Commercial Dispute Settlement in China-United States Trade: Conciliation in Perspective

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Abstract

This Note analyzes the Chinese approach to commercial dispute settlement in the context of international contracts. Part I examines article VIII, the dispute settlement portion of the Trade Agreement, and the Chinese procedures for private dispute settlement. Part II discusses the problems of legal uncertainty that exist in the Chinese approach and the prospect of emerging Chinese law. Part III discusses the current importance of conciliation in Chinese dispute settlement, presents a case study of an actual joint conciliation conducted in China, and evaluates the results.
COMMERCIAL DISPUTE SETTLEMENT IN CHINA-UNITED STATES TRADE: CONCILIATION IN PERSPECTIVE

INTRODUCTION

With a quarter of the world’s population, the People’s Republic of China is potentially the United States’ most significant new trade partner of the century. The dramatic increase in the volume of annual bilateral trade between the United States and China from near zero in 1970 to almost five billion United States dollars ten years later appears to be the beginning of an expanding commer-


2. See The New Era in East Asia: Hearings Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs, 97th Cong., 1st Sess. 235 (1981) (statement of David S. Tappan, Chairman of the Board of Directors of the National Council for United States-China Trade) [hereinafter cited as Hearings]. However, it should be noted that the one billion potential customers of China are very poor customers indeed. Jan S. Prybyla, Professor of Economics at Pennsylvania State University and a specialist on the economy of the People’s Republic of China, discusses the present reality in China today:

1. the per capita gross national product of China is on the order of $400-450 but very likely less;
2. the average yearly industrial wage (modern industry) is approximately $360;
3. the bulk of the peasantry makes about 20c per person per day from collective endeavor;
4. the Chinese authorities admit that ten percent of the population (100 million people) do not have enough to eat (other reports speak of 200 million peasants being in a condition of acute privation);
5. per capita grain production today is the same as it was twenty years ago;
6. annual foreign trade turnover is less than $20 a head; and
7. the $1 billion current trade with the United States represents one-third of one percent of total U.S. trade.


cial partnership. If the United States can increase its share of the Chinese market to twenty percent, the value of trade with China could increase to an amount between ten and sixteen billion dollars by 1990.

China is already a significant participant in United States international trade. After Japan and South Korea, China is the United States' third largest Asian customer, and the potential for future growth is great. For the first time in its long history, China

4. See infra note 9, which indicates the complementary natures of the United States and Chinese economies.

5. In 1980, the United States share of the Chinese market was only about 12%. Hearings, supra note 2, at 198 (prepared statement of David S. Tappan). In comparison, the Japanese share was about 25%. Id.

Both Japan's and the United States' share of the Chinese market is estimated to have dropped in 1981 despite a larger volume of trade with China by both countries (as measured in United States dollars). See China Data, CHINA BUS. REV., Jan.-Feb. 1982, at 67, 69. This evidences China's increasingly active role in world trade. A further indication of the continued expansion of China's foreign economic and trade relations is the growing number of trade agreements and economic cooperation agreements with other countries. Between 1970 and 1980 about 140 such agreements were signed, 50 of which were signed from 1978 to 1980.

6. See id. at 208 (prepared statement of Mary Ames Wadsworth). "China is rich in energy resources, and the U.S., while needing resources, is highly advanced in the technological skills and means of resource exploitation." Id. China is fourth in the world in energy production, Clarke, Commercial Implication of Normalization, 5 INT'L TRADE L.J. 93, 97 (1979), and greatly in need of Western technology. Dole, Comments, 5 INT'L TRADE L.J. 60, 61 (1979). See also Wang, The People's Republic of China—Industrial Power with a Strong Mineral Base, in HOW TO DO BUSINESS WITH CHINA 325-39 (1979) (discussion of oil and gas resources).

By 1979, petroleum had become China's leading export to the United States. Mathews, Petroleum Becomes Peking's Top Export to U.S., Wash. Post, Aug. 27, 1979, at 23, col. 1. China exports approximately 300,000 barrels of oil a day, which earned U.S. $4 billion in foreign exchange last year. Farnsworth, China Starts to Play Its Oil Card, N.Y. Times, Sept. 5, 1982, at F4, col. 3. However, some experts predict that China will become a net importer of oil in the future. Id. China intends to further develop its oil resources and is interested in American business participation. Id. See generally Wren, China Energy: Chance for U.S., N.Y. Times, Oct. 14, 1982, at D1, col. 3 (discussing potential for American business). During 1979 and 1980, American oil exploration companies conducted seismic surveys in the South China Sea and thereby won the right to bid for the development of China's offshore oil resources. Woodard & Goodwin, Supplying Offshore Services, CHINA BUS. REV., Mar.-Apr. 1982, at 9. The surveys cost the companies an estimated $200 million and were free to the Chinese. Id. Bids have also been made for exploration rights in the Yellow Sea. Offshore Bids
is actively encouraging foreign investment. To help smooth the way for increased trade relations, the United States and China signed the Agreement on Trade Relations Between the United States of America and the People's Republic of China (Trade Agreement) in 1979.

The Trade Agreement includes a provision for the resolution of contract disputes which in effect incorporates the Chinese ap-

Under Review, CHINA TRADE REP., Sept. 1982, at 11. Contracts for development should be signed by mid-1983; all exploration costs will be borne by the foreign companies. Green, Offshore Business, CHINA BUS. REV., May-June 1982, at 17. The terms of the model contract issued by the Chinese emphasizes China's determination to be in control of the undertaking and to expand its own capabilities to conduct future offshore operations. Brown, Tough Terms for Offshore Oil, CHINA BUS. REV., July-Aug. 1982, at 34. The total cost of exploration for the areas of the first round of bidding is estimated to be between $2 billion and $3 billion. Id. at 35. See generally Note, Legal Aspects of Sino-American Oil Exploration in the South China Sea, 14 J. INT'L L. & ECON. 443 (1980).

Furthermore, "China has a wealth of human capital, and America has much to offer in economic management and organizational skills." Hearings, supra note 2, at 208 (prepared statement of Mary Ames Wadsworth). American management skills are being taught by American professors to Chinese technocrats at the Dalian Institute of Technology, Dalian, China. The Dalian program is considered the "most successful ingredient of the Chinese-American protocol on scientific and technical cooperation." Wren, Chinese Get Latest Word on U.S. Management Skills, N.Y. Times, Aug. 17, 1982, at A6, col. 1. This program costs the United States about $160,000 a year. Id. See also Reed, Student Exchange: Far East Meets Midwest, N.Y. Times, Aug. 22, 1982, § 12, at 43.


Until May, 1979, the free flow of trade between the United States and China was impeded by the unresolved Sino-American assets-claim issue, but that issue was resolved by the Agreement Concerning the Settlement of Claims, May 11, 1979, United States-People's Republic of China, 30 U.S.T. 1957, T.I.A.S. No. 9306. See Comment, The Blocked Chinese Assets—United States Claims Problem: The Lump-Sum Settlement Solution, 3 FORDHAM INT'L L.J. 51 (1979) for a discussion thereof.

12. Trade Agreement, supra note 11, art. VIII. Article VIII reads as follows:

1. The Contracting Parties encourage the prompt and equitable settlement of any disputes arising from or in relation to contracts between their respective firms,
proach to commercial dispute settlement. It encourages parties to a dispute to resolve their differences through “friendly consultations, conciliation or other mutually acceptable means.” Should these means prove ineffective, the Trade Agreement provides for recourse to arbitration. The Chinese, however, are reluctant to go to arbitration, even in China, and prefer friendly consultation and

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 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 United States of America, the People’s Republic of China, 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.


14. Trade Agreement, supra note 11, art. VIII, para. 1.

15. Id. para. 2. The Trade Agreement does not demand that arbitration proceedings take place in China, nor does it require that parties submit to such proceedings according to Chinese rules. See id. However, the Chinese are reluctant to submit their disputes to foreign arbitration panels and in their contracts or other agreements with the foreign party may refuse to provide for arbitration outside of China. Theroux, Arbitration in China? You May Need a Chinese Lawyer, CHINA BUS. REV., May-June 1982, at 38. “More and more contracts provide for arbitration to be conducted in China.” Ren, supra note 5, at 8. However, there is evidence that the Chinese have become less hostile to arbitration in neutral settings (third countries). Yeow, Arbitration, CHINA BUS. REV., Nov.-Dec. 1981, at 48. See also Comment, An Evaluation of the People’s Republic of China’s Participation in International Commercial Arbitration: Pragmatic Prospectus, 12 CAL. W. INT’L L.J. 128, 137 (1982) which attests to China’s acceptance of “Western-style” international arbitration.

More than half of all United States-China trade contracts contain clauses which specify arbitration in third countries. Yeow, supra. The Chinese may include such clauses to meet the demands of their trading partners. Id. at 49. A problem that may arise with some contracts results from the lack of a clearly defined “trigger mechanism” which starts the arbitration process. Without an effective “trigger mechanism,” either party to a dispute may resist arbitration by claiming that an amicable solution can still be found. Id. at 50. Furthermore, some contracts call for arbitration in China if the Chinese party is the defendant, and in a third country only if it is not. Id. at 49. See also Ren, supra note 5, at 8 (indicating approval of providing for arbitration in the defendant’s country). In such a case, should the defendant be Chinese, the foreign party may not be permitted to have other than Chinese legal representation. Theroux, supra, at 39. See also infra notes 36-41, 79-81 and accompanying text.
conciliation as means for settling disputes.16 It is therefore important for the American businessman to understand how the Chinese mechanisms for dispute resolution function.

The Chinese approach to commercial practices in general, and to methods of resolving contract disputes in particular, are unfamiliar and, in many ways, fundamentally different from those used in the West. The Chinese avoid going to court, especially over commercial matters.17 Their methods of settling commercial disputes are among the most informal in the world.18 “[T]hey have abolished the opportunity for adversaries in a dispute to squander their energies and fortunes in legal combat in a court of law,”19 a noteworthy achievement. However, a definite dispute resolution procedure that gives confidence to the trader or transnational investor does not exist.

This Note analyzes the Chinese approach to commercial dispute settlement in the context of international contracts. Part I examines article VIII, the dispute settlement portion of the Trade Agreement, and the Chinese procedures for private dispute settlement. Part II discusses the problems of legal uncertainty that exist in the Chinese approach and the prospect of emerging Chinese law. Part III discusses the current importance of conciliation in Chinese

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17. See infra notes 36-40 and accompanying text. Economic courts have recently been established—more than one thousand since 1980. Allen & Palay, Economic Courts, CHINA Bus. Rev., Nov.-Dec. 1981, at 44. They are empowered to dispose of economic and trade disputes involving a foreign party. Id. “Foreign litigants who want to have attorneys to act for them to protect their rights and interests must appoint lawyers of Chinese nationality.” Ren, supra note 5, at 7. In China, lawyers represent the facts, not the client, and will refuse to represent a client believed to be “incorrect”; furthermore, on appeal, according to Chinese law, lawyers who believe that the lower court ruling was proper “must remain silent.” Allen & Palay, supra, at 48. However, Chinese courts of law do not take jurisdiction over foreign trade disputes where an arbitration agreement is in force. See infra note 43. See also Pattison, China's Developing Legal Framework for Foreign Investment: Experience & Expectations, 13 LAW & POL'Y INT'L Bus. 89, 138-41 (1981) (discussion of the economic courts).

The United States Justice Department has decided to permit the Chinese to sue in American courts. This is based on its finding that legal reciprocity now exists between the United States and China. Lewin, U.S. Allows China to Sue It, N.Y. Times, Nov. 2, 1982, at D9, col. 4.

18. See infra notes 38-45 and accompanying text for a discussion of the Chinese resolve to avoid legal formalities.

19. NATIONAL COUNCIL FOR UNITED STATES-CHINA TRADE, SPECIAL REPORT NO. 4, ARBITRATION AND DISPUTE SETTLEMENT IN TRADE WITH CHINA 4 (1974) [hereinafter cited as SPECIAL REPORT].
dispute settlement, presents a case study of an actual joint conciliation conducted in China, and evaluates the results.

I. PRIVATE DISPUTE SETTLEMENT: THE TRADE AGREEMENT AND THE CHINESE APPROACH

The encouragement of settling international disputes by private settlement mechanisms is becoming the norm in United States agreements with socialist countries, and arbitration clauses currently are standard practice in contracts between Western corporations and socialist foreign trade organizations. Arbitration has

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Agreements with Romania and Hungary, for example, contain provisions in which the governments recommend arbitration of disputes arising from international commercial transactions. Section 2 of article VIII of the April 2, 1975 Trade Agreement with Romania provides: The Parties encourage the adoption of arbitration for the settlement of disputes arising out of international commercial transactions concluded between firms, companies and economic organizations of the United States of America and those of the Socialist Republic of Romania. Such arbitration should be provided for by provisions in contracts between such firms, companies and economic organizations, or in separate agreements between them in writing executed in the form required for such contracts. Such agreements (a) should provide for arbitration under the rules of arbitration of the International Chamber of Commerce in Paris; and (b) should specify as the place of arbitration a place in a country other than the United States of America or the Socialist Republic of Romania that is a party to the Convention for the Recognition and Enforcement of Foreign Arbitral Awards of New York on June 10, 1958; however, firms, companies and economic organizations party to a contract may agree upon any other form or place of arbitration. Agreement on Trade Relations, Apr. 2, 1975, United States-Romania, 26 U.S.T. 2305, T.I.A.S. No. 8159 (emphasis added) (footnote omitted).

Article VIII of the March 17, 1978 Trade Agreement with Hungary provides:

1. The Parties encourage the prompt and equitable settlement of commercial disputes between their firms, enterprises and companies.

2. Both Parties endorse the adoption of arbitration for the settlement of such disputes not otherwise amicably resolved. The Parties encourage their respective firms, enterprises and companies to provide in their contracts for arbitration under internationally recognized arbitration rules. Such agreements may specify a place of arbitration in a country other than the Hungarian People's Republic or the United States of America that is a Party to the 1958 Convention for the Recognition and Enforcement of Foreign Arbitral Awards. Parties to the contract may provide for any other place or rules of arbitration.


22. Arbitration may be defined as a voluntary agreement by parties to a contract that disputes arising out of the contract or in connection therewith will be settled by one or more
been preferred by Western businessmen in order to avoid the uncertainties and complications associated with litigation in foreign courts. Furthermore, because arbitration proceedings generally do not result in published opinions, they preserve the confidentiality of commercial arrangements.

23. The significant advantages of arbitration over litigation can be summarized as follows:
   a) Since arbitrators are normally chosen directly by the parties, they enjoy their confidence.
   b) For the same reason, they may be particularly competent for the settlement of a certain dispute.
   c) In international contract cases, the arbitrators may be of different nationalities, and more specifically they—or one of them—may be of a nationality other than those of the parties.
   d) The parties may choose any place they like as the place of the arbitration.
   e) The parties may, within the limits of the public policy of the country where the arbitration is being held, adopt whatsoever rules of procedure they like and select the language in which the arbitration is to be conducted.
   f) The procedure is therefore much more flexible, and thus normally faster, than court procedure.
   g) The arbitration award is normally final and immediately binding upon the parties, and only subject to being set aside for one of several specific reasons.
   h) Recognition and enforcement of arbitration awards are, as a consequence of existing international conventions widely ratified, easier than recognition and enforcement of court judgements.


25. The Chinese system for dispute resolution offers similar advantages and disadvantages to Western arbitration proceedings. The difficulty of assessing the fairness of arbitration awards and other settlements because of the unavailability of reports thereon, *Special Report, supra* note 19, at 15-16, creates the advantage of preserving the confidentiality of the commercial arrangements of the parties. See *supra* notes 20-24 and accompanying text. See generally 1-5 J. Wetter, *The International Arbitration Process: Public and Private* (1979) (extensive treatment of the subject). Because arbitration is less formal and less divisive than court proceedings, it provides a means for resolving disputes in a manner more likely to preserve good will between the parties. Thus arbitration is to be preferred especially where the parties are committed to maintaining a harmonious relationship. Stevenson, *An Introduction to ICC Arbitration*, 14 J. INT’L L. & ECON. 381, 381 (1980).

The existence of a comprehensive commercial law does not necessarily mean that such a law will control in an arbitration proceeding. "In the United States the arbitrators are not
The Trade Agreement encourages private settlement of international contract disputes through the use of several novel provisions.\textsuperscript{26} Included are: pre-arbitral procedures\textsuperscript{27} not found in previous trade agreements;\textsuperscript{28} the possibility of new arrangements;\textsuperscript{29} a broad definition of disputes covered;\textsuperscript{30} greater emphasis on institutional arbitration;\textsuperscript{31} direct reference to a set of recognized interna-
tional arbitration rules;\textsuperscript{32} and government aid in obtaining legal enforcement of international awards.\textsuperscript{33} What is striking about the Trade Agreement is that the provisions relating to dispute resolution are not limited to arbitration. Included are "friendly consultations, conciliation or other mutually acceptable means."\textsuperscript{34} These terms are absent from the trade agreements between the United States and other countries.\textsuperscript{35} The Chinese have a clearly stated preference for friendly negotiation\textsuperscript{36} or conciliation;\textsuperscript{37} both procedures are less formal than arbitration.

What appears to be typical of the Chinese approach is the proclivity to avoid legal formalities of any kind.\textsuperscript{38} The Chinese

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. para. 3. However, despite reference thereto in art. VIII, para. 2, it should be noted that unlike the United States, China is not a signatory to the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38. It was acceded to by the United States on September 30, 1970, and incorporated into domestic law in 9 U.S.C. §§ 201-208 (1976). "China . . . is unwilling to entrust dispute resolution to an international body; it favors bilateral negotiations between the parties." Li, Sovereignty at Sea: China and the Law of the Sea Conference, 15 Stan. J. Int’l Stud., 225, 235-36 (1979). Because China is not a signatory to the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards, supra, China is not necessarily bound to enforce such awards as a matter of international law. Surrey & Soble, supra note 13, at 32. Whether the United States is bound by the terms of the Trade Agreement regarding the enforceability of arbitral awards when the Chinese may not be, is, given the current state of affairs, ambiguous. Id. It might be wise for the parties negotiating contracts with China to include a provision about the enforcement of arbitral awards in their contracts and joint venture agreements. Id.
\item Trade Agreement, supra note 11, art. VIII, para. 1.
\item See, e.g., United States-Hungary Agreement on Trade Relations, supra note 20.
\item See Jen & Liu, People’s Republic of China, 3 Y.B. Com. Arb. 153, 153 (P. Sanders ed. 1978). Because friendly negotiation is, in effect, private discussions between parties to a dispute, reports thereof are generally unavailable.
\item See Trade with China, 65 A.B.A. J. 1063, 1065 (1979). See infra notes 108-12 and accompanying text for a discussion of conciliation in China today. It should be noted that the encouragement of conciliatory settlements is not uniquely Chinese. For example, the International Chamber of Commerce has also encouraged conciliation as an option to arbitration. See, e.g., ICC Rules, supra note 24, arts. 1-5.
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CONCILIATION IN PERSPECTIVE

resort to arbitration procedures only when less formal methods fail to reach an acceptable settlement. As a result, the vast majority of disputes in China never reach the arbitration stage. Over ninety percent of the cases in which Chinese international arbitral institutions participate are settled by friendly consultation or conciliation. About ten to fifteen percent of the settlements come unavailable. Personal communication by Donald B. Straus, author of Diary II, to the author of this Note (Sept., 1982). The American party and the AAA agreed that signing was unnecessary because it was felt that insistence on signing would be damaging to future joint conciliations. Id. For a more complete synopsis of this joint conciliation, see infra Part III of this Note.

However, despite their aversion to formalistic mechanisms for resolving disputes, the Chinese have earned a reputation as strict constructionists of the controlling provisions of commercial contracts. Surrey & Soble, supra note 13, at 32.

"So strict is Chinese insistence on adherence to the contract that several European manufacturers have been known to encounter Chinese complaints or even refusal to accept the goods when they shipped at no added cost pieces of machinery that were newer models than those actually specified in the contract." Lubman, supra note 25, at 138. "Requiring very strict compliance with contract specifications ... is commonly found in all bureaucracies whose officials wish to avoid being blamed for purchasing or accepting defective foreign goods." Lubman, supra note 16, at 6. Because the Chinese have this "strict constructionist" attitude toward contracts, the United States Department of Commerce urges businessmen to press for inclusion of all terms. INDUSTRY & TRADE AD., U.S. DEP'T OF COM., STOCK NO. 003-009-00316-4, DOING BUSINESS WITH CHINA 12 (1979), reprinted in HOW TO DO BUSINESS WITH CHINA 215 (1979) [hereinafter cited as DOING BUSINESS]. "Grave uncertainty exists ... as to the law governing circumstances outside the four corners of the document." Hudspeth, The Nature and Protection of Economic Interests in the People's Republic of China, 46 ALB. L. REV. 691, 699 (1982). "Contract law ... remains the vaguest area of China's civil economic law." Kato, Civil and Economic Law in the People's Republic of China, 30 AM. J. COMP. L. 429, 449 (1982). See generally Hsiao, Role of Economic Contracts in Communist China, 53 CAL. L. REV. 1029 (1965). However, in most cases the American businessman will find that negotiating the terms of his choice is not an easy matter. See infra notes 77-81 and accompanying text for a discussion thereof.

39. Arbitration is more formal than either friendly negotiation or conciliation; less formal, of course, than litigation.


"[A]t its current state of economic development, China is a developing country." Trade Agreement, supra note 11, art. II, para. 3.

41. Holtzmann, supra note 24, at 255, 346 n.23. This figure may appear high to Americans, but settlement of large numbers of cases before an arbitral award is made is not uniquely Chinese. Approximately 50% of the cases handled by the ICC are settled before an award is made. Id. at 255. Approximately 40% of the cases handled by the AAA are so settled, with a like percentage reported for the Foreign Trade Arbitration Commission of the U.S.S.R. Id. Japan reports an even higher percentage of settlements before awards were issued than China. For example, during the first half of 1974, out of 1,497 cases received by
after the conciliators make non-binding recommendations.\textsuperscript{42} Arbitration is thus merely an auxiliary process to friendly consultation and conciliation.\textsuperscript{43}

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the Japan Commercial Arbitration Association, only five were settled by arbitration. \textit{Japan-China Trade Agreement Concluded}, Q. \textit{Japan Com. Arb. A.}, Apr.-Sept. 1974, at 8. Consultation was effectively used to reach a settlement in 1,119 of those cases; adjustment on the complaint was used in 373 cases; conciliation was not used. \textit{Id.} In comparison, during that same year, of the over one hundred commercial and maritime disputes submitted for arbitration in China, all but twelve were settled by friendly negotiation. AAA Visit to FTAC of the People's Republic of China, January 16-28, 1975, from notes taken by Donald B. Straus, at 32 (unpublished) (available at the AAA Library in New York with Mr. Straus' permission) [hereinafter cited as Diary I]. Of the twelve that reached the conciliation stage, only one went to arbitration. \textit{Id.} See also G. Hsiao, \textit{Foreign Trade of China: Policy, Law and Practice} 156-57 (1977).

\textsuperscript{42} Holtzmann, supra note 24, at 255, 346 n.23.

\textsuperscript{43} See Trade Agreement, supra note 11, art. VIII, para. 2. Despite the dearth of cases which go to arbitration and the likelihood that most disputes be resolved "amicably," the availability of an effective procedure for arbitration can be vital. Its availability can provide a strong impetus to compel serious attempts to settle disputes by informal means and can also safeguard against unacceptable delay in friendly consultation and conciliation. Furthermore, an effective arbitration clause becomes indispensable should the dispute remain unresolved by friendly consultation and conciliation. Holtzmann, supra note 24, at 322. See supra note 15 for discussion of arbitration in China.

One major advantage that the Chinese report is their ability to reach a settlement in considerably less time than their Western counterparts. Diary I, supra note 41, at 68. The average time for friendly negotiations in China was reported to be six months, and for arbitration, twelve months. \textit{Id.} This compares favorably with ICC arbitration proceedings, which generally last at least eighteen months, and sometimes as long as five years. Goekjian, \textit{ICC Arbitration from a Practitioner's Perspective}, 14 J. Int'l. L. & Econ. 407, 430 (1980) (figures for the fiscal year 1977). Litigation in the United States is, on the whole, a slower process than the Chinese mechanism for resolving disputes, and resembles in timing the ICC arbitration procedure. For example, according to a 1980 report, a civil trial in a federal district court took an overall average time of twenty months. \textit{Administrative Office of the U.S. Courts, Ann. Rep. of the Director} 393 (1980). See \textit{id.} at 393-96 for detailed tables showing times required by United States District Courts to dispose of civil cases.

However, there are reports which indicate that Chinese contentions of quick settlement are inaccurate, and that in the past many economic disputes could not be settled quickly by using informal means. Allen & Palay, supra note 17, at 45. This led to the creation of economic courts. \textit{Id.} No foreign company has yet appeared in an economic court. \textit{Id.} at 48. See supra note 17 for a discussion of the newly created economic courts.

The preference for informal dispute resolution is not limited to the Chinese. This approach is compatible with the American preference for avoiding commercial litigation in countries such as China, where relatively little is known about the practice and procedure of a legal system so fundamentally different from that of the United States. Nonetheless, an effective understanding of the meaning of and the relationship among friendly consultation, conciliation and arbitration is crucial.

Typically, friendly consultation is the first step in resolving a dispute and is expected to continue even if the parties begin conciliation, or even arbitration. Conciliation, while generally preceding arbitration, may likewise take place while arbitration is in progress. Thus, the Chinese approach is not composed of distinct and separated processes occurring in rigid sequence, but in fact is a flexible system of procedures which may or may not be employed concurrently.

A. Friendly Consultation

Friendly consultation is the attempt to settle a dispute through discussion and correspondence by the parties themselves. It can be compared to pre-trial negotiation between litigating par-
ties followed by a settlement out of court, a process with which American lawyers are familiar.\textsuperscript{51} The Chinese tendency is toward maintaining friendly relationships.\textsuperscript{52} “In traditional Chinese society, law often was equated with coercion . . . .”\textsuperscript{53} A failure to resolve commercial disputes through negotiation and compromise implies that the disputants may not be honorable or reasonable men.\textsuperscript{54}

The Chinese prefer to negotiate a settlement in terms of future business dealings and are reluctant to make cash payments in settlements.\textsuperscript{55} In this way, continuing business relationships are not only encouraged, but assured; thus, a dispute can give rise to additional commerce between the parties according to the terms set forth by the settlement reached.\textsuperscript{56} “Friendly” relations are preserved.

The unique aspect of friendly consultation in modern commercial disputes is the practice of third party assistance at the request of the disputants.\textsuperscript{57} In China this assistance may be administered by the Foreign Economic and Trade Arbitration Commission (FETAC)\textsuperscript{58} or the Maritime Arbitration Commission (MAC).\textsuperscript{59} The

\textsuperscript{51} It should be noted that the use of extensive formal legal briefs is not part of the Chinese approach. See, e.g., id. at 299-300.


\textsuperscript{53} Li, \textit{supra} note 52, at 85.

\textsuperscript{54} Id. at 86.

\textsuperscript{55} See Diary II, \textit{supra} note 25, at 77.

\textsuperscript{56} For example, if a settlement is reached whereby the injured party will receive a ten percent discount on the million dollars worth of future purchases, he must continue to purchase in order to take advantage of the discount.

\textsuperscript{57} Holtzmann, \textit{supra} note 24, at 249.

\textsuperscript{58} To indicate the broadened scope of disputes of which it will take cognizance, the Foreign Trade Arbitration Commission (FTAC) was renamed the Foreign Economic and Trade Arbitration Commission (FETAC) in February, 1980. Excerpt from speech by Shen Shiao-ming to the American Arbitration Association’s Corporate Counsel Committee Meeting (Nov. 12, 1981) at 5. This Note uses the term FETAC.

\textsuperscript{59} Holtzmann, \textit{supra} note 24, at 249.

FTAC was established in 1956, and MAC, in 1958. Disputes arising from contracts and transactions in foreign trade are within their jurisdiction. The basis of the treatment of disputes is founded on the principle of equality of the parties, irrespective of the size of the countries they come from and the amount of capital they possess. These commissions adhere to the rule that “both contracting parties should observe contracts faithfully and honour their
process of friendly consultation thereby encompasses the attempt to settle the dispute by the parties themselves and a process in which they are assisted by a third party.

B. Conciliation

It is difficult to determine the point at which friendly consultation conducted with the assistance of third parties ends and the process of conciliation begins. The Trade Agreement defines neither term. However, there is a distinction: "[C]onciliation begins when one or more third parties are designated as conciliators and embark on a process of assisting the parties to gather facts and analyze their dispute in a deeper and more systematic way than generally occurs in friendly consultation." Unlike arbitration—where the arbitrator's decision is final and binding—the parties to a dispute are free to adopt or reject the proposal of the third party.

promises,"," Jen & Liu, supra note 36, at 154, and are resolutely opposed to national egoism, in making use of arbitration to favor the party of their own nationality. Id. at 153-55.

When ascertaining the rights and obligations of the contracting parties, the FTAC and the MAC also have to refer to those reasonable international practices which have formed themselves in a long period of time in world trade and are favourable to the development of international trade and marine transport. In short, in handling cases, the FTAC and the MAC not only abide by the Chinese laws, observe the provisions of the contracts signed by the parties, but also pay due regard to the international practice. Combining these three elements organically, they are able to solve problems in a fair, reasonable and truth-seeking way.

In concrete work, the FTAC and the MAC adopt the method of combining arbitration with conciliation. An arbitral award is made only where the dispute cannot be settled through conciliation. Experience proves that most of the cases seized by the FTAC and the MAC can be settled by conciliation in the course of investigation or examination, prior to the arbitration proceedings or before an award is granted. This is welcomed by both of the disputing parties, Chinese and foreign. The FTAC and the MAC put emphasis on investigation and study. When handling cases, they not only examine 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 the wrong, to ascertain liability, to be fair and reasonable and truth-seeking.

Id. at 154.

60. Holtzmann, supra note 24, at 249.

61. See Trade Agreement, supra note 11, art. VIII, para. 1.

62. Holtzmann, supra note 24, at 250.

63. "An arbitration award once made has the force of law . . . .” Jen & Liu, supra note 36, at 159.

64. "Conciliation . . . does not lead to any binding judgements or demands on the disputing parties.” Shen, supra note 58, at 4. However one commentator suggests that the
As a means of dispute settlement, conciliation is favored by the Chinese because it is more conducive to continuing friendship and trade relations than is arbitration. However, contrary to a belief that appears prevalent in the West, the Chinese may not be opposed to arbitration. The Chinese do not consider a request for arbitration an unfriendly act, provided that a serious effort to settle the case through friendly negotiations and conciliation has been made. The Chinese do not consider arbitration and conciliation to be mutually exclusive or antagonistic, but rather, complementary processes that may be carried on concurrently.

The participation of arbitrators in the process of conciliation is not unique to the Chinese. Its acceptance in the West is confirmed by the Code of Ethics for Arbitrators in Commercial Disputes, which states:

It is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement of the case. However, an arbitrator should not be present or otherwise participate in the settlement discussions unless requested to do so by all parties. An arbitrator should not exert pressure on any party to settle.

As occurs in friendly negotiations with the assistance of third parties, the role of the conciliator in trade disputes in China is

67. Id. Diary I, supra note 41, at 65 (remark attributed to Jen, Secretary General of F[E]TAC). But see Special Report, supra note 19, at 19 (reporting that the Chinese regard insistence on arbitration as unfriendly or evidence of bad faith).
68. Diary II, supra note 25, at 2. Thus the contention of some that the Chinese regard insistence on arbitration as unfriendly or evidence of bad faith, Special Report, supra note 19, at 19, is perhaps only valid when a serious effort to settle through friendly negotiation or conciliation has not been made. See also supra note 15.
69. Jen & Liu, supra note 36, at 155.
70. Code of Ethics for Arbitrators in Commercial Disputes (1977) (prepared by the American Arbitration Association in conjunction with the American Bar Association).
71. Id. Canon IV, H (emphasis added). But see infra note 139 (UNCITRAL Conciliation Rules, article 19).
generally played by FETAC. It is also possible that a corresponding conciliatory institution of the foreign party's choice can function with FETAC in a process called joint conciliation. Joint conciliation is not intended to supersede any existing contractual provisions. Furthermore, a failure to reach a settlement does not constitute submission by the parties to the jurisdiction of the conciliatory bodies for arbitration purposes.

C. Arbitration

Should the "friendlier" means of resolving disputes fail, arbitration, China's procedure of last resort, may be initiated. The Trade Agreement provides "recourse to arbitration for settlement in accordance with provisions specified in their contracts or other agreements to submit to arbitration." The parties may agree on arbitration in China, the United States, or a third country, but there is no requirement that the Chinese consent to arbitration outside of China in any particular contract. The Trade Agreement merely states that such an agreement is valid. Generally, the Chinese are reluctant to agree to arbitration anywhere other than China, and some commentators contend that the likelihood of

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72. Shen, supra note 58, at 3-4; Ren, supra note 5, at 9. For an account of a joint conciliation conducted between American and Chinese parties, see infra Part III of this Note.
73. Diary II, supra note 25, at 103-04. See also Holtzmann, supra note 24, at 290.
74. Holtzmann, supra note 24, at 290.
75. See Special Report, supra note 19, at 15, 17, 19; Lubman, supra note 16, at 46.
76. Holtzmann, supra note 24, at 253. See also supra note 15.
77. Trade Agreement, supra note 11, art. VIII, para. 2.
78. Id.
79. Note, supra note 43, at 268. "Chinese negotiators typically will insist that arbitration take place in Beijing." Yeow, supra note 15, at 49. The Chinese wonder why a dispute should be settled in a third country. Diary II, supra note 25, at 49. However, they might be willing to have some cases arbitrated in the United States or third countries in order to gain experience with the various ways of settling disputes. Id. See also supra note 15 and accompanying text.

The Chinese are extremely able negotiators. See Jenkins, Dealing with the Chinese, 5 INT'L TRADE L.J. 27, 29 (1979). See also Brown, supra note 9, at 35-37, for a discussion of
third-country arbitrations is minimal. The details of dispute resolution remain open for negotiation on an ad hoc basis, subject to the provisions of the contract.

The Trade Agreement also emphasizes the use of the arbitration rules of FETAC, MAC, the American Arbitration Association (AAA), the United Nations Commission on International Trade Law (UNCITRAL), or other internationally recognized rules. This emphasis on institutional arbitration, in view of general Chinese practice, is likely to lead to more consistent arbitration procedures than would use of ad hoc arbitration. This greater likelihood of consistent procedure is to be preferred in that it "substantially alleviates the obvious difficulties of trying to establish a more comprehensive scheme in the arbitration clause."

II. LEGAL UNCERTAINTY AND THE PROSPECT OF EMERGING CHINESE LAW

The Trade Agreement represents a major step forward in the normalization of the free flow of trade between China and the
United States. However, many American and other foreign businessmen will hesitate to invest in China because of what they perceive as a climate of legal uncertainty despite China's excellent credit rating in the world financial community and China's international reputation for fairness and reliability. Foreign investors ordinarily have no way of knowing what substantive law will govern international commercial transactions because most Chinese laws and regulations remain uncodified. A comprehensive com-

Arbitration Rules, 31 U.N. GAOR Supp. (No. 17) at 35-50, U.N. Doc. A/31/17 (1976); the quoted material is equally applicable to other consistent arbitration procedures.

85. See Cohen, supra note 10, at 143, 147.

86. "China's past loan repayment record had been exemplary and on the basis of this performance, the country has an excellent credit rating in the world financial community." Prybyla, supra note 2, at 50. "[T]he British have offered a $1.2 billion line of credit, the Japanese . . . $2 billion . . . ." Clarke, supra note 9, at 99.

87. "The very few cases that have been arbitrated were reportedly conducted very fairly." Doing Business, supra note 38, at 216. "It has been reported that, as of 1960, 61 cases involving parties from Great Britain, Switzerland, Finland, Greece, the U.A.R., India, Ceylon, Canada and Singapore had been arbitrated—without apparent complaint of the proceeding or the award." Special Report, supra note 19, at 16. See Surrey & Soble, supra note 13, at 35, for testimony as to fairness in conducting inspections.

88. See, e.g., supra note 86. However:

China's credit history is not necessarily a reliable indicator of China's future credit performance. China's present borrowing plans bear little relationship to past practice and must be examined on their own precise merits. This cannot be done unless the Chinese authorities release fuller information than they have done so far on their assets, liabilities, reserves and debt service ratios. If China wants to participate in the world economic community, she should be made to understand that continued obsessive secrecy regarding her economic performance constitutes unacceptable conduct.

Prybyla, supra note 2, at 50.

This "obscene secrecy" is not limited to China's economic performance. It extends to many areas. Although more than 8,000 Chinese scholars, scientists, and students are in the United States, most of whom are studying some form of technology, the 300 or so Americans studying in China find their efforts hampered by obstacles "erected against studying in China." Butterfield, Testing the Limits of U.S.-China Exchanges, N.Y. Times, Aug. 8, 1982, at E20, col. 1. For details on Chinese technical personnel in the United States, see Green, Chinese Technicians in the United States, China Bus. Rev., Nov.-Dec. 1977, at 27, 30. The Chinese have "a penchant for classifying most written materials as secrets . . . ." Butterfield, supra, at col. 3. Some local newspapers, decades-old economic data and even 16th century maps have been so classified. Id. at col. 4. Furthermore, there has been a ban on field research, which suggests that American sociologists and anthropologists are little more than spies. Id. See also N.Y. Times, June 6, 1982, at 15, col. 5, which reports the expulsion of an American teacher on charges of stealing state secrets.

89. See, e.g., Cohen, Huang & Nee, China's New Joint Venture Law, in A New Look at Legal Aspects of Doing Business with China 195, 205-07 (H. Holtzmann & W. Suttey eds. 1979). For example, there are no laws protecting industrial property rights, or protecting against expropriation, nationalization or other taking of property. Id. at 207. Despite the preference of the Chinese for resolving disputes by informal means, contractual obligations
commercial code does not exist, and despite recent efforts toward legislation in this area, China's legal system remains limited almost exclusively to the criminal area. Moreover, detailed reports of trade arbitration or other means for dispute resolution involving Chinese corporations are virtually unavailable, and the Trade Agreement itself contains terms that are ill-defined and subject to more than one interpretation.

are an entirely different matter. The Chinese have earned a reputation for adhering strictly to the controlling provisions of commercial contracts. See Hudspeth, supra note 38, at 693-702 for a discussion of some Chinese laws which have been codified.

90. See generally Cohen, supra note 81, at 73, for a discussion of the recognized need for law within contemporary China.

Reports indicate that China is in the process of drafting a commercial code, but it is expected to be broad, thus leaving many trade questions unanswered. Hudspeth, supra note 38, at 715-17; Mathews, Chinese Seek Grasp of Western Laws, Wash. Post, Nov. 25, 1979, at 28, col. 1. Peng Zhen, Vice-Chairman of the Standing Committee, stated at a recent National People's Congress that priority should be given to drafting a law on contracts so that economic legislation will keep abreast of economic reform. The People's Republic of China: U.S. FOREIGN BROADCASTING INFORMATION SERVICE DAILY REP., Sept. 2, 1980, at L34. See Kato, supra note 38, at 449. But see Foster, Codification in Post-Mao China, 30 AM. J. COMP. L. 395, 428 (1982) (indicating an abandonment of the sweeping program of national codification proposed in 1978 in favor of more conventional Chinese law-making mechanisms. Party leadership continues to be the real source of authority.).


93. Lubman, supra note 16, at 46. This inaccessibility has been confirmed by Jaqueline A. Keith, Program Director, United States Council, International Chamber of Commerce on January 25, 1982 and by Richard E. Lerner, Associate General Counsel, American Arbitration Association, on January 26, 1982, both in personal communications to the author. But see Jen & Liu, supra note 36, at 159 ("The [arbitral] award shall be made in writing . . . "). Article 30 of FETAC rules provides for a written award and an opinion explaining the basis for the decision. Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade (May 6, 1954), reprinted in SPECIAL REPORT, supra note 19, at 49-51. However, the FETAC is not willing to give copies of the award unless it has permission of the parties. Diary I, supra note 41, at 65.

94. For example, article I paragraph 3 of the Trade Agreement states: "Commercial transactions will be effected on the basis of contracts between firms, companies and corpora-
The Chinese recognize the need to strengthen their legal system. They realize that national rules governing economic and civil matters will promote China's program of modernization and help to induce foreign investment and foreign commercial and economic contact. The Chinese leadership has demonstrated an effort to implement a formal system of law. However, the evolution of a legal system is difficult. The development of new laws for internations, and trading organizations of the two countries. They will be concluded on the basis of customary international trade practice and commercial considerations such as price, quality, delivery and terms of payment.” Trade Agreement, supra note 11, art. 1, para. 3 (emphasis added).

This is in keeping with the Chinese policy of adopting, in the absence of a comprehensive commercial code, customary international trade practices in dealings with foreign enterprises. See Some Questions on Developing Economic and Technological Exchanges with Foreign Countries, BEIJING REV., Apr. 27, 1979, at 17, 19-20 (interview with Zou Siyi, member of the Export Bureau of the Ministry of Foreign Trade). However, “customary international trade practices and commercial considerations” are by no means uniform throughout the world. A number of customary Chinese trade practices conform neither to an objective standard of customary international trade practice (to the extent that an established standard exists), nor to customary practices of the United States. Surrey & Soble, supra note 13, at 35. In export sales contracts for example, payment for certified conforming goods usually is to be made at final inspection. Id. The final inspection of exports generally is specified in Chinese sales contracts to take place in China; thus the foreign importer relying on the language “customary international trade practices” may not be aware that he bears the risk of loss during shipment. Id. He must be careful, familiar with all the proposed provisions of the contract, and “know the territory” if he is to negotiate the best arrangement and the best protection from costly misunderstanding. Hammer, A Primer for Doing Business in China, N.Y. TIMES, Apr. 11, 1982, at F2, col. 6 (Armand Hammer is chairman of the Occidental Petroleum Corporation). See generally id. for one businessman's approach.

95. Address by Ren Jian-xim, Director Legal Affairs Department, The China Council for the Promotion of International Trade, Some Aspects of China's Work in Economy, Trade and Law, at 3, given at the American Arbitration Association in New York City (Dec. 11-14, 1979) (reproduced for distribution by the AAA). “[W]e must strengthen our legal systems.” Id. See Hudspeth, supra note 38, at 715-17 for discussion of the forces compelling the enactment of commercial statutes in China. But see Foster, supra note 90, at 428 (indicating an abandonment of the sweeping program of national codification).

96. See Li, supra note 52, at 96, 101 n.27.
97. See Cohen, supra note 81, at 77-78.
98. Li, supra note 52, at 83-84. Work has progressed in the areas of corporations law, civil law and civil procedure, and taxation. Id. See also supra note 91. But note that a similar effort mounted in the mid-1950's collapsed a few years later. Li, supra note 52, at 84, 92. See Cohen, supra note 81, at 82 for discussion of Chinese tax studies. For reprints of regulations, laws and forms on taxation of individuals, joint ventures, and foreign enterprises, see PRICE WATERHOUSE INFORMATION GUIDE, DOING BUSINESS IN THE PEOPLE’S REPUBLIC OF CHINA 43-90 (1982).

Law schools have reopened in China. See Diary I, supra note 41, at 44. In 1979 the graduating class at Beijing University Law School had eighty students. Cohen, supra note 81, at 75.

tional trade will be based on their utility in implementing Chinese policy according to three principles:

1) the policy of independence and of keeping the initiative in Chinese hands;

2) the policy of mutuality and equal benefits; and

3) the policy of taking international practice into consideration.

"[T]o formulate the practices of a particular moment into codes of law might imbue them with a greater sense of permanency than they ought to have." Social and economic conditions in China are changing at a pace that requires reciprocal development of the rules to be applied. "First we [the Chinese] must deal with cases and then sum up experience. Only in this way can we codify procedures."

The prospect of an emerging commercial code offers little assurance to the American businessman or lawyer who is made uncomfortable by the uncertainties of trade, particularly in the face of an unfamiliar dispute resolution mechanism about which practi-


Western trading partners should . . . bear in mind that people from many states with less sophisticated legal systems than the Western model, have found the Chinese arbitration system very much to their liking. After all, there is no merit in sophistication for its own sake. I am sure that many here will welcome a legal system which ensures that the chances of their success do not depend too heavily on the amount of legal fees they are prepared to invest in their claim. Instead, a do-it-yourself kit like the Chinese system may not be such a bad thing. (Coming from a practising lawyer, the last statement has certainly been unbiased and disinterested!) In view of the popularity the Chinese system is at present enjoying internationally, it would be foolish to expect it to be drastically changed to suit the tastes of a few.

Liu, supra note 66, at 13.

102. Id.
103. Id.
104. V. Li, supra note 99, at 4.
105. Id. "Law must be developed step by step, from simple to complex. We [the Chinese] do not advocate making complete set of codes, we prefer separate regulations and acts. Because our country is socialist, our country develops with each passing day. We must adjust laws to men, not men to laws." Diary I, supra note 41, at 55 (statement attributed to Jen Tsien-Hsin, Secretary General of F[E]TAC, Director of Legal Affairs Department).
106. Diary II, supra note 25, at 46 (statement attributed to Jen Tsien-Hsin, Secretary General of F[E]TAC, Director of Legal Affairs Department).
cally nothing, other than hearsay reports, is available. Despite the Chinese reputation for fairness and good faith dealing, the material on the mechanism in action can be looked upon as neutral at best. Alternatively, it can be looked upon as a deliberate move on the part of the Chinese to exclude examination of their mechanism by foreign parties.\textsuperscript{107}

Undoubtedly, the study of experience is the means to knowledge and understanding. Unfortunately, American and foreign businessmen have little to study in the way of Chinese commercial law in general, or the Chinese dispute resolution mechanism in particular. A policy of confidentiality does not allow it.

III. \textbf{THE IMPORTANCE OF CONCILIATION IN CHINESE DISPUTE SETTLEMENT}

\textbf{A. The Current Role of Conciliation}

Conciliation as a means of dispute settlement in China has continuing vitality.\textsuperscript{108} The Chinese still regard arbitration with

\textsuperscript{107} See supra note 88 for a perspective on China's "obsessive secrecy." However, the confidentiality of private dispute settlement mechanisms is what makes them preferred by Western businessmen. See notes 20-25 and accompanying text.


Conciliation has been recognized by the United Nations as a viable means of settling international disputes. UNCITRAL Conciliation Rules have been unanimously adopted by that agency. Report of the United Nations Commission on International Trade Law, 35 U.N. \textit{GAOR} Supp. (No. 17) at 32, U.N. Doc. A/35/17 (1980) [hereinafter cited as UNCITRAL Conciliation Report]. Representatives of both China and the United States were members of the Drafting Party. \textit{Id.} at 11. See id. at 33-38 for the text of the adopted Rules. Article 1 provides that these Rules are applicable by agreement of the parties, and that the parties may modify the Rules at any time. \textit{Id.} at 33.

Article 17 provides that unless otherwise agreed, costs are to be borne equally by the parties. \textit{Id.} at 37. These costs do not include expenses of the parties themselves but do include the expenses of conciliator(s), witnesses, experts, conciliation fees, etc. \textit{Id.} This can be important to an American party who travels to China to partake in joint conciliation. It may motivate both parties to reach a quick settlement as expenses mount. Furthermore, as provided by article 18 the conciliator(s) (and this presumably could include an American joint conciliator) may request each party to deposit equal amounts in advance for these costs. \textit{Id.}
distrust, to be conducted only as a last resort.\textsuperscript{109} "If they could, the Chinese would perhaps dispense with dispute settlement clauses in their contracts altogether."\textsuperscript{110} In a survey of twenty-nine United States-China trade contracts, three had no such clauses, and the remaining twenty-six called for the settling of differences through conciliation.\textsuperscript{111} At least five disputes in United States-China trade have been resolved successfully through conciliation.\textsuperscript{112} While official reports detailing the actual settlements would be illustrative, formal records are unavailable.\textsuperscript{113} However, some unofficial observations of a joint conciliation conducted in 1977 may help the Western reader to understand the nature of the Chinese conciliation process.\textsuperscript{114}

\textsuperscript{109} Yeow, supra note 15, at 48. The great majority of disputes between the Chinese themselves are settled by informal means. See Allen & Palay, supra note 17, at 48, reporting 4,382 settlements before trial out of 6,132 cases examined by the economic courts. See generally supra notes 15, 36, 37, 68, 75 and accompanying text.

\textsuperscript{110} Yeow, supra note 15, at 48.

\textsuperscript{111} Id. at 48-49. Given their dislike of adversary proceedings, it is not surprising that the Chinese seldom resort to arbitration. The few instances of arbitration with Western companies have all taken place in Beijing, according to Chinese sources.

Yet US lawyers involved in China trade insist that the arbitration clause is an indispensable part of any contract. . . . [T]he Chinese will include arbitration clauses in order to meet the needs of their trading partners. But there is considerable variety in the types of clauses agreed to.

At one extreme the language is so vague as to be almost meaningless. Id. at 49. See Note, supra note 43, at 260 which suggests that arbitration clauses are included in contracts by the Chinese in order to avoid jurisdiction of foreign courts. But see Comment, supra note 15 (commentary purporting China's acceptance of "Western-style" international arbitration). See generally supra note 15.

\textsuperscript{112} Yeow, supra note 15, at 51.

\textsuperscript{113} See supra note 93 and accompanying text. Some unofficial reports of case examples do exist, see, e.g., Special Report, supra note 19, at 21-38, but they are relatively uninformative.

\textsuperscript{114} The following material is drawn from an unpublished diary of Donald B. Straus, Diary II, supra note 25. This joint conciliation was the result of almost three years of constructive discussions between the AAA and CCPIT. Id. at 25. Aspects of this 1977 joint conciliation, other than those discussed in this Note, have been reported, most notably in Holtzmann, supra note 24, at 299. The unavailability of more current material is primarily a result of the desire of the parties to maintain the confidentiality of their business arrangements, and this is particularly true in light of the Chinese emphasis on the importance of continuing business relations. Personal communication by Donald B. Straus to the author of this Note. See supra notes 20-25, 65 and accompanying text (general discussion of the preferred position of confidential arrangements). See infra note 137 (brief discussion of reference to this joint conciliation made in later years).

Joint conciliation is compatible with article 3 of the UNCITRAL Conciliation Rules, which provides that the parties may agree that there shall be two conciliators. UNCITRAL
B. A Case Study

The dispute arose in a multimillion dollar transaction between an American seller of commodities and a Chinese buyer. Representatives of the AAA and the Chinese FETAC conducted a successful joint conciliation in China to the satisfaction of the parties.

The contract between the parties required that the product in question be delivered at United States ports by the American seller to the Chinese buyer who would transport the product in ships of its own designation. The seller was unable to meet the delivery date originally agreed upon and requested a revised delivery schedule. The Chinese buyer responded with a new schedule. Subsequently the price of the product dropped sharply; the Chinese buyer failed to meet its revised pick-up schedule. The product was finally shipped to China after long delays that the American seller claimed cost several million dollars in storage and interest charges (carrying charges) which it was entitled to recover under a provision in the contract. The seller requested that a joint conciliation be initiated.
to help find a friendly solution to the problems that had arisen between the seller and the Chinese buyer.

The buyer's position was that the difficulties all stemmed from the seller's inability to deliver according to the original schedule.\textsuperscript{116} The buyer calculated that it justifiably could have cancelled the contract to protect its own interest; under the principles of equality and mutual benefit, it did not.\textsuperscript{117} However, the Chinese buyer offered little or no evidence to support its counterclaim for damages.\textsuperscript{118}

The Chinese conciliators suggested that the American seller had no valid claim and should look to future trade\textsuperscript{119} because, eventually, each side would benefit from growing trade.\textsuperscript{120} This solution was rejected.\textsuperscript{121} The seller wished to negotiate on the case at hand.\textsuperscript{122}

After repeated attempts to reach a mutual understanding, a settlement was reached, consisting of a payment of more than one million dollars by the buyer.\textsuperscript{123} The Chinese stressed that they admitted no liability but agreed to the settlement in the spirit of

\textsuperscript{116} Diary II, \textit{supra} note 25, at 34.
\textsuperscript{117} Id. at 35.
\textsuperscript{118} The Chinese party asserted that it made no claim on these losses in the name of friendship, and thus, because no claim was made, supporting evidence was unnecessary. Id. at 83.

The American party documented its loss with a 45 page brief supported by 14 exhibits. The exhibits included: (1) the contract; (2) a full set of correspondence between the parties; (3) statistical tables; (4) computer printouts of relevant figures; (5) copies of invoices; (6) affidavits by experienced individuals not connected with the transaction to attest to customary trade practices; and (7) copies of United States, British, Swiss and Philippine statutes to demonstrate prevailing international legal principles. Holtzmann, \textit{supra} note 24, at 299-300 (in reference to this same joint conciliation). According to the Chinese approach, the principle of conciliation requires that the search for facts and documentary evidence be limited only to the "essential facts," but the meaning of "essential facts" was never satisfactorily conveyed. Diary II, \textit{supra} note 25, at 5-6.

Article 8(3) of the UNCITRAL Conciliation Rules provides: "At any stage of the conciliation proceedings the conciliator[(s)] may request a party to submit to him such additional information as he deems appropriate." UNCITRAL Conciliation Report, \textit{supra} note 108, at 34. These Rules should alleviate the problem of inadequate information upon which to base a recommendation. Article 11 provides that the parties co-operate with the conciliator(s) in good faith and endeavor to comply with requests for written materials and evidence. Id. at 36.

\textsuperscript{119} Diary II, \textit{supra} note 25, at 51, 71, 77.
\textsuperscript{120} Id. at 71.
\textsuperscript{121} See id. at 51.
\textsuperscript{122} Id. at 76.
\textsuperscript{123} Id. at 100.
friendship. The Chinese insisted that signing the settlement agreement was unnecessary, and that the agreement would be kept.

The key to the American party's right to recovery was a controlling contractual provision that ascertained in advance the legal rules that would apply. Legal rights can be preserved by comprehensive and detailed contracts that cover all conceivable possibilities, exigent or not. However, aside from the extreme impracticability of such an approach with even the most cooperative party, negotiating the terms of choice with the Chinese will be difficult. While the penchant of American lawyers to provide in the contract against every conceivable eventuality is perhaps the most extreme in the world, the Chinese practice of legal informalism, particularly of avoiding written commitment on their part, is equally extreme. Furthermore, "insistence on highly formal and abstract solutions [on the part of American negotiators] . . . might call into question [for the Chinese] the neutrality of the rules . . .

124. Id. at 101.
125. Diary II, supra note 25, at 108. Article 13(2) of the UNCITRAL Conciliation Rules requires that if the parties reach a settlement agreement, it be signed by the parties, and article 13(3) makes such a signed agreement binding. UNCITRAL Conciliation Report, supra note 108, at 36.
126. Id.
127. In this case the controlling provision was included as protection for the buyer. See supra note 115. A recent study of a number of contracts revealed that the terms were decidedly in favor of the Chinese party. G. Hsiao, supra note 41, at 143-52. See Brown, supra note 9, for a discussion of Chinese model contract terms. See also supra notes 77-81 and accompanying text.
   The tendency of American lawyers to want to provide in the contract against every conceivable eventuality is the subject of some amusement on the part of some of their colleagues in other countries. During the course of a recent seminar in Paris on ICC arbitration, a French lawyer recounted to the general mirth of his audience his experience with an American counterpart who wished to "improve" the standard ICC clause by adding "or its successor" after "International Chamber of Commerce."
Reprinted in Stevenson, supra note 25, at 401 n.110.
129. See, e.g., supra note 38 and accompanying text.
urged . . . ." However, this is not to say that United States negotiators should not be firm on points of economic significance. Persistence, composure, patience, and perhaps a bit of insouciance can sometimes turn even a "non-negotiable" issue into one that is negotiable.

This successful resolution of a dispute through joint conciliation, while a simplified account of a complex settlement, is nevertheless instructive. It illustrates the paramount principle that agreements and stipulations of the parties to a contract must be observed—despite the Chinese insistence that the American seller had no valid claim. It also illustrates the Chinese preference for looking to future trade as a way to settle current disputes, as well as the Chinese penchant for informality in their legal approach. Furthermore, the fact that the awarded sum was approximately half the amount sought may be indicative of the Chinese readiness to compromise.

Despite the apparent success of this joint conciliation in reaching a settlement, no further joint conciliations have been conducted by the AAA and FETAC. This may indicate a dissatisfaction on

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130. Lubman, supra note 16, at 9. The Chinese have been skeptical of the attorney's role in negotiating business arrangements. Jenkins, Implications of Recent Agreements for United States-China Trade, 14 INT'L. LAW. 5, 5 (1980). However, this attitude is changing, due in part to the growing importance of attorneys within China itself. Lawyers representing American firms will play an important role as negotiators of commercial contracts. Hudspeth, supra note 38, at 735-40.

131. Contracts with the Chinese do not materialize overnight. Occidental's coal deal took two and one half years of give-and-take negotiations before an agreement was reached. Hammer, supra note 94, at F2, col. 3. A co-production contract between the Chinese and Avon Products Inc. was signed after a year and a half of negotiations. Wren, Peking Factory Making Avon Cream for Chinese, N.Y. Times, Sept. 23, 1982, at D1, col. 5.

132. Jenkins, supra note 79, at 31-32.


134. See supra note 55 and accompanying text.

135. See supra note 38 and accompanying text (the Chinese insisted that signing an agreement of settlement was an unnecessary formality).

136. See supra note 25 for materials on compromise. In the West parties often receive in settlement considerably less than the amount to which they feel they have a right, and this is not considered a compromise.

137. Personal communication to the author of this Note by Donald B. Straus, former President of the American Arbitration Association. Confirmed by Michael Hoellering, General Counsel of the American Arbitration Association in a telephone conversation with the author of this Note on September 22, 1982 [hereinafter cited as Hoellering conversation]. Reference in Ren, supra note 5, at 9, to two joint conciliations conducted in 1978-79 by a branch of the CCPIT and the AAA is said to be in error as to the date. Hoellering conversa-
the part of the Chinese with the joint conciliation process, at least in this instance. In effect, the conciliatory bodies acted as advocates for the entities of their own nations. The Chinese, in pursuit of Chinese control of the dispute settlement process, may consider the AAA's role to have been overly assertive and a derogation from Chinese authority.

CONCLUSION

The likelihood of growing trade between the United States and China gives increasing importance to the Trade Agreement between these two nations and to its dispute resolution procedures.
When a dispute cannot be resolved by the parties themselves, the participation of an objective third party can help the disputants view the matter as part of a continuing business relationship that is in their mutual interests. Conciliation, unlike arbitration or litigation, is a system that allows parties to voluntarily adopt a settlement. The Chinese will continue to prefer conciliation, their traditional means of dispute resolution, although they may experiment with arbitration and court systems in order to appease their foreign business partners.

Joint conciliation, a method not explicitly mentioned in article VIII, has been successfully conducted in China by representatives of the American Arbitration Association and the Chinese FETAC, and evidences the flexibility of the Chinese system. It further manifests the need for flexibility by Americans doing business in China.

The Chinese will continue to assert control over the dispute resolution procedure in whatever form it takes. Foreign parties will want to protect their interests by requesting a provision in the contract requiring joint conciliation should a dispute arise. This is especially true for American businessmen who will feel more secure utilizing this form of dispute resolution. Joint conciliation between American and Chinese parties can take on an adversarial nature because in effect the AAA and FETAC may represent the party of their nation. The American is more comfortable because the settlement process is analogous to being in court; yet, the mechanism is an informal one and trade relations remain friendly. However, the Chinese consider participation, indeed, perhaps even observation, by foreign third parties as encroaching on Chinese control. Negotiating such terms into the contract, therefore, will require concessions by the foreign parties in other areas. The Chinese would prefer to eliminate dispute settlement provisions entirely.

Chinese determination to control Chinese destiny is evidenced by contract terms, see, e.g., Brown, supra note 9, at 34, and the requirements that foreign litigants, and perhaps parties to arbitration proceedings, have Chinese lawyers, if any; yet Chinese lawyers represent "facts," not clients. See supra notes 15, 17. Unfortunately, part of the Chinese determination to maintain control manifests itself in an attitude of secrecy toward the West. See supra note 88.

141. See supra note 65 and accompanying text. However, one author suggests that because of the risk of nationalization, investors should seek high short-term returns on their capital. See Kato, supra note 38, at 455.
It is important for the Chinese to understand that American investors and traders will be hesitant to commit capital to a venture in China if they lack confidence that their investment will be legally protected should a dispute arise with their Chinese business associates. Accustomed to Western legal practices, American businessmen will want to know in advance and in definite terms what their rights and obligations will be under the law. Those who invest at all will do so on terms that take into account the perceived risk that uncertainty creates. Joint conciliation will minimize the perceived risk—and that will increase the attractiveness of doing business in China.

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