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I. Introduction

Bearing witness to its active interest in developing foreign trade and investment, the People's Republic of China (P.R.C.) signed at least fifty bilateral and multilateral trade, economic, and scientific agreements between 1978 and 1980. These agreements are consistent with the guidelines of the P.R.C.'s current trade policy:

With an effort exerted on the basis of self-reliance for realizing the four modernizations it is a long-lasting strategic task and also an unswerving and important policy of our government to take what is the best in foreign

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countries, to develop foreign trade, to import advanced technology, to utilize foreign investment and to expand foreign economic cooperation and technological exchange.\(^2\)

The history of its trade policies\(^3\) indicates, however, that the P.R.C. has not always pursued foreign trade and investment as an essential part of its overall economic development.\(^4\) In the 1950's, foreign trade, particularly with other socialist countries, prospered under a successful five year plan designed to rebuild the country after its civil war.\(^5\) In the 1960's, however, Sino-Soviet trade and political relations radically deteriorated and the Soviets eventually withdrew their economic and technical assistance.\(^6\) The P.R.C. decided to commit itself to a policy of self-reliance and independence,\(^7\) and, as a consequence, foreign trade dropped precipitously.\(^8\)

The P.R.C. showed renewed interest in developing its foreign trade following a significant shift in the nation's political power structure in 1976.\(^9\) Following a trend which began in the 1960's, its major trading partners became non-communist countries, including Japan, Hong Kong, West Germany, Canada, France, Singapore, the United Kingdom, and Norway.\(^10\)

The United States and the P.R.C. gradually emerged as trading part-

\(^2\) R. Jianxin, Some Legal Aspects of Our Import of Technology and Utilization of Foreign Investment 1 (Oct. 1980) (Legal Aff. Dep't of the China Council for the Promotion of International Trade) [hereinafter R. Jianxin, Technology].

\(^3\) See generally A.D. Barnett, China and the Major Powers in East Asia (1977); Law and Politics in China's Foreign Trade (V. Li ed. 1977) [hereinafter Foreign Trade].


\(^5\) China Trade Handbook, supra note 1, at 145.

\(^6\) A.D. Barnett, supra note 3, at 32-52.

\(^7\) Lubman, Practice, Policy & Law, supra note 4, at 10-11.

\(^8\) China Trade Handbook, supra note 1, at 145-46. Increases have been more dramatic in the P.R.C.'s trade with non-communist countries. While trade volume with communist countries tripled from 1950 to 1978, that with non-communist countries increased more than twentyfold. Id. at 146.

\(^9\) In 1976, the Gang of Four was ousted from power. Id. at 145.

\(^10\) Id. at 16-17, 19-56, 145; Klein, The Foreign Trade Apparatus, in Foreign Trade,
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ners after President Nixon's visit in 1973 and the Shanghai Communique.\textsuperscript{11} Trade balances varied\textsuperscript{12} but growth over time in the total trade volume seemed assured. Even before the normalization of diplomatic relations in 1979,\textsuperscript{13} U.S.-P.R.C. trade volume experienced tremendous growth. Between 1977 and 1978, for example, there was a 222% increase in trade.\textsuperscript{14}

The development of the U.S.-P.R.C. trade relationship initially produced euphoric projections of an enormous untapped market for U.S. companies.\textsuperscript{15} These projections have been tempered, however, as trade relations have stabilized\textsuperscript{16} and business executives have begun to recognize the limitations and obstacles accompanying the tremendous potential inherent in U.S.-P.R.C. trade.\textsuperscript{17} The fluctuating history of the P.R.C.'s trade policies suggests that these lowered expectations are appropriate and that U.S. executives should proceed slowly and deliberately. As one observer has noted, "[f]irst, should come understanding, and there is no greater obstacle to expanded trade than mutual ignorance of the values, institutions, and practices that shape each country's

\textsuperscript{supra} note 3, at 308, 317. See also China's Trade With Industrial Nations, Especially North America, Surged in 1980, Wall St. J., Nov. 12, 1981, at 33, col. 5.


15. Li, \textit{Trade with China: An Introduction}, in FOREIGN TRADE, \textit{supra} note 3, at 3, 3-4. This euphoria stemmed from the belief that China is a market with hundreds of millions of consumers who will pay for western industrial goods with still largely untapped minerals and raw materials. Visions of sugarpalms appear when one considers that quantity of goods needed if each person in China would purchase but a single unit.

\textit{Id.}


participation in trade with the other."\textsuperscript{18}

Knowledge of the standards and customs underlying the negotiation of commercial transactions between the two countries is growing as the number, type, and complexity of projects increase.\textsuperscript{19} One important area of mutual concern, but limited information, is the nature and function of mechanisms for the resolution of commercial disputes.\textsuperscript{20} Chinese and U.S. trading partners have divergent views on which dispute resolution mechanisms are appropriate under particular circumstances. While U.S. executives prefer international arbitration proceedings,\textsuperscript{21} Chinese generally agree to dispute resolution provisions that require arbitration only as a last resort, preferring to settle conflicts by informal procedures such as consultation and conciliation.\textsuperscript{22}

This Article argues that these divergent views are merely differences in emphasis. The differences, however, must be understood and reconciled to allow the parties to achieve their common objective in reaching agreement on efficient, effective, and equitable means for the resolution of commercial disputes. The Article attempts to provide the essential background for the achievement of this objective. It first describes current practice in U.S.-P.R.C. trade and investment transactions and develops the fundamental values and techniques, legal structures, and government institutions involved in dispute resolution in the P.R.C. Built on this foundation is an analysis of the dispute resolution processes used in the P.R.C., including informal mechanisms, arbitration, and litigation. The Article then discusses the negotiation ex ante of dispute resolution provisions in a commercial agreement. Finally, the Article examines the likely willingness of the Chinese to recognize contractual arbitration provisions and the mechanisms for the enforcement in the P.R.C. of arbitral awards.

II. Current Transactional Practice

The P.R.C.'s foreign trade long consisted primarily of the export and import of finished goods.\textsuperscript{23} These relatively simple transactions were

\begin{itemize}
  \item \textsuperscript{19} Descriptions of planned P.R.C. trade projects (including exports, imports, joint ventures, and compensation trade) are printed at the rear of each issue of \textit{China Business Review}.
  \item \textsuperscript{20} Hinman, \textit{supra} note 4, at 56.
  \item \textsuperscript{21} \textit{Id.} at 57.
  \item \textsuperscript{22} The Chinese preference for informal dispute resolution is discussed \textit{infra} at text accompanying notes 107-17.
  \item \textsuperscript{23} Even today, basic export and import sales are the predominant transactional type, as
\end{itemize}
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formalized through standardized contracts. Potential problems were readily anticipated and dispute resolution mechanisms were based on "direct adjustments" according to the terms of the contract.

As foreign trade and investment in the P.R.C. have intensified, more sophisticated commercial transactions have begun to appear. They include licensing, transfer of technological equipment and know-how, compensation trade, cooperative production, codesign, coexploitation of resources, and joint ventures. Projects contemplated under these agreements range from the importation of sophisticated factory equipment to the importation of an entire factory. The P.R.C.'s flexibility in accepting these agreements serves at least two purposes. First, it encourages foreign trade and investment by minimizing the structural requirements and restraints inherent in standardized transactions and by permitting negotiators to design agreements creatively to suit the needs and interests of the parties. Second, it allows the P.R.C. to pursue an "equity" participation strategy in financing its economic modernization. This approach is less risky for the P.R.C. than the assumption of massive international commercial debts.

These more complex transactions, however, often demand larger investments and risks. They also involve the parties in more intimate working relationships. A large-scale joint venture agreement for a hotel in Beijing, for example, contains many intricate specifications on financing and construction, and complex provisions concerning the shown by the summaries of the P.R.C. trade projects at the rear of each issue of China Business Review.

25. See infra note 206.
26. R. JIANXIN, TECHNOLOGY, supra note 2, at 3 (rather than importing complete equipment, the Chinese will import selectively basic components and materials, together with designs of complete factory equipment and key production techniques to boost their technological level and productivity.).
27. Id. at 1-3.
28. Shields, Spooner & Summerlin, Financing Sales to China, in DEVELOPMENTS, supra note 17, at 407. The commentators note that [a]s a wise, risk-averse investor, China has not chosen to plunge into international commercial debt markets and subject itself to high, fluctuating interest rates and scheduled amortization. Rather than immediately "leveraging" its economic modernization, the PRC has adopted a less risky approach which could be characterized in terms familiar to Westerners as an "equity" strategy. This is to say, a strategy of (1) rapid export expansion through use of more flexible trade practices, processing and assembly contracts, compensation trade and barter, (2) joint venture arrangements which tap foreign equity sources . . . and (3) subsidized government export credits.
management and marketing of the finished project. Unlike the basic export or import sales, these complex transactions give rise to problems which cannot be anticipated. Disputes of first impression undoubtedly will emerge from these innovative arrangements. It is important, therefore, for U.S. business executives to protect their interests by understanding particular transaction types and by negotiating dispute resolution provisions that reflect their anticipation and appreciation of the kinds of conflict that may occur.

Three common types of transaction that U.S. executives may encounter in U.S.-P.R.C. trade and investment projects are compensation trade, cooperative production, and joint ventures.

A. Compensation Trade

In compensation trade, the foreign party typically supplies some combination of equipment, expertise, materials, facilities, or financing, necessary for the production of a good in the P.R.C., while the Chinese complete the processing or manufacturing, contributing the necessary labor, land, management, and other elements of production. The foreign party generally is not involved in the management of the project or in the manufacturing process. As production expands, the Chinese compensate the foreign party, in whole or in part, with finished goods. These noncash “payments” frequently are made during installment periods ranging from three to five years in length. Be-

30. This type of transaction is called compensation trade, countertrade, or product buyback. This Article will use the term compensation trade throughout. But see Lubman, Institutional Changes in Trade with China, in DEVELOPMENTS, supra note 17, at 157, 180 (countertrade); CHINA TRADE HANDBOOK, supra note 1, at 174 (product buyback).
31. The Chinese have reportedly expressed interest in buying complete plants through compensation trade. Lubman, Institutional Changes in Trade With China, in DEVELOPMENTS, supra note 17, at 157, 181 [hereinafter Lubman, Institutional Changes].
32. CHINA TRADE HANDBOOK, supra note 1, at 174.
33. Shields, Spooner & Summerlin, supra note 28, at 419-20. The finished goods usually are produced from equipment supplied by the foreign party, but they may be unrelated to the equipment. This latter form of compensation trade is essentially a barter transaction. Id.
34. CHINA TRADE HANDBOOK, supra note 1, at 175. Typical examples of compensation trade include the following agreements: (1) the foreign party supplies all parts and materials and the Chinese party assembles the product for a “processing fee” which is deducted from the cost of parts; (2) the foreign party advances funds to enable the Chinese party to import parts and materials which together with domestically produced parts are used to manufacture the finished products; and (3) the foreign company supplies machinery and the Chinese
cause the foreign party supplying the equipment may not be well-suited for marketing the finished product, marketing arrangements may be made through another firm.\textsuperscript{35} Payment from the Chinese entity to the supplying partner therefore may be indirect.\textsuperscript{36}

Compensation trade was introduced in 1978 and popularized during the 1979 Spring Canton Fair.\textsuperscript{37} Guangdong Province alone reportedly has concluded over 800 agreements, amounting to over $300 million in trade.\textsuperscript{38} Compensation trade is an attractive form of joint participation because it serves the needs of both parties. The Chinese can increase their access to and knowledge of advanced foreign technology (e.g., through the negotiated use of patents, exposure to advanced production equipment, and training of work force), thereby improving the quality of their manufactured products. Because of the minimal capital expenditures on their part, financing problems are alleviated. Finally, the Chinese can utilize their manufacturing capabilities, while leaving the international marketing function, in which they have limited expertise, to foreign parties.\textsuperscript{39}

The foreign party also achieves important benefits through compensation trade. It allows entities already buying from the P.R.C. to supply the country with modern production equipment and know-how, thus improving the quality of the products they eventually will receive.\textsuperscript{40} The P.R.C. also offers comparatively low labor and land costs.\textsuperscript{41} In addition, compensation trade provides the foreign partner with an indirect way to sell consumption goods to the Chinese, thus enabling it to bypass prohibitions against marketing products directly in the P.R.C.\textsuperscript{42} Finally, because the Chinese are receptive to this form of transaction, it

\textsuperscript{35} Shields, Spooner & Summerlin, \textit{supra} note 28, at 418.

\textsuperscript{36} \textit{Id.} Indirect payment can be made through a fourth party. The foreign party borrows from a bank for the equipment and transfers the equipment to the Chinese party which manufactures the products. The Chinese manufacturer then transfers the product to a marketing firm which sells it on the world market. \textit{Id.}

\textsuperscript{37} \textit{CHINA TRADE HANDBOOK}, \textit{supra} note 1, at 174. \textit{See also id.} at 200 (discussion of Canton Fairs).

\textsuperscript{38} \textit{Id.} at 174.

\textsuperscript{39} \textit{Id.} at 175.

\textsuperscript{40} \textit{Id.} A foreign party also can minimize its direct involvement in manufacturing, but still negotiate terms that ensure that the value of the products received includes compensation for both the equipment supplied and the imputed interest. \textit{Note, supra} note 30, at 238.

\textsuperscript{41} \textit{CHINA TRADE HANDBOOK}, \textit{supra} note 1, at 174-75.

\textsuperscript{42} \textit{Id.} at 175. The indirect method of selling in the P.R.C. is accomplished through the use of coupons for finished products which are given to the foreign party. The foreign party then sells the coupons outside the P.R.C. to Chinese who send them to friends and relatives in the P.R.C. The resident Chinese redeem the coupons for the goods. \textit{Id.}
facilitates the access of foreign parties interested in selling equipment to the P.R.C.\textsuperscript{43} Compens...

\textsuperscript{43}id. Compens...
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Congress to amend the law.\textsuperscript{53} In addition, it prescribes structural and management characteristics, including the establishment of a minimum level of foreign participation of twenty-five percent.\textsuperscript{54} It also provides for flexible project duration,\textsuperscript{55} describes the permitted contributions of each party,\textsuperscript{56} requires the proportional division of profits, risks, and losses according to the proportional contributions of the parties,\textsuperscript{57} gives the venture’s Board of Directors broad powers and responsibilities,\textsuperscript{58} sets forth purchasing and marketing priorities,\textsuperscript{59} allocates financial obligations for major losses,\textsuperscript{60} and states general guidelines for dispute resolution.\textsuperscript{61} Finally, the law guarantees the protection of the foreign party’s resources and profits,\textsuperscript{62} provides for taxes and exemptions,\textsuperscript{63} and mandates banking, financial exchange, and remittance procedures.\textsuperscript{64} The basic requirements for establishing a joint venture are simple, according to Chinese officials. The venture must further: (1) the development of the four modernizations; (2) the augmentation of foreign exchange; (3) the improvement of management techniques and production technology; (4) the requirements of environmental protection; and (5) the reformation of old plants.\textsuperscript{65} The P.R.C. also has created the China International Trust and Investment Corporation (CITIC),\textsuperscript{66} a state-owned enterprise whose function is to “to introduce, absorb, and apply foreign investment, advanced technology, and advanced equipment for purposes of China’s national construction and

\textsuperscript{53} Id. art. 15.

\textsuperscript{54} Id. art. 4. Note that a ceiling on foreign participation in a given venture is not indicated. The prevailing view appears to be that the Chinese must have a majority percentage. See Weil, \textit{Technology Transfers}, \textsc{China Bus. Rev.}, Mar.-Apr. 1981, at 21, 22 (1981).

\textsuperscript{55} Joint Venture Law, \textit{supra} note 47, art. 12. The length of the agreements is longest for heavy industry, shorter for light industry, and shortest for tourism. Sample durations of existing joint ventures include 10 years for tourism, 15 years for a woolen mill, and 20 years for an electric lift manufacturer. R. Jianxin, \textit{Technology, supra} note 2, at 11.

\textsuperscript{56} Joint Venture Law, \textit{supra} note 47, art. 5.

\textsuperscript{57} Id. art. 4.

\textsuperscript{58} Id. art. 6. The Board of Directors determines the production plan of a joint venture. Government approval of the plan is not required, but the Board must file the plan with the appropriate department for reporting purposes. The Board has autonomy to purchase materials and equipment for use by the joint venture, either in the P.R.C. or from abroad. It can also determine employment policies. R. Jianxin, \textit{Technology, supra} note 2, at 9.

\textsuperscript{59} Joint Venture Law, \textit{supra} note 47, art 9.

\textsuperscript{60} Id. art. 13.

\textsuperscript{61} Id. art. 14.

\textsuperscript{62} Id. art. 2. \textit{See also} R. Jianxin, \textit{Technology, supra} note 2, at 12.

\textsuperscript{63} Joint Venture Law, \textit{supra} note 47, arts. 7, 11.

\textsuperscript{64} Id. arts. 8, 10.

\textsuperscript{65} R. Jianxin, \textit{Technology, supra} note 2, at 9.

\textsuperscript{66} For a description of CITIC, its enabling statute (principles, operation, organization, and management), and a list of its members see \textit{China Trade Handbook, supra} note 1, at 189-94.
promotion of socialist modernization of China pursuant [to the Joint Venture Law]."\(^67\) CITIC representatives act on a commissioned basis as negotiators or mediators between foreign corporations and Chinese entities interested in forming joint ventures.\(^68\)

The treatment of joint ventures under Chinese law is still largely unknown. The Chinese government continues to issue explanatory regulations and laws, including regulations on income taxes,\(^69\) registration,\(^70\) labor management,\(^71\) foreign exchange controls,\(^72\) and special economic zones.\(^73\) The Joint Venture Law is also the object of active legal scholarship.\(^74\) Its practical importance ultimately will depend on whether the joint venture comes to be perceived as a satisfactory vehicle for foreign investment in the P.R.C.

The initial flurry of interest in joint ventures has, perhaps temporarily, subsided.\(^75\) Joint ventures demand a much more complicated and intimate working relationship between the parties than other equity arrangements, such as compensation trade or cooperative production. The parties anticipate that difficult issues may arise, yet lack sufficiently detailed experience to provide for them. In light of these difficulties the Chinese have become more cautious in approving joint ventures,\(^76\) and foreign parties have become less eager to negotiate them.\(^77\) In 1980, for

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68. Id. at 191-92, citing CITIC Statute, arts. 6-11.
70. See id. at 1 (referring to the Regulations on the Registration of Joint Ventures Using Chinese and Foreign Investment).
72. See R. Jianxin, Law Work, supra note 1, at 3-4 (summarizing Foreign Exchange Control Regulations).
73. See id. at 1 (referring to Regulations on Special Economic Zones in Guangdong Province).
75. Within three months of promulgating the Joint Venture Law, the P.R.C. received about 100 inquiries from foreign firms. China Trade Handbook, supra note 1, at 190.
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instance, foreign participants invested only $177 million and the Chinese invested only $35 million in joint ventures in the P.R.C., considerably less than the $600 million reportedly invested in cooperative production. 78

As of spring 1981, China had approved only twenty-four joint ventures. 79 These projects differed widely in size and variety of foreign interests and product areas. They included projects for airline catering, manufacture of woolen yarns and sweaters, production of watch components, machinery leasing, and manufacture of electronic instruments. Foreign partners included entities from Hong Kong, France, Japan, and the United States. 80

The joint venture agreement between the China Construction Machinery Corporation, 81 Schindler Holding AG (Switzerland), and Jardine Schindler (Far East) Holdings S.A. (Hong Kong) has been publicized widely as an example of a successful joint venture. 82 The foreign participants in the Schindler joint venture reportedly received a net profit of $900,000 from the first year’s business. 83 This amount represented a twenty-three percent return on their initial investment in the joint venture. 84

The object of the Schindler joint venture is to manufacture products, conduct research and development, and improve maintenance services for the elevator, escalator, and passenger conveyor industry in the P.R.C. 85 The Chinese entity contributed buildings, machinery, and inventory (approximately seventy-five percent of total equity); the foreign participants have contributed cash. 86 Through licensing and franchising agreements, the joint venture has obtained access to the technology and know-how for the design, manufacture, installation, and maintenance of Schindler products. The joint venture agreement designates the foreign participants as the exclusive agents for export sales. The joint venture is to last twenty years, subject to multiple five year exten-

80. Id. Hong Kong enterprises have been the most frequent foreign participants.
81. See discussion on foreign trade corporations, infra, at text accompanying notes 171-
84.
84. Id.
85. CHINA TRADE HANDBOOK, supra note 1, at 197.
86. Weil, supra note 79, 22-23.
Finally, the contract includes a dispute resolution provision for arbitration in London by the arbitral institution of the International Chamber of Commerce (ICC).

C. Cooperative Production

In cooperative production, a third type of transaction likely to be encountered by U.S. executives, both parties participate in the production process and share in the profits derived from the sale of the finished goods. The Chinese and foreign entities each contribute some combination of raw materials, semi-processed goods, component parts, and financing. The Chinese typically do the final assembly and complete the production process. They also negotiate terms that minimize their capital outlay while maximizing their involvement in management and manufacturing functions. Cooperative production agreements specify a period, usually from ten to twenty years in length, during which the entire project gradually is turned over to the Chinese entity so that it can manufacture the goods independently. Cooperative production, therefore, serves the P.R.C.'s long-term interests, while the foreign party receives its return on investment within a relatively short period.

Foreign parties reportedly have invested over $600 million in cooperative production projects. Many of the projects are located in Guangdong Province or other regions where foreign investment is actively encouraged. Examples of the projects include the construction and operation of apartment buildings, a restaurant, a luxury hotel, and facilities for the production of sophisticated technological equipment.

III. Fundamental Values and Techniques Relevant to Dispute Resolution

The transactions discussed above involve parties with different cultural backgrounds. These parties are likely to bring very different values and techniques to the resolution of disputes that may arise over the

87. CHINA TRADE HANDBOOK, supra note 1, at 197.
88. Soble, supra note 82, at 16 (dispute resolution clause).
89. See generally Reynolds, supra note 74, at 33; Chinese Attracted More Than $1 Billion In Investment From Foreigners Last Year, Wall St. J., Mar. 12, 1981, at 35, col. 2. Cooperative production is also called coproduction.
90. Reynolds, supra note 74, at 33. In some cooperative production projects, the foreign party provides 100% of the necessary capital.
91. Id (ten year turnover period from Italian company to Chinese First Ministry of Machine Building).
93. Id. Other examples are given in Reynolds, supra note 74, at 33.
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course of a project. A familiarity with the basic values, analytic techniques, and interpretative norms with which the Chinese approach the dispute resolution process is therefore helpful to U.S. executives and lawyers contemplating commercial projects with entities from the P.R.C. These values and techniques are reflected in many aspects of the P.R.C.'s foreign trade. They are particularly relevant to an understanding of (1) the kind of relationship the Chinese seek with foreign business partners; and (2) the ways in which the Chinese analyze problems and possible solutions during the dispute resolution process.

A. Values in the Relationship Between the Parties

The Chinese believe that an amicable relationship between business partners is very important and look for foreign partners who share similar principles and values about the nature of business relationships. In particular, the Chinese seek trade relationships which emphasize: (1) each party's independence and self-reliance; (2) mutual benefit and equality; and (3) minimal third party intervention in the dispute resolution process.

1. Independence and Self-Reliance

The principle of independence is described by the Chinese as "keeping initiative in our own hands," acting freely, and acting in the absence of coercion or force. It is closely related to the P.R.C.'s longstanding policy of self-reliance. Both concepts are derived from the notion of mutual respect of sovereigns, and are based on the assumption that the P.R.C. should be able to determine its own destiny without foreign interference or control. In the context of dispute


95. Commentators have referred to the fundamental values and interpretative norms in their discussion of Chinese foreign trade and dispute resolution, but have not categorized them in this particular way. See supra note 94. The author believes, however, that this particular grouping of the values and norms facilitates the practical understanding and application of these ideas.


98. Fenwick, supra note 97, 200-02.
resolution, the principles of independence and self-reliance mean that both parties should enter into and participate in dispute resolution procedures voluntarily.99

The principles of independence and self-reliance are interpreted flexibly100 so that the practical goals of dispute resolution will not be obstructed by unnecessary ideological differences. The P.R.C.'s policy on the importation of technology provides an example of its capacity to blend the principles of independence and self-reliance with pragmatic objectives. Rather than permitting indiscriminate acquisition of technology, the P.R.C. selectively chooses projects that help build the national infrastructure:

The technology to be brought in must serve the purpose of producing benefits to the sector of national economy which enjoys priority in investment, . . . must serve communication and transportation, . . . must serve the development of agriculture and light industry, . . . must serve the tapping of potential renovation and reconstruction of existing factories, . . . and must serve the improvement of management of industrial enterprises with scientific methods.101

Contract terms, such as those in cooperative production agreements, also permit the P.R.C.'s eventual independent operation of advanced technology and facilities. Therefore, the P.R.C. is building long-term independence and self-reliance by making carefully planned concessions.

2. Mutual Benefit and Equality

The second major principle is mutual benefit and equality.102 It focuses on the relationship between the Chinese entity and the foreign party, and requires that each party be treated on an "even footing."103 Preferential treatment should not be extended to a party on the basis of nationality.104 To illustrate, a Chinese representative describes how the P.R.C.'s arbitral institutions would apply the principle of mutual benefit and equality:

102. Reghizzi, Trade With Italy, in FOREIGN TRADE, supra note 3, at 169, 175; Holtzmann, supra note 96, at 263.
103. Holtzmann, supra note 96, at 263. The P.R.C. can minimize the possibility of an unequal bargaining position by selecting trading partners who, at the outset, have comparable risk and interest commitments.
104. Id.
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Their treatment of the disputing parties is one of equality, irrespective of the size of the countries they come from and the amount of capital they possess . . . They are firmly opposed to despotic hegemonism in international trade and marine transport by deceit and blackmail, the big bullying the small and the strong domineering the weak; and are resolutely opposed to great-power chauvinism and national egoism in making use of arbitration to favour the party of their own nationality.105

In the context of the dispute resolution process, the principle of mutual benefit and equality requires that the process be objective and not use a biased approach to protect any special interests. The conflict should be appraised on the merits, and proceedings should be conducted in a reasonable and fair manner. For example, if the law of a non-socialist country or arbitration outside the P.R.C. is perceived to be inconsistent with these requirements, it should not be included in the terms of the dispute resolution provision.106

3. Minimal Third Party Intervention

The Chinese dislike all forms of adjudication that involve formalized third party intervention.107 This dislike includes arbitration and litigation. An old Chinese proverb states that it is better “to die of vexation than to get involved in a lawsuit.”108 The negative attitude is reflected in another saying: “To enter a court of law . . . is to enter a tiger’s mouth.”109 These adages describe the general Chinese sentiment about adjudication, but they do not explain why these views prevail.

This attitude toward dispute resolution can be traced to beliefs historically rooted in Chinese culture. In Imperial China, the use of formalized laws to affect behavior, instead of the use of moral education or a system of virtues, was viewed as a weak and inferior alternative.110 This Confucian attitude emphasized compromising, yielding, and mediating in the settlement of civil and commercial disputes.111 Failure to resolve differences by informal means implied that the parties were not

106. See Holtzmann, supra note 96, at 263. The law of a socialist country or a provision for arbitration in the P.R.C. should not be included in the contract provisions if it would interfere with the foreign party's mutual benefit and equality.
107. See generally Li, Reflections on the Current Drive Toward Greater Legalization in China, in DEVELOPMENTS, supra note 17, at 81, 84-86 [hereinafter Li, Reflections]; Hinman, supra note 4.
109. Id.
110. Hinman, supra note 4, at 59-63.
"reasonable and honorable." The use of formalized third party intervention, such as arbitration, was undesirable because it resulted in the loss of dignity.

These beliefs were premised on the importance of maintaining friendships in a close community where amicable long-term relationships were necessary for a productive and peaceful society. This philosophy has shaped the Chinese view of foreign trade relationships, in which trading partners are seen as "friends" in an international community.

If a disagreement arises over a particular transaction, the disputants know that they must continue to live together and to deal with each other after the dispute is resolved, and it generally is more important to preserve the overall relationship—or at least not to render impossible the reestablishment of good relations in the near future—than to assert one's "rights" to the limit in each specific instance. Indeed, often the last thing one would want in such circumstances is to have disputes settled by an outside agency, such as a court, where the antagonistic positions of the two parties become crystallized and strengthened.

Although the traditional preference for mediation and other informal means of dispute resolution continues in the P.R.C., the classical Chinese model has been modified. Discussions now are characterized by less compromise; conclusions on actual fault and responsibility may be reached. Furthermore, concern for familial and neighborhood relationships is being replaced by a concern for maintaining amicable business relationships.

B. Techniques of Analysis and Norms of Interpretation

The analysis of problems and issues, the consideration of alternative solutions and the interpretation of particular events are essential aspects of the dispute resolution process. The Chinese bring certain techniques to this process: (1) fact-finding; (2) "dividing one into two"; (3) honoring the contract; and (4) adhering to international practices.

112. Li, Reflections, supra note 107, at 86.
113. Hinman, supra note 4, at 60.
114. Holtzmann, supra note 96, at 276.
115. Id. (friendship is a broad concept which embraces cooperation, cordiality, and loyalty).
116. Li, Reflections, supra note 107, at 86.
117. Hinman, supra note 4, at 60-61.
118. See generally Holtzmann, supra note 96, at 278-82; P.R.C. Report, supra note 94, at 260; J. Greenfield, supra note 94, at 2 (the method used to achieve a result is more important than the result itself).
1. **Fact-finding**

Disputes are often accompanied by confusion about what actually occurred and why problems developed. One party may base its complaints on mistaken assumptions. The other party may react emotionally, which may color its interpretation of the relevant events. Extensive "fact-finding" is a method used to find the "truth." It utilizes the systematic compilation of all appropriate documents, a thorough investigation of events, and a comprehensive study of legal obligations.

In arbitral fact-finding, for example, the fact finders examine the statements of facts from the disputing parties, but also listen to the views of other persons concerned, and make investigations on the market or on the spot whenever necessary and possible, which enables them to draw a clear line between the right and wrong, to ascertain liability, to be fair and reasonable and truth-seeking. This process diminishes the possibility of a biased evaluation.

2. **"Dividing One Into Two"**

"Dividing one into two" is an approach by which a conflict is analyzed from the perspective of each party. It seeks to disclose the fault of each party so that both sides recognize their mutual responsibility for the problem. At the same time, each party reveals the constraints under which it had to operate, including those caused by unforeseen developments. The other side can then appreciate the difficult circumstances faced by the opposing party. Dividing one into two does not require that the settlement be a balanced compromise, achieved by mutual concessions. If concessions are made, however, the parties can tailor them to each side's particular requirements.

This approach can be illustrated in the negotiation of settlement terms. For example, the parties may conclude that the foreign entity owes the Chinese entity extensive damages. The foreign entity reveals,
however, that it is experiencing a short-term cash flow problem. Because it would be difficult for the party to make an immediate cash settlement, compensation for damages might be made through negotiating concessions on the next large-scale transaction between the parties. If, on the other hand, it would not be feasible for the injured Chinese party to receive its settlement through a subsequent deal, an installment payment plan might be arranged.

3. **Honoring the Contract**

The Chinese approach to the interpretation of agreements in dispute resolution is based on the principle of “honoring the contract.” The Chinese have long been known for their strict adherence to contractual terms. Their emphasis on contractual obligations is not based on legal doctrine, but rather on the belief that parties who voluntarily enter an agreement on the basis of mutual benefit and equality should honor the integrity of their commitment. The contract is read strictly and literally. An analysis of its terms is a critical part of the fact-finding process. Its delineations of the parties’ intentions, rights, obligations, and limitations on liabilities serve as a guide for resolving the conflict, and the stipulated dispute resolution mechanisms are apt to be followed.

4. **Adherence to International Practices**

Disagreements may be resolved through reference to international practices. The Chinese recognize that active participation in international trade mandates the consideration of basic international practices and customs. Although there are differences in emphasis, the P.R.C.’s legal forms and techniques in international transactions are, in fact, generally similar to international practices. The Chinese believe, however, that international customs should not be followed blindly, without regard to their own interest.

Furthermore, the Chinese traditionally distinguish between interna-

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123. *See R. Jianxin, Technology, supra* note 2, at 9. (“China ever ‘keeps to contracts,’ ‘honours its words’ and ‘strictly adheres to the provisions of a contract.’”).


129. J. Greenfield, *supra* note 94, at 8 (“[I]n practical terms the Chinese point of view is that international law operates only on national internal acceptance and implementation of such law and not on the bases of international obligations imposed by external processes.”).
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tional “law” and international “practices.” The Chinese understand international practices to be customs universally followed by the international community. The development of these practices is an ongoing dialectical international process that evolves through the interaction of the parties. The practices may be deliberately vague yet still uniformly understood. The Chinese contrast international practices with international law, which they consider to be written law largely created by Western thinking. In their view, it has limited value to countries that lack military, political, and economic power to defend themselves.

IV. Legal Structures

A. Chinese Laws

The U.S. practitioner involved in U.S.-P.R.C. commercial transactions should be aware that the P.R.C. currently is involved in the monumental task of creating a system of formalized laws. This legalization movement requires not only writing substantive laws, but also changing traditionally negative attitudes about the law and the legal profession. Historically, the Chinese have been skeptical of the concept of law. On the other hand, the P.R.C.’s interest in developing domestic and foreign commercial activities requires a system of laws on which business executives can rely. The development of Chinese laws, therefore, will attempt to balance an historical skepticism of law against the desirable pragmatic role that laws now can serve.

130. Id.
131. Id. at 230. The absence of formal codes of law in Chinese history suggests that the vagueness is deliberate.
132. Hinman, supra note 4, at 57-59; Lubman, Practice, Policy & Law, supra note 4, at 3-4.
133. Hinman, supra note 4, at 58-59 & nn.43-44 (the P.R.C.’s involvement with international law has been negative).
134. See generally Li, Reflections, supra note 107; J. Greenfield, supra note 94, at 6; Hinman, supra note 4, at 61. In the 1950’s, the P.R.C. began a legalization movement, establishing criminal and civil codes. It was followed by a period of delegalization and delegalization.
135. Pattison, China’s Framework for Foreign Investment, 13 Law & Pol’y Int’l Bus. 89, 95 (1981). In 1979, seven new laws were promulgated, and during the Sixth National People’s Congress a number of explanatory regulations were issued.
136. Li, Reflections, supra note 107, at 88.
137. Before the Revolution, the Chinese believed that the Western powers used their laws to exploit unfairly Chinese property, resources, and people. After the Revolution, this skepticism of law was formalized as a basic Marxist-Leninist belief that law is a manipulative tool of the ruling class. Hinman, supra note 4, at 59-67. See also, Cohen, Is There Law in China?, 5 Int’l Trade L.J. 73 (1979); Essays on China’s Legal Tradition (J. Cohen ed. 1980)(discussion of the Chinese conception of law).
138. Hinman, supra note 4, at 63-67; R. Jianxin, Law Work, supra note 1, at 1.
The legalization movement in the P.R.C. affects international commercial dispute resolution in numerous ways. First, the P.R.C.'s substantive laws will be applied to dispute resolution conflicts if so indicated in contract provisions. Recourse to Chinese law also may occur if no governing law clause is included in the contract or if conflict of laws doctrines indicate that it should govern. In addition, the broader legalization movement has led to the development of formalized dispute resolution mechanisms which are coming to be seen as standard commercial and legal practice. The P.R.C. is restructuring institutions that are involved in dispute resolution, such as the arbitral bodies and the court system. It also is redefining the role of lawyers in society and in dispute resolution, while implementing programs to train professionals to carry out newly defined legal responsibilities. Finally, substantive laws, such as the Joint Venture Law and regionally promulgated regulations, prescribe which dispute resolution mechanisms are permissible for activities within their ambit.

1. Joint Venture Law

The Joint Venture Law was promulgated by the Second Session of the Fifth National People's Congress in July, 1979. Article 14 provides that:

[d]isputes arising between the parties to a joint venture which the Board of Directors fails to settle through consultation may be settled through conciliation or arbitration by an arbitral body of China or through arbitration by an arbitral body agreed upon by the parties. The provision is very general. Its meaning has been clarified through Chinese publications, but many uncertainties remain. Article 14 applies to joint venture agreements, regardless of the nationality of the foreign party, but not to other transactions such as compensation trade or cooperative production projects.

Article 14 indicates that the Board of Directors of the joint venture
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should try to resolve conflicts through consultation. They should attempt to settle problems internally, without third party intervention. The Directors have broad powers in decision making and management; they also will have flexibility in attempting to resolve a conflict.

If the dispute cannot be settled internally, the parties may proceed to conciliation or arbitration. These processes are stated in the disjunctive, so they are apparently alternative options. Arbitration may be pursued even though no attempt at conciliation has been made. Although this option is not expressly prescribed, the law clearly allows and encourages the parties to use variations of conciliation or arbitration, such as joint conciliation or "combining arbitration and conciliation."

The Joint Venture Law provides few specific guidelines for arbitral proceedings. It states explicitly that the arbitral body may be Chinese or, in the alternative, the "arbitral body agreed upon." It does not indicate the place of arbitration, the applicable arbitral rules or substantive laws, or the enforcement procedures for the recognition of the arbitral provision or the arbitral award. These terms are subject to negotiation between the parties.

A cursory examination of article 14 might suggest that the selection of the arbitral body implicitly determines the location, rules, and laws that govern the arbitration. If a Chinese arbitral body is selected, one might assume that the arbitration would occur in the P.R.C. under Chinese rules and according to Chinese law. In the absence of terms on location, rules, and law, this would, by default, be the probable result. It is important to note, however, that article 14 does not preclude the negotiation of these terms.

Article 2 of the Joint Venture Law raises the issue of whether the substantive law is predetermined. It states, in part, that "[a]ll the activities of a joint venture shall be governed by the laws, decrees and pertinent rules and regulations of the People's Republic of China." If the dispute resolution process, and in particular the arbitration proceedings, are considered "activities" of the joint venture, then Chinese law would apply. Commentators have reached different conclusions on whether the parties need to negotiate a governing law clause. One writer assumes that unless the parties agreed otherwise, Chinese law

144. It is unclear whether consultation is required or merely encouraged, or whether the Board of Directors is the exclusive participant in consultation.
will apply. This preference for Chinese law seems logical, he notes, since the joint venture is located and incorporated in China. Even if article 2 were applicable, a second commentator observes that problems on substantive law would still remain. Issues might arise for whose resolution the Chinese have developed no law. In addition, disputes might arise outside the P.R.C. if the joint venture conducts marketing or maintenance functions in a third country. Depending on the construction of the phrase “activities of a joint venture,” it is unclear which law would prevail in the absence of a governing law clause.

2. Additional National and Regional Regulations

The P.R.C. continues to issue national regulations related to joint ventures and other foreign trade projects. These include statutes on income tax, labor management, foreign exchange, and registration. There are no additional national regulations on dispute resolution, however.

Regional and local authorities also may issue trade-related regulations. For example, Guangdong and Fujian, coastal provinces which have long played major roles in foreign trade, now are authorized to promulgate regulations and set up special economic zones designed to attract foreign investments. These special economic zones are subdivided into industrial areas. Regulations may be promulgated specifically for the province, the special economic zone, or the industrial area.

At least one local regulation on dispute resolution has been promulgated. Skehou Industrial Area in the Shenzhen Special Economic Zone located in Guangdong Province has particular rules for the resolution of disputes involving joint ventures. It states that the parties should endeavor to settle disputes through friendly consultation. If this attempt is unsuccessful, the parties may pursue resolution through conciliation or arbitration by a Chinese arbitral body or an arbitral body agreed upon by the parties. The Skehou regulations are similar to article 14 of the Joint Venture Law. They do not require, however, that consultation meetings be conducted by the Board of Directors, as required by the Joint Venture Law. This difference may appear slight,

146. Cohen, Huang & Nee, China’s New Joint Venture Law, in DEVELOPMENTS, supra note 17, at 195, 232.
147. Id. at 204.
148. Soble, supra note 82, at 16.
149. See supra note 134.
150. Pattison, supra note 135, at 162; CHINA TRADE HANDBOOK, supra note 1, at 207-22.
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but could be significant in certain circumstances.\textsuperscript{153}

The importance of regional and local regulations is likely to increase. As decentralization of the institutional structure continues,\textsuperscript{154} and local authorities are given more autonomy, competition and market stratifications will grow.\textsuperscript{155} The provinces, special economic zones, and industrial areas will implement regulations to help them compete more effectively for the type of foreign investment they wish to attract, and future local regulations thus may include variations in dispute resolution guidelines that are tailored for certain types of transactions.

B. The U.S.-P.R.C. Trade Agreement of 1979

In recent years, the United States and the P.R.C. have signed numerous bilateral agreements, some of which are of vital importance to trade relations.\textsuperscript{156} These agreements cover a broad range of topics and confirm the two countries' commitment to the normalization process.\textsuperscript{157}

The Agreement on Trade Relations Between the United States of America and the People's Republic of China,\textsuperscript{158} signed July 7, 1979, is particularly important to an analysis of the dispute resolution process. The Trade Agreement's objective is to "develop further economic and trade relations between both countries on the basis of the principles of equality and mutual benefit as well as nondiscriminatory treatment"\textsuperscript{159} and "to promote the continuous, long-term development of trade between the two countries."\textsuperscript{160} One of its central provisions is that commercial contracts should be based on customary international practices.\textsuperscript{161} It also grants the P.R.C. most favored nation status,\textsuperscript{162} al-

\textsuperscript{153} If the dispute involves allegations of misconduct by Board members, consultation should involve other representatives from the Chinese and American companies. This would allow for some fresh input by joint venture participants.

\textsuperscript{154} Pattison, \textit{supra} note 135, at 97-101.

\textsuperscript{155} \textit{Id} at 164 (Shekou industrial zone concentrates on joint ventures, while Shenzhen encourages a variety of transactions).

\textsuperscript{156} \textit{Id}. at 103 n.66 (summary of numerous agreements on technical cooperation, academic exchanges, etc.). For a comprehensive compilation of the 22 agreements signed in 1979, see \textit{UNITED STATES—CHINA RELATIONS IN 1979: AGREEMENTS, PROTOCOLS, ACCORDS, AND UNDERSTANDINGS, 14 CHINESE LAW & GOV.} 3 (T. Fingar & V.H. Li ed. 1981).

\textsuperscript{157} Fingar & Li, \textit{Introduction}, to 14 CHINESE LAW & GOV., \textit{supra} note 156, at 1-15 (stages of normalization and overview of the role of treaties in normalization).

\textsuperscript{158} Agreement on Trade Relations, July 7, 1979, United States-The People's Republic of China, T.I.A.S. No. 9630, \textit{reprinted in} 18 I.L.M. 1041 (1979) [hereinafter Trade Agreement].

\textsuperscript{159} \textit{Id}. preamble.

\textsuperscript{160} \textit{Id}. art. 1, at § 1.

\textsuperscript{161} \textit{Id}. at § 3.

\textsuperscript{162} \textit{Id}. art. 2.
allows U.S. companies and banks to establish offices in China,\textsuperscript{163} promotes trade-related visits,\textsuperscript{164} clarifies financing and banking arrangements,\textsuperscript{165} and provides for the protection of patents, trademarks, and copyrights.\textsuperscript{166}

Article 8 contains three paragraphs on dispute resolution:

1. The Contracting Parties encourage the prompt and equitable settlement of any disputes arising from or in relation to contracts between their respective firms, companies and corporations, and trading organizations, through friendly consultations, conciliation or other mutually acceptable means.

2. If such disputes cannot be settled promptly by any one of the above-mentioned means, the parties to the dispute may have recourse to arbitration for settlement \textit{in accordance with provisions specified in their contracts} or other agreements to submit to arbitration. Such arbitration may be conducted by an arbitration institution in the People's Republic of China, the United States of America, or a third country. The arbitration rules of procedure of the relevant arbitration institution are applicable, and the arbitration rules of the United Nations, Commission on International Trade Law recommended by the United Nations, or other international arbitration rules, may also be used where acceptable to the parties to the dispute and to the arbitration institution.

3. Each Contracting Party shall seek to ensure that arbitration awards are recognized and enforced by their competent authorities where enforcement is sought, in accordance with applicable laws and regulations.\textsuperscript{167}

Article 8 applies to disputes arising from all U.S.-P.R.C. transactions. Therefore its more detailed provisions apply to U.S.-P.R.C. joint ventures and may be used to clarify the general terms of article 14 of the Joint Venture Law.\textsuperscript{168}

The Trade Agreement encourages settlement by friendly consultations, conciliations, or other mutually acceptable means. These processes are listed in the disjunctive, so they are alternative options, rather than sequential steps in the dispute resolution process; either consultation, conciliation, or other mutually accepted means should be attempted. It is unclear what the phrase "other mutually acceptable means" includes, although it certainly allows other informal dispute resolution processes and their variations, such as joint conciliation or

\textsuperscript{163} \textit{Id.} arts. 3, 5. For a list of the 24 firms registered to establish offices in the P.R.C., see Seligman, \textit{Opening Your Resident Office}, CHINA BUS. REV., Mar-Apr. 1981, at 54.

\textsuperscript{164} Trade Agreement, \textit{supra} note 158, art. 3.

\textsuperscript{165} \textit{Id.} art. 5.

\textsuperscript{166} \textit{Id.} art. 6.

\textsuperscript{167} \textit{Id.} art. 8 (emphasis added).

\textsuperscript{168} See \textit{supra} notes 141-48 and accompanying text.
combining arbitration and conciliation. It also leaves open more ingenious possibilities, such as negotiated recourse to the courts.

Under the terms of the Trade Agreement, if settlement cannot be reached through informal proceedings, the parties may move to arbitration. While the details on the arbitral proceedings are negotiable ("in accordance with provisions specified in their contracts"), general guidelines for the location and rules of the arbitration are provided in paragraph 2. According to paragraph 2, arbitration may occur in (1) the P.R.C., (2) the United States, or (3) a third country. The applicable rules may be (1) those of the "relevant arbitral institution," (2) UNICITRAL rules, or (3) other rules if they are acceptable to the parties and the arbitral institution. Because article 8 of the Trade Agreement specifically permits the negotiation of contract terms providing for arbitration in third countries and for the use of rules different from those of the P.R.C.'s arbitral institutions, U.S. executives should feel justified in pressing for such terms should they be thought especially desirable. In contrast, article 8 does not address specifically what substantive law the arbitral body should apply, or which arbitral body should sit in the country selected as the site of arbitration. It is therefore unclear whether the Chinese subsequently would accept provisions negotiated by the parties that explicitly stipulated the arbitral institution to hear the dispute, or that predetermined the substantive law to be applied.

V. Government Institutions

A survey of the P.R.C.'s institutions involved in the negotiation of trade contracts is necessary in order to understand the relationships among national government entities, trade contract negotiators, and end-users. A discussion of the Chinese arbitral institutions will clarify the structure of these institutions, their relation to State Ministry offices, and the different roles they play in the dispute resolution process in U.S.-P.R.C. commercial transactions.

169. See Surrey & Soble, supra note 145, at 16. Note that while the Joint Venture Law does not preclude the negotiation of such terms, the failure of the statute specifically to endorse them would appear to make their negotiation more difficult.

170. See supra text accompanying note 167. The Trade Agreement's discussion of the enforcement of arbitral awards will be deferred until the general consideration of the enforceability of arbitral provisions and awards. See infra notes 297-306 and accompanying text.
A. *Institutions Responsible for the Negotiation of Foreign Trade Contracts*

The P.R.C.’s Ministry of Foreign Trade is responsible for general trade relations with foreign countries, including the overall planning and implementation of import, export, and foreign investment programs.\(^{171}\) It reports to the State Council, which in turn receives its authorizations and directives from the National People’s Congress or the National People’s Congress Standing Committee.\(^{172}\)

The Ministry of Foreign Trade supervises the activities of the foreign trade corporations (FTCs), which traditionally have borne primary responsibility for negotiation with foreign entities.\(^{173}\) The twelve FTCs are organized by product area, (e.g., arts and crafts, chemicals, machinery) or by functional specialty (e.g., purchasing of whole plants and licensing of foreign technology).\(^{174}\) They represent end-users\(^{175}\) or production units of the product areas, but typically they do not own their own production facilities.

Although foreign entities in the past have negotiated almost exclusively with the FTCs, end-users themselves or their representatives are now actively participating in the process.\(^{176}\) End-users can set up their own corporations as negotiating entities.\(^{177}\) Some factories, encouraged by provincial organizations established to promote trade in their areas, are beginning to deal directly with foreign buyers.\(^{178}\) On the national level, the P.R.C. has created corporations keyed to specialized industries, which operate under ministries other than the Ministry of Foreign Trade.\(^{179}\) These include the China Coal Industry Technology and Equipment Corporation, the China National Electronic Component Corporation, and the China Metallurgical Import-Export Corporation.\(^{180}\) In addition, Chinese firms may be represented by agents outside the P.R.C., such as those located in Hong Kong.\(^{181}\)

These changes are contributing to an increasing decentralization of

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172. Id. at 63.
174. See *China Trade Handbook*, supra note 1, at 114-25 (list of all FTCs, their officers, and principal trade commodities).
175. See id. at 163 (definition of end-users).
176. End-users usually may assume active roles in the negotiations until the final details are settled. Lubman, *Contracts*, supra note 100, at 768.
178. Id. at 166.
179. Pattison, supra note 135, at 100.
180. See id.
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the foreign trade institutional structure. They have been spurred by complaints of inefficient state bureaucracy and demands by local units for increased autonomy. The trend toward decentralization has eased what was once the rigid administration of trade activities through head offices in Beijing.

Decentralization has important implications for the dispute resolution process. It has created, at least temporarily, difficulties for U.S. entities which are faced with an array of different negotiating units with which they must bargain for dispute resolution contract provisions or with which they must resolve disputes. Although all Chinese entities are state-owned, the increasing autonomy of local units or specialized units can be expected to produce a growing diversity of objectives and interests, and differing degrees of negotiating experience and skill. Different Chinese entities' views on and familiarity with foreign trade practices, including dispute resolution mechanisms, are apt to vary greatly. Parties may need to tailor resolution provisions creatively so they are appropriate for the particular transaction. Finally, given this complexity, generalizations about the dynamics of the dispute resolution process will have to be assessed carefully for their applicability to specific circumstances.

B. Arbitral Institutions

The Ministry of Trade also directs the activities of the China Council for the Promotion of International Trade (CCPIT), whose general mandate is to promote trade with noncommunist countries. Its activities include organizing P.R.C. trade delegations and exhibitions traveling abroad, and hosting foreign delegations and exhibitions visiting the P.R.C.

183. Lubman, Institutional Changes, supra note 31, at 161-68.
184. See Li, State Control of Foreign Trade After Liberation, in FOREIGN TRADE, supra note 3, at 344-58 (state control of trade corporations and trade policies in the 1950's and 1960's).
185. Pattison, supra note 135, at 101 n.31 (final restructuring following the 1981-1990 Ten Year Plan will result in streamlining of trade procedures).
186. See generally Jianxin, The role of the CCPIT, E. ASIAN EXEC. REP., Feb., 1980, at 4; CHINA TRADE HANDBOOK, supra note 1, at 113.
187. Brown, supra note 186, at 126. The Canton Fair, for example, is a major responsibility of the CCPIT, although the Fair's importance will probably diminish as decentralization of the institutional structure continues. Id. See also China Plans Cutbacks at Canton Trade Fair, Wall St. J., Dec. 28, 1981, at 13, col. 4.
The CCPIT also plays a substantial role in the dispute resolution process. Dispute resolution is the particular focus of three CCPIT bodies: the Department of Legal Affairs and the two arbitral institutions, the Foreign Economic and Trade Arbitration Commission (FETAC) and the Maritime Arbitration Commission (MAC). The Department of Legal Affairs serves an expanding role in providing legal information, counseling on foreign trade matters, and clarifying the P.R.C.'s position on commercial dispute resolution. The Department also performs many of the routine administrative functions of the arbitral institutions. Three of its sections specialize in dispute resolution: (1) a foreign trade arbitration section, which examines problems arising from foreign trade contracts; (2) a maritime section, which considers maritime-related disputes; and (3) a research section, which analyzes dispute resolution procedures used in international practices and maintains contact with arbitral institutions throughout the world. Working through the CCPIT, the research section attempts to educate Chinese government officials and negotiators about dispute resolution mechanisms.

FETAC and MAC have similar procedural rules for arbitral proceedings and share a common overall goal:

The aim of the FETAC and the MAC in handling foreign trade and maritime cases is not only to obtain reasonable settlement of disputes but also through such settlement to help promote development of trade relations between the Chinese people and other peoples in the world. FETAC carries out this broadly defined goal by assisting in the resolution of a wide range of foreign trade disputes, including: (1) all disputes arising from contracts for purchase or sale of merchandise in foreign trade or contracts for commissioning agencies to purchase or sell merchandise; (2) disputes arising from transportation, insurance, safe-keeping of merchandise, etc.; and (3) disputes arising from other matters of business in foreign trade. The scope of FETAC's jurisdicti-
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tion was widened in February, 1980 to include "[d]isputes arising from economic and trade dealings in joint ventures with Chinese and foreign investment, building of factories by foreign investors, mutual credits and loans between Chinese and foreign banks, patents, technical know-how, trademarks and so forth." 

In view of this broad mandate, FETAC seems likely to play a more prominent role in the resolution of commercial disputes involving parties from the U.S. and the P.R.C. FETAC currently consists of twenty-one members who serve one-year terms. The CCPIT appoints FETAC members, selecting individuals with specialized experience and knowledge about economics, trade, industry, or law. They come from all occupational and geographical areas of China, including academia, government, and industry. Current members include the vice-chair of the CCPIT and the director and deputy director of its Legal Affairs Department.

FETAC can be utilized in several dispute resolution mechanisms including conciliation, joint conciliation, and arbitration. Its involvement is appropriate if either party requests assistance and such assistance is not contrary to the dispute resolution agreement. The arbitral institutions "generally do not interfere with the examination of specific cases," although the arbitral tribunal may submit questions on principles and policy to the institutions. Both FETAC and MAC, however, are influenced by the national government. The arbitral institutions conduct studies and establish policies, principles, and methods "under the guidance of . . . the Party Central Committee . . . and in accordance with our state principles and policies."

The MAC was established in 1958 and specializes in the resolution of maritime-related disputes, including: (1) disputes regarding re-

195. R. JIANXIN, LAW WORK, supra note 1, at 7-8.
196. See R. JIANXIN, TECHNOLOGY, supra note 2, at 14 (CCPIT has indicated that its size will increase even though the enabling legislation limits it to 15 to 21 members).
197. P.R.C. Report, supra note 94, at 663.
198. Holtzmann, supra note 96, at 270.
199. See CHINA TRADE HANDBOOK, supra note 1, at 113-20 (list of CCPIT organization and personnel and list of the National Foreign Trade Corporations).
200. See Holtzmann, supra note 96, at 284 (CCPIT has indicated that 50% of requests are made by foreign parties).
201. P.R.C. Report, supra note 94, at 666.
202. Id.
203. Id.
204. See supra note 189.
muneration for salvage services rendered by vessels to each other; (2) disputes arising from collisions between sea-going vessels; and (3) disputes arising from chartering sea-going vessels, agency services rendered to sea-going vessels, carriage by sea in virtue of contracts of affreightment, bills of lading or other shipping documents, as well as disputes arising from marine insurance.  

VI. Dispute Resolution Processes in the P.R.C.

The foundation has been laid for an understanding of the dispute resolution process in the P.R.C. The discussion now turns to an analysis of several types of dispute resolution that are used in the settlement of conflicts arising from U.S.-P.R.C. commercial transactions. The specific mechanisms likely to be used in the settlement of conflicts arising from U.S.-P.R.C. commercial transactions can be classified into three groups: (1) informal dispute resolution processes, (2) arbitration, and (3) litigation.

Prior to recent changes in the legal framework, exemplified by the Joint Venture Law and the Trade Agreement, dispute resolution under Chinese law was essentially limited to informal processes and to a system of direct adjustments. With the advent of increased trade with non-communist countries and complex equity-related projects, the P.R.C.'s dispute resolution mechanisms have evolved in ways that are more consistent with international practice. They continue to maintain, however, a distinctly Chinese character in at least two respects. First, these processes are used flexibly. They may be used concurrently, intermittently, or sequentially, or they may be blended. Second, in structuring their business relationships with foreigners the Chinese adhere to the basic values, analytic techniques, and interpretative norms which lead to a distinctive approach to dispute resolution.

206. See *Hsiao*, supra note 94, at 511-12 (1969). A system of direct adjustments has been used in disputes arising from export-import sales contracts with socialist countries. The contract—"General Conditions for Delivery"—usually includes a direct adjustment clause which requires the buyer to advise the seller of any nonconformity with the contract within a specified time. The seller must reply specifically within a specified time. If the parties cannot agree on the proper settlement, an ad hoc review board is appointed by the Chinese government. *Id*
Dispute Resolution in the P.R.C.

A. Informal Dispute Resolution

1. Consultation

Consultation, sometimes called friendly consultation or friendly negotiation, consists of discussions between the parties conducted without third party intervention. The emphasis is on fact-finding and clarifying misunderstandings between the parties, so that they can find a mutually acceptable settlement consistent with basic Chinese values. Consultation has the advantage of being relatively inexpensive and more likely to leave the parties on amicable terms. Significantly, it can be conducted in informal and private meetings, so that the potential indignities of public disclosure are avoided.

2. Conciliation

In conciliation, a FETAC delegate or some other mutually agreeable third party is enlisted by the parties to facilitate the process of fact-finding and problem analysis. If FETAC assistance is desired, an application is made to the arbitral institution. The FETAC representative asks each party to submit a brief summary of its position, along with all the pertinent documents. FETAC also may conduct its own fact-finding investigation, gathering materials within the P.R.C. or through its contacts abroad. All information collected is disclosed to the parties.

The FETAC conciliator assists the parties in analyzing the facts and then notes his or her view of the strengths and weaknesses of each side's position. Thereafter, the parties are invited "to go back and think it over and to try to reach an amicable settlement between themselves." After this stage, the parties return to discuss their conclusions concerning legal liability. This process of systematic fact-finding, analysis, and discussion is repeated if it appears that it would help the parties reach a solution. Participation in this and other informal

208. The nomenclature of various informal dispute resolution processes is not uniform. In particular, the terms consultation, negotiations, and conciliation sometimes are used interchangeably. Negotiators should ascertain the parties' understanding of the terms. The critical characteristics are: attempts at settlement without third party intervention; third party intervention but no recommendation given; third party intervention with an non-binding recommendation given.

209. See Note, supra note 30, at 262-67; Holtzmann, supra note 96, at 248-51.

210. See Note, supra note 30, at 263-64; Holtzmann, supra note 96, at 248-51, 284-88.

211. See Holtzmann, supra note 96, at 284 (the request does not require pre-set formalities).

212. See id. at 285 (the routine investigatory and organizational work is done by the FETAC section of the Legal Affairs Department).

213. See id. at 286 (disclosure may be timed to encourage settlement).

214. Id.
processes is completely voluntary, however.\footnote{215} There are two types of conciliation. In one, the third-party intervenor makes no recommendation for a solution. In the second, the conciliator makes a non-binding recommendation to the parties.\footnote{216} If the parties are not satisfied with the recommendation, they may continue negotiating or they may proceed to some other dispute resolution process.\footnote{217}

3. Joint Conciliation

Joint conciliation is a variation of the conciliation process. There are two conciliators, one from FETAC and one from an arbitral body chosen by the foreign party.\footnote{218} In a U.S.-P.R.C. joint conciliation, the conciliators might well be from the American Arbitration Association (AAA) and FETAC. The two conciliators conduct the conciliation process "on equal basis."\footnote{219} Submission to joint conciliation does not constitute submission to the arbitral institutions for purposes of arbitration.\footnote{220}

Joint conciliation is an attractive form of dispute resolution for U.S.-P.R.C. transactions. It "is designed to provide valuable insights concerning the business thinking, law and attitudes of both sides and thus to help bridge cultural gaps between disputing companies which come from different social, economic and legal systems."\footnote{221} No U.S.-P.R.C. bilateral agreement specifically provides for joint conciliation,\footnote{222} but the process has been used with FETAC and AAA conciliators successfully in the resolution of disputes arising from two U.S.-P.R.C. projects.\footnote{223}

The joint conciliations undertaken heretofore by U.S. and P.R.C. entities have revealed basic differences in the assumptions of the U.S. and Chinese parties. This point has been emphasized in the detailed description of the proceedings of a joint conciliation made by an offi-

\footnote{215}{Id. at 283, 286; P.R.C. Report, supra note 94, at 661.}
\footnote{216}{This type of conciliation is called consultation by some commentators. See Note, supra note 30, 263-64.}
\footnote{217}{P.R.C. Report, supra note 94, at 661 (If the parties accept the recommendation, a "conciliatory statement" is written and the parties execute it.).}
\footnote{218}{R. JIANXIN, LAW WORK, supra note 1, at 9 (In 1980, joint conciliation was included in the Protocol for Settlement of Disputes Arising from China-France Trade in Industrial Properties.). A team of conciliators can be used also, and it is composed of an equal number of members from each side.}
\footnote{219}{R. JIANXIN, TECHNOLOGY, supra note 2, at 15.}
\footnote{220}{Holtzmann, supra note 96, at 290.}
\footnote{221}{Id. at 289.}
\footnote{222}{The AAA is reportedly working on a set of draft provisions. Id. at 288-90.}
\footnote{223}{R. JIANXIN, LAW WORK, supra note 1, at 9.}
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The observer noted that disagreements occurred because the Chinese stressed fundamental principles and values with little regard for the formal documentation of the factual circumstances of the case, while the U.S. participants relied on elaborately documented arguments and adversarial procedures. The U.S. conciliator suggested that these different approaches made necessary the development of rules of procedure for joint conciliation, and offered the UNCI-TRAL rules as a model.

4. Arbitration Combined with Conciliation

The Chinese emphasize that conciliation can be used both before and after arbitral proceedings are initiated. In practice, FETAC often combines arbitration with conciliation. The two processes are described as “interrelating and complementary”; they are not “antagonistic and do not exclude each other.” The Chinese clearly prefer voluntary settlement by conciliation to the imposition of a binding recommendation by an arbitral tribunal. Participation in conciliation, however, is voluntary and it is not a prerequisite to the arbitral process.

5. Other Means of Dispute Resolution

The Trade Agreement indicates that “any other means agreeable to the parties” may be used as a dispute resolution process. This is consistent with the P.R.C.'s general approach to dispute resolution and foreign trade: participants should have wide flexibility in negotiating creative terms to suit the needs of the parties, provided they are compatible with basic Chinese values and with the broader legal and institutional frameworks.

One example of “other means” of dispute resolution is “joint handling.” Joint handling is included as part of the dispute resolution process in the 1978 “Protocol for Using Arbitration to Settle Sino-Japanese Maritime Disputes” signed between the Maritime Arbitration

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225. See id. at 300-02.
226. See id. at 299-301.
227. See id. at 317-21.
228. P.R.C. Report, supra note 94, at 662 (FETAC conducts conciliation before an arbitral tribunal is formed and the arbitral tribunal can continue the process).
229. Id. at 660-61.
230. Id. at 661.
231. R. Jianxin, Technology, supra note 2, at 15.
232. Trade Agreement, supra note 158, art. 8, ¶ 1. For a brief discussion on the meaning of this term, see Holtzmann, supra note 96, at 251-53.
Commission of the CCPIT and the Arbitration Commission of Japan Shipping Exchange, Ltd. The bilateral agreement offers an array of dispute resolution mechanisms for maritime-related disputes. Included are arbitration by an arbitral body of the country in which the dispute arises, or in the country of the defendant, or by a body jointly selected by arbitral institutions of both countries. If the parties cannot agree on the appropriate arbitral body, arbitral institutions of both countries will “handle” arbitration jointly.234

B. Arbitration

The CCPIT has declared repeatedly that arbitration is a recognized dispute resolution process in conflicts arising from foreign trade transactions:

In our country, arbitration is one of the principal means for settling foreign economic and trade disputes. An arbitration clause is generally contained in the contracts . . . . There is also usually a provision for arbitration in the bilateral economic, trade and shipping agreements . . . signed between our government and foreign governments.235

Some foreign business executives believe, however, that the practical importance of arbitration is severely limited by three factors. First, arbitration is used only as a last resort. Initial efforts at informal dispute resolution processes are extended until it is clear that resolution is impossible.236 Second, arbitration clauses are invoked by a foreign party at the risk of breaking the bond of friendship between the parties or provoking the general disfavor of the Chinese party.237 Third, if terms permitting recourse to arbitration are included in the contract, the Chinese may insist that the terms require the arbitration to be conducted in the P.R.C. by FETAC under FETAC rules.

This emphasis on the limitations of arbitration in the P.R.C. probably is exaggerated. The Chinese prefer informal dispute resolution processes to arbitration, but participation in informal dispute resolution processes, such as conciliation, is voluntary.238 In addition, the Chinese maintain that a foreign party’s invocation of an arbitral clause is not necessarily viewed as “unfriendly.”239 Finally, the Chinese prefer contract provisions specifying arbitration in the P.R.C. under

234. Id.
235. R. Jianxin, Technology, supra note 2, at 13. This sentiment is also voiced in another CCPIT publication. See P.R.C. Report, supra note 94, at 660.
236. Holtzmann, supra note 96, at 258.
237. Regghizzii, supra note 102, at 184-85.
238. R. Jianxin, Technology, supra note 2, at 15.
239. Holtzmann, supra note 96, at 334 (CCPIT states that the parties should follow the contract).
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FETAC and FETAC rules, but U.S. executives report that the Chinese also are receptive to some third-country arbitral clauses.\textsuperscript{240} Despite these favorable indications, arbitration of foreign trade disputes in the P.R.C. remains rare.\textsuperscript{241} Two cases from 1973 and 1974 have been reported, one involving a Middle Eastern party and the other a European party. The disputes were settled through a careful analysis of the facts, contract terms, and controlling trade customs.\textsuperscript{242}

C. Litigation

Both Chinese and U.S. parties have avoided dispute resolution through the Chinese judiciary. The Chinese find court adjudication objectionable, because the sides assume strong adversarial roles, color facts to their advantage, reinforce negative feelings about each other, and are forced to accept a court-imposed solution of a conflict that they have been unable to settle between themselves. U.S. practitioners are equally hesitant to subject themselves to Chinese courts' jurisdiction, but for different reasons. They are unfamiliar with the operation of the court system and they recognize that the substantive law is still emerging and remains unclear.

Despite these uncertainties, dispute resolution by Chinese courts is an increasingly likely alternative. The current development of the judicial system includes mechanisms for the resolution of economic and trade conflicts. The Chinese maintain that with the "gradual perfection of our legislation in the economic field, settlement of economic and trade disputes by litigation has become one of the important tasks of our courts."\textsuperscript{243}

Few details have emerged concerning the resolution of foreign trade disputes by Chinese courts. While a glimpse of the reported judicial structure and procedures suggests similarities to the American court system, it is unclear if these similarities are superficial or substantive. Commentators have remarked that the basic assumptions underlying the two legal systems are fundamentally different.\textsuperscript{244}

\textsuperscript{240} Lubman, \textit{The Development of China's Formal Legal System}, in \textit{DEVELOPMENTS}, \textit{supra} note 17, at 105, 131-32.

\textsuperscript{241} Theroux, \textit{supra} note 108, at 237.


\textsuperscript{243} See R. Jianxin, \textit{Law Work}, \textit{supra} note 1, at 6-7; Allen & Pallay, \textit{supra} note 139, at 44.

\textsuperscript{244} Lubman, \textit{Contracts}, \textit{supra} note 100, at 779 (It is "an unrealistic suggestion that the
The CCPIT indicates that economic and trade disputes involving a foreign party are subject to the jurisdiction of the local people's court, which is composed of two tiers. The first, the intermediate people's court, is the court of first instance. The second, the superior court, takes appeals from the intermediate court, and serves as the court of last resort.\(^{245}\) A judge and a group of "people's assessors" hear the case in the intermediate court and a panel of judges hears the appeal in the superior court.\(^{246}\) The courts base their decisions on what is presented at trial, with strict adherence to the "laws." CCPIT also explains that foreign citizens have the same rights and obligations in litigation as Chinese citizens. For example, parties to the suit may be represented by attorneys, but these attorneys must be Chinese nationals.\(^{247}\)

VII. Negotiating Dispute Resolution Provisions

A. Negotiating with the Chinese

In negotiating dispute resolution provisions, it is helpful to be familiar with the bargaining patterns of Chinese participants. Although specific tactics depend on the character of the individual negotiator as well as on the nature of the project at issue, U.S. negotiators have noted certain common patterns in the behavior of their Chinese counterparts.\(^{248}\) These patterns are useful as general reference points in effective bargaining for contract terms, or if a dispute arises, in negotiating a settlement.

First, the Chinese are avid information seekers. They ask many questions, often in great depth, during information-gathering and negotiating sessions.\(^{249}\) This is especially true if the project has unfamiliar technical aspects.\(^{250}\) They want to be aware of all options and their relative merits in order to make well-informed decisions.

United States and the P.R.C. should agree that 'legal and natural persons ought to have access to the domestic courts of the two countries.' Not only do U.S. corporate counsel not know enough about the Chinese legal system . . . [but also] the basic assumptions underlying [the Chinese system] are too different."\(^{245}\)

\(^{245}\) R. JIANXIN, LAW WORK, supra note 1, at 6-7.
\(^{246}\) Lubman, The Development of China's Formal Legal System, in DEVELOPMENTS, supra note 17, at 105, 131-32.
\(^{247}\) R. JIANXIN, LAW WORK, supra note 1, at 7.
\(^{248}\) See generally Lubman, Trade with U.S., supra note 11, at 225-27; Lubman, Contracts, supra note 100, at 768-70; Jenkins, Dealing With the Chinese, 5 INT'L TRADE L.J. 27 (1979); Avery & Clarke, The Sino-American Commercial Relationship, in JOINT ECON. COMM., 95TH CONG., 2D SESS., A COMPREHEND OF PAPERS ON CHINESE ECONOMY POST-MAO, at 742, 756-57 (1978).
\(^{249}\) Lubman, Trade with U.S., supra note 11, at 225-26; Lubman, Contracts, supra note 100, at 769.
\(^{250}\) Lubman, Contracts, supra note 100, at 769.
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Second, the Chinese seek trading partners with whom they can develop congenial, mutually beneficial, long-term relations. Through lengthy discussions with prospective partners, they become acquainted with the interests, attitudes, and the commitment of their counterparts. They also seek from many sources detailed information on prospective partners to evaluate their sincerity as well as the reliability of information gathered during face-to-face discussions.

Third, the Chinese are patient and persistent. Negotiation sessions may be more lengthy than those to which U.S. negotiators may be accustomed. U.S. negotiators should anticipate this slower-paced process and adjust their schedule accordingly, thereby avoiding hasty concessions made merely to expedite negotiations. Finally, Chinese negotiators are adept at bargaining for advantageous terms such as low prices, minimum quality and delivery requirements, and dispute resolution provisions that specify informal processes supervised by FETAC.

In summary, the Chinese are skilled negotiators and demanding bargainers. They are inquisitive and cautious about their risks and consequences. Furthermore, they aggressively pursue the best possible terms on a given contract, but do not overlook the importance of acting diplomatically in order to preserve an amicable long-term relationship.

B. Inclusion of Dispute Resolution Provisions

In considering dispute resolution provisions, the first question is whether a dispute resolution provision should be included in the contract at all. That the inclusion of such a provision is common but not automatic is suggested by the results of the China Trade Survey, which received responses from twenty-six U.S. executives who had negotiated contracts with entities from the P.R.C., and which found that three of the respondents had not included a dispute resolution provi-

251. Avery & Clarke, supra note 248, at 756. It has been argued that this “feeling out” process has a direct impact on dispute resolution. First, because the parties are mutually congenial, disputes are less likely to occur. Second, if a dispute occurs, the parties' congeniality enhances the probable success of informal dispute resolution. Li, Trade with China: An Introduction, in FOREIGN TRADE, supra note 3, at 13-15.

252. Lubman, Trade with U.S., supra note 11, at 227.

253. Id. at 227-28.

254. Id. at 225, 231.

sion in their contracts.256

The absence of a dispute resolution provision offers certain limited benefits to both parties. Chinese negotiators and their superiors may be unfamiliar with the options available under particular dispute resolution terms and with their implications. Therefore, they may not want to risk the inclusion of terms which may prove disadvantageous to their interests. In addition, the absence of a provision may leave available certain dispute resolution mechanisms that might otherwise be excluded, such as arbitration or recourse to the courts. In such circumstances, the U.S. party may also prefer to negotiate a dispute resolution agreement after the problem arises. For example, if the U.S. party anticipates it will enjoy a stronger bargaining position once a problem arises, it may prefer to postpone negotiation on dispute resolution until that time.

Generally, however, the advantages afforded by the inclusion of a mutually agreeable and well-written dispute resolution clause clearly outweigh the benefits that might flow from failure to include such a clause. The overriding advantage of a provision is that the parties have the security of knowing that an effective dispute resolution mechanism is provided, and the certainty that the resolution of a conflict will proceed in a reasonable and fair manner.

C. Terms of Dispute Resolution Provisions


Parties from the U.S. and the P.R.C. employ a variety of dispute resolution processes when disputes arise in their commercial transactions. The legal structure of the P.R.C. offers basic guidelines, but the parties have wide latitude in their choice of process. Again, data from the China Trade Survey are illuminating; all twenty-three of the respondents who had included a dispute resolution provision in their contracts had provided for some combination of informal dispute resolution and arbitration. With respect to the informal processes, only three respondents indicated that conciliation had been included, and of these, one involved a joint conciliation clause. In contrast, all twenty-three respondents had included consultation, although the process was described by a variety of terms—e.g., friendly discussions, friendly consultations, and friendly negotiations. This lack of agreement on appropriate terminology suggests a potential for subsequent confusion; to avoid it, the careful drafter should include a brief definition of the in-

256. See FOREIGN TRADE, supra note 3, at app. 7 (Standard Purchase Contract). Note that the standard Chinese sales contract does not include a dispute resolution provision.
formal dispute resolution process to which the parties have agreed.\textsuperscript{257}

Even though the participants may never go to arbitration, providing for it in the contract may serve important strategic purposes. With the knowledge that arbitration can be invoked, the parties are encouraged to conduct the informal dispute resolution processes of consultation or conciliation seriously and in a timely fashion.\textsuperscript{258} It has also been suggested that an arbitration clause providing for third country arbitration will hasten Chinese settlement of a dispute so as to avoid arbitration outside the P.R.C.\textsuperscript{259} The U.S. party may have a similar incentive if the clause provides for arbitration in the P.R.C. under Chinese rules and law. Finally, if the informal dispute resolution processes are unsuccessful, an effective alternative is required. A well-written arbitration clause can provide this alternative.

2. \textit{Arbitration Provisions}

Contract provisions can include terms specifying the following characteristics of the arbitration proceeding:

- place of arbitration
- arbitral institution to conduct proceedings
- procedural rules
- arbitral tribunal (selection of tribunal including the umpire)
- substantive law
- finality of award
- judicial enforcement of arbitration clause
- other terms (e.g., costs, language, notification and discovery procedures, ongoing performance of contract).

The parties' right to negotiate each detail is not precluded by the legal framework. Although in practice provisions rarely include explicit terms on each issue, it is advisable to consider carefully whether to include provisions for the place of arbitration, the substantive law, and the arbitral institution and procedural rules.

\textsuperscript{257} See \textit{China Trade Survey}, \textit{supra} note 255.

A literal interpretation of the Joint Venture Law, however, imposes certain restrictions on the permissible scope of informal dispute resolution clauses. The law states that a dispute may be settled "through conciliation or arbitration by an arbitral body of China or through arbitration by an arbitral body agreed upon by the parties." Joint Venture Law, \textit{supra} note 47, art. 14 (emphasis added). The first part of the phrase might be read to imply that only FETAC or MAC can conduct a conciliation. Such a reading would make unenforceable a provision for joint conciliation in joint venture agreements, because both AAA and FETAC participation would be required. See \textit{Note}, \textit{supra} note 30, at 266.

\textsuperscript{258} Holtzmann, \textit{supra} note 96, at 321-22.

\textsuperscript{259} Note, \textit{supra} note 30, at 267.
a. *Place of Arbitration*

Specification of the place of arbitration is important because, in the absence of contract terms to the contrary, it may determine the arbitral institution, procedural rules, governing law, and arbitral tribunal. The ideological and political systems and the attitude of the general public, both factors shaped by the location of the arbitral proceeding, may also affect the outcome of the arbitration.

Chinese entities may agree to arbitration in: (1) the P.R.C. or the United States; (2) the country of the defendant; or (3) a third country. Arbitration in the United States is an alternative mentioned in the Trade Agreement, but the Chinese probably would resist including such a provision, preferring arbitration in the P.R.C. In the China Trade Survey, approximately twenty-five percent of the contracts provided for arbitration in the P.R.C. The standard purchase contract used by the China National Import and Export Corporation is illustrative:

All disputes in connection with this Contract or the execution thereof shall be settled through friendly negotiations. In case no settlement can be reached, the case may then be submitted for arbitration to the Arbitration Committee of the China Council for the Promotion of International Trade in accordance with the Provisional Rules of Procedure promulgated by said Arbitration Committee. The Arbitration shall take place in Beijing and the decisions of the Arbitration Committee shall be final and binding upon both parties: neither party shall seek recourse to a law court or other authorities to appeal for reversal of the decision. Arbitration fees shall be borne by the losing party. Or the Arbitration may be settled in a third country mutually agreed upon by the parties.

On the other hand, arbitration in the P.R.C. may be an unattractive option for U.S. participants. Unless the parties agree otherwise, arbitration proceedings in the P.R.C. will follow FETAC rules. These rules provide for hearings in the P.R.C. with Chinese as the official language and with arbitrators provided by FETAC. Furthermore, under the rules it is unclear whether a foreign party can be represented by a non-Chinese attorney.

Neither party should be eager to negotiate provisions calling for ar-

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260. The location of arbitration is important because it determines which party's tribunal has jurisdiction to hear and to decide the dispute, and also the choice of arbitrators and umpire. "Although all arbitrators and umpires are supposed to be impartial judges, it is a fact of life that the inherited instincts, traditional beliefs, and acquired convictions of a judge have a great deal to do with his decisions." Hsiao, *supra* note 94, at 515.


263. CHINA TRADE HANDBOOK, *supra* note 1, at 173.

264. See *supra* note 140.
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Each party prefers arbitration in its own country; thus, each might maneuver to be the defendant when a conflict develops or is anticipated. One can imagine circumstances in which each party might be tempted to put the other in such a position that it would be compelled to initiate proceedings. Such action would ensure that the provoking party would have the benefit of arbitration in its own country. Such maneuvering clearly could not be conducive to the maintenance of amicable long-term relations.265

The third option is to specify a third country as the place of arbitration. Legal scholars heralded the P.R.C.'s acceptance of third country arbitration as a surprising breakthrough;266 provisions with this option are no longer uncommon. Some third countries are established fora for international arbitration, and have a history of neutrality that is satisfactory to both U.S. and Chinese parties. Sweden, for example, is a popular choice, as the China Trade survey indicates. Twelve of the twenty-six respondents had specified dispute resolution clauses providing for arbitration in Sweden.267 Other sites selected were Geneva, the Hague, and Paris, while two contracts stated that arbitration would take place in an unnamed third country.

b. Governing Law

Governing law clauses are seldom found in dispute resolution provisions in U.S.-P.R.C. agreements. In the China Trade Survey, only two contracts specified the applicable substantive law,268 one stipulating Swedish law and the other Swiss law.

The omission of governing law clauses can lead to unpredictable results.269 Consider, for example, the case where the parties agree to arbitration in Sweden and the arbitral rules of the Stockholm Chamber of Commerce (SCC). They do not indicate the applicable substantive law because they assume that the rules would unambiguously and easily determine the law. Under SCC rules, the arbitrators use the law agreed to by the parties.270 If they have made no specific agreement,

265. Holtzmann, supra note 96, at 331; Choo, supra note 255, at 48.
266. Lubman, Trade with U.S., supra note 11, at 232.
267. See supra note 255. See also Holtzmann, supra note 96, at 332. Factors to consider in choosing a third country include convenience in conducting arbitration (e.g. availability of facilities and support staff, freedom and privacy in carrying documents across the borders and in communicating freely with offices, relative ease and speed of access of counsel, witnesses, arbitrators, and parties) and procedural laws of the country which govern the arbitration. Id.
268. See supra note 255.
269. For a discussion of how the omission of a governing law clause can raise problems in a joint venture agreement, see Soble, supra note 82, at 17.
270. See 5 INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE 129-36 (J. Wetter
the SCC directs the arbitrators to the "Swedish Law of Arbitration." The Swedish Arbitration Act, however has no provisions on choice of law, so recourse to Swedish conflict of laws rules probably is required. These conflict of laws rules require that the country of "closest connection" be selected.\textsuperscript{271} The P.R.C. probably would be the country of "closest connection," but as noted earlier, Chinese laws are still evolving and may provide limited guidance on the correct resolution of substantive issues.

c. \textit{Arbitral Institution and Procedural Rules}

Arbitral institutions provide facilities and rules for the administration of arbitral proceedings. They differ in size, specific function, expertise, support staff, and cost.\textsuperscript{272} One especially important function of an arbitral institution is to provide procedural rules.\textsuperscript{273} The procedural rules of FETAC,\textsuperscript{274} discussed here, should be compared with those of the other arbitral institutions.\textsuperscript{275} U.S. negotiators should give particular consideration to UNCITRAL rules,\textsuperscript{276} because they are widely recognized and because their specific inclusion in the Trade Agreement indicates that the Chinese find them generally acceptable.\textsuperscript{277}

The FETAC rules offer procedures for initiating and conducting arbitral proceedings. They are detailed in their treatment, explaining application information, fees, and notification of the parties. They provide for FETAC to assume jurisdiction over the arbitration through the written agreement of both parties.\textsuperscript{278} The rules also describe the selection of arbitrators\textsuperscript{279} and procedures for their replacement should that prove necessary.\textsuperscript{280} If the arbitral tribunal is to be composed of three members,\textsuperscript{281} each party chooses one member,\textsuperscript{282} and these two

\textsuperscript{272} See 7 \textit{Arbitral Process}, supra note 270, at 234-44 (comparative analysis of five major arbitral institutions, including the SCC, ICC, and AAA).
\textsuperscript{273} See 5 \textit{Arbitral Process}, supra note 270, at 65-69 (procedural rules of AAA); \textit{id}. at 89-105 (procedural rules of ICC); \textit{id}. at 129-36 (procedural rules of SCC); 4 \textit{Arbitral Process}, supra, at 413 (procedural rules of UNCITRAL).
\textsuperscript{275} See supra note 273.
\textsuperscript{277} Holtzmann, supra note 96, at 326.
\textsuperscript{278} Rules, supra note 274, art. 3. The agreement may be concluded prior to or subsequent to the dispute. \textit{P.R.C. Report}, supra note 94, at 662. \textit{See also} Rules, supra, arts. 4, 5 \& 7 (application information); \textit{id}. art. 6 (fees); \textit{id}. art. 24 (notification).
\textsuperscript{279} Rules, supra note 274, arts. 9-12.
\textsuperscript{280} \textit{Id}. arts. 13-15.
\textsuperscript{281} \textit{Id}. art. 20.
arbitrators then jointly choose the presiding arbitrator.\textsuperscript{283} If the parties do not make timely applications, or if the parties so stipulate, FETAC may appoint the tribunal or the sole arbitrator.\textsuperscript{284} FETAC insists that the tribunal be composed exclusively of FETAC members, a requirement that is the most distinctive and potentially disturbing aspect of the rules. CCPIT explains, however, that parties may challenge the arbitrators. This challenge has never occurred, the CCPIT maintains, because FETAC members are persons of "eminent reputation," who are required to proceed in an impartial, "fair, reasonable, and truth-seeking way."\textsuperscript{285} If an arbitrator is challenged, FETAC decides whether the arbitrator should be replaced.

The arbitrators preside at open arbitration hearings,\textsuperscript{286} unless the parties request closed sessions.\textsuperscript{287} The parties may be represented by Chinese or foreign attorneys.\textsuperscript{288} Evidence is presented and examined, and experts may be called.\textsuperscript{289} The official language is Chinese, although interpreters are allowed.\textsuperscript{290} The tribunal may order interim protective measures if appropriate.\textsuperscript{291} At the conclusion of the proceedings the tribunal renders the arbitral decision with an explanation of reasons. The decision may be rendered even though a party does not appear.\textsuperscript{292} The award is final\textsuperscript{293} and may be enforced through Chinese courts.\textsuperscript{294}

\textsuperscript{282} \textit{Id.} art. 9.
\textsuperscript{283} \textit{Id.} art. 11.
\textsuperscript{284} \textit{Id.} arts. 10-12.
\textsuperscript{285} \textit{P.R.C. Report, supra} note 94, at 663. It is unclear whether the FETAC members on arbitral tribunals are independent from the government. Early reports indicated that, in very important or complex cases, the Communist Party and the government would guide the arbitral institutions to "act reasonably and correctly." Further CCPIT explanations suggested that the guidance would not affect the disposition of the case but would ensure a fair and reasonable settlement, consistent with fundamental Chinese values. \textit{See Holtzmann, supra note} 96, at 271-72.
\textsuperscript{286} \textit{Rules, supra} note 274, arts. 16, 19 (procedures for selecting the date and place of arbitration).
\textsuperscript{287} \textit{Id.} art. 21. The Chinese explain that they prefer open sessions for two reasons: (1) to ensure that arbitrations are handled fairly and reasonably; and (2) to educate others about the dispute, to enable observers to avoid the kind of problems encountered by the disputing parties. \textit{See Holtzmann, supra} note 242, at 539.
\textsuperscript{288} \textit{Rules, supra} note 274, art. 18. The Chinese government recently confirmed that foreign lawyers cannot qualify to and work as lawyers in the P.R.C. \textit{Peking Restricts Foreign Legal Firms, Dealing Setbacks to Some U.S. Lawyers,} Wall St. J., Jan. 8, 1982, at 26, col. 2. Therefore, either article 18 can be interpreted as being in direct conflict with the policy stated above, or the representation of clients in FETAC arbitrations is not considered part of the practice of law.
\textsuperscript{289} \textit{Rules, supra} note 274, arts. 25-27.
\textsuperscript{290} \textit{Id.} art. 36.
\textsuperscript{291} \textit{Id.} art. 15.
\textsuperscript{292} \textit{Id.} art. 30. The parties, however, must be notified of the hearings. \textit{Id.} art. 23.
\textsuperscript{293} \textit{Id.} art. 31.
\textsuperscript{294} \textit{Id.} art. 32.
VIII. Enforcement of Arbitral Awards and Recognition of Arbitral Provisions

Arbitration proceedings are meaningful only if the awards are carried out, either by voluntary performance or by court intervention. Similarly, contract provisions for arbitration are valuable only if the courts recognize them as valid. Under principles of private international law, enforcement of arbitral provisions or awards is determined by the laws of the country where enforcement is sought. The most likely fora for the enforcement of arbitral provisions or awards are the courts of the P.R.C. or the United States.

A. Enforcement of Arbitral Provisions in the P.R.C.

The Chinese apparently are willing to enforce contractual provisions

295. Hinman, supra note 4, at 70.
296. It is also possible for the prevailing party to seek enforcement through the courts of another country. That process, however, is beyond the scope of this Article.

Although the U.S. is a party to the 1958 N.Y. Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3, the domestic implementing legislation imposed important glosses on the Convention's scope that may make problematic the enforcement of awards through U.S. courts. Trooboff & Goldstein, Foreign Arbitral Awards and the 1958 New York Convention: Experience to Date in the U.S. Courts, 17 VA. J. INT'L L. 467, 471 (1977). The most relevant gloss is the declaration that the United States will only recognize and enforce awards made in the territory of another contracting state—a reservation permitted under article I of the N.Y. Convention. Because the P.R.C. is not a contracting state, U.S. courts may not be obligated under the Convention to enforce arbitral awards made in the P.R.C. If, however, the award is rendered in another contracting state, such as Sweden, U.S. courts would be bound to enforce it.

The Convention itself recognizes defenses that could be invoked to prevent the enforcement of an award. They include incapacity of the parties, or the invalidity of the agreement to arbitrate, insufficient notice of the appointment of arbitrators or the arbitral proceedings, inadequate opportunity to present the case, abuse of arbitration by the treatment of subjects beyond the scope of the matters submitted by the parties, improper composition of the tribunal, and the suspension of the award by a competent authority. See N.Y. Convention, supra art. 5. Although U.S. courts have interpreted the Convention only occasionally, it is clear that they are construing the defenses narrowly. See, e.g., Fotochrome, Inc. v. Copal, Co., 517 F. 2d 512 (2d Cir. 1975); Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier, 508 F. 2d 969 (2d Cir. 1974).

In addition, the United States is bound by the U.S.-P.R.C. Trade Agreement. In practice, the Trade Agreement provisions would be meaningless unless they presuppose the recognition of arbitral provisions. U.S. courts probably would be willing to recognize contractual provisions in a case in which the U.S. party wanted the dispute settled in U.S. courts in violation of the contractual provision which specified arbitration in the P.R.C. under FETAC rules. See Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

In Scherk, a U.S. company under Illinois law sought to avoid an arbitration clause requiring arbitration at the ICC, in Paris. It preferred recourse to U.S. courts. The Supreme Court, however rejected the U.S. company's arguments and held that arbitration clauses in international agreements should be enforced because such provisions are essential for the orderliness and predictability of international business transactions. 417 U.S. at 516. The Court also noted that the United States was a signatory to the N.Y. Convention. Id. at 520 n.15.

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that require the resolution of disputes through arbitration. The CCPIT states that "Chinese courts of law [should] not seize cases of foreign trade and maritime disputes where an arbitration contract is in force." The Trade Agreement also implicitly encourages recognition of arbitral provisions through its stipulations providing for recourse to arbitration, as agreed to by the parties, and for the enforcement of arbitral awards. As with the enforcement of awards, the P.R.C.'s recognition of arbitral provisions is consistent with international practice and the Chinese value of honoring contracts.

The one known case in the last quarter-century in which a Chinese court ruled on a commercial dispute between a foreign and a Chinese party did not, unfortunately, clarify the Chinese position on arbitral provisions. In that case, *Techimport v. Vickers-Zimmer, Ltd.* the Beijing Municipal Intermediate People's Court awarded Techimport, a Chinese foreign trade corporation, damages for breach of contract to build a petrochemical plant. The contract apparently contained an arbitration clause, but the court reportedly ignored it. The court's reasons for ignoring the clause are not known. The case, however, was decided at the height of the Cultural Revolution and prior to the P.R.C.'s legalization movement and interest in foreign trade. Furthermore, the allegations against the foreign company were of a criminal and political nature and were not based on the contractual terms. The court's opinion concentrates on the fact that Vickers-Zimmer had used "tricks, and chicanery," and "deliberate political and economic sabotage and fraud . . . in an attempt to endanger China's security." Thus, the failure of the court to enforce the clause may not constitute meaningful precedent.

B. Enforcement of Arbitral Awards in the P.R.C.

Although the P.R.C. is not a member of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, the P.R.C. is considering joining the N.Y. Convention. This CCPIT statement describes its attitude about international conventions:

It is also one of our major activities to developing China's international economic and trade cooperation to participate in some international economic, trade and maritime organizations, to join some international conventions and to develop multilateral cooperation in a planned and steady way and with priority.
nese courts probably will enforce both Chinese and foreign arbitral awards. First, in the interest of developing foreign trade, the P.R.C. is likely to adhere to recognized international practices. Second, the P.R.C. is fastidious in honoring the terms of its contract. This willingness to enforce arbitration awards is exemplified in this CCPIT statement:

As to the enforcement of foreign arbitral awards in China, although China is not a member of international conventions for recognition and enforcement of foreign arbitral awards, the enforcement is in fact fully secured so long as they are fair and not in violation of Chinese laws and policies . . . In fact, the Chinese corporations and enterprises will execute foreign awards voluntarily; to execute the award, the foreign party may request the . . . [CCPIT] to assist, or apply pursuant to the bilateral treaties or agreements, to the Chinese law-court to enforce it in accordance with law.302

In addition, the legislation establishing FETAC stresses the finality of the arbitration award303 and provides that parties should execute the awards voluntarily. If the parties hesitate to do so, the people's courts will, upon request, enforce it “in accordance with law.”304 CCPIT officials have stated that these principles apply equally to the enforcement of foreign awards.305

The Trade Agreement also provides for the enforcement of arbitral awards, stating that “[e]ach Contracting Party shall seek to ensure that arbitration awards are recognized and enforced by their competent authorities where enforcement is sought, in accordance with applicable laws and regulations.”306 Unfortunately, the mechanisms for enforcement are not indicated.

It also should be noted that the Trade Agreement, the CCPIT statement, and the FETAC law provisions all state that awards are enforced “in accordance with law.” At this time, however, little information is available on the enforcement of arbitral awards, on the access of foreign parties to the judicial system, and on the standards the courts will use to determine if the awards are “fair and not in violation of Chinese laws and policies.” Until these details are clear or until the P.R.C. joins

302. R. JIANXIN, TECHNOLOGY, supra note 2, at 17-18.
303. Rules, supra note 274, art. 10 (“The award given by the Arbitration Committee is final and neither party shall bring an appeal for revision before a court of law or any other organization.”).
304. Id. art. 11 (“The award of the Arbitration Commission shall be executed by the parties themselves within the time fixed by the award. In case of an award is not executed after the expiration of the fixed time, the People's Court of the People's Republic of China shall, upon request of one of the parties, enforce it in accordance with the law.”).
305. Holtzmann, supra note 96, at 339-40.
306. Trade Agreement, supra note 158, art. 3.
the New York Convention, participants in U.S.-P.R.C. transactions should include finality and enforcement clauses in their dispute resolution provisions.

IX. Conclusion

This Article analyzes the dispute resolution processes that U.S. practitioners are likely to encounter in commercial transactions with entities from the P.R.C. It proceeds on the assumption that these processes must be set in the context of the transactional practice, fundamental values and techniques, legal structures, and governmental institutions that combine to give dispute resolution in the P.R.C. its distinctive character.

In contrast to past trade policies, the P.R.C. now allows a wide variety of transactions to take place under the umbrella of foreign trade and investment. Because of their novelty and potential complexity, however, these transactions pose difficult problems of negotiation and implementation and will result inevitably in unanticipated disputes. U.S. executives should understand the type of transaction they are undertaking in order to negotiate dispute resolution provisions which are most appropriate for the kinds of conflict likely to arise. The potential for expanded trade between the P.R.C. and the U.S. is great, but so too are the economic, social, and cultural differences that are likely to separate U.S. negotiators from their Chinese counterparts. As trade becomes more extensive, disputes are inevitable, and it seems likely that these national differences may make their resolution more difficult. The aim of this Article has been to provide U.S. practitioners with essential information about the resolution of disputes in the P.R.C. in order to minimize the potential for misunderstanding in this most sensitive area. The practitioner armed with this information will be better able to negotiate contract provisions that facilitate the prompt and amicable resolution of disputes, and thereby to protect the interests of clients interested in participating in the growing trade with the P.R.C.