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I. Introduction

In December 2001, the World Trade Organization (WTO) admitted China after almost fifteen years of negotiations.[1] With the dramatic decrease in tariff rates for WTO nations[2] came an equally impressive increase in foreign investment into China.[3] Logically, this influx of investment into China also resulted in a greater number of legal disputes

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1. WTO Ministerial Conference Approves China's Accession (Press Release), *WTO News* (Nov. 10, 2001), *available at* http://www.wto.org/english/news_e/pres01_e/pr252_e.htm (last visited Jan. 24, 2006). As part of its acceptance into the WTO, China agreed to: (1) provide non-discriminatory treatment to all WTO Members. All foreign individuals and enterprises, including those not invested or registered in China, will be accorded treatment no less favorable than that accorded to enterprises in China with respect to the right to trade; (2) eliminate dual pricing practices as well as differences in treatment accorded to goods produced for sale in China in comparison to those produced for export; (3) discontinue the use of price controls for use of protecting domestic industries; (4) implement WTO agreement in an effective and uniform manner by revising its existing domestic laws and enacting new legislation fully in compliance with the WTO agreement; (5) within three years of accession, give all enterprises the right to import and export all goods and trade them throughout the customs territory with limited exceptions; (6) not introduce or maintain any export subsidies on agriculture. *Id.*

2. James C. Hsiung, *The Aftermath of China's Accession the World Trade Organization*, 1 IND. INST. IND. REV. 8, 88 (June 22, 2003).

3. *See* GALE GROUP, INC. 2003 EUROMONEY INSTITUIONAL INVESTOR PLC, *China Law & Practice* No. 3 Vol. 17 (Apr. 1, 2003) (chronicling the increased investment in China by foreign companies, as well as listing the firms representing these ventures). *See also* Gregory C. Chow, The Impact of Joining the WTO on China's Economic, Legal and Political Institutions, Invited Speech delivered at the International Conference on Greater China and the WTO (Mar. 22-24, 2001).

between Chinese and U.S. parties.[4] Unlike most multi-national disputes, the disparities between Chinese and U.S. parties have become more difficult to solve due to the diametrically opposed political and social frameworks of the two countries. Yet, because the U.S. previously has dealt with similar problems during the 1980s with Iran[5] and the Soviet Union,[6] the lessons of the not-so-distant past should help provide solutions to the Sino-American problems of today.

Corporate parties from different nations primarily use arbitration to resolve their legal disputes.[7] These parties tend to seek arbitration in order to prevent an abundance of jurisdictional problems.[8] Arbitration alleviates such problems by providing an efficient form of dispute resolution designed by the parties or an arbitral institution.[9] The diametrically opposed legal traditions of the two nations only serve to magnify these jurisdictional problems. As a result, arbitration presents the only viable method of resolving disputes between politically polar opposite nations.

In order to guarantee the legitimacy of the arbitration process, the arbitral institution must ensure the neutrality of the arbitrator.[10] While this proposition may seem self evident, in practice the process can be more daunting. First, parties, at least in the short run, would benefit from favorably partial arbitrators. Second, since nations fall predominantly into either eastern or western political traditions, parties may find it

4. *See* GALE GROUP, INC. 2003 EUROMONEY INSTITUIONAL INVESTOR PLC, *International Financial Law Review* No. 9 Vol. 20 (Sept. 1, 2001).

5. In response to the U.S.'s freezing of assets after the Iran Hostage Crisis, the U.S. and Iran formed the U.S.-Iran Claims Tribunal in The Hague and commenced arbitral proceedings on July, 1, 1981. General information on the U.S.-Iran Claims tribunal is available at http://www.iusct.org/background-english.html (last visited Jan..24, 2006).

6. *See* W. Michael Reisman, *For a Permanent U.S.-Soviet Claims Commission*, 83 A.J.I.L. 51, 53 (Jan. 1989). At the Twenty-Seventh Party Congress in November 1986, Mikael Gorbachev introduced perestroika, a social, economic and political restructuring of the Soviet Union, which opened the Soviet Union up to greater Western influence. *Id.* More background on perestroika is available at http://www.loc.gov/exhibits/archives/pere.html (last visited Nov. 1, 2005).

7. Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the PRC*, 15 BERKELEY J. INT'L L. 329, 333 (1997); *see generally* James H. Carter, *Litigating in Foreign Territory: Arbitration Alternatives and Enforcement Issues, Presentation Before the American Bar Association Center for Continuing Legal Education*, National Institute, Doing Business Worldwide (Feb. 8-10, 1998). In discussing why arbitration is so popular in foreign litigation, the author make multiple assertions including: 1) resulting awards have little risk of being set aside by courts; 2) arbitration awards are easier to enforce than court awards; 3) there is increased privacy; 4) the desire for predictability and avoidance of a potentially hostile foreign court is the largest incentive for choice of arbitration. *Id.*

8. *See* Brown & Rogers, *supra* note 7, at 333.

9. *See* Hightower v. GMRI, Inc., 272 F.3d 239, 241 (4th Cir. 2001).

10. *See* Aetna Cas. & Sur. Co. v. Grabbert, 590 A.2d 88, 92 (R.I. 1991).

challenging to find an arbitrator that can fairly balance an issue decided along geopolitical lines. Finally, intrinsically, both nations distrust each other, making even the selection of an arbitral institution problematic.[11] Yet, even with these problems, the U.S. has managed to successfully resolve disputes with these diametrically opposed nations through the use of arbitration.[12] Furthermore, the opportunity to repeat, and even surpass such successes with China seems much more attainable because the U.S. has a more amiable relationship with China than it did with either Iran or the Soviet Union during the 1980s.[13] While the task of ensuring arbitrator neutrality in China, both in perception and reality, presents a number of possible barriers,[14] the reward of minimizing the risk of western nations doing business in China offers a result conducive to expanding the global economy into a relatively untapped region with a huge productive potential.[15]

Part II provides background of arbitrator neutrality in the U.S. and abroad, as well as discusses its specific importance in corporate and commercial transactions on the international level. Part III examines how arbitration fits within the legal culture of China and illuminates the problems with arbitration in China from a western perspective. To better understand the problems in ensuring arbitrator neutrality in China, Part IV discusses the historical problems and successes that the U.S. had in ensuring neutral arbitrators with Iran and the Soviet Union during the Iran-U.S. Claims Trials and perestroika, respectively. Part V compares and contrasts the problems the U.S. had with Iran and the Soviet Union to the problems the U.S. currently has with China with respect to ensuring arbitrator neutrality. In so doing, Part V demonstrates how certain solutions used in the past may offer possible solutions in China. Finally, Part VI draws basic conclusions from the analysis.

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11. *See, e.g.*, Jerome Cohen, Seminar on Private Equity Investing in Emerging Markets at the Paul H. Nitze School of Advanced International Studies Center for International Business and Public Policy of Johns Hopkins University (Oct. 23, 2001), *available at* http://www.sais-jhu.edu/centers/bizgovcenter/seminars/oct_01text.html (last visited Jan. 24, 2006). In his speech, Mr. Cohen comments on the procedural unfairness to western parties using CIETAC arbitration. *Id.*

12. *See* Richard A. Mosk, *The Role of Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-United States Claims Tribunal*, 1 TRANSNAT'L LAW. 253, 253-270 (1988) (explaining the success of the U.S.-Iran Claims Tribunal); *see also* Edwin R. Alley, *International Arbitration: The Alternative of the Stockholm Chamber of Commerce*, 22 INT'L LAW 837, notes 1-45 (1988) (for evidence of success with East-West disputes in the Stockholm Chamber of Commerce).

13. *Compare* Part III *infra* (detailing in part the current relationship between the United States and China) *with* Part IV *infra* (detailing in part the relationship the United States had with Iran and the Soviet Union during the 1980s).

14. *See* Part III & Part V *infra*.

15. *See U.S. Firms Make Profits in China*, Global News Wire-Asia Africa Intelligence Wire: Business Dailey Update (Oct. 8, 2004).

II. Arbitrator Neutrality

Foreign parties often cite arbitration's perceived independence and impartiality as the main reason why they choose arbitration as their preferred method of dispute resolution.[16] This impartiality begins and ends with the arbitrator or arbitrators deciding the case. Sophisticated commercial and corporate parties voluntarily contract into arbitration to resolve disputes that arise between them.[17] As a result, once arbitrators lose the appearance of impartiality, regardless whether founded on reality, corporate entities shy away from using arbitrators to resolve their disputes, ultimately leading to a chilling effect on commerce between nations.[18]

This part first discusses the grounds for ensuring arbitrator neutrality in the United States, focusing on Section 10 of the Federal Arbitration Act.[19] Next, it examines the importance of arbitrator neutrality in international arbitrations. Specifically, it analyzes the advantages of arbitration over the courts internationally, the advantages and disadvantages of the different structures of arbitral tribunals, and the residual effects of impartiality in international arbitrations.

A. Section 10 of the Federal Arbitration Act

Section 10 of the Federal Arbitration Act (FAA) provides the only statutory means to vacate an arbitration award in the United States.[20] While the purpose of ensuring arbitrator neutrality emanates throughout Section 10, the most applicable sub-section of the statute specifically focuses on "evident partiality or corruption" of the arbitrator.[21] In the

16. Jose Rosell, *Arbitral Proceedings—Selected Issues: The Challenge of Arbitrators*, 10 CROAT. ARBIT. YEARB. 151, 151 (2003).

17. Olga K. Byrne, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party Appointed Arbitrators on a Tripartite Panel*, 30 FORDHAM URB. L.J. 1815, 1817 (Sept. 2003).

18. If parties lose faith in arbitration, one of two results could occur. First, international commercial parties could attempt to use the court systems when conflicts arise. Going through the court systems often leads to litigation in multiple countries because each party would rather litigate in its home nation or at least a nation whose laws favor their claim. *See, e.g., Paramedics Electomedicina Comercial, LTDA. v. GE Medical Sys. Infor. Tech., Inc.*, 369 F.3d 645 (2nd Cir. 2004) (where both a Brazilian and American party brought suit in their respective countries when a dispute over arbitration arose). This result would also draw out the cost of litigation for both parties. *See, e.g. Remmey v. Paine Webber*, 32 F.3d 143, 146 (4th Cir. 1994). Second, foreign parties could simply stop doing business in a country where they believe arbitrators do not act impartially because they believe the risk of doing business in a country without an effective system of dispute resolution outweighs the possible benefits.

19. *See infra* Part II.A

20. *See* Federal Arbitration Act, 9 U.S.C. § 10 (2004).

21. *Id.*

landmark case *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[22] the U.S. Supreme Court vacated an arbitral award on this ground because the neutral arbitrator failed to disclose a continued business relationship, which included consulting with the prevailing party on the dispute in question.[23] The Court found that the neutral arbitrator not only "must be unbiased, but also must avoid the appearance of bias."[24] The Ninth Circuit elaborated on this holding in *Schmitz v. Zilvet*,[25] reasoning that a rule requiring arbitrators to disclose any possible bias to the parties at the outset of the arbitration prevents disgruntled parties from attempting to vacate the award after the arbitrator renders his decision.[26] Conversely, a substantial line of cases has rejected the stringent standard set out in *Commonwealth Coatings* in favor of an objective approach asking whether a "reasonable person" would believe the situation provides "strong evidence of partiality."[27] This view falls in line with the federal policy favoring arbitration.[28] Likewise, some judges have

22. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968).

23. *Id. Commonwealth Coatings* addressed the neutrality of the third party neutral arbitrator of a three-man arbitration tribunal. *Id.*

24. *Id.*

25. Schmitz v. Zilvet, 20 F.3d 1043, 1049 (9th Cir. 1994).

26. *Id.* Many federal and state courts have followed the standard set out in *Commonwealth Coatings*. *See, e.g.*, Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1200 (11th Cir. 1982) (adopting "reasonable impression of possible bias" standard and holding that arbitrator had a duty to disclose his involvment in an ongoing legal dispute with an insurer party); Olson v. Merrill Lynch, Pierce, Fenner & Smith, 51 F.3d 157, 159-60 (8th Cir. 1995) (recognizing that disclosure of "indirect ties" will aid the arbitration process and holding that arbitrator had a duty to disclose business relationship between his firm and the party); Al-Harbi v. Citibank, N.A., 85 F.3d 680, 683 (D.C. Cir. 1996) (recognizing arbitrator's duty to disclose facts which "might create an impression of possible bias"); Barcon Assoc. v. Tri-County Asphalt Corp., 430 A.2d 214, 220 (N.J. 1981) (adopting "appearance of partiality" standard and holding that arbitrator had a duty to disclose business relationship with the party); Kern v. 303 E. 57th St. Corp., 204 A.D.2d 152, 152-54 (N.Y. App. Div. 1994) (implementing an "appearance of partiality" standard and holding that arbitrator had duty to disclose that party's attorney had referred business to him during arbitration proceedings).

27. Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984). This court treated the opinion in *Commonwealth Coating* as a plurality, even though Justices White and Marshall completely joined Justice Black's opinion. *Id.* at 82. Many other federal and state courts have followed the standard set out in *Morelite*. *See, e.g.*, Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993); Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358 (6th Cir. 1989); Local 530, AFSCME, Council 15 v. City of New Haven, 518 A.2d 941, 949 (Conn. App. Ct. 1986) (adopting the *Morelite* standard and holding that a arbitrator did not show "evident partiality" in a labor grievance from a police officer because a mayor had appointed him to public office); In re Arbitration Between U.S. Turney Exploration, Inc. and PSI, Inc., 577 So. 2d 1131, 1135 (La. Ct. App. 1991) (adopting a *Morelite* standard and holding a arbitrator's advice to a party regarding presentation of evidence was not "evident partiality").

28. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). To develop a standard, some courts such as *ANR Coal Co. v. Cogentrix of N.C.*,

attributed the recent cooling of the *Commonwealth Coatings* standard mainly to its inapplicability in the modern business world.[29]

While a recent Texas Supreme Court decision followed the standard set out in *Commonwealth Coating*, it noted that the duty of disclosure does not extend to party-appointed arbitrators.[30] This assertion seems to violate Section 10(a)(2) of the FAA, which calls for a court to vacate an arbitral award if evident partiality occurs in the "arbitrators, or either of them."[31] However, some jurisdictions, both federal and state, have to some extent lessened the standard of partiality for party-appointed arbitrators.[32] These courts assert that not only is it unrealistic to believe that non-neutral arbitrators will refrain from advocating for the party that appointed them, but also that the parties themselves had contracted for a party-appointed arbitrator to ensure the tribunal understood their interests.[33] However, some of these jurisdictions have made a point to state that they nevertheless require arbitrators to "participate in the arbitration process in a fair, honest[,] and good faith manner."[34]

Inc., 173 F.3d 493 (4th Cir. 1999), have developed a set of four guidelines to serve as a framework for evaluating these type of claims. Under the guidelines, the courts should evaluate: (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding. *Id.* at 500.

29. *See* JCI Comm., Inc. v. Int'l Bhd. of Elec. Workers, Local 103, 324 F.3d 42, 51 (1st Cir. 2003) (finding the fact that business rivals of one of the arbitrating parties sat on the arbitration tribunal did not constitute evident partiality because the litigants were on notice that the tribunal would consist of members of its industry). *See also* Sphere Drake Ins., Ltd. v. All Am. Life Ins. Co., 307 F.3d 617, 621-23 (7th Cir. 2002) (finding that a party-appointed arbitrator need not be disqualified simply because he served as counsel for the party in an unrelated insurance matter that occurred four years earlier).

30. Burlington N.R.R. v. TUCO, 960 S.W.2d 629, 639 (Tex. 1997).

31. 9 U.S.C. § 10(a)(2) (2004).

32. *See* Daiichi Haw. Real Estate Corp. v. Lichter, 103 Haw. 325, 342 (Haw. 2003) (assuming that party-appointed arbitrators "might view the proceeding through a more subjective and partial lens than a neutral arbitrator"). *See also* Washburn v. McManus, 895 F.Supp 392, 399 (D. Conn. 1994) ("Courts have commented that some subjectiveness is tolerated and even expected"); Astoria Med. Group v. Health Ins. Plan of Greater New York, 11 N.Y.2d 128, 135 (N.Y. 1962) ("The very reason each of the parties contracts for the choice of his own arbitrator is to make certain that his 'side' will, in a sense, be represented on the tribunal"); Aetna Cas. & Sur. Co. v. Grabbert, 590 A.2d 88, 92 (R.I. 1991) ("It would be inappropriate to require the party-appointed arbitrator to adhere to the same standard of neutrality as a judge. That standard ignores the practical realities of arbitration panels composed of party-appointed arbitrators."); Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 307 F.3d 617, 623 (7th Cir. 2002) (stating "failure [for a party-appointed arbitrator] to make a full disclosure may sully his reputation for candor but does not demonstrate 'evident partiality' and thus does not spoil the award").

33. *See* Rosell, 10 CROAT. ARBIT. YEARB. 151, 155 (2003).

34. Metro. Prop. and Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co., 780 F. Supp. 885, 892 (D. Conn. 1991). The court recognized the distinction between neutral and non-

Conversely, other jurisdictions,[35] as well as arbitral institutions like the American Arbitration Association[36] (AAA), have supported the proposition that all arbitrators, whether party-appointed or neutral, have the same obligation of impartiality. Generally, these jurisdictions believe that any impartiality by arbitrators damages the integrity of arbitration as a whole.[37] Ultimately, the vast majority of international jurisdictions adhere to this legal tradition,[38] making the idea of a non-neutral arbitrator a unique aspect of American arbitration law.[39]

B. Arbitrator Neutrality in International Arbitration

As previously stated, parties from different nations prefer to use arbitration as a means to resolve their legal disputes.[40] Arbitration provides international parties with specific advantages over traditional litigation. Foremost, arbitration alleviates most of the jurisdictional disputes amongst parties.[41] Rather than litigate in the national courts of one of the parties to a dispute, arbitration provides a neutral venue that aims at ensuring procedural fairness for both parties.[42] Specifically, parties can contract to govern all disputes by a certain set of laws or

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neutral parties for disclosure, yet still found that a non-neutral arbitrator's failure to disclose *inter alia* his ex-parte communication with the appointing party regarding the merits of the case constituted a violation of AAA rules. *Id.*

35. *See, e.g.*, Barcon Assocs., Inc. v. Tri-county Asphalt Corp., 430 A.2d 214, 220 (N.J. 1981) (finding that the "idea of biased or partisan arbitrators is conceptually inadmissible, and the law simply cannot allow any judicially enforceable arbitration proceeding to be anything other than an impartial proceeding which has appropriate appearances of impartiality"); Northwest Mech., Inc. v. Public Util. Comm'n of City of Va., 283 N.W.2d. 522, 524 (Minn. 1979) (applying disclosure requirement to both a party-designated arbitrator and neutral arbitrator); J.P. Stevens & Co., Inc. v. Rytex Corp., 312 N.E.2d 466, 468-469 (N.Y. 1974) (applying the disclosure requirement to all arbitrators).

36. AMERICAN ARBITRATION ASSOCIATION, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (effective Mar. 1, 2004), *available at* http://www.adr.org/sp.asp?id=21958 (last visited Jan. 24, 2006).

37. *See* Barcon Assocs., Inc. v. Tri-county Asphalt Corp., 430 A.2d 214, 220 (N.J. 1981).

38. *See* Richard M. Mosk, *The Role of Party-Appointed Arbitration: The Experience of the Iran-United States Claims Tribunal*, 1 TRANSNAT'L LAW. 253, 260 (1988); *see also* Thomas E. Carbonneau, THE LAW AND PRACTICE OF ARBITRATION 335, 413-14 (2004). The Swiss Supreme Court's ruling that party-appointed arbitrators must be independent in relation to both the parties' and the parties' lawyers. *Hitachi Ltd. v. SMS Schloemann*, 15 ASA Bull. 99-107 (Swiss Sup. Ct. 1994); *see also supra* note 36.

39. *See supra* note 32 (listing the jurisdictions that adhere to this different standard); *see also* Carbonneau, *supra* note 38, at 413-14.

40. *See* Rosell *supra* note 16, at 151; Byrne, *supra* note 17, at 1817.

41. *See* Thomas Lundmark, *Verbose Contracts*, 49 AM. J. COMP. L. 121, 131 (Winter 2001).

42. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974).

procedures.[43] For example, a party from country X can contract with a party from country Y to have the contract laws of country Z govern any disputes between them, yet still provide for certain procedural aspects of the arbitration such as the language the arbitrators must speak. Not only does this aspect of arbitration help to ensure parties receive a procedurally fair arbitration, but it also gives them an increased level of substantive predictability for their disputes. Both these aspects of arbitration help to lower the risk of commercial parties doing business in foreign countries.[44] Furthermore, due to the universal acceptance of the 1958 New York Convention,[45] parties cannot resolve their disputes in multiple forums if one party contests the decision of the arbitral tribunal because the convention provides for the confirmation of arbitration awards in member nations.[46]

Arbitration also provides commercial parties with advantages not found in litigation. First, it offers them an efficient and generally cost-effective solution to their legal disputes.[47] The arbitration process, especially the "fast-track variety,"[48] expedites the arbitration process. Furthermore, the lack of an appeals process in arbitration, gives parties expedited finality in their legal disputes.[49] Although arbitration can

43. *Id.* at 518.

44. *See* Philip J. McConnaughay, *The Scope and Autonomy in International Contracts and its Relation to Economic Regulation and Development*, 39 COLUM. J. TRANSNAT'L LAW 595, 633-35 (2001) (commenting on how the choice of law increases predictability, allowing parties to know and adhere to the legal standards before a legal dispute arises); *see also* Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451, 453 (2000) (commenting on how arbitration in international disputes helps to avoid "hometown justice").

45. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention or Convention].

46. *Id.* Article V of the convention provides the limited reasons why parties to the convention should not confirm an arbitration award. *Id.* Currently, 134 nations are party to the convention. The list of nations is available at http://arbiter.wipo.int/arbitration/ny-convention/parties.html (last visited Jan. 24, 2006).

47. *See* Catherine Cronin-Harris, *Symposium on Business Dispute Resolution: ADR and Beyond: Mainstreaming: Systematic Corporate Use of ADR*, 59 ALB. L. REV. 847, 853-54 (1996).

48. Fast-track arbitration is an accelerated form of arbitration contracted into by parties to achieve finality. The SCC Institute has recently changed the name of this form of arbitration from "fast track arbitration" to "expedited arbitration." *See* http://www.sccinstitute.com/_upload/shared_files/regler/web_A4_Forenklade_2004_eng.pdf (last visited Jan. 24, 2005). This form of arbitration increases the benefits of cost-effectiveness and finality, while at the same time limits aspects of procedural due process. *Id.*

49. *See* 9 U.S.C. § 10 (2004) (limiting judicial review of arbitration awards to a few very narrow situations); *see also* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (narrowly restricting the situations where a member nation may not confirm an arbitration award).

contain a substantial level of front-end costs,[50] ultimately, the decreased lawyers' fees, combined with opportunity costs associated with litigation, generally make arbitration more cost-effective for commercial parties than litigation.[51]

Second, arbitration allows parties to maintain privacy in resolving their legal disputes.[52] Generally, parties that solve their disputes through litigation must make certain records public.[53] Arbitration helps to curtail the possibility of damage to a party's reputation from any public litigation.[54] As a result, commercial parties value the anonymity that arbitration offers.[55] Such privacy virtually eliminates the risk of the public learning of the party's "dirty laundry."

Finally, arbitration provides commercial parties with an expert decision maker.[56] Presumably, the arbitrator has a background in the subject area of the dispute.[57] Judges or juries resolving the dispute through public litigation usually do not have the same level of expertise.[58] Consequently, by contracting for an arbitrator with specific knowledge in the field of the dispute, parties hope to eliminate much of the unpredictability associated with litigation.[59]

Arbitrator bias however, negates many of the benefits of arbitration to commercial parties. Before a court can decide whether arbitrator partiality occurred, it must first define what constitutes impartiality. As stated above, different standards relevant to this question exist in the

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50. *See, e.g.*, INTERNATIONAL CHAMBER OF COMMERCE, RULES OF ARBITRATION, Appendix B (effective as of Oct. 2004). Parties must pay on a sliding scale of arbitration fees dependent on the sum in dispute. *Id.* The minimum fee for an arbitration of less than $50,000 is $2,500. The entire scale is *available at* http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf (last visited Jan. 24, 2006).

51. *See* Cronin-Harris, *supra* note 47, at 855-58 (relying on *inter alia* CPR Institute for Dispute Resolution, ADR Cost Savings & Benefits Studies I-14 to I-23 (CPR Model ADR Procs. and Pracs. Series)) (Catherine Cronin-Harris ed., 1994) (discussing the various costs associated with civil litigation).

52. *See* Amy J. Schmitz, *Ending a Mud Bowl: Ending Arbitration's Finality through Functional Analysis*, 37 GA. L. R. 123, 157-60 (Fall 2002).

53. *See* William H. Knull, III and Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeals Option?*, 11 AM. REV. INT'L ARB. 531, 538-39 (2000).

54. *Id.*

55. *Id.* at 538-41.

56. *See* Byrne, *supra* note 17, at 1818.

57. *See* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983) (stating that parties "prefer a tribunal knowledgeable about the subject matter of their disputes to a generalist court with its austere impartiality but limited knowledge of subject matter"); *see also* Letter from Roscoe Pound, Esq., Dean Emeritus of the Law School of Harvard University (Feb. 11, 1953), 8 APR DISP. RESOL. J. 1, 1 (1953), *reprinted in* 56 APR DISP. RESOL. J. 45, 52 (2001).

58. *See* Knull and Rubins, *supra* note 53, at 540.

59. *See* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983).

United States.[60] International jurisdictions tend to adhere to the stricter standard for determining impartiality.[61] Such a standard obviously has its place in arbitrations using a single arbitrator. With the onus of the entire decision-making process on one man's shoulders, a single arbitrator should strive to maintain the same level of impartiality as a judge.[62] However, single-arbitrator arbitrations present some logistical problems[63] even though they cost less than three-man tribunals.[64] Consequently, international commercial arbitrations, especially those cases involving large sums of money, gravitate towards the use of three-arbitrator tribunals with each party appointing one arbitrator.[65] As with a single arbitrator, the third-party neutral arbitrator should maintain the utmost of neutrality. Yet, although against the generally accepted principles of most international jurisdictions, allowing for a different standard of impartiality for party-appointed arbitrators may prove beneficial in specific types of international arbitrations.

At the most, in all arbitrations the level of partiality amongst party-appointed arbitrators must be minimal and uniform. The duty of maintaining the appearance of procedural fairness remains a necessary task, because in the end, the cost of arbitration is minimal compared to the risk of impartiality.[66] Ultimately, institutions can measure the success of arbitration in the willingness of commercial parties to voluntarily contract for its continual use. Without such a willingness to use arbitration, international parties would have greater difficulty resolving disputes in the ever expanding global economy.[67] The

60. *See supra* Section II-B.

61. *See supra* note 38.

62. The operative word in this statement is "strive." Justice White commented on this point in his concurrence in *Commonwealth Coatings*, finding that arbitrators should not be held to the same standard as judges because their effectiveness as arbitrators occurs as a result of their position in the marketplace. The key then becomes not their prior business dealings, but rather their disclosure of these relationships to both parties before the onset of the arbitration. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150-51 (1968) (White, J., concurring).

63. *See* Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT'L ARB. 383, 399-402 (1999). Arbitrations with single arbitrators run into the problem of how that arbitrator is chosen.

64. *Id.* For the most part, this statement is self-evident. Parties must pay three times the amount for a tribunal made up of three arbitrators.

65. *See* Mosk, *supra* note 38, at 253.

66. *See* M. Scott Donahey, *The Independence and Neutrality of Arbitrators*, 9 J. INT'L ARB. 31, 31, 37 (NO. 4, 1992).

67. *See Arbitration Sector to Play a Greater Role*, BUSINESS DAILEY UPDATE, GLOBAL NEWSWIRE—ASIA AFRICA INTELLIGENCE WIRE (May 17, 2004). This article chronicles the increase of trade in China and how this causes more disputes, which have generally been resolved through arbitration. *Id.* Conversely then, if parties do not feel comfortable with arbitration because they feared impartiality of arbitrators, the disputes will not reach a solution. Such a result increases the risk to foreign investors and

increased risk and unpredictability would only lead to a cooling in commerce between foreign nations.[68] As a result, in order to maximize the economic opportunities in foreign nations, countries and arbitral institutions must first ensure the appearance of impartiality in their arbitrators.

III. Arbitration in China

Arbitration has become the preferred method for foreign parties to resolve their legal disputes in China, due in large part to the distrust these parties have with the Chinese courts.[69] The Chinese government has legislated that the Chinese International Economic and Trade Arbitration Commission (CIETAC) is charged with resolving all arbitrations in China involving foreign parties.[70] While this Commission has taken steps to ensure the impartiality of its arbitrators,[71] CIETAC rules nevertheless contain major flaws that give it the appearance of partiality. With the increasing number of disputes between U.S. and Chinese parties,[72] problems arising from this appearance of partiality only will be magnified.

A. The Legal Culture in China

Unlike western nations, China has a unique legal culture predicated

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consequently causes a cooling effect on the level of investment in that particular nation.

68. *Id.*

69. *See* Deborah Chow, *Development of China's Legal System Will Strengthen Its Mediation Programs*, 3 CARDOZO ONLINE J. CONFL. RESOL. 4 no. 131 (2002); *see also* Michael T Colatrella, Jr., *"Court Performed" Mediation in the People's Republic of China: A Proposed Model to Improve the United States Federal District Courts' Mediation Programs*, 15 OHIO ST. J. DISP. RESOL. 391, 395 (2000); *but see generally* Cole Sternberg, *Chinese Courts: More a Gamble than Arbitration?*, 4 INT'L BUS. L. REV. 31 (2004) (stating that Chinese courts may be fairer than arbitration, a minority viewpoint).

70. *See* Li Hu, *Setting Aside an Arbitral Award in the People's Republic of China*, 12 AM. REV. INT'L ARB. 1, 14-16 (2001); *See also* Xiaowen Qiu, *Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of the United States and China*, 11 AM. REV. INT'L ARB. 607, 607-613, 624-628 (2000). While Chinese parties can contract to arbitrate with a non-CIETAC arbitral institution, foreign arbitrations that take place in China must be arbitrated through CIETAC. *Id.* For obvious reasons, Chinese parties prefer to arbitrate in China and often have leverage to do so because foreign parties are coming to China for business. *See* Randall Peerenboom, *The Evolving Regulatory Framework for Enforcing Arbitral Awards in the People's Republic of China*, 1 ASIAN-PACIFIC L. & POL'Y J. 12, *7-*8 (Jun. 2000). Furthermore, enforcing arbitral awards issued by CIETAC is probably easier than those issued by other foreign arbitral institutions. *See generally id.*

71. *See* Michael J. Moser, *Arbitration in China*, THE CHINA BUS. REV. 45 (Sept.-Oct. 1990); *see also* Yanmin Huang, *The Ethics of Arbitrators in CIETAC Arbitrations,* 12 J. INT'L ARB. 5 (NO. 2 1995).

72. *See* GALE GROUP, *supra* note 3.

largely on family.[73] This legal culture differs so much from western legal cultures that western parties often feel that no predictable legal culture even exists.[74] Without taking this culture into account, western parties will find it virtually impossible to conduct profitable and mutually beneficial business dealings with Chinese parties.

1. Contracts

Foreign parties arbitrating in China need to first understand the differences between Chinese and western contract law. Chinese parties do not believe in a finalized contract.[75] Rather, they believe that a contract merely begins a business relationship between the parties and the parties must adapt their contract to meet the future business relationship.[76] This notion of a "living contract" obviously runs contrary to western contract law. For foreign parties accustomed to memorializing entire business relationships in their contracts, this practice can lead to disputes based on this misunderstanding alone.[77] Furthermore, from a western perspective, uncertainty with respect to a contract only increases the risk for foreign corporate parties to enter into joint ventures with their Chinese counterparts.[78]

2. Saving Face and Guanxi

To effectively negotiate with Chinese parties, western parties need to appreciate the Chinese understanding of saving face and guanxi. Saving face originates from a Confucian concept meaning "prestige" and "personal character."[79] Chinese parties put a premium on maintaining

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73. *See* Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1608-09, 1634-38 (JUL. 2000). Law in China has always centered on the family rather than the nation, although this has changed some under communist rule. *Id.* In fact, as Ruskola argues, family or clan in China acts much like a corporation or trust. *Id.*

74. *See* Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 184 (Oct. 2002) (stating, "[u]nlike the more traditional comparativist who studies French or German law, for example, the student of Chinese law frequently needs to convince her audience that the subject matter exists in the first place.").

75. *See* Patricia Pattison and Daniel Herron, *The Mountains are High and the Emperor Is Far Away: Sanctity of Contract Law in China*, 40 AM. BUS. L.J. 459, 460 (Spring 2003). In recent years China has tried to assimilate its contract law to become closer to western views. *Id.*

76. *See* BEE CHEN GOH, TRADE AND INVESTMENT NEGOTIATION WITH THE CHINESE IN CHINA'S INTERNATIONAL TRANSACTIONS: TRADE AND INVESTMENT 40 (K C D M Wilde ed., LBC Information Services 2000).

77. *See* Pattison and Herron, *supra* note 75, at 466-73.

78. *Id.*

79. *See* George O. White III, *Navigating the Cultural Malaise: Foreign Direct Investment Dispute Resolution in the People's Republic of China*, 5 TRANSACTIONS 55, 58

their reputation, or "face," and quickly take offense to any implication that attacks it.[80] Consequently, direct and confrontational behavior inherent to western negotiations often has a detrimental effect upon negotiations with Chinese parties.[81]

Similarly, Chinese parties value the concept of "guanxi" in business relationships. This concept establishes a "special relationship individuals have with each other in which each can make unlimited demands on each other."[82] Such a moral sense of obligation is foreign to western parties and puts great importance on trust and patience.[83] Accordingly, refusing a request by a party will lead to a loss of "face" from the requesting party.[84]

These two concepts center on flexibility between parties. While such a relationship fosters trust, it also leaves uncertainty typically not found in western relations. As a result, the increased risk that western parties may incur in this aspect of relations with Chinese parties increases the importance of ensuring the impartiality of the arbitrators deciding their disputes.

3. Communism

> Foreign observers say that the Chinese are like a sheet of loose sand. Why? Simply because our people have shown loyalty to family and clan but not to the nation—there has been no nationalism.[85]
>
> -Sun Yat-sen

Sun Yat-sen spoke of a China before the rise of communism and Mao Zedong.[86] After 1949, communism introduced the new element of nationalism into China's legal tradition. Unlike other communist societies that believe in "[a]bolition of the family,"[87] China's communism became tiered with the family on the lower level and the state as a national patriarchal presence.[88] However, even this view over-

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(FALL 2003).

80. *See* Jeffery C.Y. Li, *Strategic Negotiations in the Greater Chinese Economic Area: A New American Perspective*, 59 ALB. L. REV. 1035, 1060 (1996).

81. *See* White, *supra* note 79, at 58.

82. GOH, *supra* note 76, at 39-40.

83. *See* White, *supra* note 79, at 60-61.

84. *See id.* at 59.

85. Ruskola, *supra* note 73, at 1681.

86. *See* TIMEasia.com *available at* http://www.time.com/time/asia/asia/magazine/1999/990823/sun_yat_sen1.html. (last visited Jan. 24, 2006).

87. Karl Marx, *Manifesto of the Communist Party*, in The Marx-Engels Reader, 487 (Robert C. Tucker ed., 1978).

88. *See* Ruskola, *supra* note 73, at 1699; *see also* Melanne Andromecca Civic, *A*

simplifies the complex role communism plays in the modern China, especially after the reform era, beginning in 1978.[89]

Although the communist structure may help western parties understand the vast differences between western and Chinese societies, nevertheless, communism greatly increases risk to international business propositions in China.[90] While in recent years the Chinese government has opened its doors to increased foreign investment,[91] the instability of the state-driven system leaves corporations at risk that the communist government could seize their investment with little or no compensation.[92] As a result, western parties not only must stay on good terms with their direct business partners, but also convince the communist party that their investment remains mutually beneficial. However, the situation does not leave U.S. parties without any leverage in their dealings with China. Ultimately, the recent U.S. investment in China has helped to propel the often sluggish Chinese economy.[93] Therefore, the Chinese government has a vested interest in maintaining an appearance of procedural fairness in handling disputes with U.S. investors.

B. Increased Interactions with the West

China's admission into the WTO in December 2001 was only the latest in its attempts to westernize trade.[94] On January 22, 1987, China

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Comparative Analysis of International and Chinese Human Right's Law—Universality versus Cultural Realism, 2 BUF. J. INT'L L. 285, 300-03 (Winter 1995-96). Mao tried hard to alter China to meet his own view of communism standards with plans such as the Cultural Revolution. While these plans worked to some extent, Mao could never severely alter the strong family structure in China. *Id.*

89. *See* Sonia M. Kim, *Old World Religious Persecution in a New World Setting: How International Relationships Can Affect China's Treatment Towards It's Religious People*, 2 RUTGERS J. LAW & RELIG. 2, 4-10 (2000/2001); *see also* Ruskola, *supra* note 73, at 1687-88. Under Deng Xiaoping's leadership, China gradually opened up to foreign investors. This trend culminated in its entrance to the WTO in 2001. *See supra* note 1.

90. *See infra*, note 92 and accompanying text.

91. *See Petrified Forest National Park Expansion Act and Resources Bill 2004: Hearing on United States-China Economic Before the Committee on House Resources, Subcommittee on National Parks, Recreation and Public Lands*, 108th Cong. (2004) (statement by Carolyn Bartholomew, Commissioner United States-China Economic).

92. Like in all countries that experienced a communist takeover, China nationalized its corporate structure soon after Mao took power. *See* Ruskola, *supra* note 73, at 1687-88. More troubling, however, are instances such as the Chinese government's eviction of McDonald's from its prime location near Tiananmen Square, unilaterally rescinding a twenty-year contract after only two years. *See* Tom Post and Steven Strasser, *No Free Lunches Here*, NEWSWEEK 39 (Feb. 20, 1995).

93. China currently has a 15.5 billion dollar trade surplus with the United States. *See* Jill Dutt, *China Unlikely to Float Currency Soon, Officials Say*, THE WASHINGTON POST E1 (Nov. 13, 2004).

94. *See* WTO Ministerial Conference, *supra* note 1.

became a signatory to the aforementioned 1958 New York Convention.[95] China has consistently increased trade with western nations, especially the United States in the past twenty-five years.[96] The approximately 1.3 billion inhabitants of China present a virtually endless source of economic potential for western businesses.[97] Similarly, China has inched its way towards a market economy aided greatly by joint ventures with western entities and special coastal economic zones.[98]

C. CIETAC and Dispute Resolution in China

CIETAC handles virtually every foreign arbitration that takes place in China.[99] With the lack of competition mandated by the communist government, CIETAC has a monopoly on dispute resolution in the emerging super power. Consequently, as more western business comes through China, the impartiality of CIETAC arbitrations holds an ever increasing importance in maintaining good trade relations.

1. CIETAC History and Structure

China originally established a foreign commercial arbitral institution in 1956.[100] By 1980, the Chinese government had renamed the institution the China International Economic and Trade Arbitration Commission (CIETAC).[101] CIETAC's headquarters are located in Beijing, but it has continued to open new offices in other parts of the country to meet increased demand.[102] Since 1988, CIETAC has changed its applicable rules six times, presumably to meet the ever changing demands in the global community for impartiality and fairness in

95. *See* Convention on the Recognition of and Enforcement of Foreign Arbitral Awards (New York, 1958) *available at* http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html (last visited Jan. 24, 2006). This link does not provide the language of the convention itself but rather the countries that have ratified and acceded to it.

96. *See* GALE GROUP, *supra* note 3.

97. *See* China.org.cn Facts and Figures *available at* http://www.china.org.cn/english/en-sz2005/index.htm (last visited Jan. 24, 2006).

98. *See* Sarah Schafer and Wang Zhneru, *A Welcome to Walmart*, NEWSWEEK (Dec. 20, 2004) *available at* http://www.keepmedia.com/pubs/Newsweek/2004/12/20/684459 (last visited Jan. 24, 2006). *See also China Hopes for Activation of Trade and Cooperation with CIS Countries*, ECONOMIC NEWS (Dec. 14, 2004).

99. *See* Hu, *supra* note 70, at 14-16. *See also* Qiu, *supra* note 70, at 607-613, 624-628.

100. China International Economic and Trade Arbitration Commission official website *available at* http://www.cietac.org/ (last visited Jan. 24, 2006).

101. *Id.*

102. *Id.* CIETAC has other offices in Dalian, Fuzhou, Changsta, Chongqui and Chengdu. *Id.* It also maintains sub-commissions in Shanghai and Shenzen, which basically are extensions of the Bejing office in terms of jurisdiction and arbitrators. *Id.*

international arbitrations.[103] Since China's accession into the WTO, CIETAC has become the world's busiest arbitral institution in terms of case load and has arbitrated for parties of 45 countries other than China.[104]

Like most large arbitral institutions, CIETAC has an honorary chairman, vice-president, and several board members.[105] Moreover, each office or sub-commission has its own secretary.[106] Generally, CIETAC arbitrations take place before three-man arbitral panels.[107] In accordance with most three-man panels, each party selects an arbitrator from a list of acceptable CIETAC arbitrators, and the two party-appointed arbitrators choose a third neutral arbitrator.[108] If the two party-appointed arbitrators fail to agree on a third arbitrator, CIETAC administration appoints the presiding arbitrator.[109]

Parties select arbitrators for their specialty in the field of the dispute.[110] CIETAC provides broad guidelines to arbitrators to prevent evident partiality. Article 25 of the CIETAC rules provides that an arbitrator must disclose any circumstances which could cause justifiable doubt of his partiality.[111] Similarly, any party who fears impartiality concerns can submit a request to the arbitral commission for the arbitrator's withdrawal, with the arbitral commission holding the ultimate decision making power.[112]

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103. *Id.*

104. China International Economic and Trade Arbitration Commission official website *available at* http://www.cietac.org/ (last visited Jan. 24, 2006). According to the CIETAC website, CIETAC awards are "accepted as fair and impartial both at home and abroad and are recognized and enforced in more than 140 countries and regions." *Id.*

105. *Id.*

106. *Id.*

107. CIETAC Arbitration Rules, Article 24 *available at* http://www.cietac.org/ (last visited Jan. 24, 2006). Parties can choose a sole arbitrator, but it rarely occurs. In China, parties can also not partake in ad-hoc arbitration. *See* Hu, *supra* note 70.

108. Id. CIETAC's pool of arbitrators is roughly two-thirds Chinese nationals and one-third foreign nationals.

109. CIETAC Arbitration Rules, Article 24 *available at* http://www.cietac.org/ (last visited Jan. 24, 2006).

110. China International Economic and Trade Arbitration Commission official website *available at* http://www.cietac.org (last visited Jan. 24, 2006). CIETAC also promotes conciliation between the parties, if both parties agree to the process or if one party wants the process and the other party agrees to it. CIETAC Arbitration Rules, Article 40 *available at* http://www.cietac.org (last visited Jan. 24, 2006). However, CIETAC allows the arbitral tribunal to conciliate the dispute, which may cause parties to avoid revealing all information for fear that if the conciliation process fails the tribunal will hold that information against the party. CIETAC Arbitration Rules, Article 40 *available at* http://www.cietac.org (last visited Jan. 24, 2006).

111. CIETAC Arbitration Rules, Article 25 *available at* http://www.cietac.org/ (last visited Jan. 24, 2006).

112. CIETAC Arbitration Rules, Article 26 *available at* http://www.cietac.org/ (last visited Jan. 24, 2006). Along with this submission a party must include facts and reasons

2. CIETAC's Structural and Procedural Flaws

While CIETAC has improved with respect to maintaining an appearance of impartiality over the past twenty-five years, CIETAC still has some procedural and structural flaws that undermine its appearance of impartiality. Regardless of the actual impartiality and fairness of CIETAC's arbitration process, western parties will hesitate to contract freely into CIETAC arbitration if it appears unfair. Moreover, CIETAC arbitration has received mixed reviews from foreign commentators that have experienced the process,[113] which only further deters foreign investors from contracting into the process.

CIETAC itself has the ability to appoint the third arbitrator if the two party-appointed arbitrators fail to agree on a neutral third arbitrator.[114] In practice, CIETAC authority almost always appoints a Chinese arbitrator in these situations.[115] Such a practice encourages Chinese parties to dispute the third arbitrator. By doing so, Chinese parties can virtually ensure an arbitral panel made up of two Chinese nationals versus only one foreign national, who may or may not hail from the same nation as the foreign party. Implicitly, the presence of two Chinese arbitrators sends a red flag to foreign parties, if for no other reason than Chinese arbitrators understand the legal position of the Chinese party better because of their rearing in the communist Chinese society. Moreover, CIETAC does not compensate its arbitrators well, making a position with the Chinese arbitral institution less attractive for foreign arbitrators.[116]

Second, CIETAC conducts all arbitrations in Chinese.[117] Unlike English or even Spanish, Chinese is not a commonly accepted language

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why they believe the arbitrator should be disqualified. *Id.* The challenge must be put in no later than the first oral hearing. *Id.*

113. *See infra* notes 123-128.

114. *See* CIETAC Arbitration Rules, *supra* note 107. If parties cannot agree on a third party neutral within fifteen days, CIETAC will appoint that third arbitrator. *Id.*

115. FRESHFIELDS BRUCKHUAS DERINGER, THE RESOLUTION OF CHINA DISPUTES THROUGH ARBITRATION 17 (MAY 2004).

116. *See* Jerome A. Cohen, *Dispute Resolution in China: Putting the House in Order*, CHINA LAW AND PRACTICE, No. 10 Vol. 15, 36 (Dec. 1, 2001). *See also* THE AMERICAN CHAMBER OF COMMERCE-CHINA, VIEWS OF AMERICAN COMPANIES REGARDING ARBITRATION IN CHINA (May 2001) *available at* http://www.AmCham-China.org.cn (last visited Jan. 24, 2006).

117. CIETAC Arbitration Rules, Article 67 *available at* http://www.cietac.org (last visited Jan. 24, 2006). Article 67 allows for the parties to contract in different languages. *Id.* However, the official language of CIETAC arbitration is Chinese and, therefore, without express language stating otherwise, the arbitration will take place in Chinese. Furthermore, all CIETAC arbitrators must speak Chinese. Consequently, arbitrating in other languages may disqualify some arbitrators simply because of a language barrier. *Id.*

in western cultures. The vast differences between western languages and Asian languages such as Mandarin or Cantonese can cause gaps in understanding and translation.[118] Such misinterpretations frustrate western parties and work in the favor of Chinese parties, especially if Chinese arbitrators make up two-thirds of the panel.

Third, CIETAC conducts all arbitrations within China.[119] While this may seem obvious and non-threatening, the fact that the Chinese communist system endorses diametrically opposed views from those of western capitalists' views makes a great deal of difference to western parties. A similar situation would take place if Ohio State had to play Michigan every year in Michigan Stadium. While the rules of the game remain the same, Michigan would have an implicit psychological advantage. Chinese parties also tend to use the system more often, giving them a greater familiarity and comfort with CIETAC arbitration than western parties.[120] In fact, CIETAC arbitrators often render their decisions after only one hearing.[121] Even though this issue garners less weight than those issues previously mentioned, it still adds to the appearance of bias in favor of Chinese parties.

Even more troublesome than CIETAC's procedural flaws is the dissatisfaction certain western parties have felt with CIETAC arbitration.[122] While criticism of CIETAC is not abundantly prevalent,[123] it does exist. Combined with assumptions of unfairness based solely on the Chinese form of government and the procedural flaws already mentioned, these specific instances of dissatisfaction do illuminate the risks of arbitrating with CIETAC that many foreign parties already assume.[124]

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118. Xiaowen Qui, *Enforcing Arbitral Awards Involving Foreign Parties*, 11 AM. REV. INT'L ARB. 607, 634 (2000).

119. CIETAC Arbitration Rules, Article 2 *available at* http://www.cietac.org/ (last visited Jan. 24, 2006). While CIETAC rules now allow it to set up new arbitration centers, it is not clear yet whether these centers can be outside the Chinese mainland. *Id.* Furthermore, CIETAC has to date failed to exercise this option. *Id.*

120. CIETAC arbitration also tends to be much more informal than most western arbitrations. *See* Johnson Tan, *A Look at CIETAC: Is it Fair and Efficient? The China International Economic Trade Arbitration Commission CIETAC has Become One of the Busiest Arbitration Centers in the World. Along with its Heavy Caseload Have Come Questions about CIETAC's Impartiality. How Accurate are the Allegations?*, CHINA LAW & PRACTICE (Apr. 1, 2003). Some observers compare the process to a meeting rather than a hearing. *Id.* The process also usually lasts for one or two days. *Id.*

121. FRESHFIELDS BRUCKHUAS DERINGER, THE RESOLUTION OF CHINA DISPUTES THROUGH ARBITRATION 13 (MAY 2004).

122. *See* Cohen, *supra* note 116, at 36.

123. THE AMERICAN CHAMBER OF COMMERCE-CHINA, VIEWS OF AMERICAN COMPANIES REGARDING ARBITRATION IN CHINA (May 2001) *available at* http://www.AmCham-China.org.cn (last visited Jan. 24, 2006).

124. *Id.*

Jerome Cohen, a well-respected expert in dispute resolution in China as well as a part-time New York University Law Professor, has raised doubts of CIETAC's impartiality, stating "[t]he longer my experience as either an advocate or an arbitrator in disputes presented to [CIETAC], the graver my doubts have become about its independence and impartiality."[125] Other commentators have remarked that the system lacks openness.[126] Specifically, questions have arisen about Chinese arbitrators having secret discussions with Chinese parties during the course of an arbitration.[127] For these reasons, some large American-based corporate law firms have steered clients away from contracting into CIETAC where possible, choosing rather to take their chances in the court systems of Hong Kong or Singapore.[128]

While in practice, parties that have had experience with CIETAC arbitration have generally compared it equally to other international arbitral institutions,[129] both parties who have not experienced the process and lawyers have found it to be less fair.[130] Parties that have not experienced CIETAC obviously base their response on reputation and appearance. Therefore, regardless of the veracity of their beliefs, CIETAC has a reputation problem. However, even more troubling to CIETAC is the relatively uniform response from foreign lawyers, classifying CIETAC arbitration as less fair than other arbitral institutions.[131] While CIETAC may ascribe some of this response to the differences between the Chinese legal traditions and Civil and Common law traditions, the institution must attribute much of this response to its

125. Jane Moir, *Foreign businesses are being urged by their lawyers not to go to China's official arbitration commission,* SOUTH CHINA MORNING POST (Oct. 3, 2001).

126. Evelyn Iritani, *A Local Firm's Baffling Trip Through China's Arbitration System: Origon Group Finds that the Country's Method of Resolving Disputes Still Lacks Openess,* LOS ANGELAS TIMES (Dec. 26, 2003).

127. Jane Moir, *Arbitration to Arbitrary,* SOUTH CHINA MORNING POST (HONG KONG) (October 3, 2001).

128. *Id.*

129. THE AMERICAN CHAMBER OF COMMERCE-CHINA, VIEWS OF AMERICAN COMPANIES REGARDING ARBITRATION IN CHINA (May 2001) *available at* http://www.AmCham-China.org.cn (last visited Jan. 24, 2006). According to this survey, twenty percent of parties that have had experience with CIETAC arbitration have thought the system was more fair, forty percent about the same, and only twenty percent believed it to be less fair. *Id.* Twenty percent of parties did not reply. *Id.*

130. *See id.* No parties surveyed found the CIETAC arbitration process fairer than other international arbitral institutions. *Id.* 35% found it equally fair and 42% found it less fair. *Id.* 23% of parties expressed no opinion. *Id.* Similarly, no lawyers surveyed found the process fairer or even as fair. *Id.* A robust 67% found the process less fair and 33% did not respond. *Id.* Parties without experience attributed much of the problems with CIETAC to the politics in the country. *Id.* Even parties who experienced the arbitration process attribute the problems of CIETAC arbitration to the legal culture or lack thereof among Chinese leaders. *Id.*

131. *See id.*

own procedural and structural flaws that do not appear in other reputable international arbitral institutions. Furthermore, these same lawyers will undoubtedly advise their clients of the risks of arbitrating through CIETAC.[132]

IV. Problems with Ensuring Neutrals with the Soviet Union and Iran

The experiences of U.S. parties with Iran and the Soviet Union during the 1980s can act as a guide to U.S. parties in China. In both experiences, U.S. parties had a pressing economic need to settle disputes. Additionally, in both situations the nations engineered unique solutions to ensure, for the most part, the impartiality of the arbitrators resolving their disputes.

A. Iran-U.S. Claims Tribunal

The Iran-U.S. Claims Tribunal serves as an example of how to effectively resolve disputes between parties from ideologically polar opposite nations. While far from perfect, the tribunal has managed to resolve disputes totaling over $2.5 billion dollars.[133] Furthermore, the tribunal has also provided a broad framework from which future tribunals and arbitral institutions should learn. Ultimately, the tribunal's successes, continuing to this day, serve as a watershed in international arbitration because of the tribunal's unique ability to resolve disputes between diametrically opposed nations.[134]

1. Background

The Algiers Accords established the Iran-U.S. Claims Tribunal to

132. *See* FRESHFIELDS BRUCKHUAS DERINGER, *supra* note 115, at 13.

133. Jeff Bleich, *The Iran-U.S. Claims Tribunal*, 39 VA. J. INT'L L. 1221, 1221 (1999) (reviewing CHARLES N. BROWER & JASON D. BRUESHKE, THE IRAN-U.S. CLAIMS TRIBUNAL (1998)).

134. Before the Iran-U.S. Claims Tribunal, nations would solve disputes of this sort in one of three ways. The nations could go to war and resolve their disputes through military might and subversive tactics. World War II and the Cold War provide excellent examples of this more primal form of dispute resolution. If one or both nations did not want war, the dispute could be solved through political means. However, unlike the Iran-U.S. Claims Tribunal, such political dispute resolution did not look at the merits of each dispute, but rather focused on a means of political compromise to save face and/or bloodshed. In these situations, one party or nation often came out ahead. Examples of this form of dispute resolution include the Cuban Missile Crisis and the 1938 Munich Pact. Finally, a nation's party could simply cut their losses and solve the dispute by avoiding it. In this situation, some parties will lose virtually everything without any form of just compensation. Examples of this form of dispute resolution include U.S. interest in Cuba after the Cuban Revolution and western interests in China after Mao Zedong and the communists took power in the late 1940s.

resolve the commercial disputes that stemmed from the 1979 Islamic Revolutionary takeover of the state of Iran, which included the 444 day standoff between the nations, where revolutionaries seized and held captive American citizens inside the American embassy in Tehran.[135] In response to this act, the U.S. froze over $14 billion worth of Iranian assets in U.S. banks.[136] Consequently, U.S. parties filed approximately 4,700 private claims against Iran to recover for business interests lost in Iran after the hostile takeover.[137]

Established in 1981 in The Hague, the Iran-U.S. Claims Tribunal resolved approximately 95% of the claims within ten years.[138] Amazingly, the Tribunal resolved these disputes in a period where the U.S. and Iran not only lacked diplomatic relations, but also had general hostility towards each other, evidenced by notable events such as the sinking of the *Iran Ajar* in 1987 by the U.S. military, the Iran-Contra affair and alleged Iranian complicity in the taking and holding of American hostages in Lebanon.[139] Yet amidst all the turmoil, the Tribunal managed to provide a peaceful and relatively fair method for both U.S. and Iranian parties to resolve their disputes.[140]

Like most international arbitrations, the Iran-U.S. Claims Tribunal contained three-man panels, composed of one arbitrator chosen by the American party, one chosen by the Iranian party, and a neutral arbitrator chosen from a neutral nation.[141] A modified version of UNCITRAL rules governed the Tribunal arbitrations.[142]

2. Problems

The Tribunal did not always run as smoothly as the United States, the Netherlands, or Iran would have liked. Much of the difficulties arose

135. *See* Bleich, *supra* note 133, at 1222-23.

136. *See* http://archives.cnn.com/2000/WORLD/meast/11/14/iran.usa.reut/ (last visited Jan. 24, 2006).

137. The U.S. Department of State Official Website *available at* http://www.state.gov/s/l/3199.htm (last visited Jan. 24, 2006).

138. Charles N. Brower, *The Lessons of the Iran-United States Claims Tribunal: How May They Be Applied in the Case of Iraq?*, 32 VA. J. INT'L L. 421, 421 (1991-1992).

139. *See id.* at 421-22.

140. *See generally* GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL: AN ANALYSIS OF THE DECISIONS OF THE TRIBUNAL (Oxford University Press) (1996). General information on the Iran-U.S. Claims Tribunal is *available at* http://www.iusct.org (last visited Jan. 24, 2006).

141. *See* Mosk, *supra* note 12, at 255.

142. John D. Franchini, *International Arbitration Under the UNCITAL Arbitration Rules: A Contractual Provision for Improvement*, 62 FORDHAM L. REV. 2223, 2229-30 (MAY 1994). UNCITRAL stands for United Nations Commission on International Trade Law. *See* http://www.uncitral.org/ (last visited Jan. 24, 2006).

in regard to the impartiality of party-appointed arbitrators.[143] Although, the Tribunal proved effective, the problems the Tribunal had with regards to impartial arbitrators surely will repeat themselves in future arbitrations involving parties from diametrically opposed nations.

First, the rules failed to sufficiently define the standards of impartiality. While the rules governed the process by which a party could challenge the impartiality of an arbitrator, the final decision fell in the Chief Justice's objective discretion.[144] UNCITRAL Rules allowed for a challenge of an arbitrator on the basis of "justifiable doubts as to the arbitrator's impartiality."[145] However, the rules only indirectly define a standard for impartiality and independence.[146]

Article 11 of the UNCITRAL Rules also gave parties fifteen days either from the time of appointment or from the time a party learns justifiable doubts to challenge an arbitrator.[147] This raised issues of whether the party had to actively seek information on the other party appointed-arbitrator's neutrality.[148] Similarly, it again raised issues of the standard of impartiality used by the Chief Justice.

The Tribunal also had trouble adapting to the cultural barriers that existed between Iranian and U.S. parties. Ultimately, U.S. arbitrators had a certain level of freedom from their government that Iranian arbitrators did not.[149] As a result, other arbitrators felt that the Iranian arbitrators worked for the Tehran government rather than as objective arbitrators.[150] In fact, at some level, the bias of the Iranian arbitrators may have actually driven the neutral arbitrators toward the American arbitrators who attempted to act with a greater level of neutrality.[151]

A poignant demonstration of this problem occurred by way of the attack on Judge Mangard, a neutral arbitrator, by two Iranian arbitrators

143. *See infra* notes 144-157.

144. Stewart Abercrombie Baker & Mark David Davis, *Establishment of an Arbitral Tribunal Under the UNCITRAL Rules: The Experience of the Iran-U.S. Claims Tribunal*, 23 INT'L LAW. 81 (Spring 1989).

145. UNCITRAL Rules art. 10.

146. *See* Baker & Davis, *supra* note 144.

147. UNCITRAL Rules art. 11.

148. *See* Franchini, *supra* note 142, at 2237-39. *See also* Robert H. Smit & Nicholas Shaw, *The Center for Public Resource Rules for Non-Administered Arbitration of International Disputes: A Critical and Comparative Commentary*, 8 AM. REV. INT'L ARB. 275, 289-90 (1997).

149. *See* Mosk, *supra* note 12 at 267-268.

150. *See id.* at 268.

151. *See* Nancy Armoury Combs, *Carter, Reagan, and Khomeni: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303, 437-439 (Jan. 2001). Another example of impartiality occurred when an Iranian arbitrator illegally advised an Iranian party of the outcome of an arbitration before it occurred, prompting the Iranian party to go into eleventh hour negotiations. *See* Baker & Davis, *supra* note 144 at, notes 133-134.

in September 1984.[152] The two assailants attacked Mangard, who was expected to be named acting president of the tribunal, on his way to the office.[153] The assailants apparently justified their position by claiming that Mangard implicitly allied with the United States.[154] However, such an attack may actually provide proof of the Iranian arbitrators' impartiality. In the end, the attack caused a delay in the tribunal's proceedings and led directly to the dismissal of the two assailants from the tribunal's panel of arbitrators.[155]

Finally, the tribunal resolved cases slowly, especially during its early years.[156] Due in large part to the problems discussed above as well as the simple logistical problems of having two diametrically opposed nations agree on anything, the process did not reach fruition as quickly as desired. However, within ten years, the Tribunal managed to resolve approximately ninety-five percent of the claims.[157]

3. Successes of Claims Tribunal

The results of the Tribunal display its success. In similar revolutions by governments adverse to the United States in China and Cuba earlier in the Twentieth Century, U.S. parties lost virtually all of their investment with little or no means of just compensation.[158] Although the process did not happen overnight, U.S. parties eventually received just compensation for their lost investment in Iran, which totaled approximately 2.5 billion dollars.[159]

The tribunal could not have achieved this success without the appearance of impartiality. The simple fact that the tribunal held its hearings in the Netherlands, respected for its relative neutrality, added to

152. *See Iranian Arbitrators Attack Mangard*, IALR 9, 170 (Sept. 5, 1984). *See also* Baker & Davis, *supra* note 144. There were actually many challenges by arbitrators on both sides. *Id.*

153. *See* Baker & Davis, *supra* note 144.

154. *See id.* at note 143.

155. *See id.* at note 148.

156. *See* Bleich, *supra* note 133, at 1237-38.

157. *See* Brower, *supra* note 138, at 421.

158. After the Communist Revolutions in China, 1949, and Cuba, 1959, the new governments nationalized their businesses, leaving most American investors with little or no compensation. The polarized atmosphere of the Cold War made it difficult to threaten specific reprisals without the fear of Soviet intervention on the side of the Communist nations. *See* http://www.pbs.org/wgbh/amex/castro/timeline/ (last visited Jan. 24, 2006) (chronicling the post-revolution governmental actions in Cuba); *see also* Debbie Liao & Philip Sohmen, *The Development of Modern China*, 1 STAN. J. E. ASIAN. AFFAIRS (Spring 2001) 27, 27-29 (discussing the nationalization of Chinese Private enterprise under Mao Zedong).

159. U.S. State Department Official Website *available at* http://www.state.gov/s/l/3199.htm (last visited Jan. 24, 2006).

the tribunal's legitimacy.[160] Even with the problems experienced with respect to the bias of the party-appointed arbitrators,[161] the neutral arbitrators provided an impartial presence needed in a tribunal in which the parties polar opposite views virtually ensured an inherent bias by the party-appointed arbitrators.[162]

The general international standard of having completely neutral party-appointed arbitrators failed in this tribunal.[163] However, with such diametrically opposed views, such a result seems logical. Although the inherent question of impartiality slowed the tribunal, the problem stemmed less from the fact that party-appointed arbitrators held this apparent bias, but rather from the lack of a defined standard of what constituted a violation of neutrality. In fact, party-appointed arbitrators may have helped ensure the ultimate success of the tribunal by allowing both parties to feel that their legal position had been advocated and understood within the tribunal.[164]

B. U.S.-Soviet Arbitration During Perestroika

Western parties encountered even more pronounced problems finding neutral dispute resolution forums with the Soviet Union than currently in China. From 1945 to 1991, the eastern block nations such as the Soviet Union had waged war against the West, not necessarily on the battlefield, but always in the economy and minds of citizens.[165] As a result, world views remained polarized, making it difficult to find neutral third parties trusted by both sides.

Beginning with the ascension of Mikhael Gorbachev to the premiership in 1985, Soviet economic interests began to open to the

160. *See* N.V. Handelsbureau la Mola v. Kennedy, 370 U.S. 940, 940 (1962) (Black J. dissenting). This case presents only one of many examples of the Netherlands neutrality which extends from their neutrality in 1756 during the Seven Years War to its neutrality pact in 1939. The Hague is also the location of the International Criminal Court as well as a number of historic conventions known for their neutrality such as the 1907 convention. *See* International Criminal Court Official Website *available at* http://www.icc-cpi.int/ (last visited Jan. 24, 2006).

161. *See supra* notes 143-151.

162. *See* Mosk, *supra* note 12, at 263.

163. *See generally* Richard A. Mosk, *Lessons From The Hague-An Update on the Iran-United States Claims Tribunal,* 14 PEPPERDINE L. REV. 819 (1987); Combs, *supra* note 151, at 437-39.

164. *See* Mosk, *supra* note 12, at 253.

165. The Cold War lasted from 1945, the end of World War II, to approximately 1991, the fall of the Soviet Union. Some experts also claim that the fall of the Berlin Wall in 1989 ended the Cold War. A vast amount of information about all aspects of the Cold War is available at http://www.cnn.com/SPECIALS/cold.war/kbank/ (last visited Jan. 24, 2006).

West.[166] This dramatic change in Soviet economic foreign policy, otherwise known as "perestroika,"[167] made it necessary for the eastern and western parties to find an acceptable dispute resolution forum to resolve the increased number of business disputes between the blocks.

1. Arbitration in the Soviet Union

Founded in the 1930s, the Foreign Trade Arbitration Commission (FTAC) acted as the Soviet Union's arbitral institution of choice for disputes involving international parties.[168] Like CIETAC in China, the USSR's Chamber of Commerce controlled FTAC, indirectly making it an extension of the government in Moscow.[169] This trait of FTAC gave it the appearance of impartiality that further structural problems only managed to enhance.[170]

First, all FTAC arbitrators were Soviet nationals.[171] While FTAC rules did not prohibit foreign nationals from becoming FTAC arbitrators, in practice the Chamber of Commerce did not appoint any foreign nationals.[172] Consequently, western parties could not appoint an arbitrator whom they felt understood their western position. Moreover,

166. *See* W. Gary Vause, *Perestroika and Market Socialism: The Effects of Communism's Slow Thaw on East-West Economic Relations*, 9 NW. J. INT'L L. & BUS. 213, 216-17 (Fall 1988).

167. *See supra* note 6 for more information on perestroika. *See also* V.A. Kabatov, *Arbitration in the USSR: The 1988 Statute and Rules of the Arbitration Court of the USSR Chamber of Commerce and Industry*, 5 ARB. INT'L 45, 48 (1989). The article states, generally, that an increased number of Soviet organizations had been given import/export rights, a direct result of Gorbachev's perestroika policies. *Id.*

168. *See* Kaj Hober, *Arbitration in Moscow*, 3 ARB. INT'L 119, 121 (1987).

169. *See id.* at 121. *See also* Vladimir Orlov, *Arbitration Procedure in East-West Trade*, 55 NORDIC J. INT'L LAW 310, 312 (1986) (describing the differences in procedure between arbitration in the Soviet Union through FTAC and the institutions to which western parties are generally accustomed).

170. *See generally id.*

171. *See Hober, supra* note 168, at 123, 146. Under Soviet legal theory, social organizations are different than a state organization in that, theoretically, the state does not have coercive powers over its members. *Id.* However, while technically the Chamber of Commerce is not subordinate to the Soviet Foreign Trade Ministry and therefore a social organization, in practice the Chamber of Commerce made up part of the Soviet foreign trade monopoly. *Id.* Consequently, the Soviet government indirectly has power over FTAC, a result which presumably was created by the Soviet government to have FTAC appear neutral while at the same time not fall from the web of party power. *Id.* However, this structure did not go unnoticed by western lawyers who questioned the legal fairness of FTAC. *Id.*

172. *See id.* at 128. While neither Soviet statutes nor Rules of Procedure contain any restrictions with respect to the citizenship of FTAC arbitrators, in practice the Chamber of Commerce only promoted Soviet citizens. *Id.* Thus, it can be expected that Soviet arbitrators typically have the same "general economic and legal outlook as the Soviet party in the dispute." *Id* at 158.

the Chamber of Commerce elected arbitrators to serve four-year terms,[173] further tying arbitrator's personal interests into those of the Chamber of Commerce.

Second, all arbitrations took place within the Soviet Union.[174] Winston Churchill did not call the border separating eastern and western bloc nations the "Iron Curtain" for no reason.[175] Life behind the curtain was intimidating, not only for western parties who generally did not live in such a restricted atmosphere, but also for eastern parties who knew one faulty move could endanger their lives.[176] Thus, the fact that FTAC arbitration took place in Moscow put an immediate red flag up to western parties.

Third, the entire process of determining impartiality of an arbitrator remained internal.[177] The Soviet government could have circumvented some of FTAC's problems associated with its entanglement to the arbitration process if it delegated decision making regarding the challenges to impartiality to an outside party with some western ties. However, the Soviet government had a hand in deciding all these challenges.[178]

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173. *See* Wim A. Timmermans, *The New Statute on the Arbitration Court at the USSR Chamber of Commerce and Industry*, 5 J. INT'L ARB. No. 3 97, 101 (1988). If it was not enough that an adverse opinion by FTAC arbitrators could prompt a midnight visit for the KGB, arbitrators also had four-year terms. *See* Hober, *supra* note 168, at 127. If the presidium decided not to re-elect an arbitrator, his options in the legal world may have been limited, depending upon their reasons for not re-electing him. *Id.* All this said, the Chamber of Commerce usually reappointed arbitrators when their terms expired. *Id.* The author failed to analyze this process though. Re-election could easily have occurred because most arbitrators followed the party's ideal conduct and decision making, rather than for their reputation for conducting fair and neutral arbitrations.

174. FTAC Rules § 6. *See also* Kabatov, *supra* note 167. All arbitrations were conducted in Russian. *Id.* It may be conducted in another language with the consent of the tribunal. *Id.*

175. *Iron Curtain Speech* made by Winston Churchill at Westminster College, Fulton, Missouri (March 5, 1946). This speech introduced the term "Iron Curtain" into the popular vernacular to describe the division between the geographical areas of the west and east. *Id.*

176. *See generally,* PETER STRAFFORD, SEXUAL BEHAVIOR IN THE COMMUNIST WORLD; AN EYEWITNESS REPORT OF LIFE, LOVE AND THE HUMAN CONDITION BEHIND THE IRON CURTAIN (Binding Unknown, 1967). *See also* Katherine B. Eaton, DAILY LIFE IN THE SOVIET UNION (Greenwood Press) (2004).

177. *See* Pat K. Chew, *A Procedural and Substantive Analysis of the Fairness of Chinese and Soviet Foreign Trade Arbitrations*, 21 TEX. INT'L L. J. 291, 304 (1985-1986). *See also* Hober, *supra* note 168, at 146. FTAC also did not impose any disclosure requirements among their arbitrators, calling into question the arbitrators impartiality right from the onset. *Id.*

178. FTAC Rules § 22, para. 1-2. *See also* Chew, *supra* note 177, at 303-304. A party could challenge the partiality of one or more arbitrators. *Id.* If the party challenged one arbitrator, then the remaining two arbitrators ruled on the issue. *Id.* If more than one arbitrator's neutrality was called into question, FTAC itself would decide the issue. *Id.*

While FTAC scholars and the Soviet government preached the impartiality of FTAC as an arbitral institution to the outside world,[179] evidence exists suggesting otherwise.[180] One specific example existed where FTAC did not allow the Israeli government to present their case because the arbitrators instructed by the government had already decided the case beforehand.[181] Even though such blatant bias may have been isolated, the trend of impartiality towards western/industrial nations seemed to have continued. In a study conducted by Pat Chew, a leading scholar, he found that in disputes involving one party from the Soviet Union and another from an eastern bloc country, FTAC remained virtually neutral.[182] However, the study concluded that when the claimant was from an industrial/western nation and the defendant hailed from the Soviet Union, the claimant only prevailed 24% of the time.[183] Furthermore, when the claimant was from the USSR and the defendant hailed from a western/industrial nation, FTAC arbitrators rendered an award in favor of the Soviet party 89% of the time.[184] Such results seemed to justify western parties' fears of arbitrating with FTAC in the

179. *See* Hober, *supra* note 168 at 154. *See also* Chew, *supra* note 177 at 302.

180. *See infra* notes 181-183.

181. *See* J. Lew, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY IN COMMERCIAL ARBITRATION AWARDS 30-31 (1978). A short description of the repercussions of FTAC's decision in the Soviet-Israeli Oil Arbitration of 1958 follows:

> That dispute arose out of the refusal by the Soviet Government to grant an export license in respect for oil meant for Israel. The refusal was a political act of the Soviet Government, in retaliation for the Israeli Suez campaign of 1956. When the Israeli purchaser claimed damages from the Soviet exporting enterprise, the FTAC made a very short and cursory award after an equally cursory hearing. Reports followed the award that the Israeli's [sic] had been denied an opportunity to put their case, the decision had been dictated by the Soviet government and the arbitrators had decided their award before hearing the parties. It was further reported that a Soviet professor who had been instructed by the Israeli's had been allowed to give evidence against the Israeli party. This award caused a furor [sic] in the west, amongst both lawyers and businessmen, and did more to undermine the reputation of socialist arbitration than any other fact.

Id. at 30. A translated and reproduced copy of the award is available in 53 AM. J. INT'L L. 800 (1959).

182. *See* Chew, *supra* note 177 at 325-329. The eastern bloc or COMECON countries Chew included were Czechoslovakia, East Germany, Hungary, and Poland. *Id.* The foreign, yet eastern block nation prevailed in 43% of the arbitrations available. *Id.*

183. *See id.*

184. *See id.* The survey Chew took looked at the arbitrations available to him. *Id.* Being a very secretive society, the Soviet Union did not release all arbitrations conducted by FTAC to the general public. An assumption can be made that if all cases had been released the ratios probably would be even more skewed towards the Soviet parties because, presumably, the government withheld arbitration results from disputes that the government had an interest in keeping confidential. Most likely the non-published arbitrations are the types of dispute that the Soviet government would have an interest in prevailing.

Soviet Union.

2. Effectiveness of Arbitrating with Stockholm Chamber of Commerce

Due to the mutual mistrust between the U.S. and Soviet Union with regards to arbitrating in the other's nation, the parties of both nations implicitly agreed to the Stockholm Chamber of Commerce (SCC) as an alternative venue to resolve much of their trade disputes.[185] During the Cold War, Sweden presented a unique position of a moderately socialist government with a well-chronicled history of neutrality.[186] Such a position made it an ideal forum to arbitrate east-west trade disputes.[187]

The presumed impartiality of the SCC Institute allowed it flexibility with its rules. The SCC basically followed a freedom of contract principle with the institution maintaining the power to conduct the arbitration as it seemed fit within the bounds of the contract, agreed upon by both parties.[188] Generally, tribunals consisted of three-man panels, with each party appointing one arbitrator and the SCC Institute appointing the presiding arbitrator.[189] Similarly, the SCC maintained broad and non-descript disclosure policies.[190] The SCC ultimately decided on any accusations of impartiality of arbitrators with little or no stated guidelines to their decision.[191] While not the optimal procedure for international arbitrations, other factors such as location, history, and background made both parties feel assured of the process' impartiality.[192]

185. *See* Edwin R. Alley, *International Arbitration: The Alternative of the Stockholm Chamber of Commerce*, 22 INT'L LAW. 837, Notes 7-9 (Fall 1998). The SCC Institute was founded in 1917 and originally served Swedish domestic arbitration. *See* http://www.sccinstiute.com/uk/About (last visited Nov. 1, 2005). Starting in the late 1970s, the SCC began to serve as a forum to resolve east-west Trade disputes. *Id.*

186. *See* Volker Viechtbauer, *Arbitration in Russia*, 29 STAN. J. INT'L L. 355, 450-51 (Winter 1993). Sweden's arbitration law also met international standards and was easily accessible to foreign parties because of the availability of accurate English translations. *Id.*

187. *See* W. Lawrence Craig, *Some Trends and Developments in the Laws and Practices of International Commercial Arbitration*, 30 TEX. INT'L L. J. 1, 14-15 (Winter 1995).

188. *See* Alley, *supra* note 185 at notes 15-22.

189. *See* Volker Viechtbauer, *Arbitration in Russia*, 29 STAN. J. INT'L L. 355, 451 (Winter 1993). The SCC formed their tribunals with a choice of six arbitrators from Eastern European countries (excluding the the USSR), six arbitrators from western nations (excluding the U.S.), and six neutral presiding arbitrators from Sweden. *See also* Arbitration Clause for Optimal Use in U.S.A.-U.S.S.R. Trade, 1978 Y.B. Arb. 299, 299.

190. *See* Alley, *supra* note 185 at notes 15-22.

191. *See id; see also* Stockholm Chamber of Commerce Official Website *available at* http:/www.sccinstitute.com/uk/About (last visited Jan. 24, 2006). According to the SCC Website, in 1988 the arbitration institute revised its rules of arbitration for the purposes of making the arbitral procedures more international. *Id.*

192. *See generally* Alley, *supra* note 185.

According to the SCC Institute Secretary-General Ulf Franke, objections to arbitrators or the arbitration agreements were infrequent.[193] After the fall of the Soviet Union in 1991, the SCC Institute has continued to take an active role in resolving disputes between former Soviet-bloc nations.[194]

V. Analysis of Comparisons Between Problems Western Parties Have Arbitrating in China with Similar Problems Western Parties Had in Iran and the Soviet Union

The lessons learned with Iran and the Soviet Union should serve as a guide to improve the appearance of neutrality for international arbitrations in China. While improving, CIETAC still has major structural flaws that adjustments similar to those made by the Iran-U.S. Claims Tribunal and SCC Institute can resolve. Similar to China, in the two aforementioned situations, the governments of Iran and the Soviet Union fundamentally opposed western ideals, yet still managed to find an acceptable method of resolving their disputes. Ultimately, once the nations had agreed to open their economy to world investment, they to some extent had to forego their ideals to achieve a workable form of dispute resolution. Although CIETAC has gradually capitulated to this process, the entrance of China to the WTO calls for more rapid changes.[195]

A. Make Up of the Tribunals

The power to form the tribunal under its rules gives an institution such as CIETAC the power to ensure a fair and neutral arbitration. As a result, the fact that CIETAC appears to not only try to guarantee neutral arbitrations, but also to some extent looks to ensure the interests of the Chinese government, may harm its legitimacy in the eyes of western parties.[196] While in practice CIETAC may conduct fair proceedings, without alterations to its structural and procedural make-up, western

193. *See id* at note 22.

194. *See* Deborah I. Holland, *Drafting a dispute resolution provision in international commercial contracts*, 7 TULSA J. COMP. & INT'L L. 451, 464 (Spring 2000).

195. *See, e.g.*, *More Work Needed on System Environment*, BUSINESS DAILY UPDATE FINANCIAL TIMES INFORMATION (May 18, 2004); Tsai Ing-Wen, *A New Era in Cross—Straight Relations? Tsai Ing-Wen Comments on the Implications of Taiwan's and China's Entry to the World Trade Organization*, 27 No.4 NEW ZEALAND INTERNATIONAL REVIEW 10, 10-17 (July 1, 2002); THE AMERICAN CHAMBER OF COMMERCE-CHINA, VIEWS OF AMERICAN COMPANIES REGARDING ARBITRATION IN CHINA (May 2001), *available at* http://www.AmCham-China.org.cn (last visited Nov. 1, 2005). *But see, e.g. Sino-German Trade Relations to Grow*, BUSINESS DAILY UPDATE FINANCIAL TIMES INFORMATION (Dec. 7, 2004).

196. *See id.*

lawyers will not be satisfied with impartiality of its arbitration process.[197]

1. Presiding Arbitrator

In a standard three-man tribunal, the presiding arbitrator carries the most influence. Theoretically, in close cases, each party-appointed arbitrator will vote with the party that appointed him, leaving the ultimate decision to the presiding arbitrator. Consequently, the impartiality of this arbitrator becomes paramount.

Currently, Chinese parties can virtually ensure that the presiding arbitrator will hail from China if their party-appointed arbitrator will not agree on a foreign national.[198] Similar to the problems experienced with FTAC tribunals, this fact leaves the western party arbitrating in China outnumbered on the panel. Even though the presiding Chinese national may intend to act with the utmost neutrality, his upbringing and background in the communist society presumably implants an inherent bias in his legal views. Consequently, presiding arbitrators in disputes between Chinese and American parties should hail from a neutral third nation. Such a proposition worked to great success in the Iran-U.S. Claims Tribunals and the SCC Institute, where any other proposal likely would have come under great scrutiny from one of the two parties.[199]

Presiding arbitrators should also have an extensive knowledge of both cultures. The purpose of the neutral third arbitrator is not to disqualify all nationals simply for their residency, but rather to attempt to eliminate inherent bias that disclosure rules themselves cannot effectively eliminate. However, this rule should not discount arbitrators from Hong Kong who have a dual education in both the western capitalist society and the eastern communist philosophy, even though technically they now hail from China.[200] In fact, rather than create jurisdictional boundaries outside those of Mainland China and the United

197. While comparing favorably to an institution such as FTAC, western parties still may view CIETAC as an extension of the Communist government in Beijing. Therefore, western parties assume the system is flawed and biased against them unless proven otherwise. *See* THE AMERICAN CHAMBER OF COMMERCE-CHINA, VIEWS OF AMERICAN COMPANIES REGARDING ARBITRATION IN CHINA (May 2001), *available at* http://www.AmCham-China.org.cn (last visited Jan. 24, 2006).

198. *See supra* notes 106-107 and accompanying text. If the Chinese parties want two Chinese arbitrators, they need only dispute the appointment of third arbitrator, shifting the decision to CIETAC. *Id.* While CIETAC could appoint anyone as presiding arbitrator, in practice they have almost always appointed a Chinese national. *Id.*

199. The author bases such assumptions on the problems that occurred in the Iran-U.S. Claims Tribunal, *see supra* notes 142-156 and accompanying text, as well as those that occurred with FTAC. *See supra* notes 168-184 and accompanying text.

200. The British controlled Hong Kong for 156 years, finally giving control of the city back to China on July 1, 1997. *See* http://www.nytimes.com/specials/hongkong/ (last visited Jan. 24, 2006).

States (or the western nation involved), the arbitral institution should administer a comprehensive legal test covering the legal traditions of both nations to all arbitrators before allowing party-appointed arbitrators to consider them as the presiding arbitrator. While this may disqualify some arbitrators, it will leave a pool of expert presiding arbitrators well versed in the legal traditions of both parties. Implementation of such a plan will look to build on the successes achieved at the Iran-U.S. Claims Tribunal while at the same time seek to avoid the problems that tribunal encountered.

Even with these rules regarding qualifications of presiding arbitrators, CIETAC, or a new institution, needs to impose a disclosure requirement. Mimicking the FTAC's lack of a disclosure requirement[201] immediately calls the entire arbitration into question. In the spring of 2004, the International Bar Association (IBA) established a color coded system for disclosure of arbitrators.[202] While such a system certainly will ensure the neutrality of the arbitrator, it may also disqualify competent arbitrators, causing the system to run less efficiently. That said, such a system does have advantages in determining presiding arbitrators for international arbitrations, especially between parties from two nations that inherently distrust each other. Consequently, for presiding arbitrators, and only for presiding arbitrators, CIETAC should adopt the system for disclosure requirements proposed by the IBA.[203] However, the institution should allow the parties to wave these requirements if the opposing party deems the arbitrator acceptable after learning of the disclosure requirements.

Logistically, this would force some overhaul of CIETAC. Currently, about two-thirds of arbitrators hail from China.[204] Adopting these suggestions obviously would create more work for foreign

201. *See* Chew, *supra* note 177, at 304.

202. IBA Guidelines on Conflicts of Interest in International Arbitration, Approved 22 May 2004 by the Council of the International Bar Association *available at* http://www.ibanet.org/images/downloads/guidelines%20text.pdf (last visited Jan. 24, 2006). The IBA divided disclosure requirements into three categories: Red, Orange, and Green. They deemed the Red requirements non-waivable. *Id.* Such items included a relationship of arbitrator to the dispute, an arbitrator's direct of indirect interest in the dispute and an arbitrator's current relationship with the parties or counsel. *Id.* Disclosure items on the Orange list are waivable at the parties discretion and include, previous services for one of the parties or other involvement in the dispute, current services for one of the parties by the arbitrators law firm, a relationship between an arbitrator and another arbitrator or counsel, a relationship between the arbitrator and others involved in the arbitration, and other circumstances described in Section 3.5 of the Rules. *Id.* This footnote only generally lays out the IBA guidelines. *Id.* For a more detailed analysis, one should visit the website. *Id.*

203. *See id.* Applying these stringent standards will ensure the impartiality of the presiding arbitrator. *Id.*

204. *See* http://www.cietac.org/ (last visited Jan. 24, 2006).

arbitrators and less for Chinese arbitrators. Even though the Chinese government will not fancy such a result, these changes are a necessary step to improve the appearance of impartiality of CIETAC arbitrations.

2. Party-Appointed Arbitrators

Party-appointed arbitrators present a different dilemma altogether. Generally, international rules require party-appointed arbitrators to conduct themselves in the same manner as a neutral presiding arbitrator.[205] While this may prove effective in disputes between like nations such as France and Germany, it does not enjoy the same type of success in arbitrations between diametrically opposed nations. Institutions may alleviate some of the distrust that permeates through all disputes between these types of nations by permitting party-appointed arbitrators to advocate to some extent for the party who appointed them.

Western experiences with SCC Institute and Iran-U.S. Claims Tribunal provide examples of the success achieved when implementing this standard. In both situations, the institutions managed to balance the interests and fears of both parties to provide a neutral arbitration for both. So long as there exists an assurance of impartiality of the presiding arbitrator, allowing for party-appointed arbitrators to partially advocate for the party that appointed them[206] may prove most effective in disputes between parties from politically polar nations. Experienced arbitrators in similar situations, such as Judge Richard A. Mosk, have advocated such a stance.[207] Having a party-appointed arbitrator partially advocate their party's position helps to ease any fear of mistrust stemming from political differences as well as ensures that tribunal understands that party's legal position.[208] Without such assurances, the parties may not feel comfortable contracting into the arbitration for fear of unfairness.

However, the institution needs to curtail the advocating of party-appointed arbitrators to the point where the arbitrator advocates as someone knowledgeable about the legal culture and position from which their party speaks, rather than as someone familiar with the particular party. The fact that a party had appointed that arbitrator in a prior proceeding should not disqualify him, but if the arbitrator had acted as legal counsel for that party within the last seven years, it should.[209]

205. *See supra* note 38.

206. *See supra* note 32 (highlighting the U.S. jurisdictions that have ruled in favor of this procedure).

207. *See* Mosk, *supra* note 12, at 253-270 (highlighting and advocating the advantages of having party-appointed arbitrators with some level of bias towards the party whom appointed them).

208. *See id.*

209. Seven years, in many ways, is an arbitrary number. However, the author felt that

Furthermore, the party-appointed arbitrator needs to disclose all prior business relations with the party.[210] If the institution deems that the arbitrator has a personal stake in the outcome of the case, then it should disqualify him. In the end, though, the institution should govern party-appointed arbitrators with the assumption of allowance.

If the system works correctly, disputes should arise where even the party-appointed arbitrators will vote against the party that appointed them. Although the rules should forbid direct communications between all arbitrators and parties during the course of the arbitration,[211] party-appointed arbitrators should act as a conduit of ideas and positions between the party which appointed them and the tribunal as a whole.

3. Location of Tribunal

Like with FTAC, the fact that CIETAC conducts all arbitration within mainland China results in an assumption of impartiality.[212] The comfort level and familiarity the home party feels provides them with a psychological advantage.[213] Furthermore, arbitrations conducted through institutions in communist or totalitarian nations come with the increased danger of government intervention, whether directly or indirectly.

The successes that the U.S. achieved in the Iran-U.S. Claims Tribunal and the Stockholm Chamber of Commerce could not have occurred without the neutral location of these institutions.[214] Both Stockholm and The Hague have a long chronicled history of neutrality. CIETAC, or a like institution, need not arbitrate in a historically neutral venue, although this would not hurt. Rather, the optimal site for arbitrations between China and the U.S. may be Hong Kong. Although technically a part of China, Hong Kong has separate economic rules

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five years was too short of a time period and ten years was too long.

210. *See* IBA Guidelines, *supra* note 202. This idea originates from the IBA guidelines and serves as a way to ensure that both parties have accurate knowledge concerning the arbitrators deciding their dispute.

211. *See* Baker & Davis, *supra* note 144, at notes 133-134. An Iranian arbitrator during the Iran-U.S. Claims Tribunal informed an Iranian party of an adverse ruling the night before the tribunal rendered the decision prompting the Iranian party to initiate eleventh hour settlement negotiations. *Id.* CIETAC must prevent such an outcome from ever occurring because it calls into question the integrity of the arbitrator as well as the institution in general. *Id.*

212. Linda Himelstein, *Is The Soviet Union Ready for This; Steptoe Venture to Dispense Private Justice*, AM. LAWYER NEWSPAPERS GROUP INC. LEGAL TIMES 1, 18 (Oct. 29, 1990). Timothy Heinsz, Dean of the University of Missouri-Columbia School of Law states, "People by nature don't want to be in someone else's home court." *Id.*

213. *See supra* Part III.C.2.

214. This statement reflects the opinion of the author, but it has support from other scholars in this area. *See e.g.* Himelstein, *supra* note 212, at 18.

favorable to capitalist societies[215] as well as a history of western control prior to 1998.[216]

After its relative success handling east-west disputes during the Cold War,[217] the Stockholm Chamber of Commerce Institute also is another logical neutral venue to handle such disputes. Although geographically it inconveniences both China and the U.S., both nations have commented positively on the process.[218] Other plausible neutral venues include Geneva and Zurich.[219]

4. Language

Like with venue, holding the entire arbitral proceedings in a language foreign to one of the parties gives CIETAC an aura of bias. CIETAC conducts their arbitrations in Chinese.[220] Such a practice contrasts with the practice of the Iran-U.S. Claims Tribunal, where the proceedings took place dually in English and Farsi.[221] While not as important as ensuring the neutrality of the arbitrators themselves,

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215. *See* Frances M. Luke, *The Imminent Threat of China's Intervention in Macau's Autonomy: Using Hong Kong's Past to Secure Macau's Future*, 15 AM. U. INT'L L. REV. 717, 726, 736 (2000).

216. Hong Kong International Arbitration Council Official Website *available at* http://www.hkiac.org (last visited Jan. 24, 2006). HKIAC was established in 1985, twelve years before the handover of Hong Kong back to China. *Id.* Thus, for international arbitrations they generally use UNCITRAL Rules, the same set of rules used during the Iran-U.S. Claims Tribunal. *Id.* Although not focused on in this comment, parties will also tend to have an easier time enforcing arbitral awards in Hong Kong than on the mainland. *Id.* Currently, HKIAC handles fewer arbitrations than CIETAC (709 versus 287 in 2003). *See id.*

217. *See supra* Part IV.B.2.

218. *See* Edwin R. Alley, *International Arbitration: The Alternative of the Stockholm Chamber of Commerce*, 22 INT'L LAW. 837, n.9 (Fall 1988).

219. *See generally* Dietrich Schindler, *Neutrality, Morality and the Holocaust; Neutrality and Morality: Developments in Switzerland and the International Community*, 14 AM. U. INT'L L. REV. 155, 155-163 (1998). Switzerland has stayed historically neutral since the Sixteenth century for better or for worse. The Swiss have carried the idea that neutrality is a guarantee of internal freedom and democracy against foreign interference. Fortunately, allied nations, such as the United States and England have allowed the Swiss to maintain this principle through World War I, World War II and the Cold War. On another note, Switzerland is a beautiful nation with much strategic importance in Europe. The difficulty of invading its mountainous terrain has also helped maintain Swiss neutrality. Geneva is the home of WTO headquarters. *See* World Trade Organization Official Website *available at* http://www.wto.org/english/thewto_e/thewto_e.htm (last visited Jan. 24, 2006). While not a major player in dispute resolution, it does have an arbitration branch capable of handling disputes. *Id.* One advantage arbitrating with the WTO or in Switzerland in general would be the overriding presumption of neutrality, similar to what the U.S. and Soviet Union found when arbitrating in Sweden.

220. This practice is similar to that used in FTAC arbitrations, where all arbitrations were conducted in Russian. *See supra* note 173.

221. Iran-U.S. Claims Tribunal Rules of Procedure, Article 17 *available at* http://www.iusct.org/tribunal-rules.pdf (last visited Jan. 24, 2006).

conducting the arbitration in both English and Chinese will alleviate confusion and discomfort among foreign parties. This practice also should not hinder the proceedings substantially. Consequently, implementing this practice will make CIETAC arbitration more attractive to foreign parties.

5. Compensation of Arbitrators

Ultimately, CIETAC could not implement the changes needed to ensure neutrality without better compensating their arbitrators. The current practice of frugal compensation of arbitrators deters foreign arbitrators from becoming CIETAC arbitrators.[222] With the amount of money involved in the disputes handled by CIETAC, it has the ability to compensate arbitrators commensurate to other international arbitral institutions.[223]

The lack of compensation of arbitrators also highlights the involvement of the Chinese government in CIETAC arbitration. Regardless of the direct level of involvement of the government with CIETAC, the fact that compensation remains so low, presumably as a result of communist economic policies, suggests the government exerts substantial influence over CIETAC.[224] In order attract the best international arbitrators, the Chinese government and/or the Chamber of Commerce must compensate arbitrators at least commensurate with other international arbitral institutions.[225]

B. To What Extent Do Cultural Differences Effect Analysis

Western lawyers would be short sighted not to take into account China's unique legal culture when trying to adapt CIETAC to give it a greater appearance of neutrality. While similar experiences existed with respect to the authoritarian governments in Iran and the Soviet Union, the U.S. has different problems in China that in several aspects may make

222. *See* Cohen, *supra* note 116, 36.

223. CIETAC Fee Schedule *available at* http://www.cietac.org.cn/english/fee/fee.htm (last visited Jan. 24, 2006). As of December 29, 2004 one U.S. Dollar equaled 8.27650 Chinese Yuan. Even with this exchange rate the amount of money involved in disputes between U.S. and Chinese parties is sufficient to more than adequately compensate CIETAC arbitrators.

224. "Whoever controls the volume of money in any country is absolute master of all industry and commerce." U.S. President James A. Garfield (1831-1881) (during first term as president). The quote is *available at* http://www.lansingbusiness monthly.com/article_read.asp?articleID=3700 (last visited Jan. 24, 2006).

225. Due to varying factors, such as moving to China and quality of life, CIETAC will probably have to compensate foreign arbitrators more than other international arbitral institutions in order to attract the most qualified arbitrators.

change easier.

In order to conduct successful dispute resolutions in China, CIETAC must continue to implement its policy of conciliation.[226] Chinese nationals greatly value this process, and eliminating it would hinder the ability of the institution to attract the support of the Chinese government. However, CIETAC should alter its conciliation process to avoid abuses by either the mediators or the parties.[227] First, CIETAC should set a time limit on the conciliation. In so doing, the parties would know when they have to reach an agreement. Such a practice would help to eliminate needless delay in the process and give both parties a realistic time table for the finality of the dispute. Next, CIETAC should not allow any of the arbitrators to act as mediators of the dispute. This practice would facilitate the free flow of information between the parties and eliminate any fear of possible bias that could form as a result of a failed conciliation. An optimal structure for this process would include two mediators, one Chinese and one western. In a perfect world, this process would resolve a meaningful percentage of disputes before arbitration proceedings commence. Furthermore, if successful, conciliation also will allow Chinese parties to "save face"[228] and thus make continued business relations between the parties possible.

If western parties can overcome the barriers Chinese legal traditions and practically implement as many of these legal traditions into the dispute resolution process, western parties may find China more amiable to change than either Iran or the Soviet Union. The U.S. has better diplomatic relations with China than they had with Iran or the Soviet Union.[229] Moreover, China has a vested interest unlike that found in Iran or the Soviet Union for U.S. investment in its economy in order to modernize its economy.

Conversely, the U.S. diplomatically compelled Iran to establish the Iran-U.S. Claims Tribunal to compensate U.S. parties for their losses resulting from the 1979 Islamic revolution.[230] As a result, Iran did not

226. *See supra* note 110.

227. *See supra* notes 70-84.

228. *See* Li, *supra* note 80, at 1060. *See also* White III, *supra* note 79, at 58.

229. Even during Gorbachev's reign as premier of the Soviet Union, the U.S. and Soviet Union were still embattled in a Cold War. *See* Official Website of Mikael Sereyevich Gorbachev, *available at* http://www.mikhailgorbachev.org/ (last visited Jan. 24, 2006). While currently China and the U.S. are not necessarily allies, they certainly are not in the midst of a Cold War. Furthermore, with the increased trade between the nations, they have become increasingly dependent economically on one another, which in turn make diplomatic cooperation between the nations more important. *See* Andy Xie, *Do Imbalances Matter*, Global Economic Forum: The Latest Views of Morgan Stanley Economists *available at* http://www.morganstanley.com/GEFdata/digests/latest-digest.html (last visited Jan. 24, 2006).

230. After Iran seized the U.S. embassy in Tehran, the U.S. government froze all

have the same economic interests in a successful claims tribunal as did U.S. parties, especially during the early years of the tribunal, which no doubt accounted for many of the problems and delays associated with the tribunal. In addition, the U.S. and Iran had cut off diplomatic relations throughout the period of the Iran-U.S. Claims Tribunal.[231]

The Soviet Union also did not have the same interests in the success of arbitration with the U.S. as China currently does. Although Gorbachev had implemented the policy of perestroika and increased relations with the west, the Soviet Union never had the economic relations with the U.S. that currently exists between China and the United States.[232] Lastly, the U.S. and China currently cooperate to alleviate the threats of Islamic terrorists[233] as well as Kim Jung-Il's militaristic North Korean regime.[234] As a result, the U.S. government may have more leverage to facilitate change in dispute resolution than it ever wielded in Iran or the Soviet Union.

VI. Conclusion

With China's accession to the WTO in 2001, disputes between Chinese and U.S. parties will only increase. The vast majority of these disputes are handled through CIETAC. While CIETAC has improved its

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Iranian assets. *See supra* note 5. This act prompted Iran to negotiate, leading directly to the Algiers Accords and the formation of the claims tribunal. For more information on the background of the Iran-U.S. Claims Tribunal, visit the Iran-U.S. Claims Tribunal Official Website *available at* http://www.iusct.org/background-english.html (last visited Jan. 24, 2006).

231. *See* Brower, *supra* note 138, at 421-22.

232. The NBA of all places provides a poignant example of this relationship. During perestroika the Soviet Union had one of the most promising centers in the world, Arvytas Sabonis. However, rather than allow him to compete in the National Basketball Association with the best athletes in the world, the Soviet Union forced him to stay in the Red Army. *See e.g.* Jack McCallum, *SO NEAR, SO FAR; Three Soviet hockey and basketball stars are hoping to play for U.S. pro teams*, SPORTS ILLUSTRATED, Oct. 18, 1988, at 46. Approximately fifteen years later the same type of situation existed in China with a young center named Yao Ming. Conversely though, China permitted Ming to play in the NBA, where he currently stars for the Houston Rockets. *See e.g.* Brook Larmer, OPERATION YAO MING: THE CHINESE SPORTS EMPIRE, AMERICAN BIG BUSINESS, AND THE MAKING OF AN NBA SUPERSTAR (Gotham) (2005).

The relationship between the U.S. and the Soviet Union continuously improved through the 1980s and may have developed the same type of relationship that China and the U.S. currently have. However, an argument can be made that the reason the Soviet Union did fall was because better relations with the west forced the country to focus on its internal problems rather than the external enemy of the United States.

233. *See e.g.* CRS REPORT FOR CONGRESS: U.S.–CHINA COUNTER TERRORISM COOPERATION: ISSUES FOR U.S. POLICY, *available at* http://www.fas.org/sgp/crs/row/RS21995.pdf (last visited Jan. 24, 2006).

234. *See* Tim Larimer, *The Remaking of Kim Jun-Il*, TIME MAGAZINE (June 26, 2000) *available at* http://www.time.com/time/archive/preview/0,10987,1101000626-47710,00.html (last visited Jan. 24, 2006).

appearance of impartiality over the past fifteen year, it still has glaring flaws that have caused many western lawyers to question its impartiality.[235] The risk involved in biased dispute resolution will cause U.S. businesses to rethink their investment in the communist nation. Such a chill in economic trade benefits neither China, the U.S., nor the rest of the world. Thus, before such problems substantiate, the U.S. and China need to improve the appearance of impartiality in the current system.

Ultimately, the question of impartiality is one of appearance rather than function. Even if CIETAC currently conducts neutral arbitrations, the contrary belief of some western parties undermines its effectiveness. Restructuring CIETAC, or a similar institution, to handle all international disputes between China and western parties must appear fair for both parties in order to ensure that the parties freely contract into it.

The experiences of the Iran-U.S. Claims Tribunal and the Stockholm Chamber of Commerce Institute can serve as a base upon which CIETAC can build. The successes of these two forums in arbitrating disputes between western and authoritarian governments should act as a guide for workable solutions. Similarly, CIETAC should serve notice to the problems experienced by FTAC in the Soviet Union and the general reluctance of western parties to arbitrate in such a biased forum.

Most importantly, CIETAC must improve the appearance of neutrality of the presiding arbitrators. Such arbitrators should come from neutral nations and have the highest disclosure requirements. Conversely, party-appointed arbitrators may have a great deal more bias, as allowed in certain U.S. jurisdictions.[236] Allowing party-appointed arbitrators to advocate for their appointing party's position will go a long way towards reinsuring U.S. and Chinese parties that the tribunal hears and understands their position. In order to practically implement these policies, CIETAC needs to compensate foreign arbitrators on a level commensurate with other international arbitral institutions. Not doing so will give these arbitrators little incentive to become CIETAC arbitrators.

Such changes, as well as the others mentioned earlier, would make CIETAC at least equally as legitimate a forum as other international arbitral institutions. This legitimacy would result in more disputes resolved through CIETAC, which in turn would promote more investment in China by decreasing risk. With the endless economic

235. *See* THE AMERICAN CHAMBER OF COMMERCE-CHINA, VIEWS OF AMERICAN COMPANIES REGARDING ARBITRATION IN CHINA (May 2001), *available at* http://www.AmCham-China.org.cn. (last visited Jan. 24, 2006). *See also supra* notes 113-131 and accompanying text.

236. *See supra* note 32.

potential in China, such investment would help to stimulate the world economy.

In the end, the success of CIETAC depends upon the willingness of the Chinese government to allow CIETAC to adopt such changes. The current structure of CIETAC seems to balance the impartiality of the process with the interests of the communist government. Regardless of whether the Chinese government ever chooses to use such power, the current system of CIETAC could allow China to fix or at the least manipulate an arbitral result.[237] Like a protective parent, the Chinese government/Chamber of Commerce must loosen their protective reigns in order for CIETAC to reach its full potential as an imporatial and legitimate international arbitral institution. in order for CIETAC to reach its full potential as an impartial and legitimate international arbitral institution.

237. *See supra* note 115. If the Chinese government wanted to manipulate the process, it could get two Chinese arbitrators appointed to the panel by having the Chinese party, usually a government entity in the communist system, challenge the appointment of the presiding arbitrator. *Id.* At this point the decision of the presiding arbitrators goes to CIETAC Council who almost always appoints a Chinese arbitrator. *Id.* If the government deemed the case important enough, the government could pressure CIETAC, of which it at the least has indirect control, to appoint an arbitrator who will decide in favor of the Chinese party. *Id.*

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