A Chinese Perspective of the ISDS Reform

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Outline

1. China’s undecided position
2. China’s innovative ISDS mechanisms
3. China’s possible position towards ISDS reform
4. China’s good practice of mediation
China’s undecided position towards the ongoing ISDS reform at the international level

The US approach and the China-US BIT negotiation (a permanent and stand-alone appellate body)

The EU approach and the China-EU CAI negotiation (a permanent investment court with an appellate mechanism)

Developing countries’ approach and China’s BRI Initiative (undecided & terminating BITs)
China’s innovative ISDS mechanisms at its domestic level and their implications

- Expanding the jurisdiction of its existing arbitral institutions to encompass investor-state disputes (SCIA & CIETAC)
- Establishing new courts to hear international commercial cases (Xi’an & Shenzhen)
- Building joint arbitration centers (CAJAC)
The mechanisms answer China’s pressing need to protect Chinese investments abroad.

The new mechanisms enable China to amplify its voice in the international discourse on the IIA-making.

China’s reform help to break the monopoly of existing Western-initiated institutions.
China’s possible position towards the current international ISDS reform

The current UNCITRAL reform work

• UNCITRAL Working Group III: a broad mandate to work on the possible reform of ISDS
• government-led work
• Proposals:
  - US approach: a permanent and stand-alone appellate body
  - EU approach: a permanent international investment court with an appellate mechanism
Lessons learned from the WTO

<table>
<thead>
<tr>
<th>UNCITRAL’s work</th>
<th>WTO</th>
<th>Chinese lessons in the WTO</th>
<th>What reaction China should take in UNCITRAL</th>
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<tr>
<td><strong>Internationalizing</strong> the reform + rule-making</td>
<td>An int’l org. + rule-making</td>
<td>ROC founder of GATT 1947, PRC quitted in 1950, lost opportunities in rule-making</td>
<td>actively participate</td>
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<tr>
<td><strong>Multilateral</strong> mechanism, Mauritius Convention model (plural approach)</td>
<td>Multilateral org., <em>provisional</em> application of the GATT 1947</td>
<td>lost opportunities in rule-making and dispute settlement</td>
<td>Participate from the very beginning</td>
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<tr>
<td><strong>Institutionalized</strong> regimes, Advantages over ad hoc</td>
<td>Institution, panel + AB</td>
<td>China benefits</td>
<td>actively participate</td>
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Sharing China’s good practice of mediation in the ISDS reform

Mediation is a proposed alternative for ISDS arbitration

- BITs & FTAs
- ICSID mediation rules
- UNCITRAL Draft Model Law & Draft Model Convention

China has good practice in mediation

- The institutionalization of mediation
- The hybrid ‘arbitration + mediation’ model
Conclusion

• it is difficult for China to adopt a definite position towards the ISDS.

• China is trying to develop its own ISDS mechanisms.

• China may learn lessons from its experience in the WTO dispute settlement in assessing the UNCITRAL work for ISDS reform.

• China has rich legislative, practical and institutional experience in implementing the ‘arbitration + mediation’ model in dispute resolution, which could be its unique contribution to the ongoing ISDS reform.
Thank you!