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CULTURAL ASPECTS OF TRADE DISPUTE RESOLUTION IN CHINA*

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The increased level of economic interaction in the Pacific Rim region has brought with it a corresponding increase in the number of potential trade disputes. Disputes emerge in a variety of often conflicting cultural contexts. This paper describes a conceptual and methodological framework for examining cultural aspects of trade disputes, and presents several case studies involving the People's Republic of China (PRC).

While a comprehensive empirical review of trade disputes involving China is well beyond the range of this study, it is hoped that the case studies discussed in this paper can be useful in achieving greater understanding of the role culture plays in trade disputes — essentially using a narrative approach to call attention to particular points of interest.[1] The selection of case studies is intended to highlight not only the differing contexts in which disputes arise, are conducted, and get resolved, but also the differing types of parties and trade relations, and finally the interplay of culture and trade disputes in the Chinese context. Bearing in mind the problems of overly-detailed specificity and overly-broad generality, it is hoped that these case studies will provide useful examples that may illuminate the interplay between culture and trade dispute resolution.

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TRADE DISPUTES AND CULTURAL CONTEXTS: GENERAL OVERVIEW

At the outset, it is important to clarify what is meant by the term "trade disputes." By "trade," the study means exchanges of goods, services, technology, financial resources, and other items worthy of exchange. By "disputes," the study refers to conflicts with sufficient levels of significance to motivate either or both parties to consider the use of institutionalized resolution mechanisms.[2] This study will focus on three categories: (i) government-to-government disputes; (ii) private-to-government disputes; and (iii) private-to-private disputes. This study recognizes that these categories are imperfect — in particular, they tend to overlook the distinctive nature of government-sponsored forms such as state-owned enterprises in nonmarket economies and Crown Corporations.[3] Nonetheless, institutions currently in place to resolve disputes generally tend to be organized according to category classifications. Thus, government-to-government disputes are often handled in the context of General Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO) panels, private-government disputes are often subject to resolution by The International Centre for the Settlement of Investment Disputes (ICSID), and private-to-private disputes are often resolved through a variety of commercial arbitration tribunals.[4]

In examining trade disputes, a number of operational issues arise. These may be classified as concerning: (i) emergence; (ii) conduct; and (iii) resolution. Analysis of the emergence of trade disputes entails a discussion of attendant circumstances, causation, issues in dispute, nature of the parties, and other questions on how the matter arose. The conduct of the dispute entails such matters as processes of negotiation, positions taken by the parties at various stages, institutions involved, and other matters attendant to the dispute after it has arisen. Resolution of the dispute entails questions such as institutions and processes for bringing a dispute to a close. In addressing trade disputes as the object of cultural contextualiza-

tion, the study will examine these three stages of disputes, as well as the varying types of parties and trade relations.[5]

To a large extent, the cultural context of trade disputes involves broad cultural norms as well as specific attributes of legal culture in the societies where one or both of the parties, and perhaps the dispute resolution institutions, are located.[6] In examining the question of culture, it is useful to bear in mind its differing levels, the dynamics by which culture is manifested, and the ways in which culture is manipulated. Levels of culture correspond to different levels of society, such as the elite (political, social and economic), professional and middle classes, working classes, and so-called "underclasses" and structurally impoverished groups. Manifestations of culture can take on many forms, including direct expression, perception (including the interpretation of circumstances attending the emergence, conduct, and resolution of disputes) and other aspects of behavior, which, in turn, may be affected by differing degrees of formality and informality in social relations. The manipulation of culture often involves the role of appearances in presenting to outside parties cultural forms and norms that are not held personally but may have some explanatory value. Although many, if not most, parties to trade disputes are representatives of elite culture, they may well adopt nonelite cultural perspectives during the course of emergence, conduct and resolution of disputes. In sum, examination of cultural contexts should take into account differing levels of culture and the contradictions therein, the varying ways in which culture is manifested, and the potential for manipulation of culture.

CULTURAL DIMENSIONS OF RESOLVING FOREIGN COMMERCIAL DISPUTE IN CHINA

Foreign-related commercial disputes in China have increased dramatically of late. The reasons are many and varied, including such factors as the general increase in China's foreign business relations and the developing institutional infrastructure for dispute resolution in China. While a complete review of China's institutions for resolving foreign business dis-

putes is well beyond the scope of this paper, the institutional landscape can be summarized. Since China is not yet a party to GATT/WTO, the provisions originally set forth in GATT and WTO's "Understanding on Rules and Procedures Governing the Settlement of Disputes"[7] do not apply to government-to-government disputes involving China, which are still resolved primarily through negotiation, although Beijing has indicated its intent to respect the Understanding pending the PRC's formal accession. China is a party to the Convention on the Settlement of Disputes Between State and the Nationals of Other States (ICSID Treaty),[8] and, thus, ICSID arbitration is available in private-to-government disputes involving the PRC government. These types of disputes are also handled through state-to-state negotiations in many instances.

Private-to-private disputes involving China are generally subject to resolution by either the Intermediate Level People's Courts whose foreign economic tribunals have jurisdiction over foreign-related disputes, or the Chinese International Economic and Trade Arbitration Commission (CIETAC) organized under the Chinese Commission for Promotion of International Trade (CCPIT, sometimes referred to as the China International Chamber of Commerce).[9] While most disagreements between business parties are resolved through negotiation, unresolved disagreements which mature into full-fledged disputes generally end up before one of these two institutions. The institutional infrastructure itself reveals cultural elements which serve as the context for the disputes which these organizations examine.

Cultural factors can be seen to play a role in judicial dispute resolution in China before the Chinese courts.[10] The low level of political status and authority of formal legal institutions derived from traditional Chinese attitudes as well as from Maoist ideology impedes the capacity of courts to compel the production of evidence and to enforce awards. The often parochial view taken by courts toward enforcement of arbitral awards and even judicial awards by courts outside the immediate area of jurisdiction reflects ingrained traditions of localism and the centrality of personal relations as the basis for behavior. Judicial processes of internal and

informal fact-finding, as well as of decisionmaking, are driven to a large degree by traditional cultural norms.

While the "Foreign Economic Litigation Chambers" (*shewai jingji shenpan ting*) of the Chinese People's Courts are available to hear disputes involving foreign parties, foreign disputants have largely avoided participating in court litigation if possible. The Chinese courts are seen as heavily politicized. This perception is influenced significantly by the continued role of the Communist Party-dominated adjudication committees, despite an official directive ordering a diminution in their activities.[11] The exclusion of foreign lawyers from direct participation in court proceedings and their lack of capacity even to secure membership in the Chinese bar association have been seen to confirm doubts about the likelihood of receiving a fair hearing. Thus, the politicization, low level of professionalism, and local protectionism of the Chinese courts have largely made them inadequate to address effectively the dispute resolution concerns of foreign businesses.[12] This is why most foreign businesses avoid them where possible. However, foreign businesses have little choice in the matter of enforcement of arbitral awards where the Chinese courts play a pivotal role.

The Chinese arbitration system is continually changing in response to institutional pressures as well as to new ideas about dispute resolution.[13] Thus, CIETAC's success with international commercial arbitration has emboldened the State Administration for Industry and Commerce to strengthen its long-standing but relatively inactive mechanisms for resolution of domestic disputes — including disputes between Chinese companies and foreign investment enterprises registered in China. International norms of private law are increasingly being adopted by Chinese commentators as necessary components of China's transition to a market economy.[14] Thus, notions about free will and contract theory as the basis for commercial arbitration suggest a respect for individual autonomy that would have been unheard of in China even during the 1980s.[15]

The cultural context through which Chinese institutions operate and foreign norms are perceived remains important. Cultural precepts about the centrality and uniqueness of China and historically derived imperatives

about separating Chinese and foreign matters are evident in discussions about whether CIETAC jurisdiction and international commercial arbitration in general should be limited to "foreign-related" matters.[16] Bureaucratic politics have also played a role, as Chinese courts have long insisted that arbitral decisions which are not "foreign-related" may fall outside the jurisdiction of CIETAC and in any event are subject to full judicial review (including review of facts and the application of law) prior to enforcement. Some commentators have urged that judicial involvement be warranted throughout the process of international commercial arbitration in many cases, even to the extent of adopting a rather liberal reading of the limited conditions for refusing enforcement set out in the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (to which China acceded effective 1987).[17] Court officials have suggested that the nationality of the parties is determinative of whether or not a matter is "foreign-related" — such that a Chinese arbitration involving foreign investment enterprises registered in China or involving international contracts by Chinese-registered parties would be subject to full judicial scrutiny rather than the limited recognition and enforcement procedures required by the New York Convention and reiterated in China's Civil Procedure Law.

Culture has also played a role in efforts to formalize rules for arbitrators.[18] CIETAC has enacted formal rules requiring fairness and impartiality by arbitrators. This has come in the face of repeated problems where arbitrators have, either during the course of the mediation process that previously was intertwined with arbitration or during the course of preparing the matter for hearing, engaged in what are essentially ex parte contacts with the disputants.[19] While such contact may seem odd to foreign litigators, it is generally consistent with Chinese traditional norms regarding the judge/arbitrator, who is expected to meet regularly with disputants and to personally investigate facts.[20] Since the disputants are seen to be in a subordinate position to the judge/arbitrator, not merely in the context of the dispute at hand but socially and morally as well, personal contacts are not expected to affect the ultimate judgment. Nonetheless, CIETAC's efforts to draft a code of ethics reflect a recognition that in practice such idealized

notions of the relations between disputants and judge/arbitrators are often not realized, and that legal regulation rather than moral norms should be the basis for governing decisionmakers.

The cultural contexts for the institutional infrastructure in which commercial dispute resolution in the PRC operates serve as an important backdrop for the case studies described below. These will be discussed by referring to the identified stages of government-to-government, private-to-government and private-to-private disputes.

Government-to-Government Disputes:
Intellectual Property Disputes Between China and the United States.[21]

Trade disputes between China and the United States (U.S.) are particularly useful in illuminating the cultural dynamics of government-to-government disputes, which also reveal the extent to which noninstitutionalized mechanisms are used. The various Memoranda of Understanding (MOU) between China and the U.S. dated 1989, 1992, and 1995 imposed specific obligations on China to improve its Intellectual Property Rights (IPR) regime, in return for which the U.S. agreed not to impose costly tariffs on Chinese imports. The MOUs reflect U.S. and Chinese efforts to resolve trade differences through bilateral negotiation without the intervention of multilateral dispute resolution organizations. However, the perspectives of the two governments are quite different. The U.S., on the one hand, has chosen to incorporate trade sanctioning mechanisms into its trade laws and then use these as a basis for extracting concessions from foreign trade partners.[22] The Chinese, on the other hand, often view negotiated agreements as part of a long-term process of relationship-building, entailing broad agreements to general principles and ideals rather than specific commitments about behavior.

U.S. - China MOU no. 1 (1989)

Under the 1979 Trade Agreement with the United States, China agreed that patent, trademark and copyright protection for U.S. firms and individuals should be commensurate with U.S. protection in these areas offered to

Chinese parties. Ten years later, the U.S. government and many U.S. companies believed that China's IPR system remained inadequate. China was one of nine nations and regions (including Taiwan) placed on the "priority watch list" in 1989 when the Special Section 301 provisions of the U.S. Trade Act became effective. To avoid the imposition of trade sanctions, China agreed with the U.S. in May 1989 to an MOU that contained broad language about improving IPR protection.

In the agreement, China stated that it was actively studying the possibility of joining various international IPR conventions, but agreed to a number of specific steps as well. The 1989 MOU committed China to introduce copyright legislation by the end of the year, which would include computer software as a category under protected work. China also agreed to revise its patent law by the end of 1989 to extend the duration of patent protection and expand its scope in accord with international practice. Although not stated explicitly, the intent of this provision was *inter alia* to lengthen the existing period of protection of 15 years for inventions and five years for utility models and industrial designs, and to permit Chinese patent protection for chemical formulas. In return, the U.S. agreed to drop China from the priority watch list.

U.S. - China MOU no. 2 (1992)

Although the 1989 MOU was significant in terms of identifying problems, it was flawed by an absence of detail. While China believed that it had satisfied the requirements of the Agreement — and indeed China did enact a Copyright (Authorship Rights) Law effective 1991 — the U.S. believed that China had failed to comply in other respects. Particular issues included copyright protection for software, patent protection to pharmaceuticals and other chemicals and better enforcement. As a result of these concerns, the U.S. placed China on the "priority foreign country" list yet again in 1991.

In January 1992, China and the U.S. signed a second MOU, whereby China agreed to a number of revisions to its IPR regime. In the patent area, China agreed to extend the duration of patent protection to 20 years, and

to afford patent protection to chemical substances (including pharmaceuticals and agricultural chemicals). China also agreed to limit its compulsory licensing provisions. In the copyright area, China agreed to join the Berne Copyright Convention and the Geneva Phonogram Convention, to amend its newly enacted Copyright Law, and to issue new regulations in order to implement these two conventions. China agreed to extend copyright protection to existing literary works and sound recordings as well as to new works, and agreed that computer software would be protected as a category under literary work for a period of 50 years. Finally, China agreed to introduce legislation for the protection of trade secrets.

U.S. - China MOU no. 3 (1995)

While the 1989 and 1993 MOUs were aimed primarily at encouraging China to step up its lawmaking efforts, the third MOU signed in 1995 focused primarily on enforcement. By mid-1994 the United States Trade Representative (USTR) had determined that China was not enforcing the intellectual property laws it had enacted, particularly with respect to copyrightable material such as computer software and compact discs (CDs). China was again placed on the Special 301 "priority watch list," and in an effort to avoid trade sanctions agreed to yet another MOU incorporating an "Action Plan" on the protection of intellectual property rights.

The Action Plan contemplated a 3-5 year sustained enforcement effort by the Chinese State Council's IPR Working Conference (*bangong huiyi*) to improve the enforcement of intellectual property rights, and to strengthen the dissemination of information and training. The Working Conference was established to replace what formally had been a leading small group (LSG) in charge of intellectual property. Based at the State Science and Technology Commission (SSTC), the Working Conference is an interagency liaison group with counterparts at the Provincial Science and Technology Committees. The interagency mission of the Working Conference was to be augmented by the work of Enforcement Task Forces established within the major intellectual property institutions such as the China Patent Office, the Trademark Bureau and the National Copyright Administration of China.

The Working Conference and the Enforcement Task Forces are intended to work over the long-term (3-5 years) duration of the action plan, while an intensive enforcement program is contemplated during the first six months of the plan. The Action Plan also provides for particular enforcement efforts in specific fields, such as audiovisual products and computer software. In addition to the standard language prohibiting infringements which is reminiscent of other elements in China's intellectual property regime, increased inspections and inventory supervision are contemplated in an effort to identify infringing products. Destruction of infringing products is authorized, and repeat violators may have their business licenses revoked.

While the establishment of the Working Conference reflected an effort to build interagency coordination, it has little power to compel cooperation among the various administrative systems (*xitong*) responsible for intellectual property. The Enforcement Task Forces, on the other hand have broad enforcement authority to punish violators, but tend to favor the parochial interests of their respective *xitong* over the need for cohesive and coordinated enforcement of intellectual property rights.

Dimensions of culture at various stages of the dispute

The U.S.-China disputes over intellectual property reflect a combination of commercial interest and cultural difference. Chinese negotiators have repeatedly argued that problems with intellectual property enforcement in China stem from traditional cultural values. This view has been recognized by foreign scholars as well .[23] In contrast to Chinese emphasis on cultural atttibutes, U.S. negotiators have tended to emphasize the commercial interests of local enterprises and government officials as the reasons for IPR violations.

While both positions have some degree of justification, it is important to note the ways in which the cultural orientation of each side affects its respective position. Thus, whether from a Marxist perspective that focuses on culture as a superstructure driven by material conditions of relations of production to one that focuses on Chinese traditional norms, culture in Chinese society has always been a central value and an important element

in the assessment of material conditions. By contrast, the United States has long embodied the perspective that culture is not a significant determinant of economic activity. Thus, in the course of the U.S.-China IPR disputes, it is not surprising to see repeated clashes and distrust between negotiators: The Chinese, on the one hand, are offended at the USTR's dismissal of Chinese culture, while the Americans, on the other hand, dismiss Chinese cultural explanations as mere obfuscation.

The U.S.-China agreements on intellectual property rights reflect cultural tensions in other ways as well. Chinese negotiators view the MOUs as imposed rather than truly mutual — indeed, China agreed to them only when faced with the imminent imposition of punitive trade sanctions. Moreover, the norms of legal institutionalism contained in the MOUs run counter to many Chinese normative perpectives. In contrast to U.S. models, regulation and the exercise of authority in China are not the product of enactment of formal rules in institutions, but rather result from a process of consensus-building and personal relations between interested stakeholders. And, even as China begrudgingly accepted U.S. demands for improved intellectual property protection, the Chinese cultural context — particularly the role of bureaucratic politics — continued to dominate the implementation of the negotiated agreement.

Private-to-Government Disputes:
From Beijing Jeep to Revpower

The Beijing Jeep case is well known as one of the first major investment project disputes between a foreign private firm and the Chinese government while the Revpower case involves perhaps the most recent major dispute between a foreign investor and the Chinese government. These two disputes each reflect the role played by cultural factors at different points in time during the reform period — the beginning of the "open door" policy and prior to China's accession to the GATT-WTO.

Beijing Jeep[24]

The well-known dispute between American Motors Corporation (AMC) and the Chinese government over the AMC Beijing Jeep joint venture highlights the number of ways in which cultural differences can affect disputes between private companies and governments. Cultural differences arose almost from the outset of the project and affected management, production, personnel, and other operational issues. The crisis that almost brought down the joint venture concerned the conversion of the Chinese currency proceeds from domestic sales into foreign currency that could be repatriated. The willingness of the Chinese joint venture party and related government entities to assist in this process was undermined by disappointment over AMC's plans to import completely knock-down (CKD) kits for Jeep Cherokees to be assembled in China. The Chinese side had thought that the joint venture would entail design and production of a completely new Chinese jeep.

The Chinese viewed the joint venture contract not as the formal limitation on the legal relationship with AMC, but merely as an expression of a broader commitment to mutual assistance. While the contract language appeared to permit AMC to limit its technology transfer to CKD kits, the Chinese side concluded that AMC's CKD plan violated a basic moral commitment to assist the Chinese in developing a new Jeep — regardless of the specific language of the joint venture agreement. The problem became a crisis when the joint venture was unable to convert sufficient Chinese local currency (nonconvertible *renminbi*) to fund the purchase of the CKD kits. AMC, for its part, believed that its obligation ran counter to the letter of the agreement. AMC believed that the Chinese were fully aware of, and had accepted the limits, to the promised technology, and also that they had an obligation to fund the imports of CKD kits.

Thus, the emergence of the dispute lay in large part in differing conceptions about the nature of technology and the extent of mutual commitment between the joint venture parties. For the Chinese, the relationship and the moral commitments of empathy (*ganqing*) that this embodied were first and foremost of importance, and the written contract was

merely a formal but not a definitive expression. The foreign investor, on the other hand, while recognizing the need to build a relationship with the Chinese and to make accommodations necessary to ensure the success of the project, nonetheless viewed the written contract as the essence of the agreement. The dispute over the repatriation of profits and the distrust that accompanied it stemmed, to a large extent, from the very fundamental differences over the nature of the personal and contractual obligations between the joint venture parties.

The parties' culturally grounded perspectives on the nature of their contractual relationships affected the contract and resolution of the dispute. Thus, AMC continually relied on a legalistic interpretation of its contractual obligations on the transfer of technology and its rights to repatriate its profits. The Chinese, on the other hand, were of the view that repatriation of profits required government intervention on the currency conversion issue, and they were reluctant to seek this in the face of the perceived failure of the foreign partner to live up to its obligations on the technology transfer component of the project. So, while AMC continually lobbied U.S. and Chinese government officials to impose a solution based on a formal legal interpretation of fixed rights and duties, the Chinese side continually emphasized the need to negotiate a solution that would reaffirm the relationship between the parties.

Ultimately a solution was achieved that embodied some elements from both positions. The solution was brokered through the intervention of high level Chinese officials including Vice Premier Zhu Rongji and former U.S. Ambassador to China Leonard Woodcock. In this sense, the process of resolving the dispute was extra-legal in character, and seemed to yield to Chinese preferences for informal dispute resolution through the intercession of community leaders. Likewise, AMC agreed to deliver additional technology in the form of training and equipment, thus appearing to accept the notion that its obligation to the Chinese side involved a firmer commitment to assistance than had been articulated in the formal agreement. On the other side, the Chinese formally agreed to assist with currency conversion and repatriation of profits.

Despite the appearance of a mutually acceptable negotiated solution, the Beijing Jeep dispute did not really reconcile the cultural differences between the concerned parties. Officials in the Beijing Automotive Works, doubtful from the outset about AMC's commitment to their welfare, had these views confirmed during the course of the dispute. Despite the negotiated solution, the Chinese side remained circumspect about its relations with AMC. Still expecting that the business arrangements would involve personal and moral commitments of mutual assistance to an equal or greater degree than formal legal commitments, the Chinese side's basic approach to commercial relations was unchanged by the dispute. On the foreign side, AMC officials in charge of the project came out of the dispute convinced that the Chinese side could not be trusted to honor agreements. Thus, the foreign investor stuck by his basic precept that the agreement was clearly spelled out in the written contract and that additional personal ties were secondary if at all relevant. Thus, the Beijing Jeep dispute revealed the extent to which cultural differences can affect the emergence, conduct and resolution of commercial disputes in China. Indeed, these differences remained in evidence even after the dispute was resolved.

Revpower[25]

The Revpower case involved several different elements ranging from a private-to-private dispute with a Chinese licensee to a private-to-government dispute over enforcement of an international arbitral award. Revpower, a Hong Kong subsidiary of Ross Engineering Corporation in Fort Lauderdale, Florida, entered into a technology transfer and compensation trade agreement with Shanghai Far East Aerotechnology Import and Export Corporation (SFAIC) under the Chinese Ministry of Aviation. The project contract stipulated that Revpower would provide equipment and technology to SFAIC for use in the production of industrial batteries which would be sold at prices specified in the contract. Shortly after the contract was concluded, SFAIC requested an increase in the sale price of the batteries and asserted that the Bank of China would be unable to provide a performance guarantee as previously agreed. Following a series of negotiations,

Revpower gave notice of material breach, but continued with friendly negotiations for an additional 18 months. Finally, Revpower filed for arbitration in Stockholm in accordance with the project contract. SFAIC participated in the arbitration, selecting an arbitrator and filing a statement of defense and counterclaim in which it was alleged that Revpower had breached its obligations on such matters as the quality and performance capability of the technology and equipment supplied under the project agreement. In a parallel action, SFAIC filed a suit with the Intermediate Level People's Court in Shanghai claiming Revpower's breach of contract, a move that appeared to violate the terms of the arbitration agreement in the project agreement. SFAIC later withdrew from the Stockholm arbitral proceedings, but the panel unanimously concluded that there was sufficient evidence to proceed with a decision and granted Revpower an arbitral award in the amount of U.S. $6.6 million plus interest.

Revpower's efforts to enforce the arbitral award were to no avail, as the Shanghai Intermediate People's Court refused even to accept Revpower's pleading for payment of fees. This is not the only instance where Chinese courts refused enforcement of foreign arbitral awards,[26] but it certainly has become something of a *cause célèbre* because it appears to involve a direct violation of China's commitment to abide by the terms of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. As of February 1996, the award remains unrecognized and unenforced.

The Revpower case reflects a number of interesting twists on the role of culture in setting the context of dispute resolution. On the one hand, the Chinese party's request to renegotiate the licensing/compensation trade agreement shortly after it had been concluded reflected common Chinese practices. Some argued that Chinese companies made concessions in written agreements in order to permit the foreign negotiator to gain face with her head office superiors, expecting that the relationship between the parties could be adjusted as necessary based on the personal relationship between the parties. Others claim that this type of conduct was motivated purely by the striving for commercial advantage. As a result, the SFAIC's request to increase the battery prices and its suggestion that the state

performance guarantees, once promised, would not be forthcoming are subject to varying interpretation. The process of extended negotiations over these issues reflected the Chinese practice of seeking amicable resolution of differences, and indeed SFAIC may well be adopting a common view among Chinese negotiators that differences in opinion are not necessarily "disputes" as such, and are thus more appropriately resolved through friendly consultation. Revpower clearly believed that a dispute had in fact arisen and that a friendly consultation was merely one step toward a concrete resolution. Thus, in the initial stages, the cultural predispositions of the parties appear to have affected not only the emergence of the dispute, but the differing perceptions of the nature of the dispute as well.

Once Revpower filed for arbitration, however, SFAIC revealed a clear willingness to rely on the same kinds of formal legal mechanisms that Revpower was using, even though these were foreign and unfamiliar. From the filing of the counterclaim in Stockholm to the filing for adjudication in Shanghai, SFAIC's actions to resist Revpower's claims suggest an ability to adapt to the formalized dispute resolution processes familiar to Western litigators.

Revpower's efforts to secure enforcement of its Stockholm arbitral award have included not only legal procedure, but also political intercession with Chinese government departments, and indirect political pressure through the good offices of U.S. government departments. The responses of the Chinese party and the Chinese government have been significantly at variance. While SFAIC has shown its capacity to adopt to the institutions and processes of formal dispute resolution, the Chinese government has responded with general silence and inaction. This is subject to a number of complementary interpretations. Of course there are many who would suggest that the Chinese government is motivated by the economic advantage of permitting SFAIC to continue resisting the enforcement of a U.S. $6.6 million (U.S. $8 million with interest) award. Others suggest that the Chinese central government's unwillingness to take action against either SFAIC and the Shanghai Intermediate People's Court, or more importantly, their respective superior organizations, underlines cultural influences, as

the loyalty of Chinese leaders to their subordinates is the basis for the cultural trait of clientelism that has been seen to dominate Chinese politics. An additional interpretation is that the Chinese government departments — primarily the Ministry of Foreign Affairs and the Ministry of Foreign Trade and Economic Cooperation — which were approached initially, have little influence since they are in other organizational systems (*xitong*) different from those of either SFAIC or the Shanghai Intermediate People's Court. Thus, the Chinese government's apparent inaction may be explained by relevant Chinese organizational structures and behavior, as well as the political culture which makes organizational and personal contact the *sine qua non* for political action.[27] Cultural influences appear to play a role in these explanations, each of which may offer a partial explanation of the Revpower dilemma.

In contrast, Revpower's and the U.S. government's views have tended to be that China has acceded to the New York convention and, hence, must ensure recognition and enforcement of foreign arbitral awards regardless of political costs due to cultural norms. The Revpower case may well reveal the inevitability of conflict between private actors and states, where one side views legal obligations as subject to cultural norms and the other is driven by the view that legal obligations transcend cultural imperatives.

Private-to-Private Disputes

Reports on private-to-private disputes involving Chinese and foreign parties are available from a number of published sources.[28] While these case reports are often incomplete, they nonetheless provide useful insights into the cultural aspects of dispute resolution, between private parties. Cultural aspects of foreign business disputes with Chinese parties often begin early on in the commercial relationship, as foreign and Chinese negotiators bring different cultural precepts and expectations to the process.[29] Foreign pressure, particularly U.S.,[30] for greater transparency in the Chinese regulatory process also reflects cultural differences between the openness required of liberal democratic regimes founded on basic assumptions of equality and the Chinese regime's political and cultural ideology that

combines Leninism with traditional Chinese patrimonial authoritarianism[31] and does not accept basic precepts of accountability upon which norms of transparency are based. Stratification of culture often plays a role in conflicts within Chinese and foreign enterprises and between principals and agents, particularly when agents motivated by personal relations and the prospect of personal gain make representations to potential business partners that are later repudiated by the principals.[32] An analogous situation arises when Chinese and foreign parties enter into contracts and begin to follow terms that are never formally approved by Chinese government authorities as required under China's "Foreign Economic Contract Law."[33] That such decisions are deemed "correct" under Chinese law suggests significant cultural and political differences over the authority of individual economic actors to conclude business transactions independently.[34]

In a number of those cases, the contractual agreement between the parties operated within a context of continually changing demands. In one case involving the shipment of galvanized plates, for example, the parties agreed to change the name of the recipient after conclusion of the contract but before the actual delivery.[35] Problems arise when requests for change occur later in the transactions, such as when changes are sought in the quality and quantity of goods ordered well after the contract has been concluded.[36] In a similar case, a seller of aluminum ingots requested a change in the price and delivery terms well after the letter of credit paying for the goods had already been opened.[37] While Chinese requests to modify agreed contract terms have been viewed by foreign businesses as evidence of lack of good faith,[38] in many instances, these requests reflect an expectation that the parties to the transaction would help one another in responding to volatile (and to the Chinese possibly unknowable changes in) market conditions. Requests for changes in contract terms do not always signify expectations of a close relationship; however, as in the case of a leather production investment project, changed contract terms were the basis for a claim (later accepted by the arbitral tribunal) that the contract had never been formed.[39]

In several cases, fundamental differences in expectations were at the root of the conflict. A typical concern, and one that arose in the context of the Beijing Jeep dispute discussed above, has to do with the nature of obligation between the parties.[40] For example, a transaction involving technology and equipment sale, and a compensation trade agreement gave rise to a dispute over whether the equipment and technology met the contract specifications.[41] The basic issue in dispute seemed to be whether the obligation of the foreign party was limited solely to the contract terms or should be measured by the expectations of the Chinese party. Thus, while the foreign seller/licensor made several attempts to correct perceived inadequacies in the equipment and technology, the Chinese purchaser/licensee remained dissatisfied — not because the terms of the contract were not fulfilled but because the Chinese were not able to reach what they considered to be the ultimate goal of the project. A similar problem arose in the context of a joint venture project involving the production of emulsion — the Chinese party claimed that the production line installed by the foreign investor was not sufficiently modern, while the foreign investor argued that it had met its contract obligations.[42] However, Chinese importers have not always been concerned strictly with project objectives. In a dispute over the performance of glass blowing equipment, for instance, the Chinese insisted on compensation for nonconforming goods even when it had been established that the equipment met Chinese project requirements but fell short of contract specifications.[43]

Assumptions that the Chinese contracting party's special relationship with its counterpart transcend the contract terms are also evident in reactions to the foreign party's view that the relationship is not particularly special. For example, in a case involving the sale of bread preservatives, the Chinese party agreed to revise the contract payment terms, then reneged when they concluded that the foreign seller merely sought to avoid customs duties.[44] The Chinese party's response seemed motivated not by the desire to enrich the Chinese Customs Service, but by disappointment that the foreign partner would subordinate its relations with the Chinese seller to concerns about avoiding import duties. A Chinese purchaser of

packaging materials and equipment expressed similar disappointment in resisting payment of a performance bond demanded by the foreign seller.[45]

Differing expectations among parties also arise when contracts do not specify terms concerning quality. In a matter involving the sale of transparent glass by a Chinese factory to a U.S. customer, the latter claimed that the delivered product failed to comply with contractual requirements for the sale of such glass. However, upon investigation and in light of Chinese regulatory requirements, CIETAC concluded that the contract terms were vague and that, in the absence of state and industry-wide standards, such terms could be defined by reference to the standards of the seller. The glass in question was found to have complied with the seller's standards even though an international consulting firm concluded that it had "no commercial value." Despite the appearance of a violation of standards of good faith, the basis for the dispute revolved instead around substantive and formalistic standards of quality. In contrast to the foreign purchaser's expectation that the term "transparent glass" was self-evident, the Chinese seller (and the Chinese arbitrators) concluded that issues of quality should be subject to formal definitions even if these contradict appearances. Transparent glass need not be transparent if so permitted by the producing firm's quality standards.

The conduct of disputes can also be subject to cultural influences, as Chinese norms of collective responsibility for management of conflict are evident in expectations about mediation and conciliation.[46] Recent Chinese government edicts prodding Chinese companies facing anti-dumping actions to litigate rather than negotiate a settlement suggest both the pervasive influence of the consensual resolution norm and the differences in approach taken by Chinese companies and administrative agencies. In a dispute between a Chinese and a Thai company, the issue concerned with the conformity of documents with the requirements of a letter of credit.[47] The Chinese bank insisted on "strict compliance" while the Thai seller and its negotiating bank claimed that the documentary differences were inconsequential. In this case, both parties engaged in a lengthy process of negotiation, political intercession amd litigation before settling on mediation

under the auspices of CIETAC. After negotiations were without avail, the Thai seller sought a political solution through the local bureau of the State Administration for Industry and Commerce (SAIC) and appealed for a court judgment before pursuing a resolution through CIETAC. CIETAC oversaw a mediated solution wherein the Thai seller was largely declared whole. The Thai company wrote a lengthy missive extolling the virtues of mediation.

In this case, there was no direct dispute between the parties over the performance of the terms of the contractual agreement. Rather, questions centered around the conformity of documents to secure settlement of the letter of credit. Normally, this should have been a matter for discussion between the negotiating and confirming banks.[48] In this case, however, although the contracting parties were unable to agree on the matter, they revealed a willingness to participate in a managed resolution. It would appear that such willingness was helped by the fact that the parties had no substantial disagreement on the performance of the contract. Thus, the willingness to engage in voluntary dispute settlement in this case depended not on the extent of economic interest, but rather on the fact that the relationship was not undermined by either party's contract performance.

There are instances, however, when negotiated solutions do not solve the dispute but only serve to sharpen the parties' differences. In a case involving the sale of steel plates for use in a hydroelectric project, for example, a dispute over an alleged failure to deliver the goods on time was settled and the seller agreed to pay a negotiated sum.[49] The Chinese importer, however, still filed for arbitration claiming additional compensation. In some cases, difficulties in communication during the course of settling a dispute exacerbated tensions between the parties, contributing to a breakdown in the transaction.[50]

CULTURAL ASPECTS OF DISPUTE RESOLUTION INVOLVING CHINA: SUMMARY

A review of the various types of disputes involving foreign and Chinese parties (government-to-government, private-to-government, and private-to-

private) suggests that cultural factors can play a critical role in the emergence, conduct and resolution of disputes. Disputes often emerge as a result of different expectations of parties regarding their relationship to each other and the nature of their obligations. Often, these are culturally driven — with Chinese parties often expecting a more fundamental commitment than might be expressed in a written contract, and foreign parties tending to interpret their obligations by referring to the language used in the contract. Once a dispute arises, the disputants seem quite capable of retaining expert legal assistance to pursue their interests. Nonetheless, cultural differences also emerge as protracted negotiations often result in a solution, albeit not necessarily one which can be explained purely by reference to the original contracted rights and obligations. In the resolution of disputes, the importance of consensual solutions is evident. However, the fact that these cases are drawn primarily from published arbitral decisions suggests that resorting to formal dispute institutions is becoming more acceptable as an alternative to purely consensual negotiations and mediations.

As the case studies discussed in this paper indicate, culture plays a potentially significant role in the emergence, conduct and resolution of trade disputes involving a vast array of governmental and nongovernmental entities. From questions on the possibility that negotiations may exacerbate tensions due to cultural misunderstanding to the pattern of consensual dispute resolution that may serve to strengthen rather than destroy relationships, and to whether disputes even exist, cultural issues are present everywhere and should be taken into account by negotiators from the private and public sectors. It is important to stress, however, that culture does not explain everything. Indeed, many disputes arise out of pure economic self-interest, and often the participants in disputes are members of elite who share more in the way of cultural norms with each other than with members of the societies they purport to represent. Nonetheless, cultural factors should always be taken into account, as they contribute to both the context and the content of trade disputes.

NOTES

1. For a discussion of the utility of a case study narrative, see Hayden White, *The Content of the Form* (Baltimore: Johns Hopkins University Press, 1987).

2. For a general discussion of dispute resolution institutions, see Richard Able, "A Comparative Theory of Dispute Resolution Institutions in Society," *Law & Society Review* 217, 8 (1973).

3. In China, for example, the lingering role of the state-enterprise system, together with the evidence that "so-called" private enterprises are more often than not dominated if not owned outright by government entities and officials, should caution against strict separation of "private" from "governmental" organizations. See Andrew G. Walder, "China's Transitional Economy: Interpreting Its Significance," in *The China Quarterly Special Issue China's Transitional Economy* (December 1995), pp. 963-79; Kristen Parris, "Local Initiative and National Reform: The Wenzhou Model of Development," *The China Quarterly* 242, 134 (1993).

4. For a review of recent developments, see Michael K. Young, "Dispute Resolution in the Uruguay Round: The Lawyers Triumph Over Diplomats," *The International Lawyer* 389, 29 (1995); and Yves Dezalay and Bryant Garth, "Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes," *Law & Society Review* 27, 29 (1995).

5. A useful biography on negotiations and dispute resolution in the U.S.-Japan-Canada context prepared by Prof. Michael Donnelly is available upon request from the author.

6. A preliminary 30-page bibliography relating to legal and political culture in Chinese societies prepared by Prof. Pitman B. Potter is available upon request from the author.

7. See *International Legal Materials* 1226, 33 (1994).

8. For a discussion of the ICSID Treaty, see Soley, "ICSID Implementation: An Effective Alternative to International Conflict," *The International Lawyer* 521, 19 (1985).

9. For a general discussion of the Chinese judicial and arbitral systems for resolving commercial disputes, see Pitman B. Potter, *Foreign Business Law in China: Past Progress Future Challenges* (San Francisco: The 1990 Institute, 1994), Chapter Five, and sources cited. Also see N. Kaplan, J. Spruce, and M. J. Moser, *Hong Kong and China Arbitration Cases and Materials* (Singapore: Butterworth's, 1994).

10. See Donald C. Clarke, "Dispute Resolution in China," *Journal of Chinese Law* 245, 5 (1991); Stanley B. Lubman, "Studying Contemporary Chinese Law: Limits, Possibilities and Strategy," *American Journal of Comparative Law* 333, 39 (1991); and Pitman B. Potter, "Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China," *The China Quarterly* 325, 138 (June, 1994).

11. See Stanley B. Lubman, "Introduction," in *Domestic Law Reform in Post-Mao China*, ed. Pitman B. Potter (Armonk, N.Y. and London: M.E. Sharpe, 1994).

12. For a discussion of the difficulties posed by local protectionism for enforcement of court judgments, see Donald C. Clarke, "Dispute Resolution in China," *J. Chinese Law* 245, 5 (1991).

13. For a review of recent developments, see Marcine A. Seld, "The Future of Chinese Arbitration in Dealing With Technology Transfer Investments in China," *Santa Clara Computer and High Technology Law Journal* 551, 9 (1993); Huang Yanming, "Some Remarks about the 1994 Rules of CIETAC and China's New International Arbitration Rules," *Journal of International Arbitration* 105, 11 (4) (1994); Chen Guiming, *"Zhongcai fa lun"* (Theory of arbitration law), Beijing: Chinese University of Politics and Law Press, 1992.

14. See Zhang Yulin, "Towards the UNCITRAL Model Law: A Chinese Perspective," *Journal of International Arbitration* 87, 11(1) (1994).

15. See Michael J. Moser, "China's New International Arbitration Rules," *Journal of International Arbitration* 5, 11(3) (1994); Shen Muzhu, "Lun wo guo zhongcai zhidu de xin fazhan" (New developments in our country's arbitration system); *Faxue pinglun* (Theory and discussion on law), no. 4 (1995): 40; Guo Xiaowen, "The Validity and Performance of

Arbitration Agreements in China", *Journal of International Arbitration* 47, 11 (1) (1994); and Ge Liu and Alexander Lourie, "International Commercial Arbitration in China: History, New Developments and Current Practice," *John Marshall Law Review* 539, 28 (1995).

16. See Song Huang, "Several Problems in Need of Resolution in China by Legislation on Foreign Affairs Arbitration," *Journal of International Arbitration* 95, 10(3) (1993).

17. See Zhu Kepeng "Lun guoji shangye zhongcai zhong de fayuan ganyu" (Judicial intervention in international commercial arbitration) *Faxue pinglun* (Theory and discussion on law), no. 4 (1995): 46. For discussion of China's accession to the Convention, see "Notice Concerning the Enforcement of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by Our Country," PRC Supreme People's Court, Circular No. 5, April 10, 1987.

18. See Huang Yanming, "The Ethics of Arbitrators in CIETAC Arbitration," *Journal of International Arbitration* 5, 12(2) (1995).

19. For examples, see Huang Yanming, "The Stylization and Regularization of the Management and Operation of the Chinese Arbitration Institute," *Journal of International Arbitration* 77, 11(2) (1994) and "Mediation in the Settlement of Business Disputes," *Journal of International Arbitration* 23, 8(4) (1991).

20. See Derk Bodde and Clarence Morris, Law in Imperial China (Philadelphia: University of Pennsylvania Press, 1967), Austin Coates, *Myself a Mandarin* (London: Frederick Muller, 1968); and Robert Van Gulik, *Celebrated Cases of Judge Dee* (New York: Dover Publications, 1976).

21. Parts of the following discussion were drawn from Pitman B. Potter's, "Editor's Notes (International and Bilateral Treaties)," in Asia Law and Practice, *Protection of Intellectual Property in China: The Law* (forthcoming, 1996).

22. See e.g., Michael P. Ryan, "USTR's Implementation of 301 Policy in the Pacific," *International Studies Quarterly* 333, 39 (1995) and Thomas Bayard and Kimberly Ann Elliott, *Reciprocity and Retaliation in U.S. Trade Policy* (Washington, D.C.: Institute for International Economics, 1994).

23. See generally, William P. Alford, *To Steal a Book is a Glorious Offense: Intellectual Property Law in Chinese Civilization* (Stanford: Stanford University Press, 1995).

24. Details of the Beijing Jeep case were taken mainly from Jim Mann, *Beijing Jeep: The Short, Unhappy Romance of American Business in China* (New York: Simon & Schuster, 1989). Professor Potter held numerous discussions about this dispute with many of the principal individuals involved.

25. Details of the Revpower case are set forth in Alberto Mora, "The Revpower Dispute: China's Breach of the New York Convention?," in China Law & Practice (ed.), *Dispute Resolution in the PRC: A Practical Guide to Litigation and Arbitration in China* (Hong Kong: China Law & Practice, 1995). Also see testimony of Robert A. Aronson, CEO of Ross Engineering before the House Ways and Means Trade Subcommittee on May 23, 1995 (Federal Information Systems, 1995).

26. See Matthew Bersani, "The Enforcement of Foreign Arbitral Awards in China," *Journal of International Arbitration* 47, 10(2) *(1993).*

27. See Kenneth Lieberthal and Michel Oksenberg, *Policy Making in China: Leaders, Structures and Processes* (Princeton: Princeton University Press, 1988); and Susan L. Shirk, *The Political Logic of Economic Reform in China* (Berkeley: University of California, 1993).

28. Arbitral decisions by CIETAC are available in Cheng Dejun (ed.), *Shewai zhongcai yu falu* (Foreign-related arbitration and law) (Beijing: Chinese People's University Press, 1992); and Civil Law Office of the NPC Standing Committee on Legal Affairs and CCPIT Secretariat (ed.), *Zhonghua renmin gongheguo zhongcai fa quanshu* (Encyclopedia of arbitration law of the PRC) (Beijing: Law Publishers, 1995). Case decisions by Chinese courts and arbitral agencies appear in Qi Tianchang (ed.), *Hetong an li pingxi* (Discussion of contract cases) (Beijing: Chinese University of Politics and Law Press, 1991); Wang Cunxue, *Zhongguo jingji zhongcai he susong shiyong shouce* (Practical handbook of Chinese economic arbitration and litigation) (Beijing: Development Press, 1993); *Zhang Huilong, She wai jingji fa anli jiexi* (Analysis of Sino-foreign economic law cases) (Beijing:

Youth Publishers, 1990); and New Selections of the Foreign-Related Economic Cases in China (Shanghai: Economic Information Agency, 1992).

29. See Franklin L. Lavin, "Negotiating with the Chinese, or How Not to Kowtow," in *Foreign Affairs* (July/August 1994): 16-22. For a general discussion of cultural aspects of negotiations with Chinese counterparts, see e.g. Robert A. Kapp (ed.), *Communicating with China* (Chicago: Intercultural Press, 1983); Bill Purves, *Barefoot in the Boardroom: Venture and Misadventure in the Peoples Republic of China* (Toronto: NC Press, 1991); and Lucien Pye, *Chinese Negotiating Style: Commercial Approaches and Cultural Approaches* (New York: Quorum Books, 1992).

30. "Recommendations on Asia of the President's Advisory Committee for Trade Policy and Negotiations" (1995).

31. For a penetrating analysis of conflicts within contemporary Chinese culture in the face of resurgent and foreign-driven capitalism, see Timothy Brook, "Commercial Economy and Cultural Doubt in China," Joint Centre for Asia Pacific Studies, 1994.

32. For a discussion of the problem of agency in the context of a dispute between the Lehman Brothers and the Shanghai Division of CITIC (China International Trust and Investment Corporation), see Nigel Page, "Lehman Brothers' Chinese Puzzle," *International Commercial Arbitration* 7, 8(5) (1995). For a discussion of the problem of enforcing a personal handshake agreement in a textile production/procurement deal that was not later ratified though a written contract, see "How Was CNY 13,000 as Business Introduction Commission Returned," in *New Selections of Foreign Related Cases in China*, p. 49.

33. See Article 7 of the Foreign Economic Contract Law of the PRC, CCH Australia Ltd., *China Laws for Foreign Business.*

34. See "Zhong wai heying qiye wei huo pijun, heying hetong ying guan wei wuxiao" (The Chinese-foreign joint venture contract is not approved, the joint venture contract should be considered void), in Qi Tianchang, p. 408.

35. See Cheng Dejun, supra, Case No. 1.

36. See Cheng Dejun, supra, Case No. 2.

37. See Wang Cunxue, supra, Case No. 3.

38. See Lynn Chu, "The Chimera of the China Market," *Atlantic Monthly* (October 1990): 56.

39. See e.g., *Zhongcai fa quanshu*, supra, Case No. 3. Also see Si Xiaotan, "CIETAC Arbitration: Joint Venture Case Studies No. 1," in China Law and Practice (ed.), *Dispute Resolution in the PRC: A Practical Guide to Litigation and Arbitration in China* (Hong Kong, China Law & Practice, 1995): 139; and Wang Cunxue, supra, Case No. 6.

40. For a discussion of this concern in the context of the Sino-Japanese Fujian Television JV, see "Zhong wai hezi jingying qiye ruhe 'hezi'?," in Zhang Huilong, *She wai jingji fa anli jiexi* (Analysis of Sino-foreign economic law cases) (Beijing: Youth Publishers, 1990): 239.

41. See Zhongcai fa quanshu, supra, Case No. 5.

42. See "Wai shang yong zuo chu zi de shebei bixu fuhe hetong he wo guo falu de yaoqiu" (The equipment used by the foreign investor as capital contribution must conform to the contract and our country's laws), in Qi Tiancheng, supra, at 422.

43. See *Zhongcai fa quanshu*, supra, Case No. 7.

44. See *Zhongcai fa quanshu*, supra, Case No. 10.

45. See *Zhongcai fa quanshu*, supra, Case No. 12.

46. See e.g., Johannes Trappe, "Conciliation in the Far East," *International Arbitration* 173, 5(2) (1989); Greg Vickery, *"International Commercial Arbitration in China," Australian Dispute Resolution Journal* 75, 5 (1994); and Anne Judith Farina, "Talking Disputes into Harmony: China Approaches International Commercial Arbitration," *American University Journal of International Law and Policy* 137, 4 (1989)

47. See Cheng Dejun, supra, Case No. 7. Also see Zhongcai fa quanshu, supra, Case No. 8.

48. See J.G. Castel, A.L.C. de Mestral, and W.C. Graham, *The Canadian Law and Practice of International Trade* (Toronto: Emond Montgomery, 1991).

49. See *Zhongcai fa quanshu,* supra, Case No. 11.

50. See *Zhongcai fa quanshu*, supra, Case No. 12 (sale of fax machine packing materials and equipment) and No. 13 (sale of parts and equipment for use on Jacguard Looms).