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"TALKING DISPUTES INTO HARMONY" CHINA APPROACHES INTERNATIONAL COMMERCIAL ARBITRATION

Anne Judith Farina*

INTRODUCTION

The People's Republic of China has announced an ambitious goal of establishing China as a leader among the industrial nations by the year 2000.¹ The "Four Modernizations," as they have become known in Chinese rhetoric, are an attempt to simultaneously improve industry, agriculture, science and technology, and defense, and will guide China in its move toward economic progress.² To achieve its goal, China will need a massive amount of foreign capital and technology.³

To obtain the requisite foreign capital and technology, China greatly increased the scope, character, and complexity of permissible foreign investment and trade agreements.⁴ The nature of these more complex

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1. See Note, *China, Modernization, and Sino-United States Trade: Will China Submit to Arbitration?*, 10 CAL. W. INT'L L.J. 53, 55 (1980) [hereinafter *China, Modernization, and Arbitration*] (stating that together with the goal of achieving societal modernity by the year 2000, Deng Xiaoping is also urging China to strive to become a world leader in economic and military affairs by the end of the century); see also Lockett, *Dispute Settlement in the People's Republic of China: The Developing Role of Arbitration in Foreign Trade and Maritime Disputes*, 16 GEO. WASH. J. INT'L L. & ECON. 239, 239 (1982) (describing these ambitious goals as a significant change in China's attitude toward involvement with foreign nations).

2. See *China, Modernization, and Arbitration*, *supra* note 1, at 55 (stating that the Four Modernizations is the principal engine for the attainment of economic progress in the People's Republic of China).

3. See *id.* at 56 (stressing the need for foreign economic assistance if China is to accomplish its domestic goals); see also Denny, *The Impact of Foreign Aid*, CH. BUS. REV., Sept./Oct. 1986, at 22 (asserting that China shed its attitude of self-reliance when it unveiled a new economic agenda in late 1978). China has since emerged as an active recipient of foreign assistance. *Id.* The decision to abandon self-reliant policies and accept foreign investment rank among the most important symbolic shifts in Deng's economic agenda. *Id.*

4. See Comment, *Commercial Dispute Resolution Between the United States and the People's Republic of China: Problems and Prospects*, 7 SUFFOLK TRANSNAT'L L.J. 329, 346 (1983) [hereinafter *Commercial Dispute Resolution*] (noting that China's experimentation with various types of foreign participation may also signal a willingness to submit disputes to alternate forms of dispute resolution in order to facilitate its increased involvement in global trade).

agreements requires the foreign partners to risk larger investments over longer periods of time.⁵ The inevitable disputes arising from these more involved international transactions require neutral, international resolutions.⁶

Chinese traditional insistence on informal dispute resolutions is gradually relenting under pressure to compete aggressively in the world economic market.⁷ Greater numbers of Sino-foreign contracts and entire areas of Chinese trade legislation now provide for arbitration conducted in international fora.⁸ There is a significant danger that Western investors will misunderstand Chinese trade and investment goals unless they develop a sensitivity to the unique cultural, social, political, and legal environment within China.⁹

This Comment discusses the philosophical underpinnings of China's historic reluctance to arbitrate and analyzes the policies behind China's recent decision to participate in international arbitration.¹⁰ Part I fo-

5. Chew-Lafitte, *The Resolution of Transnational Commercial Disputes in the People's Republic of China: A Guide for Legal Practitioners*, 8 YALE J. WORLD PUB. ORD. 236, 241 (1982).

6. See *Commercial Dispute Resolution*, *supra* note 4, at 346 (criticizing China's domestic method of dispute resolution as lacking speed, coherence, uniformity, and predictability, all features necessary for continued expansion of international trade); see also Rubin, *Overview*, in INTERNATIONAL INVESTMENT DISPUTES: AVOIDANCE AND SETTLEMENT 11 (S. Rubin and R. Nelson eds. 1985) [hereinafter INTERNATIONAL INVESTMENT DISPUTES] (suggesting that China does not exhibit a unique concern for the continued growth of its international trade). The need for, and shortages, of private investment capital on a worldwide basis are among the most effective factors in the global development of new techniques for dispute avoidance and settlement. *Id.*

7. See Cohen, *The Role of Arbitration in Economic Cooperation With China*, in FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA, 296, 297 (M. Moser ed. 1984) [hereinafter FOREIGN TRADE, INVESTMENT AND THE LAW] (suggesting that if China cannot handle international disputes in a neutrally satisfactory manner, foreign investor confidence in China will diminish). China's reputation for settling international disputes will constitute a crucial factor in investor confidence by the international commercial marketplace. *Id.*

8. See *Commercial Dispute Resolution*, *supra* note 4, at 358 (arguing that crucial to China's stated policy of increasing its economic independence is its ability to function effectively within the rules set by the global market). To function within this market, China must participate in neutral, international arbitration. *Id.*

9. See Pritchard, *China's Economic Law in Context*, 14 INT'L BUS. LAW. 333, 333 (1986) (advising Western investors to gain basic understandings of the cultural, political, and social views of their Eastern counterparts before attempting to negotiate a contract with the Chinese).

10. See *China, Modernization and Arbitration*, *supra* note 1, at 57 (commenting that China's willingness to submit to international arbitration represents a logical extension of the shifts in economic and political philosophy under the Deng regime). Such shifts in domestic policy ultimately ensure China's full participation in international trade. *Id.* China's goals for economic development will convince its leadership to accept any international trade practice that represents its best interests in the long term, such as submission of its trade disputes to international arbitration. *Id.* at 92.

cuses on China's historic and philosophic distrust of the use of law and third party intervention to resolve disputes. Part II discusses China's new international trade environment and argues that China must exhibit a willingness to submit to international arbitration¹¹ if it wishes to competitively seek the foreign currency needed to complete the Four Modernizations. Part III traces the transformation of traditional domestic dispute resolution concepts as they come in contact with the modern legal thought of Marx and Mao. The Comment concludes with a practical guide for drafting an effective international arbitration clause¹² and suggests sites most likely to resolve a Sino-foreign trade dispute.

I. CHINA'S LEGAL PERSPECTIVE

A. HISTORICAL AND PHILOSOPHICAL LEGAL ROOTS

Chinese legal scholars regard the Western legal tradition as overly litigious and offensive for its singular focus on the vindication of individual rights.¹³ In comparison, Chinese legal traditions seek equitable solutions, bringing both parties into harmony with each other and with society through the use of informal discussion and negotiation.¹⁴ This emphasis on reconciliation rather than litigation reflects the Chinese desire to avoid direct confrontation and disruption of societal harmony.¹⁵ Chinese dispute resolution desires to promote fluid discussion,

11. See *Commercial Dispute Resolution*, *supra* note 4, at 330 (arguing that China is able to amend its preferred methods of dispute resolution, negotiation, consultation, and mediation to conform to the needs of international commerce without betraying its fundamental philosophies).

12. See Holtzmann, *A New Look at Resolving Disputes in U.S.-China Trade* [hereinafter Holtzmann, *U.S.-China Trade*], in *A NEW LOOK AT THE LEGAL ASPECTS OF DOING BUSINESS IN CHINA, DEVELOPMENTS A YEAR AFTER RECOGNITION* 332 (H. Holtzmann and W. Surrey eds. 1979) [hereinafter *A NEW LOOK*] (noting that the presence of a well-drafted arbitration clause always provides a useful negotiation tool for Western investors). If both parties are aware that their contract includes an effective arbitration clause, each has strong incentive to conduct business according to its stated terms. *Id.* An arbitration clause with a well-defined "trigger" mechanism designed to move the parties out of the "friendly negotiation" stages represents the best defense against unacceptable delay in the preliminary stages of dispute settlement. *Id.*

13. See Utter, *Dispute Resolution in China*, 62 WASH. L. REV. 383, 392 (portraying Chinese emphasis on conciliation between the parties as a lesson for those seeking improvement of the Western adjudication model). Chinese jurists have criticized capitalistic legal systems for trivializing and commercializing such fundamental values as human dignity into items having a "market price" and adequately compensated for in dollars. *Id.*

14. See *Commercial Dispute Resolution*, *supra* note 4, at 335 (describing the essential differences between the Eastern and Western approaches toward dispute resolution).

15. See *id.* at 336 (suggesting that the use of compromise techniques best melio-

rather than confrontation between the parties in an effort to maintain their relationship.¹⁶

The avoidance of formal solutions imposed by third parties has deep roots in Chinese philosophy. From the time of Confucius¹⁷ to the present, concepts of *li* and *fa* formed the nucleus of Chinese legal thought.¹⁸ *Li*, a philosophical concept, forms a body of rules regulating social conduct.¹⁹ *Li* retains primary importance over *fa* and encompasses normative rules of morality and proper behavior.²⁰ The essential goal of *li* is to preserve social harmony through emulation of virtuous conduct and correct thought.²¹ *Li* stresses compromise and friendly discussion.²² When a dispute disrupts societal harmony, the community

rates disruption of societal harmony). But see Wu Xiaoming, "Relationship" *Bahl It's the Law that Counts*, China Daily, Aug. 28, 1986, at 4 (describing a protracted civil lawsuit between two Chinese parties indicating to Chinese business that in their economic activities the law counts far more than the "feelings" of the interested parties). Traditional Asian philosophies promoting harmony and stressing friendship are outdated and do not accommodate the needs of a market-oriented economy. *Id.*

16. See Li, *Reflections on the Current Drive Toward Greater Legalization in China*, [hereinafter *Reflections*] in A NEW LOOK, *supra* note 12, at 81, 86 (concluding that the desire to maintain existing familial and commercial relationships does not represent a belief system unique to the Chinese but rather reflects a universal sociological need to peacefully co-exist). The nature of community life consists not of isolated confrontations, but rather facilitation of the flow of relationships over time. *Id.* Such continuity requires a dispute resolution mechanism that promotes the reestablishment of good societal relations, not the vindication of an individual's personal rights. *Id.*

17. See DeAngelis, *The People's Republic of China*, in LEGAL TRADITIONS AND SYSTEMS: AN INTERNATIONAL HANDBOOK 243 (A. Katz ed. 1986) (providing a historical analysis of the factors contributing to the rise of the Confucian belief system among the peoples of the Yellow River Basin during the first millennium B.C.). Confucianism, a synthesis of various religious and philosophical traditions, actually predates Confucius' own era. *Id.* at 244.

18. See *Commercial Dispute Resolution*, *supra* note 4, at 336 (discussing Confucian principles of *li* and *fa*, and their subsequent historical development to reflect notions of moral propriety and penal transgressions).

19. See Lee & Lai, *The Chinese Conception of Law: Confucian, Legalist, and Buddhist*, 29 HASTINGS L.J. 1307, 1308 (1978) (describing *li* as the embodiment of the teachings of Confucius, stressing in particular, the "five relationships"). *Li* defines the relationships between ruler and subject, father and son, husband and wife, elder and younger brother, and friend and friend. *Id.* *Li* emphasizes moral rules and regulates human desires. *Id.* *Li* continues to govern the rules of behavior affecting both interpersonal and international relations. *Id.* at 1312.

20. See *id.* at 1310-11 (comparing *li*, a form of social control that forbids trespasses before an individual commits them, to *fa*, a form of social control that punishes an individual after the commission of a criminal act).

21. See *id.* (stressing that *li* is primarily concerned with loyalty and trustworthiness); see also DeAngelis, *supra* note 17, at 245 (describing the Confucian desire to mold human nature by providing moral leaders who rule through their virtuous example). Accordingly, Confucianism teaches that society must structure its educational system so as to reinforce ethical and moral behavior of all its citizens. *Id.*

22. See Lee & Lai, *supra* note 19, at 1310 (noting that the Confucian system of compromise and yielding have remained far more important in Asian dispute resolution

uses techniques of conciliation and mediation to help the parties reach a compromise solution.²³

Fa corresponds closely to the Western notion of the "rule of law."²⁴ *Fa* essentially codified those acts that Imperial Edicts forbade and stipulated harsh sanctions in the event of a breach.²⁵ Traditional Chinese society equated "law" or *fa* with coercion.²⁶ The imposition of *fa* to affect behavior rather than the application of moral persuasion or emulation of virtuous conduct represented a weak and inferior alternative.²⁷ Although current Marxist/Maoist thought may no longer explicitly mention *li* and *fa*, both ancient and modern Chinese philosophies implicitly share the belief that human nature remains fundamentally influenced by these concepts.²⁸

Confucian philosophy greatly emphasizes yielding and compromise between the parties during dispute settlement.²⁹ Resort to formalized, third-party resolution necessarily results in a loss of face for the disputants.³⁰ Failure to come to a successful resolution through informal means implies that the parties are not able to honorably settle their dispute.³¹

than the rigid invocation of "personal" rights).

23. See *China, Modernization and Arbitration*, *supra* note 1, at 60 (acknowledging that Chinese social groups have deflected an enormous volume of potential litigation from the courts using traditional mechanisms of mediation, conciliation, and yielding).

24. See *Commercial Dispute Resolution*, *supra* note 4, at 336 (translating *fa* to mean "law" and occupying a much lower place than *li* among the virtues); see also Lockett, *supra* note 1, at 241 (stating that the Chinese did not herald the "rule of law" as a major social achievement but rather as a regrettable necessity used against those who refused to submit to the moral persuasion of *li*).

25. See DeAngelis, *supra* note 17, at 245 (discussing the Legalist school as developing a diametrically opposed belief system to that of the Confucians). Lasting only a brief fifteen years (Qin Dynasty 221 B.C.-206 B.C.), the Legalist school initiated harsh persecutions of Confucian scholars. *Id.* Han Fei-tzu, who led the Legalists, rejected Confucian optimism, declaring instead that man had an essentially bad character which required strict accountability to the rule of law (*fa*). *Id.*

26. See Lee & Lai, *supra* note 19, at 1309 (describing the reliance of the Legalist school on the threat of sanctions to coerce compliance with the law). In contrast, the Confucians stress government by virtue or *li* rather than through sanctions or *fa*. *Id.*

27. See *Reflections*, *supra* note 16, at 85 (observing that as long as society functioned harmoniously, law would remain something feared rather than invoked).

28. See Lee & Lai, *supra* note 19, at 1312 (noting that *li* continues to exert strong influence over modern Chinese society and is still far more persuasive than governmental laws or decrees (*fa*)). In the modern Chinese context, *li* incorporates Party ideology while *fa* merely embodies state regulations. *Id.*

29. See *Commercial Dispute Resolution*, *supra* note 4, at 337 (describing the most celebrated and subtle legal art practiced since the time of Confucius as that of *jang*, or the delicate art of yielding on certain points of the discussion in order to gain advantage on others). Both the use of *jang* and the retention of *li* remain very much a part of Chinese society under Communist rule. *Id.*

30. Chew-Lafitte, *supra* note 5, at 252.

31. See Note, *Dispute Settlement in China*, 4 A.S.I.L.S. INT'L J. 71, 73 (1980)

B. CURRENT LEGAL THOUGHT

China's current system of dispute resolution combines both the Confucian notion that behavior is basically amenable to proper education and the Marxist/Maoist emphasis on the rational ordering of society.³² This integrated belief system generates several interdependent principles guiding China's modern approach toward dispute resolution. These principles form an overall framework allowing each stage of dispute resolution to flow smoothly into the next.³³ Basic understanding of the principles that guide Chinese contract negotiators is important for any Western investor attempting to negotiate a dispute resolution clause.³⁴

The Chinese maintain the firm belief that the parties in a dispute resolution should seek the truth through facts and achieve a fair, reasonable, and mutually beneficial solution.³⁵ The Chinese base this belief on the traditional concept that human beings possess an essentially good character and the ability to choose rational solutions when pro-

[hereinafter *Dispute Settlement in China*] (relating that even the victors in a traditional Chinese court often found themselves bankrupt, possibly tortured or at least humiliated, in the process of giving evidence). In Imperial China the court system vaguely defined offenses, awarded severe sanctions, and provided no definite court procedure. *Id.* at 74.

32. See Li, *Conflicts on Contracts and Why Things Are What They Are in China*, in NATIONAL COUNCIL FOR U.S.-CHINA TRADE, SPECIAL REPORT NO. 4 19 (1974) (explaining that Marxist philosophy views society as an organism capable of functioning in an orderly, rational manner with its "components" or citizens capable of deciding matters rationally). Confucianism starts from the individual perspective and views both individuals and the resultant societal unit as basically rational. *Id.* Both Marxist and Confucianist philosophies share the belief that human beings have the capacity to choose the most rational solutions to their disagreements. *Id.*

33. See Lockett, *supra* note 1, at 260 (specifying the four steps contained in the dispute resolution process as friendly consultation, friendly negotiation with the assistance of conciliators, non-binding recommendations by conciliators, and arbitration).

34. See Wallace, *Negotiating With Government Agencies of Developing Countries in the Pacific Basin*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN THE PACIFIC BASIN 289 (R. Rosendahl, ed. 1987) [hereinafter PACIFIC BASIN] (stressing the importance for Western investors to foster an awareness and sensitivity to policy and administrative tensions of the developing partner). Western negotiators' awareness of the developing partners' legal philosophy and social customs will provide a better basis for contract negotiations than knowledge of their national laws or regulations. *Id.*; see also Neilsen, *Structuring and Negotiating Contractual Arrangements with Developing Countries in the Pacific Basin*, in PACIFIC BASIN, *supra*, at 334 (arguing that awareness of cultural differences between the Chinese and Western partner represents the single most important factor in the negotiation of a successful contract). Cultural sensitivity can ease tension during the formation of the contract as well as promote prompt reconciliation in the event of a dispute. *Id.* at 336.

35. See Holtzmann, *U.S.-China Trade*, in A NEW LOOK, *supra* note 12, at 265-67 (stating that when the Western investor attempts to settle a dispute with a Chinese partner, the investor must thoroughly investigate the facts surrounding the dispute). The Western investor should anticipate a lengthy discussion of all issues surrounding the dispute. *Id.* at 266.

vided all the facts.³⁶ According to this view, only careful investigation will reveal the truth to the parties and lead to a fair resolution of the dispute.³⁷

Equally fundamental to the Chinese is the belief that parties must resolve contract disputes in a manner that both honors the contract and obeys the law.³⁸ The Chinese give great weight to strict construction of the terms of the contract itself.³⁹ Although the enactment of a commercial legislative framework is a fairly recent phenomenon, China's desire to encourage both its domestic and foreign commercial activities provides strong incentive for its adherence to a stable and enforceable system of laws on which business executives can rely.⁴⁰

The Chinese legal system also maintains the fundamental importance of independence, equality, mutual benefit, and reference to international law.⁴¹ Most pieces of Chinese commercial legislation mention principles of international law either explicitly, as in the preamble of the Chinese Constitution,⁴² or implicitly, as in the dispute settlement clauses of certain commercial laws.⁴³ The concept of independence

36. See Chew-Lafitte, *supra* note 5, at 253 (explaining that disputes require extensive fact finding because parties often react emotionally, debilitating their reason).

37. See Lockett, *supra* note 1, at 258 (stating that the Western negotiator should not overestimate Chinese insistence on "seeking truth through facts"). Only careful investigation of all the facts surrounding the dispute will lead to its equitable solution. *Id.*

38. See Chew-Lafitte, *supra* note 5, at 254 (noting that the Chinese have a historical tradition of strictly adhering to contractual terms). The Chinese have developed an excellent reputation among the international community for fulfilling contractual commitments. *Id.* at 267.

39. See Lee & Lai, *supra* note 19, at 1312 (analogizing that the Chinese have held the belief for the last two hundred years that once a provision enters a treaty it becomes "ironclad").

40. See Lubman, *Institutional Changes in Trade With China*, in A NEW LOOK, *supra* note 12, at 192-93 (stating that in addition to China's Four Modernizations, a fifth major modernization has occurred; the attempt to create a legal structure that will assure the safety of current and future investments in China). In 1979, the Chinese legislature in effect endorsed Western reliance on the "rule of law" when it enacted the first set of legal codes in Communist China in the last thirty years. *Id.*

41. See Ren, *China's Foreign Trade Arbitration*, in CHINA'S FOREIGN TRADE, Mar./Apr. 1981, at 4 (stating that China's experiences in dispute resolution prove that parties can resolve their disputes reasonably and verifiably through an organic and dialectic combination of conciliation and mediation stressing the principals of equality, independence, and mutual benefit).

42. See The Constitution of the People's Republic of China, preamble, adopted at the Fifth Session of the Fifth People's Congress on December 4, 1982, reprinted in COMMERCIAL BUSINESS AND TRADE LAWS: PEOPLE'S REPUBLIC OF CHINA, pt. 3, bklt. 16 at 1 (O. Nee Jr. ed. 1987) [hereinafter TRADE LAWS] (stating that China adheres to an independent foreign policy as well as to the principles of mutual respect, non-aggression, equality, and mutual benefit).

43. See Law of The People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, art. 6 (adopted by the Second Session of the Fifth National

closely relates to China's policy of international autonomy. China believes that as a sovereign state, it has the right to determine its own economic destiny without undue foreign influence.⁴⁴ This belief provides a framework for the Chinese and foreign party to negotiate as equals, ultimately concluding in a contract that mutually benefits both parties.⁴⁵ Should a dispute arise from that contract, its resolution must reflect the equality of both parties and refer to settled principles of international law and practice.⁴⁶

II. CHINA'S CURRENT INTERNATIONAL TRADE ENVIRONMENT

During the 13th Party Congress in October 1987, the Chinese Communist Party selected a new party secretary and reaffirmed the economic and political reforms that have guided China for the last decade.⁴⁷ Party Secretary Zhao Ziyang presides over a politburo of top officials who reached their political maturity after the Communist revolution in 1949.⁴⁸ The new leaders are more receptive to achieving the institutional and political reforms necessary within the Communist ideology to allow China to reach its full potential as a world leader.⁴⁹

People's Congress on July 1, 1979, and promulgated on July 8, 1979) [hereinafter Joint Venture Law], *reprinted in* TRADE LAWS, *supra* note 42, pt. 1, bklt. 3 at 39, 41 (stating that should important problems arise during the life of the joint venture, the Board of Directors must attempt to resolve disputes through consultation between the parties and in accordance with principles of equality and mutual benefit); *see also* Law of the People's Republic of China on Economic Contracts Involving Foreign Parties, art. 3, (promulgated on March 21, 1985) [hereinafter Foreign Economic Contracts Law], *reprinted in* TRADE LAWS, *supra* note 42, pt. 1, bklt. 4, at 7 (stating that parties shall conclude contracts in accordance with the principles of mutual benefit and equality, and reach consensus through consultation).

44. *See China, Modernization and Arbitration*, *supra* note 1, at 57-59 (describing a century of foreign oppression China experienced which began during the Opium Wars of 1839-1842 and effectively continued until the Communist Party victory in 1949). The Communist Revolutionary leaders who took control of the Chinese mainland criticized Western law as a tool of mass oppression and exploitation. *Id.* This attitude culminated in Mao's xenophobic drive toward self-reliance. *Id.*

45. *See* Lockett, *supra* note 1, at 259 (emphasizing that belief in equality and mutual benefit signifies Chinese reluctance to unilaterally insist on adopting only its views into the contract).

46. *See* Cohen, *supra* note 7, at 315 (cautioning that while Chinese negotiators often insist that Chinese domestic law should apply to contract disputes, they will modify this stipulation to permit reference to international legal standards).

47. Weil, *The 13th Party Congress*, CH. BUS. REV., Jan./Feb. 1988, at 34. The selection of China's new Communist Party leader Zhao Ziyang affirmed Deng's program of economic and political reform. *Id.*

48. *Id.* at 34. The ages of the Politburo officials that Zhao will lead range from fifty to sixty, compared to the previous group whose ages ranged in the seventies and eighties. *Id.*

49. *See China, Modernization and Arbitration*, *supra* note 1, at 90 (noting that

Zhao assumed power with a clear mandate from the Party to continue Deng Xiaoping's successful economic reforms.

A. COMPLEXITY AND SCOPE OF COMMERCIAL TRANSACTIONS

After the normalization⁵⁰ of the international trade and investment relations suspended during Mao's program of "self-reliance,"⁵¹ China permitted more competitive and innovative forms of foreign trade and investment within its borders.⁵² China not only rapidly intensified its foreign trade but has adopted more sophisticated contractual agreements.⁵³ China's insistence on informal solutions devised within the framework of domestic mediation techniques alone is no longer feasible. A more formal approach is needed when attempting to resolve complex multimillion dollar disputes involving investors representing all variations of capitalism, socialism, and communism with their competing systems of economic philosophy and jurisprudence.⁵⁴ Unlike a simple purchase and sales agreement utilizing standard provisions, these more complex transactions require the foreign partner to make larger investments and assume greater risks in commercial relationships that can bind the investors for several years or even decades.⁵⁵ The inevita-

Deng Xiaoping's moderate, pragmatic approach quickly replaced Mao Zedong's ideological fervor). China appears willing to free its economy from the restraints of the "party line" to the point of compromising former ideological purity. *Id.*

50. See *id.* at 53-56 (providing a synopsis of the chain of diplomatic exchanges which culminated in the normalization of relations between the United States and the People's Republic of China). The normalization of relations with China began when President Richard M. Nixon relaxed United States trade restrictions with China in 1969 and rescinded the United States objection to Chinese participation to the United Nations in 1971. *Id.* at 53. President Nixon's visit to Beijing in 1972 was the final indication of United States and Chinese desire to normalize relations. *Id.*

51. See Horsley, *The Regulation of China's Foreign Trade* in FOREIGN TRADE, INVESTMENT AND THE LAW, *supra* note 7, at 6 (describing Deng Xiaoping's specific abandonment of Mao Zedong's ill-fated policy of xenophobic self-reliance in an effort to obtain from abroad those items crucial to China's rapid modernization drive).

52. See Ingriselli, *International Dispute Resolution and The People's Republic of China*, 12 INT'L BUS. LAW. 376, 376 (1984) (summarizing Chinese economic policy in the 1970s and 1980s as geared toward the development of foreign trade, the importation of advanced technology, the utilization of foreign investment, and the expansion of foreign economic cooperation and technical exchange); see also Armacost, *The People's Republic of China: Economic Reform, Modernization and the Law*, 3 CH. L. REP. 153, 154 (1984-1985) (suggesting that Beijing's economic reforms over the past decade represent one of the most courageous and extensive efforts to restructure a major economy anywhere in the world).

53. See Chew-LaFitte, *supra* note 5, at 241 (describing China's policy of aggressively pursuing such complex transactions as licensing agreements, co-exploration of natural resources, and equity joint ventures).

54. DeAngelis, *supra* note 17, at 268.

55. See Chew-LaFitte, *supra* note 5, at 241 (describing joint venture projects that included the importation of an entire factory). An ambitious project such as a hotel

ble disputes arising from transactions involving compensation trade, joint ventures, profit-sharing agreements, and technology transfer require much more involved and neutral settlement procedures.⁵⁶ International commercial arbitration provides the flexibility needed when facing those challenges inherent in resolving transnational disputes.⁵⁷

B. CHINA'S NEW LEGAL SYSTEM

1. *International Agreements*

The inclusion of arbitration clauses in Chinese international agreements exemplifies concrete application of Deng Xiaoping's "Open Door" policy.⁵⁸ In 1979, China and the United States signed a major bilateral trade treaty providing for the resolution of Sino-American disputes to take place in a neutral forum.⁵⁹ China has acceded to the United Nations Convention on the Recognition and Enforcement of

complex could involve the parties in a variety of detailed negotiations spanning several years and culminating in a contract that could last for decades. *Id.* at 242.

56. See *id.* at 242-48 (describing the business and legal elements of compensation, joint venture, and cooperation productive agreements). Compensation trade agreements, where the foreign party supplies equipment, expertise or finance and the Chinese party supplies the elements of production, often involve arrangements that steadily change as production of the goods expands. *Id.* at 242. Joint ventures often involve flexible project durations and require the parties to divide all profits, risks, and losses on a proportional measure. *Id.* at 244-45. Cooperative production agreements, where both parties participate equally in the production process and share equally in profits generated, may last for as long as twenty years. *Id.* at 248. On the whole, Sino-foreign trade relationships are becoming much less predictable while increasing in duration. *Id.* Both sides have an interest in minimizing the potential for misunderstandings in the negotiation and resolution stages. *Id.* at 283. Due to the fact that the parties come from vastly different cultural, social, and economic backgrounds, they may prefer to promote their own dispute resolution procedures at the negotiation table. *Id.* at 283; see also McLaughlin, *Arbitration and Developing Countries*, 13 INT'L LAW. 211, 214 (1979) (cautioning that a developing country's goals and its perceptions of how to achieve these goals may differ crucially from those of the Western investor).

57. See Yates, *Arbitration or Court Litigation for Private International Dispute Resolution & The Lesser of Two Evils*, in RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION 224, 231 (C. Carbonneau ed. 1986) [hereinafter RESOLVING TRANSNATIONAL DISPUTES] (stating that arbitration can meet the unique needs of transnational investment disputes).

58. See generally Salter, *The Awakening Dragon: The People's Republic of China Enters the 21st Century*, 86 COMM. L.J. 90 (1981) (providing an explanation of Deng Xiaoping's "Open Door" policies and goals and their recognizable effects on China's international treaty relations).

59. Agreement on Trade Relations, July 7, 1979, United States-The People's Republic of China, art. VIII, 31 U.S.T. 4651 T.I.A.S. No. 9630, *reprinted in* 18 I.L.M. 1041, 1049 (1979) [hereinafter Trade Agreement]. The Contracting Parties agreed to settle of any dispute arising from or in relation to their contracts through friendly consultation, conciliation, or mutually acceptable means, including international third party arbitration. *Id.*

Foreign Arbitral Awards⁶⁰ and the United Nations Convention on Contracts for the International Sale of Goods.⁶¹

However, in areas such as natural resource exploitation, which implicates China's national sovereignty, China will insist on the application of domestic law to the contract.⁶² Only Chinese national courts or arbitral institutions may decide disputes concerning expropriation of foreign property.⁶³ This national sovereignty objection to the use of international arbitration frustrates attempts by the United States Trade Representative to reach a consensus with China on a Sino-American bilateral investment treaty.⁶⁴

2. Domestic Legislation

Responding to the fears of Western nations concerning the lack of any system of legal norms after the Cultural Revolution,⁶⁵ China has rapidly enacted a commercial legislative structure.⁶⁶ These trade laws

60. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter Convention on Foreign Arbitral Awards].

61. United Nations Convention For the International Sale of Goods, U.N. Doc. A/CONF 97/18, *reprinted in* 19 I.L.M. 671 (1980) [hereinafter CISG].

62. Regulations of the People's Republic of China on the Exploration of Offshore Petroleum Resources in Cooperation with Foreign Enterprises (adopted by the State Council on January 12, 1982 and promulgated by the State Council on January 30, 1982) [hereinafter Off Shore Oil Exploration Law], *reprinted in* TRADE LAWS, *supra* note 42, pt. 1, bklt. 3, art. 3, at 152.

63. *Id.* art. 3, at 152.

64. Frisbe, *The Investment Treaty Impasse*, CH. BUS. REV., Sept./Oct. 1986, at 41. The United States argues that a neutral third country should arbitrate questions regarding whether an expropriation has occurred to ensure that the investor has adequate protection when alleging domestic measures amounting to expropriation of its property. *Id.* The Chinese, however, argue that a third party arbitration between the Chinese government and a foreign national on matters other than the amount of compensation due after its domestic court or arbitration system has acknowledged the existence of an expropriation constitutes a violation of its sovereignty. *Id.*

65. See, *China, Modernization and Arbitration*, *supra* note 1, at 57-63 (tracing China's historic distrust for the law culminating in Mao's near eradication of China's legal system during the Cultural Revolution).

66. See Yang Xiaobing, *Laws Back Foreign Economic Activities*, Beijing Rev., Feb. 16, 1987, at 14 (stating that thus far the State Council has promulgated close to sixty laws and regulations dealing with foreign economic activities). In addition, ministries and commissions under the State Council have promulgated over thirty rules and regulations dealing with economic trade issues. *Id.*; see also *Reflections*, *supra* note 16, at 83 (describing this rapid promulgation of legislation as a "veritable flood" demonstrating China's desire to create an atmosphere of legal security for foreign commercial transactions); accord Ingriselli, *supra* note 52, at 377 (noting the use of internal non-published laws (*neibu*) when dealing with foreign investors has diminished as Deng's regime continues to strive to implement a modern, stable, legal infrastructure). But see Armacost, *supra* note 52, at 154, 155 (cautioning that this rapid expansion of legal codes has not been met with universal approval from China's elite). The deepest roots

cover a wide spectrum of commercial activity including equity joint ventures,⁶⁷ wholly foreign-owned enterprises,⁶⁸ foreign economic contracts,⁶⁹ technology transfer,⁷⁰ taxation,⁷¹ customs duties,⁷² foreign exchange control,⁷³ arbitration procedures,⁷⁴ trademark,⁷⁵ patent,⁷⁶ crea-

of Chinese culture assume that China must remain aloof from all corrupting influences. *Id.* Xenophobia, which has long guided Chinese foreign policy is still prevalent within the Party, and accusations of "cultural contamination" have surfaced in Beijing. *Id.* at 155.

67. See Joint Venture Law, *supra* note 43, at 41 (discussing the establishment and maintenance of joint ventures using Chinese and foreign investment).

68. The Law of the People's Republic of China Governing Foreign Capital Enterprises (adopted at the Fourth Session of the Sixth People's Congress on April 12, 1987), *reprinted in* TRADE LAWS, *supra* note 42, pt. 1, bklt. 3, at 163. To expand China's economy and technological exchange, China now permits wholly-foreign owned enterprises. *Id.*

69. Foreign Economic Contracts Law, *supra* note 43, at 21. China formulated these regulations to further expand economic and technological cooperation. *Id.* at 7.

70. Regulations of the People's Republic of China Governing Contracts for the Importation of Technology (promulgated by the State Council on May 24, 1985), *reprinted in* TRADE LAWS, *supra* note 42, pt. 1, bklt. 4, at 27. The Chinese government retains the authority to examine and approve the importation of all technology, regardless of the nationality of the supplier. *Id.*

71. The Income Tax Law of the People's Republic of China Concerning Foreign Enterprises (adopted at the Fourth Session of the Fifth National People's Council on December 13, 1981 and promulgated by an Order of Ye Jianying, Chairman of the Standing Committee of the National People's Congress on December 13, 1981), *reprinted in* TRADE LAWS, *supra* note 42, pt. 1, bklt. 5, at 75. All foreign enterprises deriving a source of income within China must pay income tax in China. *Id.*

72. Regulations Governing Import and Export Customs Duties of the People's Republic of China (promulgated by the State Council on March 7, 1985), *reprinted in* TRADE LAWS, *supra* note 42, pt. 1, bklt. 6, at 3. All goods permitted for import or export are subject to a customs duty. *Id.*

73. Detailed Rules and Regulations for the Implementation of Foreign Exchange Controls Governing Enterprises with Overseas Chinese Capital, Enterprises with Foreign Capital, and Joint Ventures Using Chinese and Foreign Investment (approved by the State Council on July 19, 1983 and promulgated by the State Administration of Foreign Exchange Control on August 1, 1983), *reprinted in* TRADE LAWS, *supra* note 42, pt. 2, bklt. 7, at 81. China will regulate all joint venture enterprises using overseas Chinese, Hong Kong and Macao capital, as well as other foreign capital. *Id.*

74. Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade (CCPIT) (adopted on May 6, 1954 at the 215th Session of the Government Administration Council), *reprinted in* TRADE LAWS, *supra* note 42, pt. 2, bklt. 8, at 11; *see also* Provisional Rules of Procedure for the Foreign Trade Arbitration Commission (FETAC) of the China Council for the Promotion of International Trade (adopted March 31, 1956 at the Fourth Session of the CCPIT), *reprinted in* TRADE LAWS, *supra* note 42, bklt. 8, at 15. The Foreign Trade Arbitration Commission exercises jurisdiction in the arbitration of disputes arising from contracts in foreign trade. *Id.*

75. Trademark Law of the People's Republic of China (adopted by the 24th Session of the Standing Committee for the Fifth National People's Congress on August 23, 1982), *reprinted in* TRADE LAWS, *supra* note 42, pt. 2, bklt. 9, at 13. The law protects the exclusive use of trademarks. *Id.*

76. Patent Law of the People's Republic of China (adopted by the Fourth Session

tion of Special Economic Zones,⁷⁷ import/export commodity inspection,⁷⁸ offshore oil exploration,⁷⁹ and environmental protection.⁸⁰

Three complex areas of commercial activity concern equity joint ventures, contracts involving foreign partners, and the exploration of offshore oil resources. These pieces of legislation make specific reference to the use of third party arbitration in the event conciliation or mediation does not resolve the dispute.⁸¹ The Foreign Economic Contract Law goes so far as to forbid litigation if the foreign economic contract contains an arbitration clause, or if the parties agree subsequently to arbitrate.⁸² The Law of Civil Procedure denies parties to any foreign trade dispute access to Chinese courts if they have a written agreement providing for arbitration.⁸³ The law further forbids the Chinese court system to provide judicial review of any resulting arbitral awards, ren-

of the Standing Committee of the Sixth National People's Congress on March 12, 1984), *reprinted in TRADE LAWS, supra* note 42, pt. 2, bklt. 9, at 53. The Patent Office of the People's Republic of China shall receive and examine all patent applications and grant patents that conform to its rules. *Id.*

77. Resolution of the Standing Committee of the National People's Congress Concerning the Authorization for the People's Congresses and Their Standing Committees of Guangdong Province and Fujian Province to Formulate Various Specific Economic Regulations For Their Respective Special Economic Zones (adopted on November 26, 1981), *reprinted in TRADE LAWS, supra* note 42, pt. 2, bklt. 10, at 27. The Guangdong and Fujian Provinces retain the primary authorization to formulate various economic regulations unique to their special economic zones. *Id.*

78. Regulations of the People's Republic of China On the Inspection of Import and Export Commodities (promulgated by the State Council on January 28, 1984), *reprinted in TRADE LAWS, supra* note 42, pt. 2, bklt. 12, at 1.

79. Offshore Oil Exploration Law, *supra* note 62, at 151.

80. The Environmental Protection Law of the People's Republic of China (for trial implementation, adopted in principle by the 11th Session of the Standing Committee of the Fifth National People's Congress on September 13, 1979), *reprinted in TRADE LAWS, supra* note 42, pt. 3, bklt. 14, at 1.

81. See Joint Venture Law, *supra* note 43, at 44 art. 14 (providing that in the event that the joint Board of Directors cannot resolve the dispute through consultations, the parties will request mediation or international arbitration); see also Foreign Economic Contracts Law, *supra* note 43, art. 17 (providing that when contract disputes occur, the parties shall, to the extent possible, resolve all disputes through consultations or third party mediation; if the parties do not wish to consult, they may request international arbitration); Offshore Oil Exploration Law, *supra* note 62, at 160, art. 27 (providing that if consultation fails as a mechanism to solve a dispute, the parties may settle the dispute through mediation or international arbitration).

82. See Foreign Economic Contract Law, *supra* note 43, art. 38 (stating that parties may bring their dispute to the People's Court only if the parties do not have an agreement providing for arbitration).

83. See Dispute Resolution Provisions of Selected Chinese Laws from the Law on Civil Procedure, art. 192 March 8, 1982, *reprinted in LEGAL ASPECTS OF DOING BUSINESS IN CHINA* 373, 416 (J. Cohen chair. 1983) [hereinafter *LEGAL ASPECTS*] (stating that if the parties have a provision in their contract for arbitration, they may not go to the People's Court; if however, no arbitration provision exists, they may petition the jurisdiction of the local People's Court).

dering the utilization of the arbitration clause in a foreign economic contract mandatory and the resulting award binding.⁸⁴

China's domestic legal system is still in the process of evolving⁸⁵ and lacks the institutionalized infrastructure necessary to handle complex commercial disputes.⁸⁶ China must still develop domestic arbitral mechanisms to solve disputes fairly, quickly, and inexpensively, utilizing settled and neutral principles of dispute resolution.⁸⁷ Once China achieves a neutral dispute resolution mechanism domestically, or allows the foreign party to utilize international arbitral fora, foreign confidence and investment will expand and the influx of foreign currency necessary for China's modernization can only increase.⁸⁸

III. CURRENT CHINESE DOMESTIC DISPUTE RESOLUTION PROCEDURES

A. CONCILIATION

During the resolution of a dispute, Chinese mediators apply the different facets of their underlying philosophies to form a cohesive pattern of conciliation.⁸⁹ Once a disagreement between the parties becomes apparent, the process of reconciliation begins with private, informal, bilateral negotiations and gradually adds elements of structure and third party intervention.⁹⁰ Not until the last instance is resort made to formal

84. See *id.* art. 193, at 416 (stating that if a foreign arbitration organization exercises jurisdiction, the parties no longer have access to the People's Court to either review the application of the clause or to review the enforcement of the award).

85. See Cohen, *supra* note 7, at 296 (commenting that the internal domestic tensions of a rapidly developing legal system combined with the external international tensions involved in the competition for place in the world market contribute to China's current investment volatility).

86. Cohen, *Some Problems of Investing in China*, in LEGAL ASPECTS, *supra* note 83, at 74.

87. *Id.* at 109-12.

88. See *China, Modernization and Arbitration*, *supra* note 1, at 67 (cautioning that commercial disputes pose a serious obstacle to the smooth flow of international trade). The parties in a commercial dispute must solve their dispute in a prompt, efficient, and neutral fashion. Costly, bitter, and lengthy litigation in national courts can only increase the costs and uncertainties inherent in transnational business. *Id.*

89. See Holtzmann, *U.S.-China Trade*, *supra* note 12, at 247 (highlighting the fact that the Chinese maintain a flexible approach to dispute resolution in which the several steps of negotiation, consultation, conciliation, and mediation do not necessarily occur in rigid sequence with each carefully separated from the next). Holtzmann states, "[r]ather, as in a fine Peking glass bottle there may be several layers, each with a different hue, each visible as a separate entity, yet all blending together to create a total pattern." *Id.*

90. See generally *id.* at 247-51 (describing the increasingly formalized processes of Chinese dispute resolution methods).

arbitration.⁹¹

The Chinese encourage the use of friendly negotiation as the primary mode of dispute settlement.⁹² Generally, these negotiations continue throughout with discussions or exchange of correspondence.⁹³ The Chinese place an emphasis on understanding the position of the other party and in seeking truth through facts.⁹⁴ Once either party determines that further informal discussions may not produce beneficial results, they may proceed to the next step of the process, conciliation.⁹⁵

At the conciliation stage, the parties may utilize the services of the China Council for the Promotion of International Trade (CCPIT).⁹⁶ CCPIT handles the dispute in two stages. First, CCPIT brings the parties together and attempts to encourage friendly negotiations and personal settlement of the dispute.⁹⁷ The conciliators attempt to aid the parties in reaching a mutually satisfactory result but at this stage they do not usually make specific recommendations concerning the terms of a conciliation statement.⁹⁸

91. See *id.* at 277 (noting that the Chinese dispute resolution technique stressing friendship rather than confrontation does not radically differ from those methods any rational international trader or investor would employ). Yet those investors relying on a legal tradition that emphasizes the adversarial nature of disputes is more likely to apply a confrontational strategy when faced with contractual disagreements. *Id.* In contrast, the Chinese consistently point out that the techniques used in conflicts with enemies are not appropriate for disagreements with friends. *Id.*

92. See Surrey & Sobel, *Recent Developments in Dispute Resolution in the People's Republic of China*, in *LEGAL ASPECTS*, *supra* note 83, at 377 (explaining that friendly consultation has no distinct beginning or ending, and instead it provides both a continuous and a fluid mechanism to resolve disputes).

93. See, e.g., *id.* at 377-78 (arguing that this method of resolution allows the parties to reach a solution without the parties becoming rigid in defense of abstract principles).

94. *Id.* at 381.

95. See *id.* at 378-90 (providing a synopsis and examples of conciliation methods).

96. See *Commercial Dispute Resolution*, *supra* note 4, at 346-51 (explaining that the China Council for the Promotion of International Trade (CCPIT) is the principal forum for dispute resolution in China).

97. Holtzmann, *U.S.-China Trade*, *supra* note 12, at 241. The CCPIT approaches disputes with a view toward friendly consultation and conciliation using arbitration only as a last resort. *Id.*; *Commercial Dispute Resolution*, *supra* note 4, at 347. The CCPIT focuses on the dispute in two stages: first seeking to resolve the dispute through friendly consultation; and second, submitting the dispute to one of two arbitral bodies contained within the CCPIT. *Id.* at 347.

98. See *Commercial Dispute Resolution*, *supra* note 4, at 348 (noting that at this stage the conciliators attempt to focus the parties' attention on the terms of the contract and allow them to fashion their own resolution). In the first stage CCPIT provides the forum, but does not participate in any substantive way. *Id.* at 347; accord Holtzmann, *U.S.-China Trade*, *supra* note 12, at 279 (arguing that contrary to the prevailing Western misconception, conciliation does not urge the partners to evenly share liability, rather it urges the partners to pursue a solution within the terms of the contract and in accordance with international trade practice).

If the parties still find themselves unable to reach a solution, the CCPIT moves to the second stage and submits the dispute to the Foreign Economic and Trade Arbitration Commission (FETAC) or the Maritime Arbitration Commission (MAC).⁹⁹ While termed a conciliation, at this stage the FETAC formally intervenes and will conduct its own investigation into the issues.¹⁰⁰ The FETAC investigation culminates in the formulation of specific recommendations and the drafting of a non-binding conciliation statement.¹⁰¹ If either party rejects these recommendations, FETAC considers the controversy appropriate for arbitration.¹⁰²

B. ARBITRATION

FETAC is also the institution responsible for overseeing the arbitration of all Sino-foreign trade and investment disputes.¹⁰³ FETAC, which is supervised by the CCPIT and ultimately by the Ministry of

99. See Chew-LaFitte, *supra* note 5, at 263-66 (outlining the organizational structure of the CCPIT). The CCPIT directly supervises two arbitral institutions, the Foreign Economic and Trade Arbitration Commission (FETAC) and the Maritime Arbitration Commission (MAC). *Id.* The FETAC assists in the resolution of all foreign trade disputes concerning purchases or sale of merchandise contracts, transportation, insurance, and any other disputes arising from foreign trade. *Id.* at 264. The MAC specializes in dispute resolutions concerning maritime disagreements, including those involving collisions, contracts, and shipping services. *Id.* at 266. Both the FETAC and the MAC participate in a wide range of related activities to assist parties in the resolution of commercial disputes, including friendly negotiations, conciliation, and arbitration. Lockett, *supra* note 1, at 254.

100. See Chew-LaFitte, *supra* note 5, at 267 (explaining that the FETAC facilitates the progress of fact finding and problem analysis); see also *Commercial Dispute Resolution*, *supra* note 4, at 348 (assuming the parties still cannot reach a satisfactory resolution, the FETAC undertakes independent research into the dispute and suggests its own solution).

101. See Holtzmann, *U.S.-China Trade*, *supra* note 12, at 288 (pointing out that the legally trained members of the FETAC formulate recommendations based on information gathered and analyzed earlier in the conciliation stage); Chew-LaFitte, *supra* note 5, at 267 (stating that the FETAC conciliator assists the parties in analyzing the facts, in presenting each side's strengths and weaknesses, and in urging the parties to privately resolve their dispute).

102. See Holtzmann, *U.S.-China Trade*, *supra* note 12, at 287 (describing the functions of the FETAC at the final stage of conciliation as independently analyzing the problem with the active participation of the disputants). The parties may request recommendations as to the appropriate settlement terms from the FETAC. *Id.* Should these prove unsatisfactory, the FETAC will then recommend that the parties begin arbitration. *Id.* at 288. But see Cohen, *supra* note 7, at 304 (suggesting that these informal discussions at the FETAC can continue indefinitely, giving a party the opportunity to reach a timely determination on the merits).

103. Chew-LaFitte, *supra* note 5, at 264. FETAC's jurisdiction includes disputes arising from contracts for the purchase or sale of merchandise in foreign trade, disputes arising from transportation or insurance, or any other matter of business in foreign trade including joint ventures, foreign loans, patents and trademarks.

Trade, is heavily influenced by national governmental policies.¹⁰⁴ China's arbitration rules of procedure are employed,¹⁰⁵ and only Chinese nationals may be appointed to the arbitration panel.¹⁰⁶ UNCITRAL Model Arbitration rules may only be included with the consent of the panel upon prior agreement by the parties.¹⁰⁷ The foreign party is thus faced with an arbitral system administered by the State, a proceeding conducted entirely in Chinese, a decision determined solely by Chinese arbitrators following Chinese procedural and (depending on the type of transaction) substantive law.

C. THE NEED FOR CHINA TO SUBMIT TO INTERNATIONAL ARBITRATION

If foreign investors perceive the Chinese domestic dispute resolution process as unstable or biased, the perception can only increase the cost and uncertainty of trade or investment there.¹⁰⁸ Trade with the West is crucial to accomplishing the Four Modernizations.¹⁰⁹ Increasing trade with the West is the primary factor motivating China to overcome its traditional reluctance to submit to "Western-style" international arbitration.¹¹⁰ Moving a nation as vast and as rural as China into the

104. *Id.* at 265.

105. Tang Houzhi, *Arbitration-Responses to Some Questions 2* (Mar. 1987) (on file with The American University Journal of International Law & Policy).

106. *Id.* at 3.

107. *Id.* at 4.

108. See *Commercial Dispute Resolution*, *supra* note 4, at 330 (explaining that as trade expands the number of disputes will inevitably multiply); accord McLaughlin, *supra* note 56, at 212 (explaining that Western investors' perception of developing countries as judicially naive or having unstable economic markets can significantly increase the "price" of the contract). The foreign parties perceive this risk factor as a contingent liability should they face possible contract litigation before the courts of the domestic partner. *Id.*

109. See *China, Modernization and Arbitration*, *supra* note 1, at 79, 80 (relating that Deng Xiaoping's active pursuit of Western technology and financial resources must persuade China to adopt internal dispute resolution policies to mirror those the Western traders generally utilize). *Id.*

110. See *Commercial Dispute Resolution*, *supra* note 4, at 345-46 (arguing that China under Deng's regime comprehensively revitalized its legal system in the areas of foreign trade and investment). This revitalization has great significance for the internationalization of dispute resolution for Chinese traders. *Id.* First, it signals a willingness to experiment with new legal forms and procedures. *Id.* at 346. Second, it demonstrates the Party's strong commitment to compete as an economic actor in world trade relations, signifying a conscious rejection of Mao's policy of insulation and self-reliance. *Id.* But see *id.* at 335 (noting that even with an express arbitration clause utilizing other domestic or international fora, the Chinese insist on exhausting traditional methods of mediation, negotiation, and conciliation before finally submitting to arbitration); see also *China, Modernization and Arbitration*, *supra* note 1, at 56-57 (noting that with the exception of a few isolated maritime disputes, virtually no trade matters have been arbitrated either in Beijing or elsewhere).

highly technical world of the twenty-first century will require enormous amounts of foreign capital and technology.¹¹¹ China has no choice but to make its total investment climate both stable and lucrative for developed nations.¹¹² A settlement process using transnational, neutral procedures elevates an international contractual dispute above the idiosyncracies of the national legal systems.¹¹³

Many refer to the international arbitral tribunal as the "businessman's court"¹¹⁴ and international business investors view arbitration as the preferred method of settling trade and investment disputes.¹¹⁵ Faced with the uncertainties and delays inherent in an informal conciliation process and the risks associated with a legal system still largely in the drafting stage, many foreign investors insist on the inclusion of third country arbitration clauses in their contracts with the Chinese.¹¹⁶

111. See *China, Modernization and Arbitration*, *supra* note 1, at 79-80 (describing that for the first time since the founding of the Republic in 1949, China has accepted government to government loans, borrowed from international agencies such as the Asian Development Bank, and permitted direct foreign investment on its soil). In addition to shortages of capital and technology, China has an acute shortage of educated managers, technicians, and engineers as a result of the decade of intellectual purges during the Great Leap Forward and Cultural Revolution campaigns. *Id.* at 82.

112. See Li, *Trade with China: An Introduction*, in *LAW AND POLITICS IN CHINA'S FOREIGN TRADE* 12 (V. Li ed. 1977) (concluding that the greater the perceived need for a Western product or investment, the greater the likelihood that the Chinese negotiator will agree to the use of third country arbitration).

113. See Ingriselli, *supra* note 52, at 376 (speculating that the potential international exposure of a contract dispute provides strong disincentive for a local Chinese provincial entity to interfere unilaterally with the contract). The dispute resolution clause represents an important stabilization mechanism for foreign investment and trade with China, increasing both the value of the investment and the duration of the relationship. *Id.*

114. See *China, Modernization and Arbitration*, *supra* note 1, at 69 (noting that the international business community, faced with uncertainties of litigating in national courts, reacted by developing their own substantive rules of commercial behavior); accord Jennings, *Preface* in *RESOLUTION OF DISPUTES IN INTERNATIONAL TRADE*, at v (Redfern and Hunter eds. 1987) [hereinafter *RESOLUTION OF INTERNATIONAL DISPUTES*] (stating that "no business[man] in [his] right mind seeks litigation").

115. See McLaughlin, *supra* note 56, at 212 (listing the advantages of arbitration as providing a flexible, mutually acceptable means of conflict resolution). Arbitration procedures offer the parties an informal and understandable process. *Id.* The arbitrator often possesses substantial knowledge of the particular subject area and does not need to rely on judicial precedent in reaching an equitable solution. *Id.* The confidentiality of the process often becomes the deciding factor when choosing to arbitrate instead of litigate. *Id.* But see *Commercial Dispute Resolution*, *supra* note 4, at 331 (arguing that adjudication also has certain advantages in the international arena). *Id.* Adjudication offers the supervision of a judge with judicial power to compel the production of evidence. *Id.* Adjudication provides the parties with a more structured format and a more predictable result. *Id.* at 332. Adjudication, however, brings the dispute before the public. *Id.* This exposure of problems often causes significant disruption of the commercial goodwill between the parties and may lower the confidence of the international financial community in the strength of the venture. *Id.* at 331.

116. See *China, Modernization and Arbitration*, *supra* note 1, at 65 (arguing that

Faced with the choice of international arbitration or national litigation, China also prefers arbitration to adjudication. Chinese governmental entities have historically refused to adjudicate disputes, whether in the domestic courts of the foreign investor¹¹⁷ or before international tribunals.¹¹⁸ In direct conflict with the Confucian notions of conciliation and compromise, the adversarial methods employed during litigation lead the parties to sharpen their points of conflict, reinforce their adversarial position, and at the conclusion of the proceedings, force the parties to accept a court-imposed solution to their dispute.¹¹⁹ Arbitration, however, keeps many of the procedural and substantive factors within the control of the parties.¹²⁰ They may negotiate the choice of forum, the procedural rules, the identity of the arbitrators, and depending upon the subject matter of the contract, the substantive law used to resolve the conflict.¹²¹ The Chinese find arbitration especially appealing because arbitrators, unlike judges, do not have to strictly follow the rule of law (*fa*) but can look to other norms, including morality (*li*) to

the expansion of foreign trade into China has necessitated increased foreign scrutiny of the present Chinese legal system); *see also* Surrey & Sobel, *supra* note 92, at 39 (stating that the preference of Chinese entities for including an arbitration clause in foreign commercial contracts is increasing).

117. *See* Lockett, *supra* note 1, at 242-43 (describing the historical and ideological reasons underlying China's distrust of Western "justice"). China first invoked international law in a futile attempt to prevent the English from importing opium into Guangzhou Province (Canton). *Id.* Their defeat in the resulting Opium War brought with it a century of foreign occupation and interference in China's foreign relations and domestic affairs. *Id.* Further abuses of international law by the Western powers only increased China's distrust for the West. *Id.* Particularly odious were the unequal treaties imposed by the superpowers allowing the West to control China's strategic ports. *Id.* The West's current hostility toward Communism only serves to strengthen Chinese conviction that justice in a Western court is an impossibility. *Id.* at 243.

118. *See* Comment, *An Evaluation of the People's Republic of China's Participation in International Commercial Arbitration: Pragmatic Prospectus*, 12 CAL. W. INT'L L.J. 128, 130-31 (1982) [hereinafter *Participation in Commercial Arbitration*] (commenting that the relatively few number of arbitrations actually participated in by Chinese entities does not necessarily indicate unwillingness to arbitrate). Rather, due to Chinese aversion to litigation, arbitration represents the only viable international alternative. *Id.*; *see also* *Commercial Dispute Resolution*, *supra* note 4, at 333 (relating that socialist countries have traditionally tended to view arbitration over litigation as the expected mode of international trade dispute settlement).

119. *See* *China, Modernization and Arbitration*, *supra* note 1, at 68 (contending that transnational litigation often results in lengthy, costly, and bitter disputes).

120. *See* Redfern and Hunter, *Introduction*, in *RESOLUTION OF INTERNATIONAL DISPUTES*, *supra* note 114, at 5 (commenting that the parties to an arbitration have control over the arbitration to an extent impossible in proceedings before a court of law).

121. *See* *Participation in Commercial Arbitration*, *supra* note 118, at 148 (listing the benefits of a model arbitration clause as permitting the parties to choose the procedures and arbitral body they feel are most appropriate to the dispute).

reach their decision.¹²² Since the arbitrators are not bound by precedent, they have the authority to decide the issue on the equities of the particular case.¹²³

D. JOINT CONCILIATION

In an attempt to respond to foreign party concerns regarding the impartiality of all Chinese conciliation teams,¹²⁴ and as a first step toward participating in international dispute resolutions, China expanded the role of the CCPIT to include participation in joint conciliation with arbitration organizations located in the country of the foreign investor.¹²⁵ Joint conciliation developed from the groundbreaking efforts between the CCPIT and the American Arbitration Association (AAA) to cooperate jointly in resolving disputes that arose from United States-China trade.¹²⁶ The National Council for United States-China Trade collaborated with the AAA to inform American corporations of the joint conciliation facilities.¹²⁷ While the first dispute, which involved a long series of trans-Pacific communications culminating in a week-long series of face-to-face negotiations in Beijing, the joint CCPIT/AAA team resolved a second dispute in less than two weeks with no need for personal meetings, no trans-Pacific travel and no significant disruption of the ongoing commercial transaction, saving both parties substantial financial resources and goodwill.¹²⁸

As a result of these two successful joint conciliations, the CCPIT

122. See *Commercial Dispute Resolution*, *supra* note 4, at 357 (noting that perhaps superficially dissimilar, the procedures utilized in an arbitration share certain key attributes of classic Chinese legal philosophy).

123. *Id.* at 357-58. The arbitrator does not need to look at precedents but can base his or her judgment on equity and morality. *Id.* at 358.

124. See Chew-Lafitte, *supra* note 5, at 268 (stating that joint conciliation allows valuable exchange of information concerning differing economic rationales and jurisprudence).

125. See Lockett, *supra* note 1, at 262 (describing joint conciliation as an innovative bilateral approach devised to quell foreign fears of national bias when facing only Chinese conciliators). The procedure for a joint conciliation involves discussions between a conciliation committee from the CCPIT and a team from a corresponding arbitration organization of the foreign parties' country. *Id.*

126. See Holtzmann, *A Case Study of Joint Conciliations in Trade with China* 6 (1982) (unpublished presentation available at the National Council for U.S.-China Trade) (providing an extensive description of the circumstances surrounding these first two joint conciliations from the personal perspective of one of the principal negotiators). Not surprisingly, Holtzmann relates, the United States party in this first dispute submitted a forty-five page "brief" supported by fourteen exhibits, while the Chinese side simply sent a telex emphasizing the importance of seeking a friendly solution. *Id.* at 6-7.

127. *Id.* at 6.

128. *Id.* at 7.

announced its formal recognition of joint conciliation as a separate technique and expanded its use to disputes involving commercial contracts with all its foreign partners.¹²⁹ China has established a joint conciliation center in Hamburg, West Germany,¹³⁰ and has entered into at least two international agreements concerning the use of joint conciliation.¹³¹ These innovative measures emphasize China's firm belief that conciliation represents the primary means to resolve transnational disputes while maintaining an ongoing business relationship.¹³²

IV. INTERNATIONAL ARBITRATION: MODEL ARBITRATION CLAUSE

Although noted sporadically throughout the text and notes, it warrants specific articulation that to date China has participated in very few verifiable international arbitrations.¹³³ The most obvious reason is that, by definition, international commercial arbitration is a private matter. Arbitration offers the single most important advantage over litigation by assuring privacy.¹³⁴ Still, many foreign investors believe that China has submitted to arbitration outside its borders on very few occasions.¹³⁵ Additionally, Western lawyers look to the rapid increase in trade and investment with China, coupled with the important pieces of international and domestic legislation providing for international arbitration and find it inevitable for suits to have reached the arbitration stage.

Yet, by recognizing the cultural importance of reconciliation to the Chinese, a satisfactory answer is possible to fashion. United States

129. See Surrey & Sobel, *supra* note 92, at 380 (commenting that the Sino-American trade agreement clause providing joint conciliation reflects each government's formal recognition of this form of conciliation).

130. *Conciliation Centers to Calm Disputes in West German Trade*, China Daily, Aug. 17, 1987, at 1. See also Surrey & Sobel, *supra* note 92, at 380-81 (describing the CCPIT's formal recognition of joint conciliation); accord Rubin, *Overview*, in INTERNATIONAL INVESTMENT DISPUTES, *supra* note 6, at 11 (commenting that the rapid growth of international conciliation centers is a result of the realization that bringing an international investment dispute to resolution through either litigation or arbitration may cost more in real terms than the ultimate value of the remedy).

131. Ren Jianxin, *Mediation, Conciliation, Arbitration and Litigation in the People's Republic of China*, 15 INT'L BUS. LAW. 395, 396 (1987).

132. *Id.*

133. Robinson & Doumar, "It is Better to Enter a Tiger's Mouth Than a Court of Law" or *Dispute Resolution Alternatives in U.S.-China Trade*, 5 DICK. J. INT'L L. 247, 266 (1987).

134. See McLaughlin, *supra* note 56, at 212 (summarizing the positive aspects of arbitration, including confidentiality).

135. See Gossen, *When To Enforce Contractual Rights in China*, EAST ASIAN EXEC. REP., Apr. 1986, at 8, 16 (discussing the attitude prevalent among Chinese traders that a request for arbitration will be seen as an unfriendly gesture).

trade with China is barely ten years old. Many United States companies willing to expend the time and resources necessary to develop a trade/investment link with China are hoping to foster a long-term relationship.¹³⁶ Pragmatic concerns blend with cultural sensitivity as Western businesses acknowledge the benefits of Chinese loyalty for "old friends" and thereby may avoid adversarial posturing.¹³⁷ Similarly, the Chinese are reluctant to risk damaging their ties with the Western capital and technology so crucial to their modernization goals. As trade with China matures, the possibility of disputes going forward to the arbitration stage will increase. In the international community China has a reputation for strict adherence both to its domestic contractual obligations as well as its international treaty obligations.¹³⁸

Careful planning during the negotiation of an international arbitration clause will assure both sides a neutral resolution to their difference and ensure continued goodwill between the parties. International arbitrations between investors with different economic philosophies can pose many difficulties in implementation.¹³⁹ Through careful drafting of an arbitration clause, investors can avoid some of those obstacles.¹⁴⁰ A well-drafted arbitration clause will clearly indicate the arbitration site, the tribunal's procedural rules, the substantive law applied to resolve the dispute, and the means used to enforce the award.¹⁴¹ In the

136. See Robinson & Doumar, *supra* note 133, at 267 (positing desire for long-term gains in China as the Western partner's rationale for not pursuing arbitration). In the area of government procurement, foreign defense contractors are reluctant to lodge protests against the Chinese government for fear of damaging their long-term relationships. *Id.*

137. See *id.* (stating that Chinese traditional values of maintaining relationships may also represent a factor in the lack of verifiable arbitrations).

138. See Chew-Lafitte, *supra* note 5, at 254 (stating that the Chinese have a reputation for strict adherence to contractual terms). The Chinese base their adherence to contractual terms on their belief that parties who voluntarily enter into an agreement do so on mutually beneficial terms and therefore, must abide by the terms they set. *Id.*

139. See Ingriselli, *supra* note 52, at 376 (noting that the People's Republic of China has no private domestic corporations). Therefore, the party with whom the foreign investor is contracting will either be the State itself or a state-owned corporation. *Id.* The Chinese party, aware of the state policy of modernization at any cost, will likely have goals other than the profit motive in mind. *Id.* A foreign investor in such circumstances must rely heavily on a formal mechanism that will provide for the international and neutral resolution of any disputes. *Id.*

140. See McLaughlin, *supra* note 56, at 232 (urging the use of careful drafting techniques when negotiating an arbitration clause). The parties can avoid many of the pitfalls associated with international arbitration such as delay, uncertain procedures, and arbitrariness of the underlying contract if time is taken to carefully draft the arbitration clause).

141. See *Participation in Commercial Arbitration*, *supra* note 118, at 152 (noting that the rapid increase in information available to foreign contract negotiators should allow these legal practitioners to draft precise arbitration agreements).

event of a dispute, a skillfully drafted arbitration clause ensures ease on its application to the dispute.¹⁴²

A. JURISDICTION

The arbitration clause establishes the jurisdiction of the arbitral institution over the dispute.¹⁴³ Should one party refuse to honor its promise to arbitrate, the arbitral body will look to the arbitration clause for authority to compel that party's participation.¹⁴⁴ If the clause contains detailed provisions ensuring the defendant a fair hearing had they participated, most national courts will enforce a default arbitral award against the non-participant.¹⁴⁵

B. USE OF CONCILIATION

When constructing the arbitration clause in a contract between a Chinese and foreign party, it is important to bear in mind the Chinese belief that all dispute resolutions begin with friendly negotiations.¹⁴⁶ A successful resolution will maintain the business relationship after the dispute. The arbitration clause, therefore, should refer to the use of friendly negotiations between the parties as the initial means of settling

142. See *China, Modernization, and Arbitration*, *supra* note 1, at 70 (concluding that only if the national courts feel comfortable in ordering the performance of an arbitration agreement will the use of arbitration provide an efficient means to resolve a dispute). The best way to achieve such judicial non-interference is to draft a clear and thorough arbitration agreement that specifically addresses such fundamental issues as procedural due process, adequate and effective notice, and institutional neutrality. *Id.* See also *Surrey & Sobel*, *supra* note 92, at 426 (concluding that a poorly drafted arbitration clause could make the parties bitter and subsequent settlement more costly, while a well-drafted clause often prevents a protracted dispute).

143. See *Vagts, Dispute Avoidance Devices in Foreign Direct Investment*, in *INTERNATIONAL INVESTMENT DISPUTES*, *supra* note 6, at 37 (arguing that an effective arbitration clause can change the dynamics of the dispute negotiation process itself). The arbitration clause does not merely illustrate the parties' consent to arbitrate; it provides the basic source of jurisdiction for the arbitral tribunal. *Id.* See generally *Lockett*, *supra* note 1, app. A, at 268-69 (detailing the jurisdictional reach of an arbitration clause under each international arbitral system).

144. See *Participation in Commercial Arbitration*, *supra* note 118, at 148 (stressing that a well-drafted arbitration clause provides the only instrument for the arbitral body to compel a non-participant to honor its previous agreement to arbitrate).

145. See *Delaume, Court Intervention in Arbitral Proceedings*, in *RESOLVING TRANSNATIONAL DISPUTES*, *supra* note 57, at 195, 200 (describing the scope and effectiveness of arbitration agreements). In addition, if a national court can ascertain a consistent pattern of behavior between the parties providing for the arbitral settlement of disputes, it will refuse to entertain actions brought contrary to such an implied agreement. *Id.* at 201.

146. See *Holtzmann, U.S.-China Trade*, *supra* note 12 (advising parties that the Chinese expect to settle the dispute primarily through friendly consultation and conciliation).

the dispute. In the event that friendly negotiation does not resolve the disagreement, the parties could provide for the use of non-binding joint conciliation calling upon the expertise of the CCPIT and the AAA.¹⁴⁷

C. TRIGGER MECHANISM

Acknowledging the Chinese preference for informal conciliatory procedures, it is important that the arbitration clause contain specific language allowing the parties to reach a final, binding decision within a reasonable amount of time.¹⁴⁸ Lengthy delays during the period of informal discussion often result in the unavailability of witnesses and evidence, and the risk of losing the capacity to bring the suit in a judicial forum due to the expiration of the applicable statute of limitations.¹⁴⁹ Therefore, the arbitration clause must contain a trigger mechanism that moves the parties out of informal negotiations into formal arbitration proceedings.¹⁵⁰

D. CHOICE OF FORUM: NEUTRAL THIRD COUNTRIES

The parties should also designate the site of arbitration.¹⁵¹ This threshold issue poses significant problems when each party to the arbitration comes from dissimilar economic and jurisprudential systems.¹⁵²

147. See *id.* at 289 (describing recommendations made by United States and Chinese officials to expand the use of joint conciliations).

148. *Id.* at 258 (cautioning that the arbitration clause must clearly state when a dispute must move on to arbitration).

149. *Id.*

150. See Gudgeon, *Arbitration Provisions of U.S. Bilateral Investment Treaties*, in INTERNATIONAL INVESTMENT DISPUTES, *supra* note 6, at 50 (cautioning that the parties cannot tolerate an open-ended arbitration clause if a workable compulsory arbitral process and an amicable settlement is the goal of arbitration). An effective arbitration clause can also serve as an inducement to settle long before protracted litigation ensues. *Id.*

151. Chew-Lafitte, *supra* note 5, at 276. Absence of specific language in the contract to the contrary, the site of the arbitral institution may determine such crucial factors as procedural rules, governing law, and choice of arbitrators.

152. See Torbert & Zhao, *The U.N. Convention on the Sale of Goods*, CH. BUS. REV., Sept./Oct. 1987, at 52 (stating that in many instances, choice of arbitral forum is either not included in the arbitral agreement or else it is left blank and decided upon later in the event of a dispute). This practice leads to unexpected results as evidenced by the decision in *Bauhinia Corp. v. China Nat'l Mach. & Equip. Corp.*, 819 F.2d 247 (9th Cir. 1987). Bauhinia Corp. contracted with China National Machinery & Equipment Corp. (CMEC) to export Chinese nails to the United States. *Id.* at 248. When CMEC failed to deliver on the contract, Bauhinia filed suit in a California district court. *Id.* CMEC moved to compel arbitration before FETAC, invoking the arbitration clause in the contract. *Id.* The district court granted CMEC's motion, finding the arbitration clause binding, but ordered that the parties submit the dispute to the American Arbitration Association. *Id.* Citing the absence of a choice of a forum clause, the court designated arbitration to be held within its own district. *Id.* at 248-49. On appeal, the

Both sides inevitably contend that any dispute resolution proceeding, even arbitration, held within national borders will be tainted by national bias.¹⁵³ In response to these fears, China has become more amenable to the inclusion of arbitration clauses specifying neutral third country arbitration.¹⁵⁴

In fact, disputes arising from specific areas of internal trade relations with China are now arbitrable in international fora.¹⁵⁵ The new Joint Venture Law, for example, provides that if the parties cannot resolve a joint venture dispute through informal measures, they may submit the conflict to any mutually agreed upon arbitral body.¹⁵⁶ The new Foreign Economic Contract Law also specifies that the parties may submit their foreign contract dispute to either a Chinese arbitration organization or any other arbitral tribunal in accordance with the arbitration clause.¹⁵⁷

Those involved in Sino-American trade may rely on the comprehensive bilateral trade treaty established between China and the United States in 1979.¹⁵⁸ On the subject of non-judicial remedies for disputes, the trade treaty provides that if the parties cannot promptly settle their dispute through friendly consultation, they may refer the dispute to arbitration. Such arbitration may occur in an arbitral institution in China, in the United States or in a mutually agreed upon third

United States Court of Appeals for the Ninth Circuit affirmed the decision, unable to find either in the language of the contract or in the intention of the parties any indication of the location of the forum the parties intended to choose. *Id.* at 250. Thus it decided, the lower court's power to order arbitration went no further than its own jurisdictional boundaries. *Id.*

153. See Ingriselli, *supra* note 52, at 377-80 (cautioning that while the FETAC, China's domestic arbitration tribunal, has attempted to expand and become more familiar with international issues, arbitration in China still poses a number of significant obstacles). These obstacles include: arbitrators must come from a FETAC panel of all Chinese arbitrators; proceedings must be in Chinese; arbitration must be held in China; and FETAC awards are final and unreviewable by Chinese courts. *Id.*; accord Holtzmann, *U.S.-China Trade*, *supra* note 12 (arguing that the principal reason for United States and Chinese business community's widespread acceptance of joint conciliation is that each believes that a national conciliator best protects its interests).

154. See *supra* notes 58-61 and accompanying text (outlining the significance of the inclusion of neutral arbitration in three major pieces of commercial legislation as well as in the United States-China Trade Agreement).

155. See Joint Venture Law, *supra* note 43, art. 14 (providing that in the event of a dispute, the parties may submit the dispute to a Chinese arbitration organization, or to international arbitration).

156. *Id.* The parties to a joint venture may allow any arbitral organization to handle disputes if they mutually agree upon its designation in the contract or subsequent to the dispute. *Id.* at 84.

157. See Foreign Economic Contracts Law, *supra* note 43, art. 17 (stating that in the event mediation and consultation fail, the parties may submit the dispute to any arbitral organization).

158. Trade Agreement, *supra* note 59. The purpose of the Trade Agreement is to strengthen all aspects of Sino-American economic and trade relations. *Id.* at 1042.

country.¹⁵⁹

E. CHOICE OF FORUM: ARBITRAL SITES

Given China's recent willingness to participate in third country arbitration and to enforce awards rendered by foreign arbitration tribunals, it is necessary to briefly review those arbitral sites likely chosen by investors to render decisions in Chinese trade and investment disputes.

1. Sweden

Historically, many important East/West contracts have contained arbitration clauses specifying the Stockholm Chamber of Commerce as the designated arbitral body.¹⁶⁰ Sweden, a non-aligned country, represents an important arbitral forum for East/West trade. Its reputation for fairness, competence, and flexibility indicates that its role in international arbitration should continue to grow at a tremendous rate.¹⁶¹ As one of the very few developed nations that can claim the distinction of political neutrality, business executives on both sides of the globe traditionally look to Sweden for dispassionate resolution of their international trade disputes.¹⁶² While the Stockholm Chamber of Commerce has devised its own set of procedural rules,¹⁶³ it also applies the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). China and the majority of international traders accept these arbitration rules.¹⁶⁴ Sweden is also a party to the

159. *Id.* at 1048. Under the treaty, no contracting party shall take any action against another party before they hold friendly consultations. *Id.*

160. See Holtzmann, *Dispute Resolution Procedures in East/West Trade*, 13 INT'L LAW. 234, 241 (1979) [hereinafter Holtzmann, *East/West Trade*] (discussing Sweden's frequent mention as an arbitral site in many contracts negotiated between the United States and the Soviet Union during the 1970s); see also Wetter, *East Meets West in Sweden*, 13 INT'L LAW. 261, 265-67 (1979) (providing a general history of American-Soviet dispute resolution under Swedish arbitration).

161. See Lockett, *supra* note 1, at 250 (reporting that the Chinese prefer the Stockholm Chamber of Commerce because of its reputation of fairness, competence, and flexibility).

162. See Holtzmann, *East/West Trade*, *supra* note 160, at 240-44 (noting that Swedish arbitration can trace its roots back to the fourteenth century). Sweden is the most frequently cited third country in current Sino-foreign trade and investment disputes. *Id.* at 332.

163. See Wetter, *Sweden as a Location of International Arbitration Proceedings*, in PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS, 223, 253 (1977) [hereinafter Wetter, *Sweden as a Location*] (commenting on Swedish arbitration law and practice, as well as providing a translation of relevant Swedish arbitration provisions); see also ARBITRATION IN SWEDEN 9, 192-201 (Stockholm Chamber of Commerce, 1977) (noting that Swedish domestic arbitration provisions do not preclude the use of the UNCITRAL rules).

164. See *Commercial Dispute Resolution*, *supra* note 4, at 355 (discussing the

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,¹⁶⁵ which ensures that all other acceding nations will enforce arbitral awards rendered in Sweden.¹⁶⁶

2. *Pacific Rim/Hong Kong*

Many of the nations along the Pacific Rim share a non-confrontational approach to dispute resolution.¹⁶⁷ It is expected that China will enter into arbitration with less reluctance if a site is specified that understands its economic, cultural, and jurisprudential goals and concerns.¹⁶⁸ The Pacific Rim nations generally recognize the importance of mediating a dispute through conciliation.¹⁶⁹ If foreign investors, however, insist on unilaterally invoking arbitration as a first resort in this region, they stand a good chance of alienating the Chinese partner, effectively foreclosing any possibility of maintaining an ongoing business relationship.¹⁷⁰ These Asian nations express their dissatisfaction with

growing number of organizations that train arbitrators in the use of UNCITRAL rules). The London Court of Arbitration and the Inter-American Commercial Arbitration Commission have adopted the UNCITRAL rules. *Id.*

165. Convention on Foreign Arbitral Awards, *supra* note 60. This Convention requires that the contracting states recognize and enforce arbitral awards made in another Contracting State. *Id.* at 338.

166. See Holtzmann, *East/West Trade*, *supra* note 160, at 243 (citing Sweden's ratification of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards as significant due to the United States and Chinese reservation specifying that they will only enforce awards made in the territory of another acceding State); see also *China, Modernization, and Arbitration*, *supra* note 1, at 70 (describing the value of the Convention as assuring business parties that domestic courts will not extensively review foreign arbitration awards rendered by member nations).

167. See Weber, *International Arbitration is Gaining Acceptance Among Pacific Rim Traders*, 7 CAL. LAW. 29, 30 (1987) (concluding that East and Southeast Asian societies have historically preferred conciliation as the primary means of dealing with both daily domestic frictions as well as with overseas trade disputes); cf. *Commercial Dispute Resolution*, *supra* note 4, at 332-33 (stating that among developing nations, arbitration is receiving increasing recognition as the preferable alternative to adjudication).

168. See Witner, *Acceptance of Arbitration by Developing Countries* in *RESOLVING TRANSNATIONAL DISPUTES*, *supra* note 57, at 288 (relating that reconciling the benefits of transnational trade with the strongly perceived need to protect markets from unfavorable strains on their economic development represents one of the greatest dilemmas for a developing country).

169. See *Dispute Settlement in China*, *supra* note 31, at 86 (characterizing Asian business practice as viewing business relationships on an essentially personal basis). First resort to conciliation rather than arbitration provides a non-confrontational means to settle the dispute in such a way as to preserve the personal relationship. *Id.*

170. See Brower, *Dispute Resolution and International Arbitration* in *PACIFIC BASIN*, *supra* note 34, at 349 (citing well-known evidence that countries in the Far East have traditionally resolved all disputes through conciliation). Japan and China especially tend to avoid situations in which the dispute is decided in a binding fashion by a

Western arbitrations utilizing Western judicial-like procedures through their continued non-participation in these arbitral fora.¹⁷¹

The establishment of new arbitration centers along the Pacific Rim represents one solution to this regional dissatisfaction.¹⁷² The movement of arbitration centers away from Western Europe will encourage Asian traders to rely more on international arbitration as a method of dispute settlement.¹⁷³ These regional arbitration centers contain local panels more responsive to the economic and cultural concerns of the Pacific Basin and allow developing countries to become more familiar with international arbitral procedures.¹⁷⁴ Moreover, the style of arbitration, now primarily a reflection of its Western adversarial heritage, will begin to shift toward promotion of conciliatory methods as the Asian nations begin to contribute to international arbitration procedures.¹⁷⁵

By establishing arbitration centers along the Pacific Rim, these nations also hope to enhance the increasing amount of intra-regional trade.¹⁷⁶ In terms of the sheer volume of trade carried out in the area,

third party. *Id.*

171. See Witner, *supra* note 168, at 286 (commenting that while developing countries have generally accepted the concept of arbitration, many confrontational elements inherent in the Western model represent a less favorable alternative as their national and regional policies take hold). Many nations along the Pacific Basin are exerting pressure on their foreign trading partners to move away from holding arbitration in major European cities with arbitrators selected from an elite corps of western lawyers. *Id.* at 288.

172. See Weber, *supra* note 167, at 29 (stating that since 1985, new arbitration centers have opened along the Pacific Rim in San Francisco, Sydney, Melbourne, Vancouver, and Hong Kong). This is in addition to established institutions in Tokyo, Beijing, Taipei, Kuala Lumpur, and Jakarta. *Id.* at 30; accord McLaughlin, *supra* note 56, at 232 (arguing that the establishment of local arbitral institutions responsive to the cultural needs and biases of the participants represents a crucial step in enhancing the image of arbitration among developing countries).

173. See McLaughlin, *supra* note 56, at 218 (echoing the sentiment of developing nations that they no longer wish to see Western-oriented arbitral tribunals determine their disputed commercial relations).

174. See *id.* at 232 (stating that the establishment of arbitration centers in local fora provides developing countries the opportunity to participate in arbitration panels). This encourages developing nations to participate in a greater number of arbitrations, making the use of third party intervention more acceptable to all involved. *Id.*

175. See Weber, *supra* note 167, at 30 (indicating that Asian countries consider arbitration as the last step in a process that must begin with conciliation). The Asian nations have always placed great emphasis upon the reconciliation of the parties. *Id.* But see *id.* at 31 (arguing that while cultural factors may have historically promoted the use of conciliation, pragmatic factors such as the geographic and jurisprudential diversity of the firms involved and the greater complexity of the commercial relationships will inevitably motivate the region to shift its preference from conciliation to arbitration).

176. See Hart, *Introduction*, in *LEGAL ASPECTS OF DOING BUSINESS IN ASIA AND THE PACIFIC* i (D. Campbell ed. 1985) (predicting that foreign trade with Asia will flourish for the remainder of the twentieth century). The economies of the Asian region

those nations having a Pacific coastline (excluding the Soviet Union) had a gross product measured at \$4.9 trillion in 1980 and is expanding at the rate of \$3 billion per week.¹⁷⁷ The nations generating this trade naturally have a desire to involve themselves in the resolution of any resulting disputes.

Many nations in this region are currently attempting to establish themselves as the premier arbitral site for the Asian business community.¹⁷⁸ Hong Kong's efforts to establish an arbitration center to attract trade with China presents a special concern to the Pacific Rim business community.¹⁷⁹ Hong Kong has become one of the world's leading banking and commercial centers. Hong Kong also has strong linguistic, cultural, and economic ties with China, with China operating many governmental offices and companies in the former Crown colony.¹⁸⁰

Recognizing that conciliation is an integral part of the Asian dispute resolution process,¹⁸¹ Hong Kong's International Arbitration Centre (HKIAC) procedures make express provision for the appointment of a conciliator if the arbitration agreement so provides.¹⁸² If the parties do not object, the conciliator may ultimately act as the arbitrator, making for an easy transition from conciliation to arbitration. Also, the

are the fastest growing in the world due in large part to the discovery of the United States market for its merchandise. *Id.*

177. See Weber, *supra* note 167, at 34 (citing California's Office of Economic Research statistics). In the twenty-first century, the Pacific Basin nations will trade most vigorously with each other). *Id.* at 35-36.

178. See Brower, *Dispute Resolution and International Arbitration in the Pacific Basin*, in *PACIFIC BASIN*, *supra* note 34, at 349 (arguing that even in the Far East the use of arbitration has become unavoidable if the Asian partner wishes to establish an ongoing relationship with a western investor who relies on the "rule of law").

179. See Ellis & Shea, *Foreign Commercial Dispute Settlement in the People's Republic of China*, 6 INT'L TRADE L.J. 155, 172 (1980) (citing several contracts between China and Hong Kong that have contained arbitration clauses specifying Hong Kong as the arbitral site); see also Kaplan, *Arbitration in Hong Kong*, 3 J. INT'L ARB. Dec. 1986, at 7 (noting Hong Kong's unique and strong relationship with The People's Republic of China); accord Surrey & Sobel, *supra* note 92, at 397 (contrasting Sweden's current status as the most popular site for Sino-foreign arbitration with Hong Kong's recent push to capture Sino-foreign disputes).

180. See Kaplan, *supra* note 179, at 7, 20 (describing Hong Kong's international recognition as one of the world's leading commercial centers and China's strong support for the establishment of an arbitration center there).

181. See Surrey & Kellner, *Commercial Arbitration in Hong Kong*, in *LEGAL ASPECTS OF DOING BUSINESS IN HONG KONG* 122, 215 (E. Theroux ed. 1986) (stating that the Hong Kong's International Arbitration Centre (HKIAC) has formally recognized conciliation as a necessary element in dispute settlement).

182. See Kaplan, *supra* note 179, at 8 (noting that section 2A of the Hong Kong Ordinances of 1982 make express provision for the conciliator to move on with the dispute and serve as arbitrator if the parties make no objection). This provision is similar to the practices of CCPIT. *Id.*

HKAC follows the UNCITRAL rules¹⁸³ and has ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, making enforcement of its awards binding upon other signatories.¹⁸⁴

Hong Kong has received strong signals of support from China in its efforts to establish an international arbitral forum. In May 1985, a Hong Kong delegation returned from Beijing with the news that the CCPIT had pledged full support for the arbitration project and offered the services of its experienced arbitrators to sit on arbitration panels of Hong Kong's new Centre.¹⁸⁵ China also pledged financial support of the project. In 1985, officials in Hong Kong estimated that the Centre should have sufficient funding due in large part to contributions from the private Chinese business community.¹⁸⁶

Although China may show enthusiasm towards Hong Kong's potential as a neutral arbitration site, the remainder of the international business community is more skeptical. According to local Hong Kong attorneys, foreign investors fear that China's ardent support will affect the ability of the Hong Kong tribunal to provide the objective and neutral arbitral decisions their foreign clients seek.¹⁸⁷

F. PROCEDURAL RULES

The United States-China Trade Agreement specifically endorses the arbitration rules of the UNCITRAL when acceptable to the parties

183. *Beijing Backs Hong Kong as an Arbitration Center*, United States Department of Commerce unclassified telegram from American Consul in Hong Kong (June 1985) [hereinafter DOC telegram] (describing the Centre's decision to follow the UNCITRAL rules rather than the International Chamber of Commerce's rules).

184. *See* Surrey & Kellner, *supra* note 181, at 221 (commenting that the United Kingdom's ratification of the Convention extends its obligation to the colony). The fact that China has also acceded to the Convention and that Hong Kong adopted it as part of its arbitral statute should assure the continued use of the Convention after China reestablishes its sovereignty over Hong Kong in 1997. *Id.*

185. *See* DOC telegram, *supra* note 183, para. 1 (announcing CCPIT's full support of Hong Kong as an arbitral site and its pledge to send experienced arbitrators to Hong Kong).

186. *See id.* para. 4 (noting that the Centre would have sufficient funds for the first three years). Of the 2.8 million Hong Kong Dollars the Centre estimates it will need over the next three years, about 1 million Hong Kong Dollars have come from private sources, among them the Bank of China and other national Chinese enterprises. *Id.*

187. *See id.* para. 5 (commenting on dissatisfaction of the foreign investor concerning Hong Kong's perceived lack of autonomy and objectivity). *But see* Surrey, *Dispute Settlement in U.S.-China Trade: Another Look*, in *LEGAL ASPECTS*, *supra* note 83, at 284 (positing that while Hong Kong's close relationship with China might have a negative effect on the emergence of Hong Kong as a major arbitral site for Asian business investors, it should have a positive effect on the use of Hong Kong as a site for Sino-American disputes).

and to the chosen arbitral body.¹⁸⁸ The UNCITRAL rules are especially designed to bridge the ideological differences between socialist and capitalist systems and between developing and developed economies.¹⁸⁹ In designing its rules, the United Nations attempted to devise a model free from any national or institutional biases. A party's request to include these rules in the arbitration clause does not represent an effort to promote or to compromise national interests.¹⁹⁰

In formulating these rules, the United Nations Drafting Commission conducted detailed surveys and submitted proposals to some seventy-five individual arbitral forums around the world. A model set of rules emerged from this process that synthesized many individual protocols and agreements.¹⁹¹ Both capitalist and socialist economies can apply these rules, and both common law and civil law systems can enforce them.¹⁹² Parties may include these rules either on an ad-hoc basis or as part of a formal arbitration in such international bodies as the Stockholm Chamber of Commerce,¹⁹³ or the Hong Kong Arbitration Centre.¹⁹⁴ The UNCITRAL rules will become the most frequently used international rules of arbitration in United States-China trade disputes due to their specific endorsement in the United States-China Trade Agreement.

G. SUBSTANTIVE LAW

Specification of the substantive law used to govern the dispute is the most difficult drafting task facing the foreign contract negotiator.¹⁹⁵

188. Trade Agreement, *supra* note 59, art. VIII, para. 2.

189. See *Commercial Dispute Resolution*, *supra* note 4, at 335 (noting that both industrialized and emerging nations have utilized the neutral rules of the UNCITRAL).

190. See *id.* at 354 (urging China's domestic arbitration organs to adopt the UNCITRAL rules). One solution to concerns about the impartiality of China's domestic arbitration institutions is to implement a set of neutral rules of procedure. *Id.*; See also Holtzmann, *East/West Trade*, *supra* note 160, at 238 (suggesting use of UNCITRAL rules as the only unbiased set of international trade rules).

191. See *Commercial Dispute Resolutions*, *supra* note 4, at 334 (providing a detailed history of the United Nations methods in drafting the UNCITRAL rules).

192. See Holtzmann, *U.S.-China Trade*, *supra* note 12, at 326 (praising the use of UNCITRAL rules as the most modern rules available and best suited not only for use with traditional export/import contracts, but also adaptable for use with more complex disputes involving technology transfer and joint venture liability).

193. See Wetter, *Sweden as a Location*, *supra* note 163, at 254 (describing the procedural rules of the Stockholm Chamber of Commerce).

194. See Kaplan, *supra* note 179, at 9 (describing Hong Kong's decision to choose the UNCITRAL rules).

195. See *Participation in Commercial Arbitration*, note 107, at 146 (commenting on China's recent insistence on the application of Chinese laws to govern economic trade disputes as the most difficult obstacle to overcome when attempting to negotiate

Prior to 1984, the vast majority of Sino-foreign arbitration clauses were silent on the choice of law issue. Chinese negotiators preferred not to specify the substantive law in the contract, leaving that issue to the discretion of the arbitral tribunal.¹⁹⁶ The Chinese insist, however, that the arbitrators rely on fundamental Chinese principles of independence, equality and mutual benefit, and reference to international commercial practice when making the choice of law determination.¹⁹⁷

Previously, the absence of a choice of law provision required the arbitrators to either resort to a national conflicts of law system or to apply international conflicts of law principles.¹⁹⁸ Under either system, factors such as substantial contacts with the country, place of performance, and nationality of the parties play an important role in determining which system of domestic laws will apply.¹⁹⁹ Due to the fact that the majority of Sino-foreign contracts are negotiated, executed, and performed in China, Chinese law was often chosen for use in the arbitration.²⁰⁰ Until recently, however, China had no cohesive body of commercial legislation and although China has passed many laws in recent years, it has relatively little experience in applying these laws to international commercial transactions.²⁰¹

In addition, the Chinese provide in many pieces of foreign contract legislation, for the exclusive use of Chinese law in the event of a breach with a foreign investor. The Foreign Economic Contract Law adopted in March 1985 broadly stipulates that Chinese law must apply to any joint venture utilizing Chinese and foreign capital; any contract calling

neutral legal principles).

196. See Surrey & Sobel, *supra* note 92, at 398 (noting that Chinese negotiators will usually avoid specifying the substantive law, leaving that decision to the arbitral tribunal and relying on the choice of law principles of the arbitral forum to designate Chinese law).

197. See *id.* (noting China's insistence that third country arbitrators refer to Chinese arbitration principles when choosing the substantive law of the arbitration). The Chinese arbitration principles include independence, equality and mutual benefit, and reference to international commercial practice. *Id.* at 398.

198. See *Participation in Commercial Arbitration*, *supra* note 118, at 146 (observing that upon the exclusion of a choice of law provision, the arbitrators may resort to international trade practice).

199. See Lockett, *supra* note 1, at App. A (giving a short synopsis of the choice of law procedures used by each major arbitral body when determining substantive law).

200. See *Participation in Commercial Arbitration*, *supra* note 118, at 146 (noting that due to the fact that the majority of contracts are signed in China and directly relate to Chinese products or resources, Chinese law would usually apply).

201. See Holtzmann, *U.S.-China Trade*, *supra* note 12, at 235 (noting United States investors' reluctance to litigate in foreign courts that operate with substantially different economic, social, and legal systems). Those who trade with or invest in China feel strongly that the lack of information available concerning the practice or procedure used in Chinese civil courts makes litigation in China an impossibility. *Id.*

for a cooperative enterprise between foreign and domestic partners or; any contact involving Sino-foreign exploration or exploitation of Chinese natural resources.²⁰² International practice will govern only to the extent that the present state of Chinese law does not cover the dispute.²⁰³

In contracts signed after January 1, 1988, however, omission of a choice of law clause in contracts for the sale of goods will trigger the use of the United Nations Convention on Contracts for the International Sale of Goods (CISG).²⁰⁴ Both the United States and China are signatories to this Convention that covers all contracts for the sale of goods between parties with places of business in China or the United States.²⁰⁵ Historically, no other country omits a choice of law clause as frequently as China, and therefore, the CISG should have a greater impact on United States trade with China than on any other United States trading partner.²⁰⁶ Unless otherwise stipulated, the CISG takes precedence over both the United States Uniform Commercial Code and the Foreign Economic Contract Law.²⁰⁷ The Chinese Ministry of Foreign Economic Relations and Trade has instructed its various trade organizations to harmonize their contracts with the language of the new treaty.²⁰⁸ The CISG, however, applies only to the sale of goods; it does not cover contracts for the supply of labor or services which would in-

202. See Foreign Economic Contracts Law, *supra* note 43, art. 5 (stipulating when Chinese laws will apply to joint ventures and cooperative ventures); see also Tang Houzhi, *supra* note 105, at 2 (explaining that the Foreign Economic Contracts Law disallows the parties to apply foreign substantive law to the contract).

203. See, e.g., Mao Tong & Burke, *Supreme People's Court Notice on the Foreign Economic Contracts Law*, EAST ASIAN EXEC. RPT., May 1988, at 10 (describing this Notice as the first step in transforming the Foreign Economic Contracts Law from a statement of general principles to a refined body of contract law). The Supreme Court's interpretation of the FECL states that only Chinese law applies to joint ventures and contracts for the exploration and exploitation of Chinese natural resources. *Id.*

204. Berlin, *U.N. Trade Pact Triggered*, Wash. Post, Dec. 12, 1986, at D11 (stressing that the establishment of international legal norms under which parties can resolve contractual differences among varying national systems as the main significance of the Convention).

205. See Torbert & Zhao, *supra* note 152, at 52 (stating that in the event that the choice of law provision is not specified in the agreement, the terms of the CISG will apply automatically to contracts for the sale of goods between parties with places of business in China or the United States).

206. *Id.*

207. Salem, *Two Steps Forward*, FAR EAST ECON. REV., Jan. 21, 1988, at 51. The CISG may take precedence over China's present Foreign Economics Contracts Law and the United States Uniform Commercial Code. *Id.*

208. *Id.* Following China's accession to the Convention, various foreign trade organizations received instructions to align their contract provisions with the terms of the CISG. *Id.*

clude advanced technology, China's most sought after item.²⁰⁹ As for mixed contracts that supply both goods and services, the applicability of the CISG provisions remains unclear.²¹⁰

H. ENFORCEMENT OF ARBITRAL AWARDS

The main value of arbitration lies in its ability to resolve disputes and render awards without forcing either party to litigate in the domestic courts of its foreign partner.²¹¹ Given China's gradual acceptance of international arbitration, international mechanisms for the enforcement of these arbitral awards become crucial.²¹² Under principles of private international law, the domestic law of the country where enforcement is sought governs the enforcement of the award.²¹³ Without some form of international agreement, recognition of foreign arbitral awards by national courts is sporadic at best. If an arbitral award is enforced only after extensive judicial review, the arbitration process becomes uncertain, if not completely futile.²¹⁴

Bilateral and multilateral treaties significantly increase the effectiveness of foreign awards by limiting the grounds available for denial of recognition and enforcement.²¹⁵ In 1986, the Standing Committee of the National People's Council approved China's accession to the United Nation Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²¹⁶ This decision is the most significant step to date toward total acceptance of international arbitration.²¹⁷ Chinese

209. See Torbert & Zhao, *supra* note 152, at 52 (stating that the CISG will not apply to contracts such as those that provide for supply of labor, services, and technology transfer).

210. See *id.* (questioning whether in the case of a mixed sale of goods and services the CISG will apply).

211. See *China, Modernization, and Arbitration*, *supra* note 1, at 70 (stating that the main value of the Convention on the Recognition of Foreign Arbitral Awards is that a recalcitrant party is required to satisfy an adverse judgment without resorting to domestic judicial review).

212. See Chew-Lafitte, *supra* note 5, at 280 (cautioning that arbitration proceedings are meaningful only to the extent that the award becomes binding upon the parties).

213. See *China, Modernization, and Arbitration*, *supra* note 1, at 70 (asserting that general principles of international law does not obligate a state to recognize an arbitral award rendered outside its borders).

214. Delaume, *supra* note 145, at 217-21.

215. See *id.* at 222 (stating that modern treaty, statutory, and judicial developments have greatly contributed to facilitating the recognition and enforcement of transnational arbitral awards).

216. See generally Convention on Foreign Arbitral Awards, *supra* note 60 (requiring contracting states to enforce each other's arbitral awards by limiting the grounds upon which a national court may refuse recognition).

217. See Liu Shaoshan, *A Brief Account of the New York Convention of 1958*,

Communist Party leaders have endorsed accession as a major step in the realization of their modernization goals.²¹⁸

The Convention specifies the obligations and conditions under which the contracting states are bound to recognize and execute foreign arbitral awards. Nations in every region of the globe including most of the major international traders have ratified and supported the Convention.²¹⁹ China's accession to the Convention shows confidence, not only in the quality of its own arbitral tribunals, but also in the fairness of awards rendered in foreign institutions.

CONCLUSION

China has begun to look beyond its borders to seek international resolution of trade disputes involving its nationals. This trend toward acceptance not only of arbitration but more significantly of international arbitration is confirmed by China's ratification of such bilateral and multilateral treaties as the United States-China Trade Agreement, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the United Nations Convention on Contracts for the International Sale of Goods. An increasing number of foreign contract clauses provide for joint conciliation and three major pieces of foreign economic legislation specifically promote the use of neutral third country arbitrations. China's desire to fully participate in the international economic marketplace has muted, if not overcome, its historic reluctance to resolve disputes in international fora.

Although philosophical and cultural barriers may impede China's willingness to turn to the West in seeking neutral third party arbitration, the enthusiasm of Pacific Rim nations expressed in the development of their own arbitration centers, each specializing in conciliatory modes of arbitration, points to a day in the very near future when China will arbitrate beyond its borders.

CHINA PATENTS AND TRADE, Feb. 1987, at 9, 10 (stressing the importance of China's accession to the Convention in the implementation of current Chinese Communist Party policies).

218. *Id.* at 9 (noting that China's accession to the Convention will greatly develop its foreign economic and trade relations, necessary elements for a successful modernization program).

219. *See id.* (describing the widespread multilateral acceptance of the Convention). Since the Convention came into force in 1959, seventy-one Contracting States, including most major trading nations, have ratified it. *Id.*