

Comments

CHINA, MODERNIZATION, AND SINO-UNITED STATES TRADE: WILL CHINA SUBMIT TO ARBITRATION?

The Communist takeover of mainland China following World War II set the stage for a long, cold, and bitter period of foreign relations between the United States and the People's Republic of China (China). A thaw in this chilly state of affairs began in 1969 when President Nixon relaxed United States restrictions regulating Sino-United States trade.¹ A new American position was in evidence in 1971 when the United States objections to China's admission to the United Nations were set aside and "ping-pong diplomacy" was initiated, culminating in President Nixon's visit to China in 1972.² A result of this historic visit was the Shanghai Communique,³ which expressed a mutual desire by China and the United States to normalize relations and resume trade.⁴ The resumption of trade in the interim has been extraordinary, with the actual volume of trade exceeding most predictions.⁵

1. See Lubman, *Trade with the United States*, in LAW AND POLITICS IN CHINA'S FOREIGN TRADE 220, 221 (V. Li ed. 1977).

2. Frankel, *Nixon Arrives in Peking To Begin An 8-Day Visit: Met By Chou At Airport*, N.Y. Times, Feb. 21, 1972, at 1, col. 8.

3. For the text of the Shanghai Communique, see 66 DEP'T STATE BULL. 435 (1972). For a discussion of the Shanghai Communique, see *id.* at 419-40; U.S. DEP'T OF COM., OVERSEAS BUS. REP., TRADING WITH THE PEOPLE'S REPUBLIC OF CHINA 1-2 (1973).

4. *Id.*

5.

UNITED STATES TRADE WITH CHINA (millions of U.S. dollars)

	Exports	Imports	Total	Balance
1971	0	4.9	4.9	-4.9
1972	63.5	32.4	95.9	31.1
1973	740.2	64.9	805.1	675.3
1974	819.1	114.7	933.8	704.4
1975	303.6	158.3	461.9	145.3
1976	149	202	351	-53
1977	188	203	391	-15
1978	450	950	1,400	500

V. LI & S. LUBMAN, *Introduction to LAW AND POLITICS IN CHINA'S FOREIGN TRADE* at xv (V. Li ed. 1977); 79 DEP'T STATE BULL. 18 (March 1979).

On the evening of December 15, 1978, a joint Communique⁶ was released simultaneously in Washington and Beijing,⁷ announcing that full normalization of diplomatic relations between the United States and China would be implemented on January 1, 1979.⁸ The Communique announced that the two governments

6. Joint Communique on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, January 1, 1979:

The United States of America and the People's Republic of China have agreed to recognize each other and to establish diplomatic relations as of January 1, 1979.

The United States of America recognizes the Government of the People's Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial and other unofficial relations with the people of Taiwan.

The United States of America and the People's Republic of China reaffirm the principles agreed on by the two sides in the Shanghai Communique and emphasize once again that:

—Both wish to reduce the danger of international military conflict.

—Neither should seek hegemony in the Asia-Pacific or in any other region of the world and each is opposed to efforts by any other country or group of countries to establish such hegemony.

—Neither is prepared to negotiate on behalf of any third party or to enter into agreements or understandings with the other directed at other states.

—The Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China.

—Both believe that normalization of Sino-American relations is not only in the interest of the Chinese and American peoples but also contributes to the cause of peace in Asia and the world.

The United States of America and the People's Republic of China will exchange ambassadors and establish embassies on March 1, 1979.

79 DEP'T STATE BULL. 25 (Jan. 1979).

7. On January 1, 1979, China officially adopted the "pinyin" system of writing Chinese characters in the Latin alphabet; subsequently the United States government also adopted pinyin. A system of romanization invented by the Chinese, pinyin has been used extensively for years in China on street signs and in elementary Chinese textbooks as an aid for Westerners in learning Chinese characters. Pinyin is to replace the Wades-Giles romanization system and will be used in this Comment. Words frequently used in this Comment are given below in Wade-Giles and pinyin.

<u>Wade-Giles</u>	<u>Pinyin</u>
Peking	Beijing
Kwangchou/Canton	Guangzhou
Luda	Luta
Hong Kong	Xianggang
Shanghai	Shanghai
Chiang Ching	Jiang Qing
Mao Tse-tung	Mao Zedong
Teng Hsiao-ping	Deng Xiaoping
Hua Kuo-Feng	Hua Guofeng
Chou En-lai	Zhou Enlai
Lin Piao	Lin Biao

INDUS. & TRADE AD., U.S. DEP'T OF COM., DOING BUSINESS WITH CHINA I (1979); NEWSWEEK, Feb. 5, 1979, at 38; Mathews, *Proposed China Laws Challenged*, L.A. Times, July 1, 1979, pt. 1, at 1, col. 5.

8. Nelson, *China, U.S. Establish Full Relations*, L.A. Times, Dec. 16, 1978, pt. 1, at 1, col. 5.

would exchange ambassadors and establish embassies on March 1, 1979.⁹ Thus, in a whirlwind turn of events, the world's wealthiest nation and the world's most populous nation officially ended their long enmity.

The death of Mao Zedong in 1976 has accelerated the increase in China's foreign trade beyond most sinologists' expectations.¹⁰ Immediately following Mao's death, an internal political power struggle took place within the Chinese Communist Party, pitting the Radical faction, led by Mao's widow Jiang Qing, against the Pragmatist faction and their spokesman Hua Guofeng.¹¹ The Radicals advocated isolationism, an end to foreign trading, and a return to complete self-reliance; the Pragmatists, on the other hand, called for a more progressive campaign to modernize China through the increased importation of foreign technology.¹² The fierce contest ended in victory for the Pragmatists and China's current Premier, Hua Guofeng.¹³ He and Vice Premier Deng Xiaoping have, in the interim, embarked upon a de-Maoification of China which has proceeded at a frenetic pace.¹⁴

China, long separated from the outer world by an "instinctive xenophobia and an admixture of reclusive Maoism," began, in 1978, what Beijing called the "New Long March."¹⁵ The Chinese, their economy sluggish and their morale exhausted by the disastrous Cultural Revolution,¹⁶ hope to arrive at a condition of relative modernity by the year 2000, and in the process become a world economic and military power.¹⁷ The motivating force behind this campaign is Vice Premier Deng Xiaoping,¹⁸ the principal architect of what has become known in Chinese rhetoric as the "Four Modernizations" — an attempt to simultaneously improve agriculture, industry, science and technology, and defense.¹⁹

9. L.A. Times, Dec. 16, 1978, pt. I, at 22, col. 1.

10. See TIME, Jan. 1, 1979, at 17.

11. *Id.*

12. *Id.*; Leslie, *Mao Widow's Future Clouded*, L.A. Times, Sept. 17, 1976, pt. I, at 1, col. 4.

13. Munro, *Mao's Widow, 3 Shanghai Radicals Reported Held for Plotting a Coup*, N.Y. Times, Oct. 12, 1976, at 1, col. 1; *Appointment of Hua As Party's Chairman Confirmed By Peking*, N.Y. Times, Oct. 13, 1976, at 1, col. 1.

14. TIME, Jan. 1, 1979, at 17.

15. *Id.* at 12.

16. The Cultural Revolution (1966-1969), directed against the onset of complacency and bureaucracy, dislocated nearly every institution of Chinese life. *Id.* at 16.

17. *Id.* at 12.

18. *Id.*

19. Deng's modernization campaign has its origins in ex-Premier Zhou Enlai's report on the work of government, delivered at the Fourth National People's Congress in 1975.

An important factor in the push for normalization was China's desire to acquire American technology for her modernization drive.²⁰ Vice Premier Deng, in late January 1979, made an unprecedented eight-day visit to the United States.²¹ The twofold purpose of the visit was to strengthen Sino-United States relations and to provide Deng with a glimpse of the technology he covets for China.²²

Normalization did not eliminate all the barriers to Sino-United States trade. Significant obstacles remained — in particular, the frozen assets-blocked claims dispute²³ and the question of granting most-favored-nation treatment to Chinese goods imported into the United States.²⁴ On May 11, 1979, China and the United States signed an agreement settling the long-standing frozen assets-blocked claims dispute, clearing the way for the signing of a Sino-United States trade agreement.²⁵ On July 7, 1979, a comprehensive trade agreement was signed.²⁶ The accord, if approved by Congress, will provide most-favored-nation treatment for Chinese imports.²⁷ The trade agreement puts the United States on equal footing with its trade competitors in Western Europe and Japan, and is expected to provide an impetus to the development of bilateral trade.²⁸

A final concern in Sino-United States trade relations is the resolution of commercial disputes — the need for workable trade arbitration mechanisms. In this area, American and Chinese philosophies are at variance. Although international commercial arbitration is currently the preferred method of settling interna-

That report and the Four Modernizations slogan are widely believed to have been the work of Deng Xiaoping, who was at the time Zhou's protégé. *Id.*

20. Mathews, *U.S., China — the Ignorance Was Mutual*, L.A. Times, Jan. 2, 1979, pt. I, at 1, col. 1; *U.S.-China Ties Formally Established*, L.A. Times, Jan. 1, 1979, pt. I, at 5, col. 1.

21. Kempster, *Teng Arrives, is Greeted Quietly in Washington*, L.A. Times, Jan. 29, 1979, pt. I, at 1, col. 5.

22. In Atlanta, Deng was escorted by Henry Ford II through a nearby Ford Motor plant. Texas provided a close look at some of the American technology Deng admires — a visit was made to the Lyndon B. Johnson Space Center in Houston, and Deng toured the Hughes Tool Company, one of the world's largest manufacturers of oil-drilling equipment. In Seattle, Deng visited the Boeing aircraft plant; China has ordered three of Boeing's 747 jumbo jets. *NEWSWEEK*, Feb. 12, 1979, at 27.

23. United States claims for property confiscated by the Chinese or abandoned after the 1949 revolution total \$196.4 million. Chinese claims for assets seized by the United States after the outbreak of the Korean War are estimated to be \$80 million. *Id.* at 32.

24. *Id.*

25. *U.S. Signs Pact on China Claims*, L.A. Times, May 11, 1979, pt. I, at 9, col. 3.

26. L.A. Times, July 8, 1979, pt. I, at 6, col. 1.

27. *Id.*

28. See notes 250-65 *infra*, and accompanying text.

tional trade disputes and is very popular with American businessmen,²⁹ the Chinese have proven to be obsessively recalcitrant to submit to arbitration, even when arbitration is provided for in a business contract.³⁰ This divergence must be reconciled to ensure that trade disagreements will be handled equitably.

This Comment will examine the problems involved in negotiating settlements of commercial disputes with China. As background to this problem, the historical, cultural, and ideological factors underlying China's reluctance to arbitrate will be examined, followed by a discussion of China's legal renaissance. This Comment will then explore the development and current popularity of arbitration in international commerce. Dispute settlement between China and other countries will be examined to demonstrate China's recent intention to avoid arbitration and to document foreign reaction to the problems this recalcitrance has presented in resolving disputes. The shift in Chinese political and economic philosophy following Mao Zedong's death in 1976 — de-Maofication and modernization — will then be examined, as will recent developments eliminating the longstanding barriers to trade. The manifestations of these new philosophies will be analyzed as portents of China's future. Finally, this Comment will demonstrate how China's participation in arbitration is a logical extension of these shifts in economic and political philosophy and one that will expedite her goal of becoming a modern nation and a member of the international business community.

I. HISTORIC INFLUENCES ON CHINESE DEVELOPMENT

A. *China and the West*

Modern international law is a creation of the West.³¹ The early stages of the international legal system appeared in mid-seventeenth century Europe in response to the needs of the new nation-states that dominated the political and spiritual community.³² These nation-states developed a "balance of power" system which prevented domination by any single power and which recognized

29. J. LEW, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* 1 (1978); see also Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 850 (1961).

30. Li, *Trade with China: An Introduction*, in *LAW AND POLITICS IN CHINA'S FOREIGN TRADE* 12 (V. Li ed. 1977). Chinese practice is to avoid formal arbitration proceedings. Even when the contract contains an arbitration clause and when a dispute has been unresolved for a duration, Chinese Foreign Trade Corporations (FTC) generally strive to settle the dispute through "friendly discussions." *INDUS. AND TRADE AD.*, *supra* note 7, at 14.

31. I J. COHEN & H. CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW* 3 (1974).

32. *Id.*

the sovereign equality of all states. "As these dynamic nation-states expanded their activities into East Asia, they discovered a civilization, China, that had not experienced the Renaissance, the Reformation, or other forces which had undermined the concept of a universal state in Europe."³³

China's first exposure to Western international law was during the Ch'ing dynasty.³⁴ Not until 1839 did China attempt to employ international law as a method of resolving grievances with European nations.³⁵ China, by relying on the publicist Vattel's *Le Droit des Gens*³⁶ and complying with the text's prescriptions,³⁷ sought to invoke international law to prevent British traders in Guangzhou from smuggling opium into China.³⁸ The attempt failed, however, and the first Opium War (1839-1842) ensued, in part as a result of China's compliance with, and reliance upon *Le Droit des Gens*.³⁹ Britain's victory in the war resulted in China's coerced acquiescence to the first substantial Western presence in China.⁴⁰

Following the first Opium War, Britain imposed the unequal treaties system. For a century and a half prior to this, Guangzhou had been the major Chinese market serving European merchants.⁴¹ In the ensuing years, other cities "were 'opened' to trade under coercion, while China paid millions of dollars indemnity to England" as a result of the war.⁴² "Imperialist powers claimed their concessions and further encroached on China's coasts and river ports," dumping surplus goods that glutted the Chinese market and smug-

33. China had been insulated from the world beyond East Asia by mountains, deserts, and oceans, as well as by an intense suspicion of "barbarians." Thus, China, whose name means "the central realm," had presided over relations among the peoples of East Asia for 2,000 years according to its own concept of universal state. *Id.*

34. *Id.* at 5.

35. *Id.*

36. China's Imperial Commissioner Lin Tse-hsu learned of the existence of Vattel's *Le Droit des Gens* (The Law of Nations) and persuaded an American missionary Dr. Peter Parker and a Chinese man to translate some passages that pertained to China's plight. As prescribed by Vattel, Commissioner Lin sent a letter to Queen Victoria to notify her of the conduct of her offending nationals. His letter was never acknowledged. *Id.* at 6.

37. These passages acknowledged a state's right to stop foreign nationals from importing noxious products into its territory. The state could declare those products to be contraband and could then effect their confiscation. Vattel prescribed that a state, before taking such action against the offending foreign nationals, must notify their sovereign and request that it restrain its subjects. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Snow, *China's Foreign Trade and Aid*, 11 J. WORLD TRADE L. 101,102 (1977).

42. *Id.* at 102.

gling the highly profitable opium into China.⁴³ Chinese economic history, from 1842 until 1949, when the Communists emerged as victors in the civil war, was marked by exploitation and humiliation.⁴⁴

This century of exploitation produced a general distrust of Western law — skepticism that Western nations would apply international law in an evenhanded manner when dealing with China.⁴⁵ This distrust had its impact on the revolutionary Chinese leaders who took control of mainland China after the civil war; they viewed Western law as a tool of subjugation and oppression.⁴⁶ Western exploitation of China and China's negative experiences with international law in the late nineteenth and early twentieth centuries provides an historical foundation for China's present reluctance to participate in international arbitration. In addition to the effect of economic history, Chinese legal tradition has also influenced China's reluctance to arbitrate foreign contract disputes.

B. *China's Legal Tradition*

Although Imperial China had developed and maintained a sophisticated legal system for more than a thousand years, "law did not enjoy the prestige and importance that it gradually attained in

43. By the end of the nineteenth century, the Mandarins of Imperial China had translated Henry Wheaton's *Elements of International Law*. Their eventual mastery of Western doctrines and practices made them increasingly aware of the limited value of this legal knowledge for a nation that lacked the military, political, and economic power to defend itself. As one of China's early diplomats wrote in 1891: "International law is just like Chinese statutory law — reasonable but unreliable. If there is right without might the right will not prevail." COHEN & CHIU, *supra* note 31, at 10.

China has traditionally been introverted, suffering a foreign presence only when too weak to resist. Nonetheless, China has felt the hunger to modernize before. In 1898, under Emperor Kuang Hsu, the Chinese tried, unsuccessfully, to imitate Japanese Emperor Meiji's nineteenth century transformation of Japan from feudalism to a modernized, Westernized economy. Then in the early days of Sun Yat-sen's Republican China, an effort to streamline Chinese society with foreign help failed miserably and eventually turned China toward puritanical socialism. "The Chinese," wrote Historian C.P. Fitzgerald, "became disillusioned with the false gods of the West. They turned restlessly to some other solution." TIME, Jan. 1, 1979, at 15.

44. Under these conditions, Britain and her colony Xianggang (Hong Kong), itself wrestled from China in 1841, led the "free trade" with the "sleeping giant of the Far East." At the beginning of World War I, Japan had acquired economic dominance over China. By the end of World War II, the United States had assumed Japan's position. China's crumbling economy sank to dismal depths under civil war, bureaucratic and official corruption, black markets, flight of capital — in the 1940s on the order of some \$200 million annually — and dissipation of national assets. Snow, *supra* note 41, at 103.

45. COHEN & CHIU, *supra* note 31, at 11.

46. *Id.* at 14.

Western societies.”⁴⁷ “In China, law was not regarded as a major social achievement and a symbol of rectitude, but as a regrettable necessity to be used by the state to enforce its will upon subjects who refused to submit to alternative means of social control.”⁴⁸ Many of the most fundamental concepts of Western legal thought were never developed by the Chinese. Imperial China never developed a judiciary that was insulated from the political authority, or an independent legal profession that strengthened the “law habit,” or a legal education system that articulated the idea of a “rule of law.”⁴⁹ Historically, the Chinese have even rejected the use of arbitration to resolve disputes, because it would impose a solution that might result in “loss of ‘face,’⁵⁰ friendships, or advantageous business relationships.”⁵¹

For centuries, Chinese society has been conditioned to abhor law and litigation as a mechanism to obtain proper conduct and to revere “moral rules” as the source of virtue in society.⁵² Chinese social groups have “disposed of an enormous volume of potential litigation using a variety of techniques rang[ing] from persuasion to ostracism to coercion,”⁵³ traditionally relying upon mediation and the Confucian virtues of yielding and compromise for the resolution of disputes.⁵⁴

The Chinese Communists have continued the tradition of mediation, asserting that mediation is far superior to adjudication,

47. *Id.* at 17. For a discussion of law in traditional China, see generally D. BODDS & C. MORRIS, *LAW IN TRADITIONAL CHINA* (1967).

48. COHEN & CHIU, *supra* note 31, at 17.

49. *Id.*

50. J. FAIRBANK, E. REISCHAUER & A. CRAIG, *EAST ASIA* 45-46 (1973). The Confucian ideal was the *chün-tzu* (gentleman), a cultivated or superior man. Confucius believed a “gentleman” should possess the qualities of righteousness, an inner integrity, conscientiousness toward others, altruism, and above all human-heartedness. Confucianism concentrated on ethical tradition; an imposed solution would *violate* the ethical values of the system. *Id.*

51. McCobb, *Foreign Trade Arbitration in the People's Republic of China*, 5 N.Y.U.J. INT'L L. & POL. 205, 207 (1972).

52. See Lee, *Chinese Communist Law: Its Background and Development*, 60 MICH. L. REV. 439, 440-42 (1962).

53. COHEN & CHIU, *supra* note 31, at 17.

54. Before the Communists gained power, mediation had been the primary mode of dispute settlement for thousands of years in traditional China . . . Confucianism, the dominant political philosophy in pre-Communist China, stressed the virtues of compromise, yielding, and nonlitigiousness. The organization of the imperial Chinese state, the operation of its governing institutions, and its traditional social nuclei — family, clan, village, and guild — combined to create pressures and institutions for extrajudicial mediation. The brief years of the Republic from 1911 to 1949 did not appreciably reduce the preference for mediation.

Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284, 1285-86 (1967).

which they consider to be coercive.⁵⁵ They have “continually extolled the virtues of mediation and claim to use it far more extensively than adjudication in settling disputes.”⁵⁶

The Communists, however, have substantially altered the traditional mode of mediating disputes.⁵⁷ They have changed the identity and role of mediators and “have partially succeeded in transforming the process and functions of mediation.”⁵⁸ They have “set themselves against the Confucian emphasis on compromise and . . . they have infused into mediation absolute criteria of right and wrong rather than allowing mediation to seek, as it once did, a compromise that would not disrupt a delicate network of personal relationships”⁵⁹

The role of law⁶⁰ in Communist China’s “socialist transformation” has been very limited, reflecting the Marxist belief that law is a tool of the ruling class.⁶¹ Indeed, much of China’s domestic orientation has been explicitly antilegal.⁶²

In 1953, China began to adopt a “Soviet-style” legal system,⁶³

55. *Id.*

56. *Id.* at 1286.

57. *Id.*

58. *Id.* at 1287.

59. *Id.*

60. Two models of law have coexisted and competed with each other in the People’s Republic of China. One may be called the jural (formal) model, and the other the societal (informal) model. Reflecting Soviet and Western influence, the jural model stands for formal, elaborate, and codified rules enforced by a centralized and institutionalized bureaucracy. The societal model, on the other hand, focuses on socially approved norms and values, implemented by political socialization and enforced by social pressures.

Leng, *The Role of Law in the People’s Republic of China as Reflecting Mao Tse-tung’s Influence*, 68 J. CRIM. LAW & CRIMINOLOGY 356, 356-57 (1977). See generally Lee, *supra* note 52, at 440-49; J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA 1949-1963: AN INTRODUCTION* (1968).

61. COHEN & CHIU, *supra* note 31, at 14. The class nature of law is an essential part of Communist jurisprudence. Leng, *supra* note 60, at 363; see generally H. KELSEN, *THE COMMUNIST THEORY OF LAW* (1955).

Two concepts have conditioned the Chinese perception of the role of law in their revolutionary scheme. One is the Marxist-Leninist theory that considers law as a political tool to implement party policy. The other is Mao’s idea of “uninterrupted revolution,” that called for a continuous effort to mold and remold human nature. These two conceptions have combined to provide the Chinese elites with a theoretical framework to view law as an instrument of social engineering, to be used for the transformation of Chinese society and its members in accordance with the revolutionary ideology.

Leng, *supra*, note 60, at 366.

62. COHEN & CHIU, *supra* note 31, at 14.

63. *Id.* at 15. “As China adopted the Soviet style of economic development in 1953, there was a swing toward institutionalization and bureaucratic normalization.” Leng, *supra* note 60, at 358.

beginning the era of China's constitutional experiment.⁶⁴ This attempt to adapt a Soviet legal model to Chinese conditions came to an abrupt end in mid-1957 with the outbreak of the "anti-rightist" movement, which dramatically reversed the previous trend toward legal professionalism and some degree of judicial autonomy.⁶⁵

A deformalization of the legal system followed,⁶⁶ adopting traditional mediation practices⁶⁷ to settle disputes in accord with revolutionary needs.⁶⁸ Even this degree of deformalization did not meet the radical antibureaucratic criteria of the Cultural Revolution. One of the targets of the Cultural Revolution was the existing legal structure, which was labeled as counterrevolutionary.⁶⁹ What emerged from the Cultural Revolution was the ascendancy of the "societal" model of law over the "jural" model.⁷⁰ Deformalization of China's legal system continued until the death of Mao Zedong in September 1976.⁷¹ By then, China had arrived at an exceptional degree of judicial simplicity,⁷² challenging the maxim of those sociologists of law who have argued that "any state determined to achieve a high level of industrialization must create a highly devel-

64. This period marked the ascendancy of the "jural" model of law and was characterized by the adoption of a constitution that guaranteed "equality before the law, right to legal defense, protection against arbitrary arrest and independence of the judiciary," and a series of substantive and procedural laws and regulations. "Efforts were also made to draft civil, criminal, and procedural codes." Leng, *supra* note 60, at 358. For a discussion of China's constitutional experiment, see COHEN, *supra* note 60, at 10-14.

65. Leng, *supra* note 60, at 358. In 1957, China's progress toward a stable legal order ended when Communist elites launched the anti-rightest campaign. China had decided to abandon the Soviet legal model in favor of Mao's strategy, the "Great Leap Forward." *Id.*; COHEN, *supra* note 60, at 47.

66. Leng, *supra* note 60, at 359; COHEN & CHIU, *supra* note 31, at 15.

67. See notes 75-81 *infra*.

68. COHEN & CHIU, *supra* note 31, at 15.

69. Mao instigated the Cultural Revolution to revolutionize the bureaucratic establishment. In an editorial entitled "*In Praise of Lawlessness*, the *People's Daily* called for the destruction of the 'bourgeois' law so that the proletarian legal order could be established." To transform the political-legal organs, Mao purged Yang Hsiu-feng, President of the Supreme People's Court, Chang Ting-cheng, the Chief Procurator, and most legal practitioners. Leng, *supra* note 60, at 359.

70. *Id.* at 358-59. During the Cultural Revolution Mao Zedong called for the end of *Kung-chien-fa* (public security, procuratorate, and judicial organs) and was quoted as saying: "Depend on the rule of man, not the rule of law." *Id.* at 356.

71. Cohen, *Will China Have a Formal Legal System?*, 64 A.B.A.J. 1510, 1511 (1978).

72. China had virtually no lawyers, not even prosecutors, and most judges had little legal training. During the previous decade, no significant legislation had been published, nor had any law reviews or legal treatises appeared. Extrajudicial institutions played a greater legal role than the courts in settling disputes. Judicial decisions had to be cleared with the relevant party members (all of whom were laymen) to make certain the decisions reflected the current "party line." *Id.*

oped legal system.”⁷³ China has not, however, challenged that maxim successfully.

Uncertainty has prevailed among Chinese workers in the absence of an established legal framework.⁷⁴ Arbitrary punishment was excessively enforced against counterrevolutionaries in the 1950s and 1960s during the successive campaigns of Mao’s perpetual revolution.⁷⁵ The arbitrary nature of the punishment led to an insecurity and instability in the social order that has inhibited economic growth.⁷⁶ These sociological factors, coupled with Mao’s economic philosophy of “self-reliance,” have combined to retard China’s economic growth and increase the discrepancy in productivity between herself and industrialized nations.

C. *China’s Legal Renaissance*

1. *Stabilization of Chinese society.* In striving for the increased sophistication of China, her new leaders have abandoned Maoist legal principles. They believe that a more sophisticated legal system will eliminate the past arbitrary enforcement of Chinese law and will stabilize Chinese society.⁷⁷ Relying on this stability as the foundation, China’s leaders are simultaneously abandoning Maoist self-reliant development principles in their bold economic plans to achieve modernization.⁷⁸

China’s new leadership is currently engaged in a comprehensive campaign to restore the morale, enthusiasm, and productivity of the articulate segments of the nation, sectors whose active efforts are essential if China is to become a modern, powerful, socialist state.⁷⁹ China’s leaders realize that the intellectuals, bureaucrats, and workers who have suffered through the successive campaigns

73. *Id.*

74. See Cohen, *In China, as in Other Nations, People Have Rights*, L.A. Times, Jan. 5, 1978, pt. VI, at 1, col. 1. In the absence of written legal codes, the “law” reflected the current “party line” of the Communist Party. What is right one day, however, may be wrong the next day, as thousands of those purged during the Cultural Revolution found out.

75. See Cohen, *supra* note 71, at 1512.

76. *Id.*

77. *Id.* As China marches away from Maoism there is occurring simultaneously a rehabilitation of the nation’s legal system. Victor Li, Stanford Law Professor, states that one reason for China’s renewed interest in jurisprudence is that “[a] group of men who were very badly treated during [the Cultural Revolution] are back in power and they are determined that sort of thing will never happen again.” NEWSWEEK, Oct. 22, 1979, at 110.

78. Cohen, *supra* note 74.

79. *Id.* China’s economic development depends on predictable law. Jerome Cohen states, “If you want people to participate in the modernization movement, you must guarantee them some protection against arbitrary rule. New ideas aren’t going to come forth if it pays to keep your mouth shut.” NEWSWEEK, Oct. 22, 1979, at 110.

against counterrevolutionaries — the anti-rightist movement, the Cultural Revolution, and the purge of Lin Biao's followers — want reassurance for their personal security.⁸⁰ So long as fear of arbitrary action persists — and the Beijing media concede that such a fear has been rampant for years — “one can hardly expect officials to take initiatives, scientists to innovate, teachers to present new ideas, and workers to criticize the bureaucracy.”⁸¹ The current leaders have emphasized that “the relationship between economic development and individual rights is not an either/or proposition.”⁸² In their view certain minimum guaranties of individual rights are essential to promote China's economic development.⁸³ The new constitution and the promulgation of new legal codes is tangible evidence of the new leadership's concern with law reform,⁸⁴ and is an attempt to stabilize Chinese society and provide the Chinese people protection from arbitrary punishment which has stifled innovation and growth in the past.⁸⁵

Beijing may not establish the “rule of law” in a Western sense,⁸⁶ but the 1978 Constitution does provide for the exercise of

80. Cohen, *supra* note 74.

81. *Id.* Disillusioned and demoralized by years of ideological upheaval, many Chinese bureaucrats drag their feet. As one foreign diplomat in Beijing notes, “The philosophy of those people is not to be a tall poppy, [t]hey know what happens to tall poppies.” NEWSWEEK, Oct. 15, 1979, at 86.

82. Cohen, *supra* note 71, at 1512.

83. The *Beijing People's Daily* announced an end to arbitrary justice in China. All citizens were to be equal before the law. In a full-page feature on the legal system in China indirectly criticizing the Cultural Revolution and Mao Zedong, the party paper said everyone would have the right to be defended by a lawyer and that the Justice Ministry, along with other judiciary agencies that were abolished during the Cultural Revolution, would be reinstated. The newspaper confirmed that codes of civil law, penal law, and criminal procedure were being drawn up and that law faculties were being reestablished in certain large universities such as Fudan and Shanghai. The article also recalled the right of Chinese citizens to be defended by lawyers, as laid down in the new Chinese Constitution of March, 1978. L.A. Times, Dec. 7, 1978, pt. I, at 9, col. 3. The English text of the new Chinese Constitution may be found in Hsia & Haun, *People's Republic of China*, III CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein & G. Flanz eds. 1978), and in 21 PEKING REV. 5 (1978) [hereinafter cited as CHINA CONST.]. For a discussion of the 1978 Chinese Constitution, see generally Kim & Kearley, *The 1978 Constitution of the People's Republic of China*, 2 HAST. INT'L & COMP. L. REV. 251 (1979).

84. Mathews, *China's Legislature Enacts 1st Legal Codes*, L.A. Times, July 2, 1979, pt. I, at 5, col. 1.

85. It is significant that China is now popularizing the more positive aspects of imperial Chinese law rather than its repressive features. All over China, on both stage and screen, the traditional Chinese Opera *Fifteen Strings of Cash*, banned by Mao's widow for a decade, is again delighting audiences. It tells the dramatic story of how an upright Manchu judicial official reverses the unjust conviction of innocent persons from whom false confessions have been extracted through torture.

Cohen, *supra* note 71, at 1512.

86. *Id.* “The Chinese make no pretense of being liberal democrats. But at a time when

judicial authority by various levels of "people's courts,"⁸⁷ to be supervised by the Supreme People's Court.⁸⁸ These judicial tribunals will enforce the Constitution and the new legal codes.⁸⁹ The 1978 Constitution iterates that the guiding principle of government is *party control* of all state organs, *including* the judiciary.⁹⁰ After nearly twenty-seven years of perpetual revolution under Mao, however, the steps taken seem to be a profound attempt by China's leaders to stabilize Chinese society.

2. *Facilitation of Foreign Trade.* There is an international as well as domestic impetus to the revival of the formal indicia of legal institutions in China. The expansion of foreign trade has necessitated an increasing foreign scrutiny of the Chinese legal system. There are certain legal issues involved in the general facilitation of trade, relating to matters of "copyright, trademark, patent protection, insurance, contracts, forms and clauses and dispute settlement

the West fears it may be choking on law and lawyers, the East is again looking to them to breathe a bit more freely." NEWSWEEK, Oct. 22, 1979, at 113.

87. *Article 41* The Supreme People's Court, local people's courts at various levels and special people's courts exercise judicial authority. The people's courts are formed as prescribed by law.

In accordance with law, the people's courts apply the system whereby representatives of the masses participate as assessors in administering justice. With regard to major counter-revolutionary or criminal cases, the masses should be drawn in for discussion and suggestions.

All cases in the people's courts are heard in public except those involving special circumstances, as prescribed by law. The accused has the right to defence.

CHINA CONST. art. 41.

88. *Article 42* The Supreme People's Court is the highest judicial organ. The Supreme People's Court supervises the administration of justice by local people's courts at various levels and by special people's courts; people's courts at the higher levels supervise the administration of justice by people's courts at the lower levels.

The Supreme People's Court is responsible and accountable to the National People's Congress and its Standing Committee. Local people's courts at various levels are responsible and accountable to local people's congresses at the corresponding levels.

CHINA CONST. art. 42.

89. *Article 43* The Supreme People's Procuratorate exercises procuratorial authority to ensure observance of the Constitution and the law by all the departments under the State Council, the local organs of state at various levels, the personnel of organs of state and the citizens. Local people's procuratorates and special people's procuratorates exercise procuratorial authority within the limits prescribed by law. The people's procuratorates are formed as prescribed by law.

The Supreme People's Procuratorate supervises the work of local people's procuratorates at various levels and of special people's procuratorates; people's procuratorates at the higher levels supervise the work of those at the lower levels.

The Supreme People's Procuratorate is responsible and accountable to the National People's Congress and its Standing Committee. Local people's procuratorates at various levels are responsible and accountable to people's congresses at the corresponding levels.

CHINA CONST. art. 42.

90. See notes 87-89 *supra*.

procedure.”⁹¹

The result has been a movement of legal renaissance in China. China’s “economic needs are . . . making the country more legalistic [T]he Chinese Academy of Social Sciences is . . . drafting investment codes, commercial laws, and tax statutes . . . [t]o attract direct foreign investment and assure corporations overseas that their transactions will be secure”⁹² On July 1, 1979, the Chinese legislature endorsed the “rule of law” by enacting the first legal codes in Communist China in thirty years.⁹³ Commercial codes are being promulgated that will offer patent and trademark protection, tax incentives for direct investment, and repatriation of profits earned inside China.⁹⁴ Small teams of Wall Street lawyers and Hong Kong solicitors have been summoned to Beijing to help China bring its trade laws into conformity with international practice.⁹⁵ During the summer of 1979, Harvard and New York University Law Schools participated in tax seminars in China.⁹⁶ Legal education has been resumed, and China recently published its first law review in years.⁹⁷ As China’s legal needs expand, she will need lawyers to fill the new roles as judges, lawyers, and prosecutors, as well as legal advisors for government enterprises such as the China Council for the Promotion of International Trade (CCPIT).⁹⁸

Despite Mao’s previous influence, there exists in China an un-

91. R. HEUSER, FOREIGN TRADE CONTRACTS BETWEEN WEST GERMAN COMPANIES AND THE PEOPLE’S REPUBLIC OF CHINA: A CASE STUDY, 3, 4 (Occasional Papers/Reprints Series in Contemporary Asian Studies No. 7, 1977).

92. Mathews, *China’s Laws — They Face a Revolution*, L.A. Times, May 29, 1979, pt. 1, at 1, col. 1 (statement by Jerome A. Cohen).

93. Mathews, *supra* note 84. After the July 1979 party congress, the Chinese government launched an extensive propaganda campaign to explain the new legal system. Trials were broadcast on radio, and newspapers printed dozens of educational articles on the legal system. NEWSWEEK, Oct. 22, 1979, at 113.

94. Mathews, *supra* note 92.

95. *Id.*

96. Address by Jerome A. Cohen, The Standing Committee on Law and National Security and the International Law Section of the American Bar Association (June 8, 1979), reprinted in 5 INT’L TRADE L. J. — (1980) [hereinafter cited as Cohen Address]. China is trying to learn international legal practices. A Hong Kong firm has been consulted for help formulating a new investment code; a young Chinese-American admiralty lawyer has been hired as an advisor; and Harvard Law School conducted a four-week seminar on comparative tax law last summer in Luda. Mathews, *supra* note 92.

97. Cohen Address, *supra* note 96.

98. *Id.* United States District Court Judge Irving Hill of Los Angeles, leading a delegation of California jurists to China stated, “Lawyers were considered the worst of the bourgeoisie, so during the Great Proletarian Cultural Revolution . . . they were scattered to the four winds. [As a result,] China is having a tough time finding experienced counsel to staff the [legal] system.” Mathews, *supra* note 92.

dercurrent running toward a more stable and regularized legal order.⁹⁹ It appears that the jural model is achieving parity with the societal model and that the Chinese legal profession may regain the respect it enjoyed in the mid-1950s.¹⁰⁰ The role of law in China is undergoing a transition, moving away from its Confucian tradition toward a philosophy more closely in line with the adversary relationship of Western legal tradition. The new constitution and law codes and the reestablishment of a legal profession and judiciary indicate a trend away from Confucian tradition. As the differences in legal philosophies and practice diminish, Chinese distrust of Western law will dissipate. The continuation of this trend would suggest that the Chinese can be persuaded to submit to commercial arbitration. To glean the significance of China's acquiescence, it is imperative that we examine the origin and growth of international commercial arbitration and the reasons for its present popularity in the world of international business.

II. ARBITRATION IN INTERNATIONAL BUSINESS

A. *International Acceptance of Arbitration*

The innovations of twentieth century technology have fueled a tremendous increase in international commerce. Commercial disputes pose a serious obstacle to the orderly flow of this international trade.¹⁰¹ Commerce is inhibited if disputes are not promptly resolved in accordance with the interests of both parties.¹⁰² If the disputes are brought before courts of law, costly, lengthy, and bitter litigation may ensue, which may destroy existing business relationships.¹⁰³ Litigation problems are compounded by differences in substantive and procedural law between the national legal systems of the two parties. These problems have generated unwelcome uncertainty in international business transactions. The primary response to this uncertainty has been the attempt by businessmen to achieve non-judicial solutions to their day-to-day disputes.¹⁰⁴

99. See Mathews, *supra* note 92.

100. *Id.*; see note 60 & 64 *supra*.

101. Gardner, *Economic and Political Implications of International Commercial Arbitration*, in *INTERNATIONAL TRADE ARBITRATION* 15, 16 (M. Domke ed. 1958).

102. *Id.*

103. *Id.* at 16-17.

104. Lubman, *supra* note 54, at 1287. Since the days of the "early English 'piepowder' courts, where merchants with the dust of the market still on their feet stepped into a tribunal of merchants for swift resolution of their disputes, businessmen have preferred arbitration, a process which . . . combines finality of decision with speed, low expense, and flexibility" over other forms of contract dispute settlement. Quigley, *Accession By The United States To*

Today, international commercial arbitration¹⁰⁵ is the preferred method of settling disputes arising out of international commerce.¹⁰⁶ The reasons for this preference are numerous.¹⁰⁷ The international business community does not have confidence in national courts.¹⁰⁸ They are "identified with the economic, legal, and political systems of the countries in which they are situated."¹⁰⁹

The United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards, 70 YALE L.J. 1049, 1049 (1961). For an examination of the development of commercial arbitration in England and the United States, see generally Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595 (1928); Jones, *History of Commercial Arbitration in England and the United States: A Summary View*, in INTERNATIONAL TRADE ARBITRATION 127 (M. Domke ed. 1958).

105. The term "international commercial arbitration" is used to refer to "any arbitration arising out of a transaction or relationship that directly or indirectly affects international commerce." LEW, *supra* note 29, at 3. For a discussion of international commercial arbitration, see generally HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL LAW (E. Cohn, M. Domke & F. Eisemann eds. 1977) [hereinafter cited as Cohn & Domke]; INTERNATIONAL TRADE ARBITRATION (M. Domke ed. 1958); Domke, *Recent Developments in International Commercial Arbitration*, 2 N.Y.U.J. INT'L L. & POL'Y 267 (1969); Ehrenhaft, *Effective International Commercial Arbitration*, 9 LAW & POL. INT'L BUS. 1191 (1977); Henry, *A Plea for Compulsory Arbitration of International Disputes*, 54 A.B.A.J. 1187 (1968); LEW, *supra* note 29; Mentschikoff, *The Significance of Arbitration — A Preliminary Inquiry*, 17 L. & CONTEMP. PROB. 698 (1952); Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961) [hereinafter cited as *Commercial Arbitration*]; McClelland, *International Arbitration: A Practical Guide to the System for the Litigation of Transnational Commercial Disputes*, 17 VA. J. INT'L L. 729 (1977); Reisman, *Multifaceted Phenomenon of International Arbitration*, 24 ARB. J. 69 (1969); SAUNDERS, INTERNATIONAL COMMERCIAL ARBITRATION (1960); Straus, *Arbitration of Disputes Between Multinational Corporations*, 24 ARB. J. 228 (1969); Tindall, *International Commercial Arbitration*, 7 AM. BUS. L.J. 65 (1969); I-V J. WETTER, THE INTERNATIONAL ARBITRATION PROCESS: PUBLIC AND PRIVATE (1979).

106. Commercial arbitration provides a simple procedure before a tribunal of private citizens who are free from the limitations of national law. See Gardner, *supra* note 101, at 15-17.

107. The reasons commonly given for preferring arbitration — speed of resolution of the dispute, less expense, more expert decision, and greater privacy — are appealing to all businessmen. *Id.*; *Commercial Arbitration*, *supra* note 105, at 850. "The desirability of arbitration among businessmen is enhanced by unpredictable conflict of laws rules . . ." Rabbino, *International Commercial Arbitration and the Federal Securities Laws*, 7 N.Y.U.J. INT'L L. & POL. 383, 401 (1974).

Arbitration can be custom-tailored to suit the parties' needs and desires. There can be maintained an atmosphere conducive to reconciliation and the maintenance of good relations between the parties. Ehrenhaft, *supra* note 105, at 1194.

The international businessman realizes that commercial disputes that go to courts of law can be costly, time consuming, and bitter. Some courts and juries favor their own nationals. In addition, there is an absence of uniform international commercial law, and courts of different countries have interpreted the rights and duties of buyers and sellers differently. Rosenthal, *A Businessman Looks at Arbitration*, in INTERNATIONAL TRADE ARBITRATION 27, 28 (M. Domke ed. 1958); Ehrenhaft, *supra* note 105, at 1192.

108. LEW, *supra* note 29, at 1; Quigley, *supra* note 104, at 1049.

109. LEW, *supra* note 29, at 1. International commercial arbitration is a means to ensure a uniform application of the customs and rules of the trade by the arbitrators who are experts chosen from members of the trade to settle the dispute. Cohn & Domke, *supra* note 105, at v.

By contrast, the international arbitration tribunal is the businessman's court. Faced with such an uncertain formal legal situation, it is natural for businessmen to react by developing substantive rules of behavior to eliminate the unpredictability inherent in transnational law suits.¹¹⁰ Such a tribunal "exists to resolve disputes between, and in accordance with the needs of, the participants of international commerce."¹¹¹ As a result, in nearly all international business contracts, the contracting parties have, as an alternative to the transnational application of domestic statutes,¹¹² inserted a clause calling for arbitration in the event of contractual disagreements.¹¹³

Businessmen doing business in foreign countries have an additional reason for preferring arbitration to local judicial remedies. Many businessmen fear discrimination, either consciously exerted in actual bias or unconsciously exhibited by preference for local principles of law.¹¹⁴ To avoid this prejudice, contracting parties have made provisions in their contracts that disputes will be settled through arbitration "in a specified nation or by a specified impartial third party."¹¹⁵ "Private organizations such as the American Arbitration Association and the International Chamber of Commerce have developed efficient arbitral procedures and make their services available to private parties."¹¹⁶

Given this acceptance of arbitration as the most expeditious method of resolving commercial disputes, a mechanism for enforcement of the arbitration agreements and awards becomes necessary. Signatories to a United Nations convention have solved this enforcement problem by agreeing to enforce arbitral agreements and awards.

*B. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*¹¹⁷

Arbitration is of real value only to the extent that "agreements

110. *Commercial Arbitration*, *supra* note 105, at 850-51.

111. LEW, *supra* note 29, at 1.

112. When a trade group develops its own rules of law, it requires as arbiters of its disputes persons who are acquainted with its standards. Because judges of formal legal systems do not possess this knowledge, "the drive toward institutionalized private machinery is reinforced." *Commercial Arbitration*, *supra* note 105, at 851.

113. LEW, *supra* note 29, at 3.

114. Quigley, *supra*, note 104, at 1051.

115. *Id.*

116. *Id.*

117. Recognition and Enforcement of Foreign Arbitral Awards, *done*, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3. See generally Contini, *International Com-*

to arbitrate will be enforced against a recalcitrant party," ensuring that what began as an arbitration will "not ultimately end up in litigation before a court of law."¹¹⁸ Arbitration is efficient only to the extent that specific performance of an arbitration agreement will be ordered and that arbitral awards will receive the benefit of summary enforcement proceedings and will not be extensively reviewed.¹¹⁹

Under principles of private international law, enforcement of an arbitral agreement or award is governed by the national law of the country where enforcement is sought.¹²⁰ Absent a contrary international agreement, international law does not impose an obligation on a state to recognize and enforce an arbitral agreement made or an award rendered abroad, nor does it prohibit a state from discriminating against foreign agreements and awards.¹²¹ "States and organizations which regard this situation as undesirable have been instrumental in formulating conventions and uniform rules [to facilitate] the enforcement of arbitration agreements and the transnational movement of arbitral awards."¹²²

Shortly after the establishment of the United Nations, attempts were made to formulate a multilateral solution to the problem of enforcing foreign arbitral awards. A United Nations conference was convened in 1958 for the conclusion of a convention on the recognition and enforcement of foreign arbitral awards.¹²³ On June 10, 1958, the Conference adopted the Draft Convention, which "requires each Contracting State 'to recognize arbitral awards as binding' and to enforce them in accordance with the rules of procedure of the forum state."¹²⁴ The forum state is prohibited from imposing "substantially more onerous conditions or higher fees or charges" on the recognition or enforcement of arbitral

mercial Arbitration. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 8 AM. J. COMP. L. 283 (1959); G. HAIGHT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (1958); PISAR, *The United Nations Convention on Foreign Arbitral Awards*, 33 SO. CALIF. L. REV. 14 (1959); Quigley, *supra* note 104; Springer, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 INT'L LAWYER 320 (1969); Sultan, *The United Nations Arbitration Convention and United States Policy*, 53 AM. J. INT'L L. 807 (1959).

118. McMahon, *Implementation of the UN Convention on Foreign Arbitral Awards in the U.S.*, 26 ARB. J. 65, 65 (1970), *reprinted in* 1971 J. MAR. L. & COM. 2 (1970).

119. *Id.* at 65-66.

120. *Id.* at 66.

121. *Id.*

122. *Id.*

123. Quigley, *supra* note 104, at 1059. The legislative history of the Convention is summarized in HAIGHT, *supra* note 117.

124. Quigley, *supra* note 104, at 1060, 1064-65.

awards to which the Convention applies than it imposes on the recognition or enforcement of domestic arbitral awards.”¹²⁵

The United States, following the recommendation of their delegation to the United Nations Conference, did not initially sign the document.¹²⁶ Interested private groups expressed considerable support for accession by the United States, and in 1968, the President submitted the Convention to the Senate for its advice and consent.¹²⁷ Accession by the United States finally occurred in 1970.¹²⁸ The United States, by becoming a party to the Convention, joined Western Europe, Japan, and most Eastern European countries, as well as the Soviet Union, in recognizing and enforcing foreign arbitral awards.¹²⁹

Although China allows arbitration clauses to be inserted in commercial contracts, it is not a signatory to the Convention. Given the acceptance of arbitration in the international business community,¹³⁰ it is important to examine the characteristics of

125. *Id.* at 1065.

126. McMahon, *supra* note 118, at 67. The reasons for the delegation's recommendation are summarized as follows:

1. The convention, if accepted on a basis that avoids conflict with State laws and judicial procedures, will confer no meaningful advantages on the United States.

2. The convention, if accepted on a basis that assures such advantage, will override the arbitration laws of a substantial number of States and entail changes in State and possibly Federal court procedures.

3. The United States lacks a sufficient domestic legal basis for acceptance of an advanced international convention on this subject matter.

4. The convention embodies principles of arbitration law which it would not be desirable for the United States to endorse.

Official Report of the United States Delegate to the United Nations Conference on International Commercial Arbitration 2 (Aug. 15, 1958) [hereinafter cited as U.S. DEL. REP.].

127. McMahon, *supra* note 118, at 67.

128. Act of July 31, 1970, 9 U.S.C. § 201 (1970). See generally Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 S.W.U.L. REV. 1 (1971); McMahon *supra* note 118; Comment, *United Nations Foreign Arbitral Awards Convention: United States Accession*, 2 CALIF. W. INT'L L.J. 67 (1971).

129. As of January 1, 1979, signatories to the Convention include: Australia, Austria, Belgium, Benin, Botswana, Bulgaria, Byelorussian Soviet Socialist Republic, Central African Empire, Chile, Cuba, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Ghana, Greece, the Holy See, Hungary, India, Israel, Italy, Japan, Kampuchea, Korea, Kuwait, Madagascar, Mexico, Morocco, Netherlands, Niger, Nigeria, Norway, the Philippines, Poland, Romania, South Africa, Spain, Sri Lanka, Sweden, Switzerland, the Syrian Arab Republic, Tanzania, Thailand, Trinidad & Tobago, Tunisia, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, United Kingdom, and the United States. U.S. DEP'T OF STATE, TREATIES IN FORCE 240 (1979).

130. Arbitration rules were adopted by the United Nations Commission on International Trade Law at its ninth session. G.A. Res. 31/98, U.N. Doc. A/31/71 (1976).

China's foreign trade and her patterns of dispute settlement with other nations.

III. FOREIGN TRADE DISPUTE SETTLEMENT WITH CHINA

A. *China and Arbitration*

Politically, China is a Marxist-Leninist revolutionary molded by the teachings of Mao Zedong, but economically, in the sense of foreign trade, China is a pragmatist.¹³¹ China employs trade practices recognized "almost *in toto*" by the International Chamber of Commerce.¹³² It appears that China adheres to these internationally accepted forms, terms, and customs, because it is a "convenient and effective way of conducting its affairs."¹³³ This implies that China may be willing to accept international trade practices when she believes it is in her best interest.

A typical arbitration clause found in Chinese import contracts provides that all contract disputes are to be resolved through friendly negotiations.¹³⁴ If no settlement is reached through friendly negotiations, the case is then submitted to the Arbitration Committee of the CCPIT in Beijing.¹³⁵ The decision of the Arbi-

131. Stark, *An Analysis of the Foreign Trade Practices of the People's Republic of China Including Comments on the Canadian Experience*, 5 BRIT. COLUM. L. REV. 165, 183 (1970).

132. *Id.*

133. Li, *supra* note 30, at 17.

134. *Arbitration:*

All disputes in connection with this Contract or the execution thereof shall be settled through friendly negotiations. In case no settlement can be reached, the case may then be submitted for arbitration to the Arbitration Committee of the China Committee for the Promotion of International Trade in accordance with the Provisional Rules of Procedures promulgated by the said Arbitration Committee. The Arbitration shall take place in Peking and the decision of the Arbitration Committee shall be final and binding upon both parties; neither party shall seek recourse to a law court or other authorities to appeal for revision of the decision. Arbitration fee shall be borne by the losing party.

Contract for Italian Export, in LAW AND POLITICS IN CHINA'S FOREIGN TRADE 409, app. 18 (V. Li ed. 1977).

135. *Id.* Stark, *supra* note 131, at 171-72.

The China Council for the Promotion of International Trade (CCPIT) established a Foreign Trade Arbitration Commission (FTAC) and a Maritime Arbitration Commission (MAC) in 1956 and 1959 respectively

The FTAC administers cases of: (a) disputes arising from contracts and transactions in foreign trade, including all disputes arising from foreign trade contracts or contracts for commissioning agencies to purchase or sell merchandise; (b) disputes arising from transportation, insurance or safekeeping of merchandise and (c) disputes arising from other matters of business in foreign trade. The FTAC is composed of 21 members selected and appointed by the CCPIT from among persons having special knowledge and experience in foreign trade, industry, agriculture, transportation, insurance, banking and law.

The MAC administers cases of: (a) disputes regarding remuneration for salvage services rendered by vessels to each other; (b) disputes arising from collisions between sea-going vessels; (c) disputes arising from chartering sea-going vessels, car-

tration Committee is final and binding upon both parties.¹³⁶ The Chinese do not feel they can receive justice under non-socialist law; therefore, Beijing is usually stipulated as the site of all arbitration proceedings.¹³⁷ If a particular transaction is important enough to the Chinese government, however, a compromise on location can be reached.¹³⁸

Regardless of what the clauses on dispute settlement provide, the most important aspect of Chinese practice is their determina-

riage by sea in virtue of contracts of affreightment, bills of lading or other shipping documents, as well as disputes arising from marine insurance. The MAC is composed of 31 members including experts in foreign trade, banking and insurance, as well as experts in navigation, ships, sea-transportation and other related matters.

The FTAC and MAC have handled a fair number of cases since their establishment. In 1974 for instance, they settled one case by arbitration and 12 by conciliation and participated in over a hundred consultative cases.

...
 . . . Arbitration is only adopted where the disputes cannot be settled through conciliation. Thus, the combination of arbitration and conciliation is a characteristic of China's arbitration work.

I WETTER, *supra* note 105, at 526-27.

136. *Contract For Italian Export*, *supra* note 134.

137. Stark, *supra* note 131, at 172.

138. *Id.* The Chinese utilize four processes for resolving commercial disputes in international trade. The four steps are:

Step 1 — Friendly negotiation by the parties

Step 2 — Friendly negotiation with assistance of conciliators

If the parties are unable to resolve their dispute by themselves, they may request a third party to assist them to conduct their friendly negotiation. The FTAC and MAC often perform this assisting function.

...
 In this step, the conciliator helps the parties to reach a mutual accommodation, but does not make specific recommendations for settlement.

Step 3 — Non-binding recommendations by conciliators

If the initial steps of friendly negotiation fail to resolve the dispute, rather than going directly to arbitration, the parties may request the third party conciliator to assist the friendly negotiations further by giving specific recommendations of terms for a fair settlement of the dispute. This is an optional step and is not done in all cases If both parties do not freely accept the recommendations, they may proceed to arbitration.

...
Step 4 — Arbitration

If all other means of resolving the dispute fail or are inappropriate either party may elect to proceed to arbitration.

I WETTER, *supra* note 105, at 530-32. There are four main arbitration procedures now recognized by China. First, the tribunal sits in the defendant country, and when dealing with socialist states, all members are from the defendant country's arbitration commission. Second, with non-socialist states usually one member of the tribunal is from each country, but sometimes all will be from the defendant state. The Chinese may permit the tribunal to be held at the port of destination, in which case the arbitrators are appointed by each party, and they in turn choose an umpire. Third, the arbitration will occasionally be allowed in another socialist country if the capitalist country does not want it in China. Fourth, the tribunal may sit in an acceptable third country, in which case local rules are not binding. *See generally* Hsiao, *Communist China's Foreign Trade Organization*, 22 VAND. L. REV. 503, 514-18 (1969).

tion to *avoid* arbitration. During a trip to Beijing in 1975, representatives of the American Arbitration Association were told that, during 1974, only one foreign trade contract dispute was resolved through arbitration;¹³⁹ “twelve disputes were handled by mediation, and more than one hundred cases were resolved through ‘friendly negotiations.’”¹⁴⁰ What is extraordinary “is that, with the exception of some maritime matters, *virtually no* trade cases have been arbitrated, in Beijing or elsewhere,”¹⁴¹ despite the serious disputes that must have arisen in a trade totaling several billion dollars a year. The Chinese would answer that all disputes were amicably resolved by reasonable men — parties to the contract — through friendly negotiations.

To date it has been impossible to obtain a detailed account of any trade arbitration involving a Chinese Foreign Trade Corporation (FTC).¹⁴² Some businessmen state that they “will never ask for arbitration because they believe that the Chinese would consider the request to be ‘unfriendly,’ and that the request would endanger future business”;¹⁴³ others say that “by either formally requesting or informally hinting they were about to request arbitration, they have brought about a prompt settlement” of their dispute.¹⁴⁴ In other instances “the Chinese have been known not to respond at all.”¹⁴⁵ A few traders “who have negotiated a Chinese claim feel that in order to preserve the air of compromise they were forced to yield . . . even when they were convinced that the [Chinese] claim was groundless or exaggerated.”¹⁴⁶ In addition to there being no examples of arbitration concerning trade, there have been no legal actions resulting from trade disputes, with the exception of

139. Torbert, *The American Lawyer's Role in Trade with China*, 63 A.B.A.J. 1117, 1119 (1977).

140. *Id.* The Chinese prefer “friendly negotiations” as a method of resolving disputes. “An important factor in ensuring that negotiations alone will . . . produce satisfactory results is that the Chinese appear to be very careful in developing relations with their trading partners”; they try to develop trade relations slowly, preferring limited transactions in the beginning — a feeling out process — before entering into substantial dealings. Li, *supra* note 30, at 13.

141. *Id.* at 12.

142. “[R]ecords of and legal bases for formally settled disputes are virtually inaccessible” Mohr, *Trade with Denmark*, in *LAW AND POLITICS IN CHINA'S FOREIGN TRADE* 142, 166 (V. Li ed. 1977).

143. Lubman, *Trade Between the United States and the People's Republic of China*, 8 L. & POL. INT'L BUS. 1, 46 (1976).

144. *Id.*

145. *Id.*

146. *Id.* at 47.

some specialized Hong Kong cases.¹⁴⁷ If accomplishing nothing else, the arbitration clause “effectively prevents a court of law from asserting jurisdiction.”¹⁴⁸ While noting China’s determination to avoid arbitration, it is useful to examine the experiences of other countries in resolving contract disputes with China.

B. Patterns of Dispute Settlement Between China and Other Countries

1. *Japan.* There seem to be several levels of dispute settlement under Sino-Japanese import-export agreements. The type of procedure favored by both the Chinese and Japanese, however, is a “mutual settlement of disputes between the parties without third-party intervention”¹⁴⁹ This appears to be the “only practicable procedure available in Sino-Japanese trade today.”¹⁵⁰ A few contracts contain arbitration clauses, but arbitration has not been requested by either China or Japan in the last twenty years of trading.¹⁵¹

2. *Denmark.* The history of Denmark’s trade with China differs from that of most other West European countries — Denmark recognized the government of the People’s Republic of China early in 1950.¹⁵² In general, Danish businessmen have confidence in Chinese trading practices.¹⁵³ As with other Western traders, however, “Danish businessmen have a basic feeling of uncertainty concerning the consequences of a possible breach of contract and are quite anxious to have the place of arbitration removed from Beijing to one of the arbitration centers in Europe.”¹⁵⁴ Like most international businessmen, the Danish trader has a “fondness for predict-

147. Li, *supra* note 30, at 13.

148. *Id.*, see *Contract for Italian Export*, *supra* note 134.

149. Henderson & Matsuo, *Trade with Japan*, in *LAW AND POLITICS IN CHINA’S FOREIGN TRADE* 28, 55 (V. Li ed. 1977).

150. *Id.*

151. *Id.* at 56.

152. Mohr, *supra* note 142, at 142.

153. *Id.* at 161.

154. *Id.* at 160.

Clearcut clauses like “arbitration at institution *X* in Zurich” occur infrequently. Equally unusual is the “bulletproof” clause which stipulates the maximum duration of the phase of friendly negotiations, a deadline for the appointment of the arbitrators, directions for the appointment of an arbitrator for the party who fails to do so himself, directions for the appointment of an umpire in the event the arbitrators cannot agree, place of arbitration, and a set of rules concerning arbitration procedure, distribution of expenses, and execution of the award.

Id.

ability.”¹⁵⁵

3. *Italy*. Most Sino-Italian contracts “include a clause calling for arbitration by one of the arbitral tribunals in [Beijing].”¹⁵⁶ In the few exceptions, “the inclusion and wording of an arbitration clause depends in large part on the bargaining strength of the two sides.”¹⁵⁷ “Even when a contract contains the standard Chinese arbitration clause, this clause is almost never invoked.”¹⁵⁸

The suggestion that “a dispute be submitted to arbitration . . . is met with disfavor.”¹⁵⁹ Suggesting arbitration would break the “bond of friendship and trust that underlies all [business] relations, particularly longterm ones.”¹⁶⁰ The Italians have found that the “Chinese prefer that the disputants arrive at some mutually acceptable solution rather than seek third-party adjudication.”¹⁶¹

4. *West Germany*. The “shrewd, businesslike behavior of the Chinese trading community” is greatly admired by German traders; they “trust the Chinese and have approached trade opportunities accordingly.”¹⁶² In spite of the general amicability, there have been disputes, some being quite serious, over contract performance.¹⁶³

“Individual contracts have been virtually the only instruments for setting the agreed-upon conditions for exchange.”¹⁶⁴ “The *Ostausschuss*¹⁶⁵ and the CCPIT did negotiate an ‘unofficial’ agree-

155. *Id.* at 166.

156. Reghizzi, *Trade with Italy*, in *LAW AND POLITICS IN CHINA'S FOREIGN TRADE* 169, 183 (V. Li ed. 1977).

157. *Id.*

158. *Id.*; see note 134 *supra*. From 1965 through 1971, no disputes arising from Sino-Italian trade have been submitted for arbitration. “Where disputes have arisen, the parties attempt to resolve it themselves through an endless exchange of correspondence.” Reghizzi, *supra* note 156, at 183.

159. Reghizzi, *supra* note 156, at 184.

160. *Id.*

161. *Id.* “In order to preserve good relations the foreign trader often must give up some apparently legitimate claim or must accept some apparently groundless Chinese claim.” *Id.*

162. Stahnke, *Trade with West Germany*, in *LAW AND POLITICS IN CHINA'S FOREIGN TRADE* 121, 138 (V. Li ed. 1977).

163. *Id.* at 139.

164. *Id.* at 130.

165. *Id.* at 125.

One of the earliest and most important governmental actions with respect to the China trade came in the early 1950's in the form of official encouragement and even pressure on the leading German economic circles to establish an ostensibly private body to facilitate trade with the socialist block. The organization that emerged in 1952 was the *Ostausschuss der Deutschen Wirtschaft*.

The formal responsibilities assumed by the *Ostausschuss* included: (1) providing information and advice to German firms on trading opportunities and hazards

ment which went into effect in October 1957 for a period of one year,"¹⁶⁶ but it was not renewed in 1958 and has not been renegotiated since then, although it is used occasionally as the basis of contract negotiations.¹⁶⁷

In contrast to current practice, "the 1957 agreement included several provisions that were relatively favorable to the German side; Zurich . . . [was] designated [as] the site for arbitration unless otherwise agreed" to by the parties, and "detailed procedures for arbitration were set out."¹⁶⁸ "The provisions apparently reflect the Chinese desire at that time" to enter Western markets.¹⁶⁹ In contracts recently negotiated, a difference between Chinese and German preferences has clearly emerged in provisions for arbitration. The Chinese prefer Beijing as the site of arbitration, whereas the Germans prefer "arbitration provisions as found in the 1957 agreement."¹⁷⁰ "In actual cases, both extremes as well as compromises have been written into contracts."¹⁷¹

Arbitration has most likely been initiated in Sino-West German trade. Yet "the occurrence and the nature of the settlements involved are among the best-kept secrets of their trading relationship,"¹⁷² most likely due to the Chinese attitude regarding that kind of dispute settlement.¹⁷³ The Chinese attempt to avoid arbitration, preferring to make adjustments in price and specifications in the succeeding contract.¹⁷⁴ According to some German businessmen, "even if they are certain to receive the award," the Chinese prefer

with socialist countries; (2) advising the government on any matter pertaining to Eastern trade; (3) participating in government negotiation with agents from the socialist bloc on pertinent subjects; and (4) negotiating with socialist bloc counterparts where for one reason or another the government could not. Its structure is comprised of a main committee (*Hauptarschuss*) and six subcommittees (*Arbeitskreisen*), one of which is responsible for the China trade.

Id. at 125-26.

166. *Id.* at 130.

167. *Id.* at 131.

168. *Id.* These are in accord with current German preferences: each party chooses an arbitrator; the two in turn choose the third member who acts as umpire. Should one of the parties to a dispute fail to select an arbitrator within thirty days, or should the two arbitrators fail to agree on the choice of an umpire, the chamber of commerce at the site of arbitration names that member of the body.

169. *Id.*

170. *Id.* at 135.

171. "One fairly common compromise, unusual in international practice, sets the place of arbitration in Peking if the Chinese party is the plaintiff and in Stockholm or Berne if the seller initiates the case." *Id.* at 136.

172. *Id.* at 140.

173. HEUSER, *supra* note 91, at 18-19.

174. Stahnke, *supra* note 162, at 140.

not to arbitrate.¹⁷⁵

The examples given above of Chinese dispute settlements with other countries illustrate the “no-win” situation in which Western businessmen often find themselves. If they do not press for arbitration, they may forfeit a legitimate claim.¹⁷⁶ On the other hand, if they pressure for arbitration and win, it may be “a Pyrrhic victory — the friendly relationship upon which further dealings are based” will probably be jeopardized.¹⁷⁷

The Chinese “treat their trading relationship with each state on an individual basis, each with its unique circumstances, problems, and opportunities.”¹⁷⁸ “As a result one cannot say with much confidence what the German experience indicates regarding . . . the possible future trading relationship of China with the United States”¹⁷⁹ Nevertheless, Western businessmen have remained adamant in their desire to apply arbitration to the resolution of trade disputes with China. Changes in China’s political philosophy following Mao Zedong’s death and the realignment of Chinese economic priorities under Deng Xiaoping may have increased the possibility of China agreeing to arbitrate in the near future.

IV. DE-MAOIFICATION AND MODERNIZATION

A. *China’s New Long March*¹⁸⁰

In late 1971 or early 1972, a “decision was made to once again emphasize the importance of foreign trade in the economic development” of China.¹⁸¹ Following Chairman Mao Zedong’s death and Premier Hua Guofeng’s arrest of the Gang of Four in 1976, Deng Xiaoping was reinstated as Vice Premier.¹⁸² He has been the

175. German traders have indicated that knowledge of this Chinese attitude toward arbitration is a real advantage, especially if the contract in question calls for arbitration in Stockholm or Zurich. They can threaten to seek settlement by arbitration if they are the partner making a claim, or they can negotiate on a Chinese claim knowing that they are not apt to be taken before an arbitration commission themselves.

Id.

176. Reghizzi, *supra* note 156, at 184.

177. *Id.* at 185.

178. Stahnke, *supra* note 162, at 141.

179. *Id.*

180. The *Beijing People’s Daily* applauded the modernization drive: “We are setting out to conquer on our New Long March the mountains, seas, plains, oilfields and mines of our motherland. We want to scale the heights of science and technology. We want to develop normal trade relations with other countries of the world.” *TIME*, Jan. 1, 1979, at 13.

181. Li, *supra* note 30, at 7.

182. The Gang of four includes Mao’s widow Jiang Qing, Chang Ch’un-ch’iao, Yao

driving force behind China's ambitious development scheme to extricate China from poverty and transform it into a major economic and military power.¹⁸³ Beijing's current emphasis on economics over politics, on facts over revolutionary rhetoric, and on cash bonuses over inspirational speeches flows from Deng's vision.¹⁸⁴ It is difficult for Westerners to understand how so vast a population can psychologically reverse itself so quickly; the Chinese, however, instinctively believe that life constantly swings between extremes — that the rule is always change, reversal.¹⁸⁵

In their drive for modernization, Chinese leaders have proceeded by "subtle indirection to prepare the masses for de-Maoification."¹⁸⁶ They are attempting the delicate task of "desanctifying Mao's memory"¹⁸⁷ without "besmirching it completely."¹⁸⁸ They are discarding much of his old ideology¹⁸⁹ — in particular, the once sacred Maoist principle of national self-reliance and independence from outside resources.¹⁹⁰

Having abandoned the philosophy of self-reliance, Chinese leaders face the problem of financing their modernization drive. China has announced that it will seek billions of dollars in foreign

Wen-yuan, and Wang Hung-wen. Shirk, *Human Rights: What About China?*, 29 FOREIGN POL. 109, 111-12 (1977-1978). Deng commands a broad power base among the senior officers of the People's Liberation Army as well as wide support among China's technocrats and intellectuals. Mathews, *Visit Caps Emergence of China*, *Teng*, L.A. Times, Jan. 28, 1979, pt. I, at 1, col. 4.

183. Mathews, *supra* note 182.

184. *Id.* See note 19 *supra*, and accompanying text.

185. TIME, Jan. 1, 1979, at 16.

186. *Id.* at 17. Deng has systematically dismantled many of Mao's pet projects, removed the Maoist quotations from the front page of the *Beijing People's Daily* and spearheaded a media drive to cut the great helmsmen to mortal size. "Democracy Wall" in Tien An Mien Square in Beijing has even seen Mao be the victim of criticism of the wall poster campaign. Mathews, *supra* note 182.

187. Mathews, *supra* note 182. It is an attempt to end the cult of personality that Mao encouraged about himself.

188. They assert that Mao's philosophy was basically correct, but that it was distorted and misapplied by his onetime heir apparent Lin Biao, and by the Gang of Four, led by Mao's widow Jiang Qing. TIME, Jan. 1, 1979, at 17.

189. All that remains of the Maoist legacy are the agricultural communes and China's staunchly anti-Soviet foreign policy. Deng has tinkered with every other aspect of Chinese life. Mathews, *Modernizing China: Teng's Daring Drive*, L.A. Times, Feb. 8, 1979, pt. I, at 1, col. 1.

190. TIME, Jan. 1, 1979, at 13. 1978 was an extraordinary year for Chinese foreign trade. In February, 1978, Japan and China signed a private trade agreement worth \$20 billion, whereby China would export oil to Japan in exchange for Japanese steel and factories. In December, 1978, China and France signed a seven-year, \$13.5 billion cooperation agreement. *Id.* at 14.

credit¹⁹¹ and has disclosed a decision “to conform to international trade practices.”¹⁹² The Chinese are willing for the first time to accept government-to-government loans, to borrow from such agencies as the World Bank and the Asian Development Bank, and to permit direct foreign investment on Chinese soil.¹⁹³ American companies will soon be able to enter into joint ventures with China’s quasi-governmental trade corporations.¹⁹⁴

A consequence of China’s emergence into the international economic system has been the rapid growth of Sino-United States trade. Even before President Carter’s decision to recognize the Beijing government, Chinese analysts estimated that trade might triple in 1979 due to major Chinese purchases of American grain, oil rigs, hotels, and industrial plants.¹⁹⁵ In 1978, business between the United States and China exceeded the billion dollar level for the first time, a total three times the 1977 level.¹⁹⁶ Now that normalization of relations has occurred, the United States finds itself on equal footing with the trading competition — Western Europe and Japan.¹⁹⁷ Moreover, Deng Xiaoping’s trip to the United States should result in a steady increase in Sino-United States trade in the years ahead.

Chinese leaders seem to be attempting to completely redefine China’s approach to the rest of the world.¹⁹⁸ A country that has traditionally regarded foreigners as barbarians now opens its gates to the outside world — last year, 530,000 tourists visited China, as did thousands of foreign businessmen looking for new markets and investments.¹⁹⁹

191. Mathews, *Ready to Welcome U.S. Companies, Peking Says*, L.A. Times, Dec. 19, 1978, pt. 1, at 1, col. 2.

192. *Id.*

193. *Id.*

194. See Birenbaum, *Doing Business in China*, Wall St. J., Aug. 31, 1979, at 6, col. 4.

195. In November 1978 alone, China concluded contracts worth \$1.5 billion, with many of the deliveries scheduled for 1979. Mathews, *supra* note 191.

196. Several multi-million dollar contracts have been signed between American corporations and China. Wall St. J., Nov. 9, 1978, at 16, col. 3. U.S. Steel Corporation has concluded an agreement to build a \$1 billion iron-ore processing complex in northern China that could boost Chinese steel production by 25%. Mathews, *U.S. Steel Will Build \$1 Billion Plant in China*, L.A. Times, Jan. 6, 1979, pt. 1, at 1, col. 6.

197. China’s policy during the long impasse over normalization was to award contracts to Japanese or European firms rather than American firms if the sales price and other terms were roughly the same. With normalization completed, American firms will, in the future, be operating on equal footing.

198. The two most startling pieces of symbolic revisionism: the Chinese are planning to construct a golf course on the outskirts of Beijing and have given Coca-Cola exclusive rights to sell in China. TIME, Jan. 1, 1979, at 13.

199. *Id.* John K. Fairbank states that the “traditional Chinese policy of ‘use barbarians

B. Readjustment to the Realities of Modernization

China is presently reassessing its modernization drive and reducing some of its overambitious economic goals.²⁰⁰ This retrenchment reflects the influence of Chen Yun, the latest addition to the Politburo's six-man Standing Committee.²⁰¹ Chen believes that well-planned economic growth cannot sustain break-neck development, his philosophy being that China "cannot afford to jump, [but] must [proceed] step by step" in its drive toward modernization.²⁰²

Most foreign economists view the reassessment as a welcome sign.²⁰³ Few expect China to reverse itself or to abandon modernization; Chinese leaders are merely reacting to a complex array of problems that has made it necessary to adjust their development policies to the realities of modernization.²⁰⁴ Consider five of several factors that have played a role in China's decision.

1. *Socioeconomic Considerations.* An important sociological factor to consider is the impact of modernization on the Chinese people. The initial investment in heavy industry diverted resources from being applied toward improving the standard of living for

to control barbarians' is still operating . . ." Holley, *Scholar Sees Continuing China Instability*, L.A. Times, March 31, 1979, pt. I, at 10, col. 1.

200. Mathews & Holley, *China Puts Brakes on Modernization Drive*, L.A. Times, March 18, 1979, pt. I, at 1, col. 5. In his address to the National People's Congress, Chinese Premier Hua Guofeng conceded that China's modernization program was too ambitious. His wide-ranging report disclosed Chinese economic progress for the preceding year, reflecting a new candor in Beijing regarding disclosures of economic statistics. Mathews, *Hua Admits Error on Modernization*, L.A. Times, June 19, 1979, pt. I, at 10, col. 1.

201. Chen, an economic expert, supervised China's economic recovery following the Civil War, before falling out of favor with Chinese leadership shortly before Mao's disastrous Great Leap Forward. Mathews, *Layoffs Seen in China Slowdown*, L.A. Times, May 31, 1979, pt. I, at 1, col. 4; Holley, *Chen: From Pariah to Prophet*, L.A. Times, June 21, 1979, pt. I, at 19, col. 1. The Great Leap Forward was Mao's development strategy designed to accelerate economic growth and socialist transformation by stressing the mass line approach (a fundamental principle of leadership requiring party cadres to be integrated with the masses and to lead the masses in implementing party policy) and the simultaneous development of agriculture and industry and of indigenous (labor intensive) and modern (capital intensive) projects. See generally J. PRYBYLA, *THE POLITICAL ECONOMY OF COMMUNIST CHINA* 256-340 (1970).

202. Soon after Chen's reemergence, China served notice that it was reassessing its development plans. In a flurry of action, Beijing suspended \$3 billion in contracts with Japan, backed off its previous commitment to double steel production by 1985, and warned foreign businessmen that major new transactions might be postponed until the end of the year. Mathews, *supra* note 201.

203. Mathews & Holley, *supra* note 200.

204. Foreign economists considered the majority of Hua Guofeng's modernization goals unattainable. By committing itself to an annual growth rate of 4% in grain production and more than 10% in industry, China's goals exceeded her capabilities; no major power on earth has ever been able to sustain such consistently high growth rates. *Id.*

China's 800 million peasants, who desperately want a better life.²⁰⁵ The demands of China's peasants place a limit on the speed at which modernization can be accomplished.²⁰⁶ A related problem is providing material incentives to motivate the work force without creating an uncontrollable urge for consumer goods.²⁰⁷ China's leaders have promised a better life for the ordinary Chinese. These promises, combined with the rising expectations of the people, which have been magnified by television glimpses of life outside China, produced expectations the Chinese leadership realized they could not meet.²⁰⁸

Another problem facing the Chinese is the shortage of educated managers, bureaucrats, scientists, and engineers.²⁰⁹ The chaos of the Great Leap Forward and the Cultural Revolution and the resulting decade of upheaval in universities and bureaucracy has left China almost totally depleted of managerial and professional skills.²¹⁰ This dearth of talent is acutely felt in China today.²¹¹ The Cultural Revolution virtually destroyed the Chinese economic system, and Chinese leadership is presently in the process of formulating an integrated economic plan.²¹²

In the past there has not been internal agreement on economic strategy in areas that necessitate decisions based upon economic analysis rather than political pronouncements.²¹³ Management needs to be put back in control.²¹⁴ China's capacity to absorb technology is also a factor that dictates the rate of modernization. Sophisticated machinery does China little good if the Chinese are insufficiently trained to operate the machines. This is the situation prevalent today.²¹⁵ China desperately needs trained workers — educated masses to utilize the tools she is buying — and concurrently she needs people trained in economic management and planning,

205. See Holley, *supra* note 199.

206. *Id.*

207. Address by William C. Clarke, The Standing Committee on Law and National Security and the International Law Section of the American Bar Association (June 9, 1979), reprinted in 5 INT'L TRADE L.J. — (1980) [hereinafter cited as Clarke Address].

208. Mathews & Holley, *supra* note 200.

209. Clarke Address, *supra* note 207.

210. *MNCs Believe China Trade Setback is Temporary*, MULTINATIONAL BUSINESS 43, 44 (No. 2, 1979) [hereinafter cited as MULTINATIONAL BUSINESS].

211. Address by Jan S. Prybyla, The Standing Committee on Law and National Security and the International Law Section of the American Bar Association (June 8, 1979), reprinted in 5 INT'L TRADE L.J. — (1980) [hereinafter cited as Prybyla Address].

212. *Id.*

213. *Id.*

214. Clarke, *supra* note 207.

215. Prybyla, *supra* note 211.

who *must* be given control.²¹⁶

2. *Bottlenecks in the Economy.* In China, even the most basic infrastructure — electricity — cannot be assumed to be adequate.²¹⁷ The newly constructed Wuhan Iron and Steel Works consumes so much electricity that power to other factories within the city often has to be suspended.²¹⁸ There is insufficient electrical power in all of Hubei province to keep the facility operating at full capacity, an example of one of the fundamental problems facing Chinese industry — an acute shortage of electric power and raw materials.²¹⁹ These shortages create bottlenecks in the economy, which retard economic growth; it is senseless to invest in areas of the economy whose growth will be retarded by these circumstances. Rather, China must concentrate on eradicating these bottlenecks to ensure steady economic growth — infrastructure investment is essential.²²⁰ The purpose of China's retrenchment is to make better use of her scarce resources²²¹ to eliminate these problem areas.

3. *Military Modernization.* Although China has joined the nuclear club, her military establishment lags far behind those of the Soviet Union and the United States.²²² China's recent military confrontation with Vietnam provided her with poignant evidence that her military machine was archaic and in need of a commitment of capital to upgrade her defensive capacity.²²³

4. *Financing the Modernization Drive.* China's financial considerations in her modernization drive can be summarized as "an overestimation of expected revenue from oil and an underestimation of the effects of modernization expenditures."²²⁴ Because China's oil has a heavy wax content, harnessing the resource will entail an enormous investment.²²⁵

Many businessmen were unnerved by the frantic pace at which

216. *Id.*

217. MULTINATIONAL BUSINESS, *supra* note 210, at 44.

218. Mathews, *supra* note 201.

219. *Id.*; Clarke Address, *supra* note 207.

220. MULTINATIONAL BUSINESS, *supra* note 210, at 46.

221. Mathews, *supra* note 201.

222. See NEWSWEEK, March 5, 1979, at 26-32. A Chinese military official recently declared that China was "at least twenty years behind the Americans and the Soviets in weaponry." Mathews, *supra* note 189.

223. Clarke Address, *supra* note 207.

224. *Id.*

225. Prybyla Address, *supra* note 211.

China was purchasing foreign commodities.²²⁶ Presently, the Chinese have plenty of cash; they are determining how to finance future purchases before they exhaust their cash supply, what any good businessman would do.²²⁷ Internationally, China is viewed as a good credit risk; she has an excellent record for paying debts. It is estimated China will have accumulated \$20 billion in credit by 1985.²²⁸

5. *Political Stability.* A final concern is the political stability of China in view of the strains and pressures caused by modernization. Chinese leaders are aware of the "zig-zag" nature of China's history²²⁹ and realize that the demands of China's peasants not only place a *limit* on China's modernization program but create pressures for a *zag* in policy.²³⁰ Although China's modernization differs greatly from what occurred in Iran, Chinese leaders are still aware of the potential dangers of moving too fast, too quickly, creating a sociological strain on the populace.²³¹

It is important to realize that China's slowdown merely reflects a readjustment, on her part, to reality. The previous year's pace of growth was unrealistic. The United States media somewhat exag-

226. Mathews & Holley, *supra* note 200. The pace of China's buying would have quickly depleted China's cash reserves. Her primary sources of income are oil, which is requiring an enormous investment to recover, and textiles, which are "import sensitive" in the West and therefore of limited potential. Prybyla Address, *supra* note 211.

227. Mathews & Holley, *supra* note 200.

228. Prybyla Address, *supra* note 211.

229. Holley, *supra* note 199. During exceptional times, political and ideological considerations have influenced China's commercial relations. In 1964, Vickers-Zimmer, Ltd., a British firm, signed a contract with the China National Technical Import Corporation to set up a petro-chemical plant in China. Although the contract provided for arbitration, in Stockholm, of disputes, a Chinese people's court in July 1968 annulled the contract and ordered Vickers-Zimmer, Ltd., to pay an indemnity of £650,000 to the Chinese for "economic losses." According to the court, Vickers-Zimmer, Ltd., had no intention of fulfilling the contract and had been deliberately perpetrating a fraud. The case must be viewed in its context — it occurred during the political turmoil of the Cultural Revolution — but the incident is evidence that China has, on occasion, turned xenophobic and chaotic. Torbert, *The American Lawyer's Role in Trade with China*, 63 A.B.A.J. 1117, 1120 (1977).

230. Holley, *supra* note 199. Aware that Chinese domestic politics have gone through alternating periods of moderation and radicalism, Deng Xiaoping has cleverly anticipated this problem. He is designing traps for any neo-Maoists who might wish to renege on the commitment to modernization and attempt to return China to insularity. If the current trend continues for a decade, it will be very difficult for China to extricate herself from her position. China will have commitments to foreign creditors that will force her to continue promoting exports and internal economic development. Tens of thousands of returning Chinese students who have been exposed to foreign ideas will resist any return to xenophobia and Romantic Maoism. Also, there may be a military unable to function without parts and technology from Hamburg or Los Angeles. *TIME*, Jan. 1, 1979, at 20.

231. Cohen Address, *supra* note 96.

gerated China's growth potential following normalization, and much written lately has exaggerated the severity of China's retrenchment. In both instances the truth lies somewhere in the middle.²³² In the long run, there is enormous potential for economic cooperation between China and the United States.²³³ The Chinese market should be viewed as one of "measured optimism" with tremendous growth potential.²³⁴

C. Reordering Chinese Priorities

As a result of Chen Yun's counsel, China is shifting the emphasis of her modernization drive away from capital-intensive fields such as steel, "toward light industries that can produce consumer goods for both export *and* domestic consumption."²³⁵ China will be placing emphasis on developing hydroelectric power, acquiring agricultural equipment to increase food production, and improving the transportation and communication sectors of the economy.²³⁶

The Beijing government, in a series of economic reports, recently disclosed economic matters long classified as state secrets.²³⁷ To date, China has joined very few international economic or financial organizations,²³⁸ but there is speculation that the Chinese are placing their financial house in order, because they wish to join the International Monetary Fund, Asian Development Bank, and the World Bank to acquire credit — all these institutions demand full financial accounting.²³⁹

China remains committed to foreign commerce. Although

232. Clarke Address, *supra* note 207.

233. Holley, *supra* note 199.

234. Clarke Address, *supra* note 207. It is important to view Sino-United States trade with foresight, to avoid focusing myopically on the immediate commercial possibilities of the next few years and view the relationship within the context of a long-term association — a market that will steadily expand.

235. Mathews, *supra* note 201. Having scaled down plans for rapidly developing a heavy industrial base, China is eager to invest her limited capital in light industries such as bicycles and transistor radios — consumer items that will be dependable exports earning foreign exchange and that can be marketed domestically to provide consumer items for her people. NEWSWEEK, May 28, 1979, at 72.

236. Clarke Address, *supra* note 207.

237. What emerges from these economic revelations is startling. China is third in the world in coal production, fifth in steel production, and among the top ten in crude oil production. The figures also revealed the distance China must travel to realize its goals of becoming an industrial power. The size of China's budget underscores her poverty. Last year, \$71 billion was spent by Beijing — less than that spent by HEW. Mathews, *China Bares its Economic Facts of Life*, L.A. Times, July 23, 1979, pt. 1, at 1, col. 1.

238. INDUS. & TRADE AD., *supra* note 7, at 1.

239. Mathews, *supra* note 237.

Beijing has decided to halt the spending spree of 1978 to use its limited revenues to update existing plants and machinery rather than buy entire factories, the 1979 budget still calls for China's foreign transactions to be approximately \$27.5 billion, a twenty-four percent increase over 1978.²⁴⁰

The National People's Congress underlined China's commitment to economic growth by recently promoting three economists to the top ranks of government.²⁴¹ Hua Guofeng's concurrent address to the Congress indicated that China would "retrench for three years, slow new construction and lower its targets before resuming the modernization drive at full speed."²⁴² China needs foreign contributions to its economic modernization plan;²⁴³ therefore, foreign trade is a *necessity*.

V. ELIMINATING BARRIERS TO TRADE: RECENT DEVELOPMENTS

A. *Settlement of the Frozen Assets-Blocked Claims Dispute*

The frozen assets-blocked claims dispute dates from 1950, when President Truman responded to China's entry into the Korean War by freezing \$80.5 million in Chinese assets — mostly bank accounts and securities — located in the United States.²⁴⁴ Beijing retaliated by seizing American property in China valued at \$196 million.²⁴⁵ Former United States Commerce Secretary Juanita M. Kreps and Chinese Finance Minister Zhang Jingfu signed an agreement, May 11, 1979, settling the long-standing dispute, removing the major obstacle to the signing of a Sino-United States trade agreement.²⁴⁶ The settlement of the property dispute clears the way for closer commercial, banking, maritime, and aviation ties between the two countries.²⁴⁷

240. Beijing's interest in acquiring foreign capital was demonstrated by the National People's Congress endorsement of a foreign investment code requiring foreign partners in joint ventures to take at least 25% interest. Mathews, *supra* note 84.

241. The three, elected to China's State Council, were critics of Mao's economic theories and were purged during the Cultural Revolution. *Id.*

242. *Id.*

243. MULTINATIONAL BUSINESS, *supra* note 210, at 46.

244. Mathews, *U.S., China Property Pact Clears Way for New Ties*, L.A. Times, May 12, 1979, pt. III, at 13, col. 4.

245. *Id.*

246. The agreement calls for the Chinese to retain the American property confiscated in China and pay the United States \$80.5 million in annual installments over the next five years. Washington will, in return, unfreeze the Chinese assets under its control, making it possible for Beijing to recover them. Because of the gap between claims and assets, the 384 American claimants will be reimbursed at the rate of 41¢ on the dollar. *Id.*

247. Because any American citizen or corporation with a claim against China could attach Chinese property entering the United States, the assets-claims problem prevented China

B. *The Sino-United States Trade Agreement*²⁴⁸

On July 7, 1979, a comprehensive trade agreement was signed by China and the United States.²⁴⁹ The pact runs for three years and is automatically renewed unless renounced by China or the United States.²⁵⁰ The accord, if endorsed by Congress, would provide the most-favored-nation treatment long sought by the Chinese.²⁵¹

Under the terms of the 1974 Foreign Trade Act, Congressional approval in both houses is mandatory before the agreement can go into effect.²⁵² Most-favored-nation status hinges on the Jackson-Vanik Amendment, which states that any Communist country granted most-favored-nation status must give assurance of free emigration.²⁵³ President Carter has received assurances from the Beijing government that it will conform to the Jackson-Vanik Amendment, and he has indicated a willingness to waive the free-migration requirement.²⁵⁴

The Sino-United States Trade Agreement was negotiated to provide a framework for future trading relations. The agreement will reduce the steep tariffs levied against Chinese exports to the United States,²⁵⁵ allow American corporations and banks to establish offices in China,²⁵⁶ and pave the way for low-interest United

from holding trade exhibitions in American cities or carrying on full banking relations with United States banks. *Id.*

248. The Sino-U.S. Trade Agreement, July 7, 1979, *reprinted in* CHINA BUS. REV., July-Aug. 1979, at 24-26 [hereinafter cited as Trade Agreement].

249. *U.S. and China Sign Trade Agreement*, L.A. Times, July 8, 1979, pt. I, at 6, col. 1; Trade Agreement, *supra* note 248, at 24.

250. Trade Agreement, *supra* note 248, art. X.

251. *Id.* art. II. Most-favored-nation status would reduce the high tariff barriers against Chinese goods, enabling China to export products to the United States more cheaply than before. Tariffs would drop from an average of 24% to 5.5%. *U.S. and China sign Trade Agreement*, *supra* note 249.

252. Trade Act of 1974, 19 U.S.C. § 2112 (1974).

253. *Id.* § 2432.

254. Mathews, *U.S., China Conclude Trade Pact*, L.A. Times, May 15, 1979, pt. IV, at 1, col. 6. The Trade Act of 1974 gives the Chief Executive authority to make such exceptions, if there is evidence that a country is moving toward a freer policy. Trade Act of 1974, 19 U.S.C. § 2432(2) (1974).

State Department sources feel that granting China most-favored-nation status could have serious implications for United States-Soviet relations, including the recently signed SALT II Treaty. Washington has refused to give most-favored-nation status to the Soviet Union, because Moscow has refused to provide assurances it will permit free emigration. President Carter's decision to sign the trade pact with China contradicts his previous policy of dealing evenhandedly with China and the Soviet Union. San Diego Union, July 8, 1979, § A, at 1, col. 3.

255. Trade Agreement, *supra* note 248, art. II.

256. *Id.* art. III.

States Export-Import Bank credits to China.²⁵⁷ The pact spells out procedures for customs,²⁵⁸ provisions regarding international payments,²⁵⁹ patents, trademarks and copyrights,²⁶⁰ resolution of bilateral trade problems,²⁶¹ and endorses nonjudicial procedures — including third-country arbitration — for the prompt settlement of commercial disputes.²⁶² The trade agreement is expected to provide an impetus to the development of bilateral economic trade — in fact, American officials estimate that under the three-year pact, annual Sino-United States trade could double its 1978 total of \$1.1 billion.²⁶³

C. *China's New Law on Joint Ventures*

China has reduced its foreign purchases, in part, because of a

257. *Id.* art. V.

258. *Id.* art. II.

259. *Id.* art. V.

260. *Id.* art. VI.

261. *Id.* art. VII.

262. *Id.* art. VIII.

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

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

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

Id. (emphasis added). Although the Trade Agreement provides that the parties "shall seek to ensure" enforcement of arbitral awards, it provides no detailed enforcement mechanism. Enforcement of a Chinese arbitration award thus presents some interesting legal issues. China is not a party to the United Nations Convention on the Recognition and Enforcement of Arbitral Awards. "It is hoped, however, that in the process of modernizing its commercial laws, [China] will sign the United Nations Convention." Existent Chinese law does not provide for judicial enforcement of an arbitral award. The Chinese do have a reputation for "adhering strictly" to their contractual obligations. "Therefore, parties negotiating contracts with [China] may find it helpful to include a clause about the enforcement of arbitral awards in their contracts and joint venture agreements." Surrey & Soble, *Joint Venture Law and Dispute Resolution In China: A Framework For International Trade*, 1 EAST ASIAN EXECUTIVE REP. 3, 16 (Sept. 1979).

263. San Diego Union, July 8, 1979, § A, at 1, col. 3. William C. Clarke, former Director of the Commerce Department's China division reported that more than \$500 million in goods changed hands during the first quarter of 1979 and that two-way trade should top \$2 billion by the end of 1979. The trade agreement is expected to boost two-way trade to \$5 billion-\$7 billion a year by 1985. Mathews, *supra* note 254.

shortage of capital. They remain, however, anxious to acquire foreign technology to modernize, and they have intensified their search for foreign investment by encouraging foreign firms to enter into joint ventures.²⁶⁴ In an attempt to ease the anxiety of potential foreign investors, China recently adopted a new law on joint ventures.²⁶⁵ The new law states a minimum of twenty-five percent for foreign investment in a joint venture; the law does not, however, set a maximum share that can be held by foreign investors.²⁶⁶ There is an indication, however, that Beijing is prepared to consider *one hundred percent* foreign ownership of joint ventures in China.²⁶⁷

The joint venture law states that legal protection is to be given to foreign investments and that profits, risks, and losses will be shared in proportion to each side's investment.²⁶⁸ In addition, in the event disputes arise that cannot be settled through mutual consultation, the joint venture law provides that the disagreements may be resolved through *arbitration by an arbitral body "agreed on by the parties."*²⁶⁹ Chinese legal experts are busy working out the regulations to support the joint venture code,²⁷⁰ as China continues as rapidly as possible to draw up new codes to cover foreign investment, taxation, and commercial law.²⁷¹

China's foreign investment law points to a China self-confident enough to accept foreign investment.²⁷² Ironically, China's prolonged isolation may be a factor facilitating the present com-

264. Butterfield, *China May Let Foreigners Own Plants*, N.Y. Times, June 2, 1979, at 29, col. 3; Wall St. J., July 9, 1979, at 6, col. 1.

265. China's National People's Congress adopted a new "Law on Joint Ventures," July 1, 1979. Wall St. J., July 9, 1979, at 6, col. 1. For a discussion of the possibilities the new law may present, see Birenbaum, *supra* note 194.

266. Wall St. J., July 9, 1979, at 6, col. 1; Birenbaum, *supra* note 194.

267. Professor Cohen stressed that details of the plan were still being worked out. He said the plan would probably include a provision that the facilities would eventually, in ten to twenty years, revert to China. Butterfield, *supra* note 264.

268. Wall St. J., July 9, 1979, at 6, col. 1.

269. Liu, *Toning down the Spirit*, FAR EASTERN ECON. REV., July 27, 1979, at 83-84; Wall St. J., July 9, 1979, at 6, col. 1 (emphasis added). "For purposes of dispute resolution, [the Trade Agreement] . . . is broader than the language of the Law on Joint Ventures." When negotiating dispute resolution clauses in contracts with China, it will be useful to be aware of "the distinctions between the Trade Agreement and the Law on Joint Ventures." For a discussion of these distinctions in dispute resolution, see Surrey & Soble, *supra* note 262, at 16.

270. Kulkarni, *China-traders await details on ventures law*, Christian Sci. Monitor, Aug. 6, 1979, at 13, col. 1.

271. Butterfield, *supra* note 264. John Kamm, Hong Kong representative for the National Council on United States China Trade, states, "I don't think any American firm will enter into a true joint venture with China until there are some laws on the books" Mathews, *supra* note 92.

272. Birenbaum, *supra* note 194.

mercial dialogue. China, unlike other developing countries, has no current legacy of grievances against multinational corporations. The new joint venture law suggests growing promise for the future of Sino-United States commercial relations.²⁷³

VI. CONCLUSION: IMPLICATIONS OF CHINA'S METAMORPHOSIS

A reevaluation of China's participation in commercial arbitration is necessary in light of the extraordinary turn of events following Mao Zedong's death. Like the seasons that change into their opposite with little regard for consistency, China is being transformed into a mirror image of its former self; yesterday's heresies have become today's orthodoxies.²⁷⁴ China's predominately antilegal domestic orientation has ceased.²⁷⁵ The new leadership, concerned with legal reform, has replaced Mao's arbitrary, deformalized legal system with a new constitution and is promulgating new written codes of law.²⁷⁶ The isolationist economic principles of self-reliance have been replaced by a bold, outward-looking program under which technology will be imported to speed China's transformation into a world power.²⁷⁷ The ideological fervor of Mao Zedong has been replaced by the pragmatic moderation of Deng Xiaoping, and an outward looking China has inextricably joined the world business community.²⁷⁸ China appears willing to free economics from the restraint of politics.²⁷⁹ This reflects a desire to seek a more moderate approach to internal development, a willingness to compromise ideological purity and economic growth in the resolution of China's glaring deficiencies.²⁸⁰

China is overcoming her distrust of law. She is using law as an instrument to ossify Chinese society and as a means to facilitate foreign trade and encourage foreign investment. China has ac-

273. *Id.* The China International Trust and Investment Corporation announced in September, 1979, that it had signed China's initial joint-venture agreement with E-S Pacific Corporation to invest \$150 million in a number of projects. NEWSWEEK, Oct. 22, 1979, at 113.

274. Schell, *Confessions of an Unreconstructed Capitalist Roadster*, L.A. Times, Feb. 4, 1979, pt. VI, at 2, col. 1.

275. See Cohen, *supra* note 71, at 1512.

276. Cohen, *supra* note 74.

277. TIME, Jan. 1, 1979, at 17.

278. *Id.*

279. L.A. Times, Dec. 27, 1978, pt. I, at 14, col. 4.

280. So eager is China for managerial expertise that the party is willing to coax former capitalists, once the most reviled class in the country, back into service. In January, 1979, Beijing announced that property and bank accounts seized from industrialists and shopkeepers during the Cultural Revolution would be restored, with interest. Mathews, *supra* note 189.

cepted these changes, because they were necessary prerequisites to the accomplishment of her long-term development goals.

China's realignment of priorities in her push to modernize has increased the possibility she will submit to arbitration. As Chinese economic philosophy adopts a more pragmatic perspective and as the Chinese increase foreign trade, the cultural, historical, and ideological factors fueling their reluctance to arbitrate will subside. There has been a revival of the formal indicia of legal institutions in China. To eliminate the remaining historical distrust and lingering cultural reluctance, first must come understanding. The road to understanding lies in the exposure to, and education of, the Chinese in the practices and procedures of international commercial arbitration. Chinese trade officials have expressed interest in learning about American institutions for trade dispute settlement.²⁸¹ The Legal Affairs Director of the CCPIT has indicated the Council might be prepared to consider sending representatives to study arbitration in the United States.²⁸² Such an exchange would be invaluable in tempering China's remaining distrust of arbitration. A *catalyst* must, however, be provided to initiate China's acceptance and participation in arbitration. An invitation should be extended through the American Arbitration Association or the American Chamber of Commerce to Chinese authorities, inviting them to observe commercial arbitration in the United States. Chinese observation of arbitration techniques and procedures will help dispel their remaining uncertainties and demonstrate the benefits of arbitration. It is reasonable to assume that the Chinese, as they escape having to justify economic decisions in light of a narrow "party line," will view trade from a businessman's perspective, and the practical advantages to arbitration will become increasingly apparent. They then will come to appreciate and trust this efficient businessman's solution to commercial disputes. China's participation in arbitration is a logical extension of her new economic, political, and legal philosophies and her increased participation in the international business community. More than ever, participation in arbitration is in China's best interest and will assist her in achieving her goal of becoming a modern nation by the year 2000.

George Burke Hinman

281. Lubman, *supra* note 1, at 236.

282. The director stated that exchanges "are under consideration" and suggested "pursuit of the idea through correspondence." Ginsburg, *American Bar Association Delegation Visits the People's Republic of China*, 64 A.B.A.J. 1516, 1518 (1978).