAW

Internationalized commercial activities call for compatible legal norms to resolve conflicts and disputes. Theoretically, such norms can be divided into international and national norms.² However, such dichotomy has failed to fully correspond to reality. Especially in this era of globalization, the relationship between international law and domestic law is dynamic, diversified, and complicated. The territorially-based conception of Westphalian sovereignty in traditional international law is now facing challenges from the contemporary world, in particular by globalization.³ The increased transnational economic transactions and arrangements, and corresponding interdependence of states, make it impossible for an individual government to assert control over a discrete territory without cooperating with others to cope with global problems such as infectious diseases and poverty reduction.⁴

International law of the contemporary world is transprocedural and transsubstantive in nature. In the current circumstances, public and private actors including nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals all contribute to the transnational legal process by either making, implementing, or interpreting relevant norms. Process has the effect of both domesticating international norms and internalizing national norms.⁵ Again within the process, private individuals sit as arbitrators and make binding decisions on states, which was unheard of before. Like judges, private arbitrators must give their own understanding of the treaty provisions by accepting one party's opinion and rejecting the other party's opinion. By doing so, they are making new norms out of such treaty provisions, a process Professor Cover described as "jurisgenerative."⁶ The interaction between these public and private actors generates laws and interpretations of laws and internalizes them into domestic law.⁷ It is equally true that where the parties submit their disputes to judicial or quasi-judicial bodies, they hand their fate to such bodies.⁸ Through interpretation of international treaties, arbitrators impose their own understanding of the provisions upon the parties, regardless of whether their understanding reflects the true meaning of the treaty provisions.⁹

2. J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66, 66 (1936).

3. Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 283 (2004).

4. *Id.* at 285.

5. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2649 (1997).

6. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983) (describing a "jurisgenerative process" as one in which interpretive communities "create law and . . . give meaning to law through their narratives and precepts.").

7. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 186 (1996).

8. See Cover, *supra* note 6, at 53 (calling judges "people of violence" as they always kill off one of the arguments, and consequentially "jurispathic"). Arbitrators of today do exactly what judges do in courts insofar as international commercial arbitration is concerned.

9. See generally Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521

In judicial and quasi-judicial interpretation, it is common that confusing and contradicting rulings are made in respect to the same provisions:

We often see not only different courts but the Judges of the same [sic] court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.¹⁰

This is particularly true in the practice of the International Center for Settlement of Investment Disputes (ICSID).¹¹ For instance, in interpreting the umbrella clause, one ICSID tribunal held it could not transform a contractual claim into a treaty claim, but another came to the opposite conclusion. In *SGS v. Pakistan*, apart from denying the elevation effect of the umbrella clause, the tribunal expressed the concern that an overly broad interpretation of the standard would be susceptible to “almost indefinite expansion” and would lead to claims that were “so automatic and unqualified and sweeping in their operation, [and] so burdensome in their potential impact” upon sovereign states.¹² It held that there must be “clear and convincing evidence” of a shared intent of states to transform contract breaches into treaty claims.¹³ Nevertheless, the tribunal in *SGS v. Philippines*, the facts of which were similar to those of *SGS v. Pakistan*, held that the umbrella clause must be construed to favor the protection of covered investments.¹⁴

The divergence of ICSID tribunals also took place in determining the applicability of the Most Favored Nation (MFN) clause to dispute settlement issues. The tribunal in *Maffezini v. Spain* ruled that the goal of the Bilateral Investment Treaty (BIT) in question was investor protection and that dispute settlement arrangements were inextricably related to the protection of foreign investors; therefore the MFN clause could be extended to procedural matters, including dispute resolution provisions.¹⁵ Such an expansive interpretation was

(2005) (discussing the inconsistency in arbitration decision making with regard to international treaty dispute resolution).

10. Cover, *supra* note 6, at 41 (quoting THE FEDERALIST No. 22, at 148-49 (Alexander Hamilton) (E. Bourne, ed., 1947)).

11. In order to restore the legitimacy of investment disputes resolution, some scholars suggested establishing some appeal mechanism. See generally Johanna Kalb, *Creating an ICSID Appellate Body*, 10 UCLA J. INT'L L. & FOREIGN AFF. 179 (2005); Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, 24 BERKELEY J. INT'L L. 444 (2006); David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39 (2006).

12. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, ¶ 166-67 (Aug. 6, 2003), 8 ICSID Rep. 406 (2005).

13. *Id.* at ¶ 167.

14. *SGS Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶ 116 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

15. *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Objections to Jurisdiction, ¶ 56 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002).

followed in *Siemens A.G. v. Argentina*,¹⁶ *Gas Natural v. Argentina*,¹⁷ *Tecmed v. Mexico*,¹⁸ and *Vivendi v. Argentina*.¹⁹

Nevertheless, in *Salini v. Jordan*, the tribunal refused to accept the investor's plea and refused jurisdiction over the primary, citing the MFN clause.²⁰ In its view, the base treaty did not expressly provide that the MFN clause would apply to dispute resolution and there was no indication that the parties intended the clause to apply to dispute resolution issues.²¹ Similarly, the *Plama v. Bulgaria* tribunal rejected the expansive interpretation of the MFN clause adopted by the *Maffezini* tribunal.²² It asserted that "doubts as to the parties' clear and unambiguous intention [could] arise if the agreement to arbitrate [was] to be reached by incorporation by reference."²³ The tribunal held that the MFN clause should not apply to dispute settlement except when there was a clear intention of the parties.²⁴

In more recent cases, the *Telefónica* tribunal regarded the local remedy requirement "as a temporary bar to the initiation of arbitration" or a matter of inadmissibility which "would result in the Tribunal's temporary lack of jurisdiction."²⁵ The *Wintershall* tribunal regarded BIT provisions relating to dispute settlement as comprising a standing offer of the host state, in which "the eighteen-month requirement of a proceeding before local courts . . . [was] an essential preliminary step to the institution of ICSID Arbitration."²⁶ Therefore, in order to access ICSID arbitration, the investor must accept the entire terms of the standing offer and first satisfy the local remedy requirement. In the end, the tribunal in *Wintershall* also found the recourse to local court proceedings to be a matter that was jurisdictional in nature.²⁷

16. *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 103 (Aug. 3, 2004), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC508_En&caseId=C7.

17. *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Preliminary Questions on Jurisdiction, ¶ 47 (June 17, 2005), <http://www.asil.org/pdfs/GasNat.v.Argentina.pdf>.

18. *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 69 (May 29, 2003), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caseId=C186.

19. *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, ¶ 62 (Aug. 3, 2006), <http://italaw.com/sites/default/files/case-documents/ita0819.pdf>.

20. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, ¶¶ 114-19 (Nov. 29, 2004), 20 ICSID Rev.—FILJ 148 (2005).

21. *Id.*

22. *Plama Consortium Ltd. v. Republic of Bulg.*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 119 (Feb. 8, 2005), 20 ICSID Rev.—FILJ 262 (2005).

23. *Id.*

24. *Id.* at ¶ 223.

25. *Telefonica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, ¶ 93 (May 25, 2006), <http://www.italaw.com/documents/DecisiononJurisdictionTelefonica.pdf>.

26. *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶ 160 (Dec. 8, 2008), <http://www.italaw.com/documents/Wintershall.pdf>.

27. *Id.* at ¶ 172.

Where decisions by the tribunals outside the ICSID regime are taken into account, conflicts are unavoidable in tribunal rulings over essentially the same facts. These contradicting arbitration decisions in practice have significantly reduced the attraction of arbitration as a means for resolving investment disputes. Some of the host countries reacted strongly to the situation of investment arbitration by withdrawing from ICSID Convention. For example, Bolivia withdrew in 2007,²⁸ Ecuador in 2009,²⁹ and Venezuela in 2012.³⁰

At the same time, as the second-largest foreign direct investment (FDI) recipient (after the United States), attracting around \$95 billion in 2009 according to the World Investment Report 2010,³¹ China is almost immune from investor-state arbitration, either as investor or host state.³² There could be many reasons for this. Yet, among all the possible reasons, traditional Chinese culture, which still has tremendous influence in modern China, has most contributed to the amicable settlement of disputes. Non-litigation methods for resolving disputes, such as consultation and mediation, are the culturally preferred means and are better suited to the Chinese environment. Among numerous considerations from the cultural perspective, praise of harmony usually comes first. This has actually been the common theme of all the major traditional Chinese schools of thought that provide the philosophical foundation for contemporary views and ways of approaching disputes.³³ The traditional view is that disputes, whatever their reasons, are serious

28. John L. Gardiner, Barry H. Garfinkel, *Bolivia Withdraws From the ICSID Convention and Venezuela May Follow Suit: Implications For Investors*, SKADDEN, ARPS, SLATE, MEAGHER & FLOOM LLP & AFFILIATES (May 2007), http://www.skadden.com/sites/default/files/publications/Publications1267_0.pdf.

29. Press Release, Ecuador Submits a Notice under Article 71 of the ICSID Convention (July 9, 2009), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20>.

30. Press Release, Venezuela Submits a Notice under Article 71 of the ICSID Convention (Jan. 6, 2012) (<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100>). See also n24fuenteno, Ministro Ramirez sobre el Ciadi.mp4 (Jan. 15, 2012), http://www.youtube.com/watch?feature=player_embedded&v=rpgUXj5CmbA (video of the Minister of Energy and Petroleum of Venezuela announcing Venezuela's intention to withdraw from the ICSID Convention in an interview on Jan. 15, 2012) (Venez.).

31. U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2010: INVESTING IN A LOW CARBON ECONOMY, fig. 1.4 at 4, U.N. Doc. UNCTAD/WIR/2010, U.N. Sales No. E.10.II.D.2 (2010).

32. *Contra Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Laudo [Award], ¶¶ 59-60 (July 7, 2011), <http://italaw.com/documents/TzaYapShumAward.pdf> (Tza Yap Shum, a Chinese national, commenced ICSID arbitration against the Republic of Peru, claiming violations of the BIT affecting his investment). See also *Ekran Berhad v. China*, ICSID Case No. ARB/11/15, Pending (July 22, 2011), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C1600&actionVal=viewCase> (a Malaysian company filed the first-ever case against the Chinese government before ICSID, but that case was "suspended" on 12 July 2011 "pursuant to the parties' agreement").

33. Gao Jun, Long Yiping & Xu Hongwei, *Revelations of Traditional Chinese Non-legal-dispute Culture on Construction of Contemporary Harmonious Chinese Society*, 23 JOURNAL OF HUBEI

challenges to harmony and good relationships among people within the society.³⁴ Confucianism, the dominant cultural influence in Chinese society for over two thousand years, strongly discourages social conflicts because of their “possible obstruction with the natural order of life and other intrinsic disharmonious principles.”³⁵

II. MEDIATION AS PART OF CHINESE CULTURE

Mediation as a traditional form of dispute resolution can be found in societies around the globe and can be traced back to the earliest history of mankind.³⁶ As early as about 3,000 BCE, this amicable resolution of disputes has existed in Egypt, Babel, and Assyria.³⁷

The mediation system in China, the so-called “oriental experience,” is an integral part of the ancient tradition of the Chinese legal culture.³⁸ It can be dated back to early ancient times, or the Rao and Shun times around 4,000 years ago, according to the “Chronicles of Five Emperors” contained in the Historical Records of Sima Qian.³⁹ Although there was no state and no law in primitive society, there were disputes for which resolution was always achieved by one of two means: peace or violence.⁴⁰ Violence here naturally refers to force, but many disputes were solved by negotiation between the parties or between the heads of the tribes.⁴¹ This might be the oldest and simplest form of mediation.

As a means of dispute settlement, mediation survived from the pre-Qin Period (before 221 BCE) to the Ming and Qing Periods (1368-1911 CE).⁴² According to the records, nearly all civil and minor criminal cases were resolved by mediation, and only if mediation failed were these cases adjudicated by the relevant laws and rules.⁴³ The inscriptions found on some cultural relics of the Western Zhou Period (1029-771 BCE) record the whole process of handling civil cases, and some

INSTITUTE FOR NATIONALITIES (PHILOSOPHY AND SOCIAL SCIENCES), no. 4, 2005, at 53, 53 (original in Chinese).

34. *Id.*

35. George O. White III, *Navigating the Cultural Malaise: Foreign Direct Investment Dispute Resolution in the People's Republic of China*, 5 TRANSACTIONS TENN. J. BUS. L. 55, 64 (2003).

36. Jacob Bercovitch, *Introduction: Putting Mediation in Context*, in STUDIES IN INTERNATIONAL MEDIATION: ESSAYS IN HONOR OF JEFFREY Z. RUBIN 3, 4 (Jacob Bercovitch, ed. 2002).

37. CHRISTIAN BUHRING-UHLE ET AL., ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 177 (2nd ed. 2006).

38. Zhou Xue, *Interpretation of Chinese Traditional Mediation System*, JOURNAL OF SUZHOU EDUCATION INSTITUTE, Oct. 2006, at 19, 20 (original in Chinese).

39. Xiao Chuanlin & Yang Jun, *Carry on Mediation Tradition and Construct Harmonious Society*, 25 JOURNAL OF ADULT EDUCATION SCHOOL OF HUBEI UNIVERSITY, Apr. 2007, at 53-4 (original in Chinese).

40. Lian Hong, *Harmonious Concept of Confucianism and Chinese Traditional Mediation System*, 18 CHANG CHUN UNIVERSITY OF SCIENCE AND TECHNOLOGY (SOCIAL SCIENCES), no. 2, 2005, at 89, 91 (original in Chinese).

41. Hu Xuzui & Xia Xinhua, *Research of the China's Mediation Tradition--A Cultural Perspective*, JOURNAL OF HENAN ADMINISTRATIVE INSTITUTE OF POLITICS AND LAW, Apr. 2000, at 21 (original in Chinese).

42. Lian, *supra* note 40.

43. *Id.*

provisions of the mediation system are even spelled out.⁴⁴ During that time, officeholders were appointed to be in charge of settling disputes between people by mediation.⁴⁵

Thereafter, the role of mediation was increasingly emphasized, especially after the Western Han Period (206-9 BCE) when Confucianism became an orthodox legal system, and there was a need to employ morality to settle the arguments whose cases often appear in the ancient books and records.⁴⁶ In the Song⁴⁷ and Yuan periods⁴⁸ (960-1368 CE), this system saw a rapid development. In the Statutes of the Yuan Dynasty (*Yuan dianzhang* 元典章), there is a special chapter on “Proceedings,” which regards mediation as having the same legal effect as a court proceeding, providing that any case officially handled by mediation cannot be later submitted to a court.⁴⁹ In the Qing Period (1644-1911 CE), the mediation system was further improved and perfected and was divided into two forms: prefecture and county mediation, and folk mediation.⁵⁰

The emergence and development of the mediation system in China has deep social and ideological origins. First of all, mediation is not only a way of settling disputes, it embodies distinct cultural values. In the Chinese tradition, the idea of “harmony” is in conformity with mediation; in one sense, traditional Chinese mediation is the result of Chinese culture and its concept of harmony.⁵¹ One feature of harmony is the avoidance of suits or adversarial proceedings.⁵² This is the ultimate orientation of values and the guiding principle of governance.

All of the main schools of thought in China—Taoism, Legalism, Confucianism, and Mohism—preach the idea of non-adversarial settlement of disputes.⁵³ Lao Tzu, the father of Taoism, sought a realm of “*wu-wei*” or inaction, meaning to “follow the flow of nature,” or to go with the flow.⁵⁴ The reflection of this idea in relation to litigation is that if people do not struggle for fame and power there might be no suits among them and the world would be at peace. On the other

44. Xiaobing Xu, *Different Mediation Traditions: A Comparison Between China and the U.S.*, 16 AM. REV. INT'L ARB. 515, 525 (2005).

45. Zhou Ying, *Study on Chinese Traditional Mediation System*, FA ZHI YUAN DI: FA ZHI YU SHE HUI [LEGAL SYSTEM: LEGAL SYSTEM AND SOCIETY], Sept. 2007, at 76, 76 (original in Chinese).

46. WANG CHENGUANG, *Alternative Dispute Resolution*, in INTRODUCTION TO CHINESE LAW § 1.03, at 4 (Wang Chenguang & Zhang Xiancu, eds., 1997).

47. See Xiaobing, *supra* note 42, at 529.

48. See *id.* at 527.

49. See *id.* at 523 (explaining that under the Yuan Code, if a court allowed the voluntary withdrawal of a civil lawsuit because the parties chose to settle through private mediation, then the court was to refuse to accept a new lawsuit on the same dispute by the same parties unless the court found that the mediation or resolution in the case had been “unreasonable”).

50. Wu Zeyong, *The Reform of Civil Procedural System as part of the Amendment to Legal Systems in the Late Qing*, STUDY OF COMP. L., no. 3, 2003, at 72, 74 (original in Chinese).

51. See generally Bobby K Y Wong, *Traditional Chinese Philosophy and Dispute Resolution*, 30 HONG KONG L.J. 304 (2000).

52. *Id.* at 306-07.

53. Shao Aihong, *Brief Comment on the Idea of No Litigation*, J. E. CHINA U. POL. & L., no. 1, 1998, at 66, 66 (original in Chinese).

54. See Eric Neigher, *The Thousand Mile Journey: Taoism and Western Legal Philosophy*, 76 S. CAL. L. REV. 663, 669-70 (2003).

hand, the aggressive Legalists insisted on severe punishment, believing that if lesser crimes were heavily sentenced nobody would dare to commit even minor crimes.⁵⁵ If there are no misdemeanors, of course, serious offenses are unlikely to crop up. In this way, people can live in a state of no struggles and no suits.

Although both Confucianism and Legalism share the same aspiration of no struggle, the idea of no suits was first put forward by Confucius, the founder of Confucianism.⁵⁶ Through his lecturing and lobbying in different states, Confucius considered that the ideal condition of the world is a harmonious society and that the concept of “no suits” is one of its necessary features.⁵⁷ Based on his system of “ren” (benevolence, love, kindheartedness, or humanity),⁵⁸ he conceived the way of punishing criminals by morality, e.g., by finding a reasonable “du” (grade or point), between the passive inaction of Taoism and the severe punishment of Legalism. In the view of Confucianism, “de” (morality) and “li” (etiquette or observance of rules) can work effectively to govern the populace and make citizens shameful when committing crimes and thus obey the ruler.⁵⁹ An emphasis on the observance of etiquette can help inspire the internal consciousness of the people and make the external regulation of etiquette become an internal demand, thus realizing the aim of “no suits.”

Confucius’ ideas continue to exert great influence upon the thinking of the Chinese people. Ordinary people perceive disputes and social order as being in opposition to each other, and they often consider suits to be shameful and litigation to be synonymous with demoralization and breakdown in morality.⁶⁰ According to Hexagram 6 (Song) of the I Ching, litigation is to be avoided; rather, individuals are encouraged to seek harmony.⁶¹

Traditional Chinese society was agriculturally oriented.⁶² On the basis of self-sufficiency and the demands of a small farming economy, the ancient society

55. GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 4 (1996); WANG CHENGUANG, *supra* note 46. See also Kevin C. Clark, *The Philosophical Underpinning and General Workings of Chinese Mediation Systems: What Lessons Can American Mediators Learn?*, 2 PEPP. DISP. RESOL. L.J. 117, 118-19 (2002).

56. See Jiefeng Lu, *Curb Your Enthusiasm: A Note on Employment Discrimination Lawsuits in China*, 10 RICH. J. GLOBAL L. & BUS. 211, 223 (2011).

57. See Cao Pei, *The Origins of Mediation in Traditional China*, DISP. RESOL. J., May 1999, at 32, 34.

58. See Herbert H.P. Ma, *The Chinese Concept of the Individual and the Reception of Foreign Law*, 9 J. CHINESE L. 207, 209 (1995) (explaining that “ren,” . . . has been translated as ‘good,’ ‘benevolence,’ or ‘humanity,’ [and] is generally regarded as the summation of all virtues”).

59. Irene Bloom, *Confucius and the Analects*, in 1 SOURCES OF CHINESE TRADITION 41, 46 (Wm. Theodore de Bary ed., 2nd ed. 1999) (translating one of the Confucian *Analects* to read, “[I] lead them by means of regulations and keep order among them through punishment, and the people will evade them and will lack any sense of shame. Lead them through moral force (*de*) and keep order among them through rites (*li*), and they will have a sense of shame and will also correct themselves”). See also Cao, *supra* note 57, at 35 (explaining that communities felt “ashamed” if lawsuits were frequently brought because they viewed them as “vulgar and immoral”).

60. See Cao, *supra* note 57, at 35.

61. Tuck Chang, *Hexagram Song*, UNVEILING THE MYSTERY OF THE I-CHING, http://www.iching123.com/6_text.htm (last visited Sept. 30, 2012).

62. He Ran & Gong He, *The Culture Source of People’s Mediate System of Our Country*, 20 J. CHANGCHUN U. SCI. & TECH. (SOC. SCI. EDITION), at 39, 41 (May 2007) (original in Chinese).

was a patriarchal one linked by blood relationships.⁶³ In this society, parent-child relationships and other blood relationships played an extremely important role.⁶⁴ This eventually led to the concept of the oneness of state and family, which posits that political society is the extension of family and such concepts as “clan, state, world” are the extension of families.⁶⁵ In this sense, state affairs can be understood as family affairs, and the rules of the state are the extension of family rules.⁶⁶ If oneness of state is considered as oneness of family, civil strife or citizen’s lawsuits can be regarded as an extension of a lack of family harmony.⁶⁷ The basic value underlying this concept is that people should live in peace and harmony.⁶⁸

In addition, this created a legal culture where living in peace and kindness was foremost, and these principles served as important standards for evaluating the achievements of officeholders in their handling of cases by mediation.⁶⁹ If there should be more cases cropping up in a region, this would mean that the officeholders there lacked morality and their achievements were poor.⁷⁰ To achieve “harmony,” the ruler must educate the people to live in peace and kindness and emphasize the bad sides of lawsuits as well as the good sides of mediation.⁷¹ At the same time, the ruler must try to limit the number of lawsuits by encouraging mediation.⁷² Therefore, in their practice, local officeholders often took mediation as a prior consideration even though there was no definite provision in the ancient Chinese laws establishing mediation as a required procedure.⁷³

According to *The History of the Song Dynasty*, Lu Jiuyuan, a famous scholar, always encouraged that lawsuits be settled by mediation between the parties and, when the disputes were among family members, advised that Confucian doctrines could be turned to.⁷⁴ In the Ming Period, Hai Rui, an official known for his honest and upright character, viewed litigation as socially unhealthy and a sign of moral degradation in the community.⁷⁵ In order to restrict lawsuits, he required that “minor matters relating to the family,” such as those concerning marriages, land,

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. See Xu, *supra* note 44, at 524 (“[O]fficial policies discouraged civil lawsuits and the number of lawsuits in a region was linked to the performance of an official in charge of that region, officials at all levels often referred civil cases back to private or semi-administrative mediation or were themselves active in settling civil cases by mediation.”).

70. T’UNG-TSU CH’Ü, *LAW AND SOCIETY IN TRADITIONAL CHINA* 252 (1961). See also Xu, *supra* note 44, at 531 (stating that when lawsuits were brought before officials, some of them would blame themselves for moral failings).

71. Zhou Biaolong, *Legal Thought of No Litigation and Its Enlightenment to the Construction of Harmonious Society*, CHUANSHAN J., no.1, 2008, at 197, 197 (original in Chinese).

72. *Id.*

73. *Id.*

74. See Albert H. Y. Chen, *Mediation, Litigation, and Justice: Confucian Reflections in a Modern Liberal Society*, in *CONFUCIANISM FOR THE MODERN WORLD* 257, 266 (Daniel A. Bell & Hahm Chaibong eds., 2003). See also Cao, *supra* note 57, at 33.

75. Chen, *supra* note 74, at 267-68.

and debts, be handled through mediation; adjudication by the magistrate was only available in the event that mediation failed.⁷⁶

The Qing Dynasty shortened the period in which parties could bring complaints and also established the scope of lawsuits.⁷⁷ Generally speaking, mediation was applied in handling such civil disputes and minor criminal cases such as marriages, land, fighting, conflicts, etc.⁷⁸ Mediation, however, could not be applied to serious cases such as robbery, murder, and so on.⁷⁹ For instance, the Yuan Code provided that community leaders were responsible for mediating minor civil disputes, minimizing the number of lawsuits, and ensuring that land was not wasted.⁸⁰

As a non-lawsuit dispute settlement mechanism, mediation has inherited the ancient Chinese cultural and social functions and has evolved in both form and content. From the Western Zhou Period to the Ming and Qing Periods, it evolved from simply one means of solving social conflicts to become an important tool for the ruler to implement the etiquette system and education through morality.⁸¹ As such, it came to possess striking political functions. As a legal phenomenon, the evolution of traditional mediation has had a great effect on the construction of the modern Chinese mediation system.

Traditional culture and its associated legal thinking continue to have a strong influence on the current legal system in China. This is also true with regard to the tradition of preferring mediation as a means of resolving disputes. The formal appearance of the mediation system as an independent article in the civil procedural law can be found in the Civil Procedural Law issued by the Kuomintang Government in 1935.⁸² This statute explicitly covered the scope, time limits, organization, methods, and outcomes of mediation.⁸³ The enactment of this law marks the beginning of mediation in China in modern times.⁸⁴

76. *Id.*, at 268.

77. See Guan Xing, *The Qing Specific Judicial System*, CHINACOURT.ORG (Sept. 19, 2011, 5:42pm) <http://bjgy.chinacourt.org/public/detail.php?id=94419> (China).

78. See 1 JAMES M. ZIMMERMAN, *CHINA LAW DESKBOOK: A LEGAL GUIDE TO FOREIGN-INVESTED ENTERPRISES* 41 (3d ed. 2005) (suggesting that the courts of ancient China rarely exercised jurisdiction over civil cases, for these cases were traditionally settled through mediation or arbitration). See also Xu, *supra* note 44, at 527.

79. See generally R.P. Peerenboom, *The Victim in Chinese Criminal Theory and Practice: A Historical Survey*, 7 J. CHINESE L. 63, 97-8 (1993) (“Confucianism has always recognized that the state must step in when the informal system fails, as in the case of murder and other violent crimes, and when the state itself is threatened, as in the case of treason and public property damage. Once forced to intervene, the state must attempt damage control. In most instances, the opportunity to restore harmony, . . . [which] never existed . . . in the case of rape or murder, . . . [t]he focus shifts from restoration of harmony to deterrence of future behavior and punishment for past misdeeds.”).

80. Xu, *supra* note 44, at 527.

81. See ZIMMERMAN, *supra* note 78, at 37; Cao, *supra* note 57.

82. The Code of Civil Procedure (promulgated on Feb. 1, 1935, effective July 1, 1935), art. 416 *in* LAWS OF THE REPUBLIC OF CHINA: FIRST SERIES—MAJOR LAWS 676 (Law Revision Planning Grp. et. al., trans., 1961).

83. See *id.* arts. 409-430.

84. Lian, *supra* note 40.

The modern mediation system continued to evolve during the first and second Chinese civil wars. Prior to the Anti-Japanese War, mediation was mainly employed by local governments at the grass-roots level,⁸⁵ but during the period 1937–1941 it became institutionalized.⁸⁶ Local governments at various levels in the revolutionary base areas worked out a series of rules and regulations concerning mediation and, after the end of the civil war, mediation was formally introduced into New China and was paid high attention.⁸⁷

In 1958, on the basis of the Supreme People's Court's Summary of Civil Case Adjudication Procedures of the People's Court, the Chinese government established the basic policy for civil adjudication, stating that it should involve investigation, research, and mediation oriented settlement of disputes.⁸⁸ The significance of this policy was its stress on mediation but not on proceedings, advocating settlement of disputes by mediation. Western scholars think of mediation in China between the 1950s and the 1970s as Maoist, characterized by its political function during the period.⁸⁹ This period (from the founding of New China in 1949 to the enactment of the Civil Procedural Law of the People's Republic of China (Trial Implementation) in 1982) is generally seen as the first period of China's modern mediation system.⁹⁰

China's legal system, including its legal provisions on mediation, has not failed to be affected by its economic exchanges with the rest of the highly-globalized world. Since the 1980s, and after its 30-year-experience with the "open door policy," China has undergone rapid economic growth.⁹¹ It had roughly 2% of world gross domestic product in 1978, but that had grown to approximately 9.4%

85. See JAMES P. BRADY, *JUSTICE AND POLITICS IN PEOPLE'S CHINA: LEGAL ORDER OR CONTINUING REVOLUTION?* 68-69 (1982) (explaining that China transitioned from a mediation system meant to "soothe tempers and preserve the folkways of the local private government" to "Communist mediation," which "meshed socialist ideology with ancient practice").

86. See Fu Hualing, *Understanding People's Mediation in Post-Mao China*, 6 J. CHINESE L. 211, 213 n. 12 (1992) ("[M]ediation in Communist China is systematized and institutionalized, and carried out in accordance with the new political standard.").

87. See Chin Kim, *The Modern Chinese Legal System*, 61 TUL. L. REV. 1413, 1431-32 (1987) (explaining that mediation was made formal by the implementation of the 1954 Provisional Organic Rules, and in 1982 mediation was adopted as one of the canons of civil litigation. The 1982 Law on Civil Procedure created people's mediation committees to handle civil disputes when prescribed by law and where parties sought such resolution voluntarily. In 1980, cases handled by mediation committees exceeded, 10.8 times over, the number of civil cases adjudicated by the people's court).

88. See *id.* at 1430.

89. See, e.g., STANLEY B. LUBMAN, *Sino-American Relations and China's Struggle for the Rule of Law*, in CHINA AND HONG KONG IN LEGAL TRANSITION: COMMERCIAL AND HUMANITARIAN ISSUES 9, 30 (Joseph W. Dellapenna & Patrick M. Norton eds., 2000); Fu, *supra* note 86, at 212-13 (1992); Stanley B. Lubman, *Dispute Resolution in China after Deng Xiaoping: "Mao and Mediation" Revisited*, 11 COLUM. J. ASIAN L. 229, 274 (1997); *id.* at 315.

90. See Chang Yi & Wang De-cheng, *The Theoretical Debates of New China's Litigation Conciliation*, 2 J. KUNMING U. SCI. & TECH., Feb. 2010, at 21, 22.

91. *Data comparing Chinese GDP to World GDP*, WORLD BANK, <http://databank.worldbank.org> (select World Development Indicators & Global Development Finance; then follow the "next" hyperlink; then select regions "China" and "World"; then follow the "next" hyperlink; then select "GDP (current US\$)"; then follow the "next" hyperlink; then select years 1978 through 2011; then follow the "next" hyperlink; then export the data).

in 2010.⁹² By the end of 2010, the economic aggregate of the People's Republic of China, when converted to purchasing power parity (PPP), ranks second in the world, following only the United States.⁹³

This rapid economic development brought about many opportunities, but, at the same time, it also produced many disputes. In the circumstances, although the rule of law must be emphasized in order to ensure that transactions are carried out and disputes are resolved effectively, the traditional Chinese culture still plays an important part in the society. It is particularly felt in the field of dispute settlement, particularly the Chinese preference of mediation. The Chinese mediation system after the 1980s can be divided into two stages: the stage of stressing mediation (from the enactment of the Civil Procedural Law (Trial Implementation) in 1982 to the enactment of the Civil Procedural Law in 1991) and the stage of voluntary mediation under the law (since the enactment of the Civil Procedural Law to the present).⁹⁴

Article 6 of the Civil Procedural Law (Trial Implementation) 1982 "stresses conciliation": if conciliation efforts are ineffective, judgments should be issued without delay.⁹⁵ In 1991, mediation appeared in the General Provisions of the Civil Procedural Law, and Chapter 8 provides that mediation is conducted voluntarily and in accordance with the rule of law.⁹⁶ For example, Article 85 provides that "the people's court shall, in handling civil cases, distinguish between right and wrong and conduct conciliation under the principle of voluntariness of the parties and on the basis of evidence facts."⁹⁷ Article 88 provides that "to reach agreement, both parties shall be voluntary and not be forced to do so, and the contents of mediation shall not be against the law."⁹⁸ Article 91 provides that "[i]f no agreement is reached through conciliation or if either party backs out of the settlement agreement before the conciliation statement is served, the people's court shall render a judgment without delay."⁹⁹

Following the approach and preference of the Chinese culture, legal and otherwise, a number of concrete measures have been taken by the Chinese government. The creation of mediation bodies is an example. In 1987, for instance, the Beijing Mediation Centre was set up, and in 2000 it was renamed the Mediation Centre of China's Council for Promotion of International Trade (CCPIT)

92. *Id.*

93. Lesley Wroughton & Tim Ahmann, *China ranks no. 2 in buying power, World Bank says*, REUTERS, Apr. 11, 2008, <http://www.reuters.com/article/2008/04/11/worldbank-china-idUSN1145131520080411>.

94. Jia Yuhai, *Brief Discussion of the Reform and Perfection of Court Mediation*, LEGAL SYSTEM AND ECONOMY, no. 1, 2011, at 63 (original in Chinese).

95. See Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., on March 8, 1982, and implemented on a trial basis as of Oct. 1, 1982), art. 6, http://www.novexcn.com/civil_procedure_law.html (China).

96. See generally Civil Procedure Law of the People's Republic of China (promulgated by Order No. 44 of the President of the People's Republic of China on Apr. 9, 1991), ch. 8, <http://www.china.org.cn/english/government/207339.htm> (China).

97. *Id.* art. 85.

98. *Id.* art. 88.

99. *Id.* art. 91.

or the China Chamber of International Commerce (CCOIC).¹⁰⁰ The center handles cases based on the mediation agreements between parties and is staffed with mediators for parties to choose among.¹⁰¹ According to its *Rules for Mediators*, the function of mediation is to ensure justice and effectiveness.¹⁰² In the process of mediation, mediators should fully respect clients' autonomy and rely on the determination of facts and responsibilities in accordance with the contract and relevant laws.¹⁰³

Mediation is also carried out in the proceedings of arbitration. It has long been the practice of the China International Economic and Trade Commission (CIETAC) and other arbitration agencies to combine arbitration with mediation.¹⁰⁴ CIETAC can handle independent mediation cases and also offers mediation for cases brought to arbitration.¹⁰⁵ Concerning the combination of arbitration and mediation, Article 45 of the *Rules of Arbitration of China International Economic and Trade Commission of People's Republic of China 2012* makes general provisions covering procedures and outcomes.¹⁰⁶ This practice is in conformity with the general spirit of court mediation.

The procedural mediation system is seen as the "oriental experience" by the international judiciary.¹⁰⁷ Along with the enactment and implementation of *Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court* on December 14, 2004, China's court mediation began to be institutionalized and normalized.¹⁰⁸ Needless to say, mediation is also a unique feature of dispute resolution by administrative bodies and other institutions in China. This cultural preference also has a clear bearing on dispute settlement concerning foreign investment.¹⁰⁹

100. CHINA CHAMBER OF INTERNATIONAL COMMERCE, MEDIATION CENTER: ABOUT US, <http://adr.ccpit.org/english/typeinfo.aspx?t1=117&t2=123> (last visited Sept. 29, 2012).

101. *Id.*

102. CHINA CHAMBER OF INTERNATIONAL COMMERCE, MEDIATION CENTER: RULES, <http://adr.ccpit.org/english/typeinfo.aspx?t1=119&t2=130> (last visited Sept. 29, 2012).

103. *Id.*

104. Joseph T. McLaughlin, Kathleen M. Scanlon & Catherine X. Pan, *Planning For Commercial Dispute Resolution in Mainland China*, 16 AM. REV. INT'L ARB. 133, 138 (2005).

105. *Id.*

106. CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION: RULES, <http://www.cietac.org/index.cms> (last visited Sept. 29, 2012).

107. Jiaqi Liang, *The Enforcement of Mediation Settlement Agreements in China*, 19 AM. REV. INT'L ARB. 489, 489 (2008).

108. Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court (Sept. 16, 2004), <http://lawinfochina.com/display.aspx?lib=law&id=3735>.

109. See Jessica Zoe Renwald, *Foreign Investment Law in the People's Republic of China: What to Expect From Enterprise Establishment to Dispute Resolution*, 16 IND. INT'L & COMP. L. REV. 453, 469-471 (2006); George O. White III, *Foreigners at the Gate: Sweeping Revolutionary Changes on the Central Kingdom's Landscape—Foreign Direct Investment Regulations & Dispute Resolution Mechanisms in the People's Republic of China*, 3 RICH. J. GLOBAL L. & BUS. 95, 132-135 (2003).

III. INFLUENCE OF TRADITIONAL CULTURE ON RESOLVING INVESTMENT DISPUTES IN CHINA

Concerning investor-state dispute resolution, under the Chinese legal system, a foreign investor or foreign-invested enterprise may resort to administrative reconsideration, administrative litigation, or both. According to the Administrative Reconsideration Law of the People's Republic of China, adopted in 1999,¹¹⁰ foreign investors or foreign-invested enterprises¹¹¹ may apply for administrative reconsideration if they consider that certain specific administrative acts infringe upon their lawful rights or interests¹¹² or that an administrative body has infringed upon their lawful decision-making power,¹¹³ imposed duties on them illegally,¹¹⁴ failed to deal with their applications, or protect their property rights.¹¹⁵

When refusing to accept a specific administrative act, the applicant must apply for administrative reconsideration to either the people's government at the same level,¹¹⁶ the competent department at the next higher level,¹¹⁷ the local people's government at the next higher level,¹¹⁸ or the department under the State Council,¹¹⁹ depending on the circumstances. The applicant may also claim for administrative compensation while applying for administrative reconsideration.¹²⁰

110. Administrative Reconsideration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999), <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/administration/administrative-reconsideration-law-of-the-peoples-republic-of-china-1999.html>.

111. Under the Law on Administrative Reconsideration Law, the qualified applicants for administrative reconsideration are citizens, legal persons, or other organizations, and Article 41 provides: "If foreigners, stateless persons, or foreign organizations are engaged in administrative reconsideration in the People's Republic of China, this Law shall be applied." *Id.* art. 41.

112. *Id.* art. 6, ¶ 11; *see also id.* art. 6, ¶¶ 1-4 (providing that such administrative acts may include, but are not limited to, decisions made by administrative organs to impose administrative penalties such as fines, confiscation of illegal gains, orders for suspension of production or business operations, and temporary suspension or rescission of licenses; to impose on them compulsory administrative measures including sealing up, seizure or freezing of property; to alter, suspend or revoke such documents as permits, licenses and qualification certificates; or to infringe upon their right of ownership in or the right to the use of natural resources).

113. *Id.* art. 6, ¶ 5.

114. *Id.* art. 6, ¶ 7.

115. *Id.* art. 6, ¶ 9.

116. *See id.* art. 12 (providing that "[a]n applicant, who refuses to accept a specific administrative act of the departments under local people's governments at or above the county level may apply for administrative reconsideration to the people's government at the same level; an applicant may also apply for administrative reconsideration to the competent authority at the next higher level").

117. *See id.* (providing that "[a]n applicant, who refuses to accept a specific administrative act of an administrative organ, who carries out vertical management system, such as Customs, banking, tax collection, foreign exchange control, or by a State security organ, shall apply for administrative reconsideration to the competent authority at the next higher level").

118. *See id.* art. 13 (providing that "[a] citizen, legal person, or any other organization that refuses to accept a specific administrative act of local people's governments at various levels shall apply for administrative reconsideration to the local people's government at the next higher level").

119. *See id.* art. 14 (providing that when refusing to accept a specific administrative act taken by a department under the State Council or by the people's government of a province, autonomous region or municipality directly under the Central Government, the applicant shall apply to the said departments or people's government for administrative reconsideration).

120. *Id.* art. 29.

A decision made after administrative reconsideration which changes a specific administrative act shall be enforced by the administrative reconsideration body according to law, or an application shall be made to a People's Court for compulsory enforcement.¹²¹

A foreign investor or foreign-invested enterprise, if unsatisfied with a decision of administrative reconsideration, may submit the dispute to a People's Court.¹²² Foreigners, stateless persons, and foreign organizations conducting administrative litigation in China usually enjoy the same rights and are subject to the same obligations as Chinese citizens and organizations. However, where a court of a foreign country restricts the administrative litigation rights of Chinese citizens and organizations, the Chinese court will apply the principle of reciprocity to the administrative litigation rights of citizens and organizations of that country.¹²³ In addition, foreign plaintiffs can only appoint Chinese lawyers as their agents *ad litem*.¹²⁴ Differently from civil disputes, mediation will not be conducted for administrative lawsuits.¹²⁵

Where it is found by the court that the specific administrative act was taken in circumstances where the evidence was insufficient, laws and regulations were incorrectly applied, statutory procedures were violated, or the related administrative organ acted beyond its authority or abused its powers, the People's Court will annul the act and order the administrative body to make another specific

121. *Id.* art. 33, ¶¶ 1-2.

122. *See id.* art. 30.

Where a citizen, legal person, or other organization believes that the specific administrative act taken by an administrative organ infringes upon his or its right of ownership in or right to the use of natural resources such as land, mineral resources, waters, forests, mountains or hills, grasslands, wasteland, tidal flats, and sea areas, which he or it has acquired according to law, he or it shall first apply for administrative reconsideration; if he or it refuses to accept the decision made after administrative reconsideration, he or it may bring an administrative lawsuit before a People's Court according to law.

Id.

The decisions made after administrative reconsideration by the people's governments of provinces, autonomous regions, or municipalities directly under the Central Government confirming the right of ownership in or the right to the use of natural resources such as land, mineral resources, waters, forests, mountains or hills, grasslands, wasteland, tidal flats, and sea areas, on the basis of the decisions made by the State Council or the people's governments of provinces, autonomous regions, or municipalities directly under the Central Government regarding the survey, delimitation, or readjustment of administrative division or regarding land requisition, are final.

Id. *See also id.* art. 14 (stating that for any dispute arising out of the act of a department under the State Council or by the people's government of a province, when refusing to accept a decision made after administrative reconsideration, the applicant may bring an administrative lawsuit before a People's Court, or apply to the State Council for a ruling, and any such ruling made by the State Council shall be final).

123. Administrative Reconsideration Law of the People's Republic of China (promulgated by Order No. 16 of the President of the People's Republic of China, Apr. 4, 1989, and effective Oct. 1 1990), art. 71, <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/administration/administrative-procedure-law-of-the-peoples-republic-of-china-1990.html>.

124. *See id.* art. 73.

125. *See id.* art. 50. *Contra id.* art 67 (providing that mediation may be conducted in the proceedings of an administrative lawsuit regarding claims for damages).

administrative act.¹²⁶ However, it is worth noting that only specific administrative acts are adjudicable in China. In other words, Chinese courts will not hear cases involving those administrative laws and regulations or administrative authority decisions or orders that have general application, or any State acts related to national defense or foreign affairs.¹²⁷ Therefore, if a foreign-invested enterprise considers its right or interest has been impaired by the regulations of an administrative organ, it may not get a desired remedy through administrative litigation. This is also the case even if it brings a lawsuit on the specific administrative act made according to the above-mentioned laws or regulations, as the courts are, under Chinese law, obliged to enforce the laws and regulations adopted by authorized bodies.¹²⁸

Restricting the power of judicial review to specific administrative acts is a distinct feature of Chinese law. This may not, however, have adverse effects on the resolution of disputes involving foreign investors and Chinese governmental bodies because most such disputes concern specific acts of the government rather than the general application of laws.¹²⁹ Even if a given dispute relates to the application of a law or administrative regulation, where the issue is its application to specific cases rather than the law or administrative regulation itself, the court will have judicial review power.¹³⁰ In China, therefore, what matters in practice is how the laws and regulations are actually implemented.

To resolve disputes with foreign investors without resorting to litigation, mechanisms such as complaint centers, mediation panels, and working panels have been established at different administrative levels throughout China.¹³¹ Some of these have been established within the local administrative bodies in charge of foreign trade and investment, while others are affiliated with the local associations of foreign investors, with staff assigned by the local governments.¹³² In fact, as early as the 1980s, the Chinese government had paid special attention to disputes with foreign investors.¹³³ Where environmental considerations, city planning, or public concerns meant that a foreign investment project had to be relocated, instead of paying compensation the Chinese government on many occasions helped the

126. *See id.* art. 54, ¶ 2.

127. *See id.* art. 12, ¶¶ 1-4.

128. *See id.* art. 17.

129. *See White, supra* note 110, at 124-25 (noting the major concerns foreign investors are faced with: “government expropriation; obscurity of the law and problems with the government’s reliance on a non-public operational code, rather than publicly accessible regulations . . . uncoordinated laws and policies at different levels of the Chinese bureaucracy . . . inconsistent interpretations of the law . . . a lack of fiduciary duty rules with respect to joint venture partners, and profit restrictions on investments . . .”); GUIGUO WANG, *CHINA’S INVESTMENT LAW: NEW DIRECTIONS* 35-37 (1988) (explaining that bureaucratic and administrative interference create the major problems foreign investors encounter).

130. *See Administrative Reconsideration Law of the People’s Republic of China, supra* note 124, art. 11.

131. *See Renwald, supra* note 110, at 469-81 (explaining the different methods China implements to avoid litigation at all costs and the administrative bodies they have in place to carry out such dispute resolution such as: people’s mediation committees, administrative bodies, and arbitral tribunals or courts).

132. JOHN S. MO, *Alternative Dispute Resolution*, in *INTRODUCTION TO CHINESE LAW* § 11.03, at 370-71 (Wang Chenguang & Zhang Xiancu, eds., 1997).

133. *See WANG, supra* note 130, at 1-2.

foreign investors find another location for the project and offered more preferential terms.¹³⁴

The Ministry of Commerce also promulgated, in 2006, the Interim Measures on Complaints from Foreign-invested Enterprises (“Interim Measures”),¹³⁵ according to which foreign-invested enterprises or foreign investors who deem that their legitimate rights or interests have been infringed upon by an administrative authority may file a complaint with the complaint acceptance authority for coordination or settlement. The Interim Measures establish a National Complaint Center for Foreign-invested Enterprises responsible for handling complaints directly filed with it, trans-provincial complaints, and complaints with great influence.¹³⁶ The Interim Measures also stipulate that local complaint acceptance authorities shall be responsible for accepting complaints from foreign-invested enterprises or foreign investors within their locality and any complaints transferred from or supervised by the National Complaint Center.¹³⁷ In addition, a Complaint Coordination Office for Foreign-invested Enterprises was established to coordinate and supervise the work of the National Complaint Center and the local complaint authorities as well as to handle complaints involving different sectors or industries which need to be settled through trans-ministerial coordination meetings.¹³⁸ In order to avoid conflicts of jurisdiction, a complaint which is being, or has been, handled through the process of administrative reconsideration, litigation, or arbitration may not be handled by the complaint centers.¹³⁹

Treaties and agreements that China has entered into also encourage amicable settlement, although investor-state arbitration has become a norm for both BITs and free trade agreements (FTAs). For instance, the China–New Zealand FTA authorizes investors to make use of ICSID conciliation or UNCITRAL arbitration procedures.¹⁴⁰ Before availing themselves of international arbitration, however, investors must give three months advance notice to the state party.¹⁴¹ The purpose of this provision is to allow the host country to require the use of its domestic administrative review procedures.¹⁴² The administrative review process, in any event, may not exceed three months. Host countries always encourage investors to submit their disputes to local courts, but investors in most cases prefer international arbitration. Under the China–New Zealand FTA, an investor that has submitted its dispute to a local court of the host country may later decide to resort to international arbitration, provided that it has withdrawn its case from the local court

134. See generally WANG, *supra* note 130, at 25-30 (providing further information on China’s strategic approach for dealing with foreign investors).

135. The Interim Measures of the Ministry of Commerce Concerning Complaints from Foreign-Invested Enterprises, Ministry of Commerce of the People’s Republic of China, Sept. 1, 2006, <http://english.mofcom.gov.cn/article/policyrelease/announcement/200712/20071205278416.html>.

136. See *id.* art. 5, ¶2.

137. See *id.* art. 5.

138. See *id.* art. 6.

139. See *id.* art. 9, ¶¶ 1-5.

140. Free Trade Agreement, N.Z.-China, art. 153, ¶¶ 1(a)-(b), Apr. 7, 2008, <http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/0-downloads/NZ-ChinaFTA-Annex-14-MRA.pdf> (N.Z.) [hereinafter China-New Zealand FTA].

141. *Id.* art. 153, ¶ 1.

142. *Id.* art. 153, ¶ 2.

before a final judgment is reached.¹⁴³ This arrangement stands in sharp contrast to that established under the China–Pakistan FTA and reflects the changes in China’s attitude towards international arbitration that occurred in the interim. The China–New Zealand FTA also has detailed rules on arbitration procedures that have the effect of modifying the domestic laws of the parties as well as ICSID’s normal procedures.¹⁴⁴ One such modification is that the statute of limitations for the submission of disputes must be within three years from “the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of obligation” by the host country which has “caus[ed] loss or damage to the investor or its investments.”¹⁴⁵

The measures that China has taken are much influenced by and, hence, in harmony with the traditional Chinese culture. These measures have proven to be quite effective in resolving disputes with foreign investors without going through the complicated and usually long-lasting proceedings of arbitration. The question then is whether the Chinese experience can be translated into other cultures.

IV. THE FUTURE FOR INVESTMENT DISPUTE RESOLUTION

Arbitration is a more desirable means for resolving commercial disputes compared to court proceedings. Insofar as investment dispute resolution is concerned, however, arbitration has its own weaknesses. For instance, there is a widely recognized doctrine called “competence-competence” in international commercial arbitration, which means that arbitrators have the power to determine their own jurisdiction.¹⁴⁶ It is questionable that the arbitrators would be less objective on challenges to their own jurisdiction where they have a financial interest in sustaining it.¹⁴⁷ During the first twenty-six years of ICSID’s history, jurisdiction was not once denied.¹⁴⁸ A 1986 study of the first seven decisions on jurisdiction by ICSID tribunals indicated that

the case law demonstrates, above all, that objections to the jurisdiction of the Centre have met with little success. ICSID tribunals have shown a consistent tendency to decide that the Centre has jurisdiction over disputes, notwithstanding an ambiguous arbitration agreement. . . . Despite the complexities of jurisdiction that can arise . . . ICSID tribunals have interpreted arbitration agreements expansively to cover all aspects of the investment and to afford all parties in

143. *Id.* art. 153, ¶ 3.

144. *See id.* art. 153, ¶ 4 (stating that “arbitration rules applicable under paragraph 1 . . . shall govern the arbitration”).

145. *Id.* art. 154, ¶ 1.

146. *See e.g.*, Rules of Arbitration of the International Chamber of Commerce, art. 6(5) (2012) (providing that “any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself”).

147. *See e.g.*, Linda Silberman, *International Arbitration: Comments from a Critic*, 13 AM. REV. INT’L ARB. 9, 11 (2002) (suggesting that lawyers acting as arbitrators may have conflicts of interest with regard to issues they are deciding, as they may be facing, or eventually face, these same issues in independent arbitration or litigation).

148. Kathleen S. McArthur & Pablo A. Ormachea, *International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction*, 28 REV. LITIG. 559, 569 (2009).

interest the protections of the Convention.¹⁴⁹

The autonomy enjoyed by disputing parties in designating the governing law is one of the distinctive elements of arbitration. Yet, arbitrators may, if the circumstances require, need to take public policy and mandatory national laws into consideration. In such cases, not only could the parties' express choice of law be derogated, but the instability and uncertainty of international arbitration also would increase.¹⁵⁰ This on the one hand is important for the protection of foreign investments. On the other hand, however, it may—and practice demonstrates that it does—tend to ignore the interests of host states. In these circumstances, mediation may serve as an alternative to arbitration.

Mediation has been widely used for resolving international commercial disputes by private actors. Mediation clauses, in addition to or instead of arbitration agreements, are increasingly common in private contracts.¹⁵¹ One survey of American business professionals show that they prefer mediation to arbitration.¹⁵² Recently, mediation has played a successful role in resolving the disputes over the "Lehman mini-bonds" in Hong Kong.¹⁵³ Under the Lehman-Brothers-related Investment Products Dispute Mediation and Arbitration Scheme,

as of 18 February 2009, a total of 105 requests for mediation [had] been made. . . . Some 10 cases [had] been settled by direct negotiations between the investors and the banks after mediation was requested. In 10 other cases mediation proceeded and in all of these cases settlement agreements were concluded.¹⁵⁴

Notwithstanding countries that have withdrawn from the ICSID Convention on investor-state arbitration, mediation has seldom been used in investor-state disputes under the ICSID regime. In its history, there are only two conciliations—and one of them was successfully completed in 1985.¹⁵⁵ Among the other 166 cases concluded, the parties of thirty-five cases reached settlement agreements and

149. W. Michael Tupman, *Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes*, 35 INT'L & COMP. L.Q. 813, 833 (1986).

150. Rachel Engle, Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability, 15 TRANSNAT'L LAW. 323, 345 (2002).

151. See William K. Slate II et al., *UNCITRAL (United Nations Commission on International Trade Law): Its Workings in International Arbitration and a New Model Conciliation Law*, 6 CARDOZO J. CONFLICT RESOL. 73, 96 (2004) (suggesting that "the overall acceptance and use of conciliation is becoming a dispute resolution option preferred and promoted by courts and government agencies, as well as in community and commercial spheres").

152. Darryl Geddes, *Survey: Corporations now widely use dispute resolution over litigation*, CORNELL CHRONICLE, June 16, 1997, http://www.news.cornell.edu/chronicle/97/6.19.97/dispute_resolution.html.

153. See Bonnie Chen, Minibond investors urged to try mediation, *The Standard* (Hong Kong), Mar. 26, 2009, http://www.thestandard.com.hk/news_detail.asp?pp_cat=11&art_id=80113&sid=23235050&con_type=1.

154. Press Release, Hong Kong International Arbitration Centre, Mediation 100% Success for Lehman Brothers-Related Investment Product Cases (Feb. 19, 2009), available at http://www.hkiac.org/HKIAC/pdf/Announcement/090219_LehmanUpdate_E.pdf.

155. See *Tesoro Petroleum Corp. v. Trin. & Tobago*, ICSID Case No. CONC/83/1 (Jan. 6, 1984) (parties agree to settle and proceeding was closed;; *SEDITEX Eng'g Beratungsgesellschaft für die Textilindustrie m.b.H. v. Democratic Republic of Madag.*, ICSID Case No. CONC/82/1 (Oct. 5, 1982) (case settled prior to the institution of the commission).

the arbitration proceedings were thus discontinued, in four cases settlements reached by the parties were recorded in the form of awards, and in five cases the awards embodied the parties' settlement agreement.¹⁵⁶ This is because even the winning parties may not necessarily welcome the arbitral awards. In *Metalclad v. Mexico*, the investor was awarded nearly \$17 million, 80 percent less than expected.¹⁵⁷ Grant Kesler, Metalclad's former CEO, complained that the process was "too slow, too costly, and too indeterminate . . . [and] . . . he wished he had merely entrusted his company's fate to informal mechanisms."¹⁵⁸

Is mediation a better choice? Mediation is usually much cheaper than arbitration.¹⁵⁹ Many mediators regard mediation as a social service, and they may even waive the mediation fee or merely charge a nominal fee.¹⁶⁰ This is in sharp contrast with arbitration where fees are either calculated on the basis of the claim amount or hourly rate. Mediation procedures are informal and flexible in which the disputing parties have discretion to reach a quick solution.

The most important advantage of mediation compared with litigation and arbitration is the almost complete autonomy of the disputing parties. Parties directly and actively participate in the communication and negotiation during mediation, and choose and control the substantive norms for decision-making. The mediation process is more like a business-type negotiation unlike the mandatory decision-making by a court or arbitration tribunal.¹⁶¹ Unlike judges and arbitrators, a mediator is not the ultimate decision maker; rather, the mediator works together with the parties to find a mutually acceptable solution.¹⁶² Unlike judges and arbitrators, mediators do not need to be juristic as their role is to persuade each party to focus on its genuine interests rather than its contractual or legal entitlement.¹⁶³ Thus, mediation can reduce tension and hostility between the disputing parties and create an amicable atmosphere during the whole dispute settlement process. Unlike the winning or losing situation in litigation and arbitration processes, mediation aims at a win-win settlement, in which a legal

156. See List of Concluded Cases, International Centre for Settlement of Investment Disputes, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded> (last updated Sept. 21, 2012).

157. *Metalclad Corp. v. United Mexican States*, ARB(AF)/97/1, Award, ¶ 131 (Aug. 30, 2000), 5 ICSID Rep. 212 (2002).

158. Jack J. Coe, Jr., *Toward A Complementary Use of Conciliation in Investor-State Disputes-A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. & POL'Y 7, 9 (2005) (going on to explain that the proceedings lasted five years, involved litigation in domestic courts, and cost Kesler \$4 million).

159. Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEG. J. 259, 263.

160. See, e.g., Hong Kong Mediation Centre, Pro-bono Mediation Schemes, <http://www.mediationcentre.org.hk/eng/free.html> (last visited Sept. 22, 2012) (explaining that the Hong Kong Mediation Centre (HKMC) has been providing pro-bono mediation services to certain government bodies and community organizations since 1999).

161. Luis Miguel Díaz & Nancy A. Oretskin, *Mediation Furthers the Principle of Transparency and Cooperation to Solve Disputes in the NAFTA Free Trade Area*, 30 DENV. J. INT'L L. & POL'Y 73, 80.

162. See Liang, *supra* note 38, at 489 (explaining that "[m]ediation is a non-litigious method for dispute resolution . . . facilitated by a neutral third party who has no binding authority to settle their dispute").

163. ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* ¶ 1-53, at 33 (3rd ed. 1999).

dispute may be transformed into a restructured relationship.¹⁶⁴ Because of the above, to use mediation as a means in resolving disputes is likely to preserve the business relationship between disputing parties during and after the dispute settlement process. A survey of inside counsel, outside counsel, and non-lawyer executives shows that 80 percent of the respondents agreed that mediation preserves business relationships.¹⁶⁵

Mediation is so effective in resolving commercial disputes, and especially cross-border disputes, because conflicts usually arise due to misconceptions and misunderstandings.¹⁶⁶ Mediation enables disputing parties to talk directly to each other and to clarify their misconceptions and misunderstanding to find a solution together. The confidential setting of mediation provides the parties with further assurance that openly participating in mediation will not affect the participants in later proceedings.¹⁶⁷ Because parties are actively involved in the mediation process and their special concerns are fully communicated, the result is more predictable. After a successful mediation, the parties may enter a settlement agreement. Such voluntary agreement almost always yields voluntary compliance.¹⁶⁸

In conclusion, the globalization of the world today has made all nations highly dependent upon each other. Due to different cultures and legal systems among countries, however, parties' misconceptions and misunderstandings result in disputes that affect economic exchanges, including foreign investment. Unless such disputes are resolved efficiently and effectively, economic exchanges will suffer. Also with the deepening of globalization and evolving forms and methods of economic exchange, certain means of dispute resolution that were effective in the past may not be equally effective today. The experience of investment dispute resolution is an example. In the past, many considered arbitration to be the most desirable way to resolve investment disputes. With the ever increasing contradictory decisions in investor-state arbitration, however, many have begun to think that mediation should be adopted, at least as an alternative for resolving investor-state disputes. In this regard, because mediation is rooted in Asian culture, the Asian people—in particular scholars in the field—have a duty to make it work.

164. See Ignazio J. Ruvo, *Appellate Mediation—"Settling" the Last Frontier of ADR*, 42 SAN DIEGO L. REV. 177, 218 (2005).

165. John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 186 (2000).

166. See William C. Smith, *Avoiding Global Conflicts: U.S. Lawyers Are Discovering That Not Everyone in the Global Marketplace Always Wants To Do Things Our Way. Knowing How and When to Adjust Will Help Lawyers and Businesses Thrive Abroad*, 86 A.B.A. J. 62, 64 (2000) (quoting Rona P. Mears, chairperson of the American Bar Association Section of International Law and Practice, identifying that "[m]ost deals crater because of cultural misunderstandings").

167. Robert B. Davidson, *International Mediation Basics*, in *Practitioners' Handbook on International Arbitration and Mediation* § 1.02[1], at 406 (Rufus VV. Rhoades et al. ed., 2nd ed. 2007) (Harold I. Abramson, original author).

168. See Shahla F. Ali, *Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West*, 28 REV. LITIG. 791, 842 (2009) (noting that voluntary settlement agreements have a greater chance of being enforced as the parties have the ability to come to a result that is feasible to both parties).