The Future of Chinese Arbitration in Dealing with Technology Transfer Investments in China

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THE FUTURE OF CHINESE ARBITRATION IN DEALING WITH TECHNOLOGY TRANSFER INVESTMENTS IN CHINA

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I. INTRODUCTION

To outside investors, the People's Republic of China (PRC) often seems like a hungry tiger waiting to pounce on its next victim. Investors are wary because information regarding Chinese trade and investment policies is often scarce or contradictory.\(^1\) Moreover, the mercurial nature of the PRC's economic development policy has frightened potential investors.\(^2\) For example, the 1979-80 cancellation of a large number of contracts relating to the Baoshan Steel Plant created an atmosphere of caution and skepticism for companies entering into contracts with the PRC.\(^3\) Skepticism is compounded by the widely-held perception that Chinese contracts lack legal enforceability despite the existing PRC judicial and arbitration bodies.\(^4\)

This reputation for non-performance of contracts stems from the Vickers-Zimmer case and similar incidents in the late 1960s.\(^5\) The Vickers-Zimmer dispute arose out of a contract to build a petrochemical plant in China.\(^6\) In the original contract, Vickers-Zimmer and China agreed that in the event of a contractual dispute that both sides would submit to arbitration in Stockholm.\(^7\) However, when Chinese soldiers prevented Vickers-Zimmer from building its plant, Vickers' request for arbitration was rejected and two of its employees were arrested as spies.\(^8\) Furthermore, in a later proceeding from which Vickers-Zimmer was excluded, the company was found liable for "failure" to fulfill its contractual obligations.\(^9\)

Throughout the 1970s, accounts of purported Chinese efforts to avoid arbitration and reject requests for dispute resolution permeated the international investment community, raising doubts

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1. "The majority of [PRC] legislation [is] frequently plagued by ambiguities and contradictions." Richard J. Goossen, Non-judicial Dispute Resolution in the People's Republic of China, Bus. L. Rev. 331, 335 (1986); "The most striking thing to the newcomer to the Chinese business environment and legal environment is there's no ready proof that China has a legal system in the conventional Western sense." Nancy L. Ross, Veteran China Hands Offer Some Advice to Businessmen, WASH. POST, April 9, 1978, at K2 (quoting former Harvard Law School Associate Dean Jerome Cohen).
2. See Goossen, supra note 1.
4. Id.
6. Id.
7. Id.
8. Id.
9. Id.
about China's reliability as a business partner.10

This comment discusses the reliability of arbitration as a means of dispute resolution for foreign parties engaged in technology transfers with China. Part one describes the various types of technology transfers to the PRC, followed by a discussion of the problems and possible preventive measures for use in negotiations involving negotiating arbitration clauses in contracts dealing with Chinese businesses. Part two describes the Chinese arbitral structure and process. The conclusion analyzes the viability of the Chinese arbitration system as a forum for resolving disputes in cases concerning foreign technology transfers to China.

II. BACKGROUND

One of the PRC's major concerns in the 1950s was to develop its technological and industrial base.11 Unfortunately, China lacked expertise and equipment to design, build, and operate modern manufacturing plants.12 As a result, China depended upon its "Big Brother," the Soviet Union, as its primary source of technology and aid.13 By 1960, the Soviets had supplied the Chinese with enough expertise to build 130 industrial projects.14 However, as a result of deteriorating Sino-Soviet relations in the late 1960s, the Soviets withdrew their technical support and China was unable to continue these projects.15 Accordingly, the importance of technological advancement and self-reliance were reflected in China's political and economic policies.16

Between 1973 and 1978, the PRC began importing heavy machinery to support large technical projects from the most reputable corporations, including airplanes from McDonald Douglas, microcomputers from Wang computers, petrochemical plant construction, and joint ventures for production of locomotives.17 In addition, China decentralized its highly structured and rigid foreign trade system by increasing the number Chinese entities permitted to

10. See Cohen, supra note 5.
12. Id. at 85.
13. Id.
14. Id.
15. Id at 138-141.
16. China is "determined to be as self-sufficient as possible and trades only to make a political point or to acquire modern equipment it cannot easily make itself." Jay Mathews, Chinese Are Expected to Increase Trade With Rest of World Slowly, WASH. POST, January 9, 1977, at G7.
17. Id.
enter into technology transfer agreements with foreigners. Unfortunately, while decentralization increased the speed of technology transfers, many of these transfers were either unnecessary or useless.

In 1984, China established a single administrative authority, the Ministry of Foreign Economic Relations and Trade (MOFERT), to govern over foreign trade in China and to effectuate efforts to re-centralize. Furthermore, the PRC developed a new industrial policy to meet China's needs in the 1990s. There are four primary goals which dominate this policy: 1) by the year 2000, to reach level of technological development comparable to that which Western industrialized nations had achieved in 1990; 2) disseminate technology into rural areas; 3) develop infrastructure and natural resources; and 4) promote high technology in the areas of computers, electronic, biotechnology, laser, robotics, and space and sea exploration.

A. Forms of Technology Transfers in the PRC

1. Pure Licensing Agreements

Pure licensing agreements for technology or industrial property are the inexpensive alternative available to foreign investors interested in investments in China. These contracts are relatively risk-free and involve a minimal level of continuing cooperation on the part of the transferor. However, the benefits of licensing contracts are often negated by Chinese demands that the transferor guarantee the quality of the product manufactured by the transferred technology. Furthermore, the transferor may be required to assume responsibility for any other machinery and equipment involved, whether or not the transferor manufactures it.

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18. Id.
19. DIETRICH, supra note 11, at 257.
20. Interview with Professor Anna Han, Associate Professor, Santa Clara University School of Law (Apr. 8, 1992) (hereinafter Han Lecture).
21. Id.
23. Id.
24. Id.
25. Id.
2. Compensation Trade/Countertrade Transactions

In a typical countertrade transaction, the foreigner supplies equipment or licenses technology, in return for repayment by the PRC in product. This type of transaction is often pursued by companies in need of raw materials or low cost labor. Moreover, the Chinese strongly encourage investors to engage in countertrade because such transactions conserve China's foreign currency reserves.

3. Contribution of Technology to a Joint Venture

Technology transfers are one of China's primary goals in encouraging joint ventures. In these agreements, the transferred technology is a significant portion of a foreign joint venture partner's total capital contribution. Equity joint ventures and Sino-contractual joint ventures (also referred to as "foreign cooperative enterprises") are two types of joint ventures used in Chinese business.

a. Equity Joint Ventures

An equity joint venture is a limited liability company in which each investor's liability is limited to their original capital investment. Each investor in an equity joint venture must contribute at least 25 percent and not more than 99 percent of the total investment "in cash or kind." Thus, the investor's proportionate capital

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26. In China, countertrade may be conducted under various methods. Countertrade structures include barter, buy-back or direct compensation trade, counter purchase or indirect compensation, advance purchase, offset, government-to-government trade agreements, clearing agreements, and switch transactions. See S. Linn Williams & Clark D. Stith, Countertrade, in DOING BUSINESS IN CHINA § 10.04 (William P. Streng & Allen D. Wilcox eds., 1992).
27. Lubman and Wajnowski, supra note 22, at § 3.02[4].
28. Williams & Stith, supra note 26, § 10.01.
29. See id § 10.02[1].
32. "In March 1987, Provisional Regulations of the State of Administration for Indus-
A contribution may consist of foreign currency, technology and/or equipment. All parties who wish to invest in China must comply with technology transfers in the form of equipment, “know-how” or training of scientific management, technical and managerial personnel. The normal duration of an equity joint venture is between ten and thirty years, but this term may be extended to fifty years with special approval. At liquidation, the assets are distributed “among the parties to the joint venture according to the proportion of each party's investment unless otherwise provided by agreement, contract or the articles of association.”

b. Contractual Joint Ventures

The purpose of this regulation is to expand and facilitate cooperation and technological exchanges between foreign entities and China. The structure of a cooperative joint venture provides greater flexibility to the contracting parties than equity joint ventures. For example, foreign investors may invest as little or as much as the parties agree upon. In contrast to equity joint ventures, contractual joint ventures permit partners to recoup their investment and depreciation expenses during the venture period. In choosing whether to enter into an equity joint venture or a contractual joint venture, the foreign investor should

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33. Joint Venture Regulations, supra note 30, ¶ 6-550(3).
34. “Know-how” is described as technical knowledge which has not been made public and is used for manufacturing, product design, quality control or management and technical process.” Anna Han, China’s New Regulations for Technology Import Contracts: An Evolving Primer For Technology Transfers to China 3 (April 1988) (unpublished manuscript, on file with Professor Anna Han, Santa Clara University, School of Law).
35. Joint Venture Regulations, supra note 30, ¶ 6-550(4).
36. Id. ¶ 6-550(100) (as amended in 1986).
37. Id.
38. Contractual Joint Ventures, supra note 30.
39. Id. ¶ 6-100(1).
40. The parties may choose not to create a legal “person” with limited liability and set forth all duties, rights and liabilities through contractual negotiation. Cohen & Valentine, supra note 3, at 180. However, “in some instances, the [contractual joint venture] is a legal entity with its own articles of association and board of directors, and occasionally even limited liability.” Id.
41. Id.
42. See Contractual Joint Ventures, supra note 30, ¶ 6-100 (22).
consider tax implications and foreign exchange repatriation.\footnote{See Cohen & Valentine, supra note 3, at 205. The problems of foreign exchange repatriation and the tax consequence associated with it will not be discussed in this comment.}

**B. Rules and Regulations**

Prior to 1985, the PRC had no established legislative regulations governing the transfer of technology.\footnote{Lubman & Wajnowski, supra note 22, at § 3.04.} Thus, negotiations for technology transfer through capital contributions and other means occurred without the benefit of published legal guidelines or state approval.\footnote{Id.} Often these technology transfers were made by Chinese authorities on an *ad hoc* basis.\footnote{Id.} Consequently, foreign investors were subject to contradictory investment requirements and uncertain prospects for success.\footnote{Id. § 3.04.} Due to the increased volume and complexity of technology transferred into the PRC, the Chinese legislature promulgated a number of regulations to handle technology transfers more effectively.\footnote{Id. § 3.03[3]-3.04.}

In 1985, "Regulations on Administration of Technology Import Contracts of the People's Republic of China" (Technology Regulations)\footnote{Regulations on the Administration of Technology Import Contracts of the People's Republic of China, 1 China Laws for Foreign Bus. (CCH Austl. Ltd.) ¶ 5-570 (1985) [hereinafter Technology Regulations].} were promulgated, setting forth general guidelines for technology transfers. In 1987, "Detailed Rules for the Implementation of the Administrative Regulations of the People's Republic of China on the Control of Technology Import Contracts" (Implementing Regulations) were promulgated.\footnote{Detailed Rules for the Implementation of the Administrative Regulations of the People's Republic of China on the Control of Technology Import Contracts, 1 China Laws for Foreign Bus. (CCH Austl. Ltd.) ¶ 5-573 (1987) [hereinafter Implementing Regulations].} In contrast to the Technology Regulations, which basically provided for contracts dealing with patent know-how,\footnote{Technology Regulations, supra note 49, ¶ 5-570(2).} the Implementing Regulations have broadened the contract scope to include the transfer of proprietary technology and trade secrets.\footnote{Implementing Regulations, supra note 50, ¶ 5-573(2). This includes technical service contracts, whereby the licensor is authorized to use a specified technology to provide service or consultation. Id.}

All contracts are subject to explicit requirements for technology import contracts. These contracts must include:

1. Name of the contract;

\footnote{See id. §§ 3.03[3]-3.04.}
2. Description, scope and requirements of the technology to be imported;
3. Criteria, time limits and standards for assessing and examining the apportionment of liability for risk and measures to be adopted;
4. Obligation of confidentiality with regards to the imported technology, and the ownership and sharing of improvements to the technology;
5. Total price and enumeration, price of individual items and form of payment;
6. Method of computing the amount of damages for breach of a contract;
7. Methods for the resolutions of dispute; and
8. Definitions of technical terminology.\(^5^3\)

The Technology Regulations also set forth guidelines limiting the types of technology that will be approved for import and implementation in China. For example, "technology to be imported must be advanced and appropriate" and is required to comply with at least one of the following goals:

1. Developing new products;
2. Improving product performance, reducing the cost of product performance, reducing the cost of products and conserving energy or raw material;
3. Favorable to maximizing the utilization of local resources;
4. Enhancing foreign exchange earnings;
5. Favorable to environmental protection;
6. Favorable to production safety;
7. Improving management; and
8. Upgrading scientific and technical standards.\(^5^4\)

However, current administrative practices and policies provide little direction for foreign investors as to which of these eight factors will be given greatest emphasis by Chinese officials. Nonetheless, it seems likely that contracts that foster the basic policy objectives of the PRC would be more likely to again approval. Technology contracts such as those which promote the development of new products for export or increase foreign exchange earnings, are more likely to be approved, because these factors comport with the basic policy objectives of the PRC.

The requirement that the technology be advanced underlies the PRC's concern that the imported technology be current.\(^5^5\) Such

\(^{53}\) Id. \(\S\) 5-573(7).
\(^{54}\) Technology Regulations, supra note 49, \(\S\) 5-570(3).
\(^{55}\) See Joint Venture Regulations, supra note 30, \(\S\)\(\S\) 6-550(3)-(4).
concerns demonstrate that Chinese authorities are very wary about being "stuck" with the West's outdated technology. Consequently, determining whether a proposed transfer involves "state of the art" technology has become a major issue in the approval process. The PRC has often preferred to license the most technologically advanced knowledge or product, despite the limited utility of such knowledge may have in China. For example, new technology is often incompatible with existing manufacturing plants or computer systems within the PRC.

The PRC's insistence on the imposition of warranty provisions upon foreign transferor has been incorporated into the Technology Regulations and the Implementing Regulations. The transferor must guarantee lawful ownership and to compensate the PRC for any and all losses resulting from an intellectual property infringement claim. Furthermore, the transferor must warrant that the technology or documents, and information provided are "complete, correct, valid and capable of accomplishing the technical targets prescribed in the contract."

The Technology and Implementing Regulations both include provisions which invalidate all contracts which place unreasonably restrictive requirements upon the Chinese party. The underlying purpose behind these restrictions is to protect the PRC from the exploitation by unscrupulous foreigners. For example, a transferor may not include any of the following clauses in a technology contract, without first obtaining special approval:

1. Include in the contract additional conditions which are relevant to the technology being imported, such as requiring the transferee to purchase unnecessary technology, technical services, raw material, equipment and products;
2. Restrict the transferee's freedom of choice to obtain raw materials, parts components or equipment from other sources.
3. Restricting the transferee's development and improvement of imported technology;
4. Restricting the transferee's acquisition of similar or competing technology from other sources;

56. Han Lecture, supra note 20.
57. Id.
58. Id.
59. Id.
60. Id.
61. Implementing Regulations, supra note 50, ¶ 5-573(11).
62. Id. ¶ 5-573(9).
63. Technology Regulations, supra note 49, ¶ 5-570(9); Implementing Regulations, supra note 50, ¶ 5-573(18).
5. Imposing unequal terms of exchange upon the transferee of improvements of the imported technology.
6. Restrict the imported technologies quantity, variety and sales price of products to be manufactured by the transferee;
7. Restrict unreasonably the transferee's sales channels and export markets;
8. Forbid use by the transferee of the imported technology after the expiration of the contract; or
9. Require the transferee to pay for or to undertake obligations for patents which are unused or no longer effective. 64

Every agreement or joint venture contract containing a technology transfer component must be approved by the Chinese government. 65 This is often a lengthy and frustrating process, due to the presence of various barriers which must be overcome. 66 The first barrier a transferor must address is determining which Chinese entity has approval authority. This is a difficult determination despite the intent of the Implementing Regulations to provide some clarity. However, as a general rule, joint venture contracts require approval by MOFERT or its local designee or bureau. 67

Pursuant to Article 6 of the Implementing Regulations, if a local agency has approved the joint venture feasibility study, the local agency retains the power to examine and approve the final contract. 68 Accordingly, in order to determine who has approval authority, the transferee and the transferor must first determine the appropriate authority for reviewing the feasibility study. 69 This is a crucial determination because the feasibility study and project proposal must be approved by the proper Chinese authority, before the transferor and transferee can negotiate a technology transfer agreement. 70

The key factors in this determination are the project's location and its total value. 71 For most projects involving a feasibility study less than $5,000,000 (U.S. dollars), approval may be obtained from the ministry under whose authority the project is being undertaken. 72 Projects between $5,000,000 and $50,000,000 (U.S. dollars) require approval by a ministry level entity or by MOFERT

64. Technology Regulations, supra note 49, ¶ 5-570(9).
65. Lubman & Wajnowski, supra note 22, at ¶ 3.04[4].
66. Id.
67. Id.
68. Id.
69. Id.
70. Lubman & Wajnowski, supra note 22, at ¶ 3.04[4].
71. Id.
72. Id.
(located in Beijing).\textsuperscript{73} When a large project is involved and the total project value exceeds one hundred million dollars, approval by MOFERT and the State Council is imperative.\textsuperscript{74}

The location of the project is also a factor in determining the appropriate approval authority. The PRC has granted independent approval authority for projects involving at least $30,000,000 U.S. dollars to the cities of Beijing, Shanghai, Dalian, Tianjin, and Guangzhou.\textsuperscript{75} In addition, special economic zones (SEZ) have autonomous approval authority and a core of separate and distinct technology transfer regulations.\textsuperscript{76}

Once negotiations are concluded, the contract will not be validated until it is scrutinized by the approving authority for compliance with the Implementing Regulations.\textsuperscript{77} The Implementing Regulations require MOFERT or the appropriate authority to make a decision on the contract within fifty days, or it is deemed approved.\textsuperscript{78} However, it is questionable whether the Chinese will honor a contract that has been approved by this default provision. Without the proper approval signatures and stamps, the necessary Chinese entities may be unwilling to cooperate. Authorization is required to implement any foreign project.\textsuperscript{79} Often, the approval authority determines that the parties must make specific amendments to the contract within a specified period before their contract will be approved.\textsuperscript{80}

Although joint venture enterprises engage in technology transfer, the PRC has expressly exempted equity, contractual and wholly owned enterprises from the scope of the Technology Implementing Regulations.\textsuperscript{81} The governing law for technology transferred as capital contribution in a joint venture is the “Regulations for the Implementation of the Law of the People’s Republic of China on Joint Ventures Using Chinese and Foreign Investment” (Joint Venture Regulations).\textsuperscript{82} However, foreign parties can expect joint venture contracts involving technology transfers to be similarly

\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Lubman & Wajnowski, supra note 22, at § 3.04[4].
\textsuperscript{77} See Jesse T.H. Chang & Elson Pow, Technology Transfer to China, EAST ASIAN EXECUTIVE REP., Jan. 15, 1986, at 8.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Han, supra note 34, at 3.
\textsuperscript{82} Joint Venture Regulations, supra note 30.
scrutinized as if the Implementing Regulations were applied. This is perhaps due to the fact that MOFERT and the provincial approval entities for joint venture contracts are the agencies most often involved in approving contracts that fall under the Technology Regulations and the Joint Venture Regulations. In fact, the provisions for the capital investment contributions of technology in joint venture contracts encompass many of the same clauses as the Technology Regulations.  

III. Dispute Resolution Clauses for Technology Contracts and Joint Venture Contracts with Technology Transfer Components

The “Foreign Economic Contract Law of the People’s Republic of China (FECL)” has established standards for settling all contract disputes involving foreign investors. The regulation establishes basic resolution procedures for use in the event of a dispute. Under this regulation, “[a]ny disputes arising from the contract ought to be settled by the parties, if possible, through consultation or mediation of a third party.” However, if the dispute cannot be resolved by consultation or mediation, the dispute may be settled by arbitration, or by suit in the People’s Court if “neither an arbitration clause is provided in the contract nor a written agreement [to arbitrate] is reached afterwards.”

Due to the loosely drafted joint venture regulations, many issues are left open to contract negotiation, including alternative means of dispute resolution. Consequently, international law and practice must fill the contractual and regulatory gaps. This allows the joint venture partners to decide issues not covered by Chinese law. Examples include the language used in the contract, the choice of venue for arbitration, and the amount of liquidated damages. This enables the parties to draw on international law to resolve disputes, should conflicts arise. Further, FECL expressly permits contract provisions based on international treaties which the PRC has participated in or concluded to differ from PRC laws.

83. Compare Technology Regulations, supra note 49 with Joint Venture Regulations, supra note 30.
85. Id. ¶ 5-500(37).
86. Id. ¶ 5-550(38).
87. Goossen, supra note 1, at 332.
88. FECL, supra note 84, ¶ 5-530(6) (except treaty clauses to which the PRC has declared reservation).
A. Problems and Solutions for Negotiation of Dispute Resolution Clauses

Although the broad language of the joint venture laws and FECL implies that there is a tremendous amount of freedom for contracting in drafting their joint venture agreements, this is not necessarily true. Foreign investors have limited autonomy because China's approval process is "plagued by confusion, bureaucratic inconveniences, and excessively rigid policy." This lack of autonomy is evident from MOFERT's model contract, which sets forth a form contract which includes China's position on issues regarding dispute resolution. Consequently, if an arbitration clause is omitted from the contract, MOFERT may be reluctant to approve the joint venture. Moreover, even though the joint venture regulations provide for dispute resolution in the courts, none of the model clauses offers this alternative. In addition, foreign treaties entered into by China make it clear that conciliation and arbitration are in fact favored methods of dispute resolution. FECL allows parties to initiate a suit only in the absence of an agreement to arbitrate; a party may not go to court if there is such an arbitral agreement.

The PRC has often claimed that a choice of forum is available to foreign investors, because Chinese law states that arbitration can take place in the defendant's domicile or where the dispute arose. However, the PRC will always attempt to make the determination that the dispute arose in China. Therefore, the arbitration will

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89. Chan, supra note 32, at 62.
90. See Christian Sakibaing, Dispute Settlement in China, in DOING BUSINESS IN CHINA § 21.05(1) (William P. Streng & Allen D. Wilcox eds., 1992); the model contract is reprinted in English in COMMERCIAL, BUSINESS, & TRADE LAWS: THE PEOPLE'S REPUBLIC OF CHINA, booklet 27,28 (Owen D. Nee Jr., et al eds, 1983). This form contract was created as a starting point for joint venture negotiations and was in part drafted to protect the interests of the PRC. Salbaing, § 21.05[1]
91. The model clauses have been interpreted to involve the courts in only the enforcement of the resolution. Walter Sterling Survey, Dispute Settlement in U.S.—China Trade—Another Look, in LEGAL ASPECTS OF DOING BUSINESS IN CHINA 277 (1985).
92. "Article 8 of the Sino-Japanese Trade Agreement which was signed on 5 January 1974 provides for recourse to friendly consultation to resolve disputes, followed by arbitration if negotiation fails. Similarly, Article VIII of the US-China Trade Agreement emphasizes that the friendly negotiation and conciliation processes should be attempted before arbitration is adopted." ERIC LEE, COMMERCIAL DISPUTE SETTLEMENT IN CHINA 10 (1985). See Agreement on Trade Relations, July 7, 1979, U.S.—P.R.C., art. VIII, 31 U.S.T. 4651. The U.S and the P.R.C. agreed to settle any dispute arising from or in relation to their contracts through friendly consultation, conciliation, or mutually acceptable means, including international third party arbitration. Goossen, supra note 1, at 332.
93. FECL, supra note 84, ¶¶ 5-550(37)-(38).
94. See Goossen, supra note 1, at 334.
95. See id.
nearly always take place in China. For example, the PRC always takes the position of defendant itself so that it can invoke the clause for permitting the arbitration to occur in the defendant's domicile. Alternatively, if the place of arbitration is decided on the basis of where the dispute arose, it is inevitable that the arbitration will take place in China.

As the model contracts do not offer a choice of forum in the arbitration clauses, an increasing number of Chinese recipients are asking that arbitration take place in Beijing under the auspices of the Foreign Economic Trade Arbitration Commission (FETAC) in China. An investor who does not wish to arbitrate under FETAC should specify the place of arbitration at the outset of negotiations. When the contract is silent as to the location of the dispute forum and choice of law, the law of the country which has the "closest connection" with the contract will be applied as set forth by the FECL. Consequently, almost all joint venture contracts in which technology is imported for use in China will be deemed as having the closest connection to China.

Dispute resolution clauses are negotiable, and MOFERT has approved contracts where the agreed location of arbitration is outside of China and governed by an arbitration organization other than FETAC. Most sample contracts permit third country arbitration if consultation has failed to resolve the dispute. In fact, MOFERT continually has approved third country arbitration in Sweden under the Stockholm Chamber of Commerce, the United Nations Commission on International Trade Laws (UNCITRAL) rules, in Zurich under Swiss arbitration, in Hong Kong under

96. See id.
97. Han, supra note 34, at 8.
98. FECL, supra note 84, ¶ 5-550(5).
99. Id., supra note 34, at 8.
100. Id. at 8.
101. See e.g., FECL, supra note 84, ¶ 5-550(35).
103. "Any dispute 'shall be settled through friendly consultation between the parties;' but if settlement cannot be reached, the dispute 'shall be submitted for arbitration.' Arbitration is to take place in Stockholm, Sweden, under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce." CHARLES A. BROWER & LEE R. MARKS, INTERNATIONAL COMMERCIAL ARBITRATION 245 (1983) (providing an summary of a typical arbitration clause used between a U.S. party and a PRC governmental entity).
104. Id., supra note 34, at 8.
105. Id.
the Hong Kong Arbitration Center,\textsuperscript{106} and most recently under the International Center for Settlement of Investment Disputes (ICSID).\textsuperscript{107}

UNCITRAL has been the accepted arena for dispute resolution since 1979, when the United States and the PRC signed a trade agreement.\textsuperscript{108} Article 8 of the Trade Agreement, which addresses dispute settlement, provides that:

The Contracting Parties encourage the prompt and equitable settlement of disputes arising from or in relation to contracts between their respective firms, companies, corporations, and trade organizations through friendly consultations, conciliations, and other mutually acceptable means.\textsuperscript{109}

If a dispute cannot be resolved promptly through consultation or conciliation, the treaty provides that the parties may submit to arbitration in the People’s Republic of China, the United States or a third country.\textsuperscript{110} The rules of procedure of the relevant arbitral institutions are either those of UNCITRAL or any other rules of procedure agreed upon by the two parties.\textsuperscript{111}

Hong Kong has also been approved for third party arbitration through the Hong Kong Arbitration Center.\textsuperscript{112} Use of this Center may be advantageous to a foreign investor for various reasons, including the great expertise of Hong Kong arbitrators in Chinese law and investment practices (these arbitrators have more experience in dealing with Chinese laws and practices than any other third country tribunal).\textsuperscript{113} In addition, Chinese language translation and interpretation services are readily accessible in Hong Kong.\textsuperscript{114}

\textsuperscript{106} Goossen, supra note 1, at 335.
\textsuperscript{107} Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966, opened for signature March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID]. The ICSID was established by convention, in 1966. It was intended to address settlement of disputes between states and nationals of other states under the sponsorship of the International Bank for Reconstruction and Development (World Bank). The convention provides short-cuts to resolution of disputes between host states and investors of other states. Although China has been a member of the World bank, it has not been until recently that China agreed to participate in ICSID.
\textsuperscript{108} See Agreement on Trade Relations between the U.S. and the P.R.C., executed July 7, 1979, 31 U.S.T. 4651, T.I.A.S. No. 9630.
\textsuperscript{109} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Goossen, supra note 1, at 335.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
In China, contract conciliation and mediation proceedings must be held prior to the initiation of arbitration.\textsuperscript{115} These proceedings involve the inherent risks that friendly conciliation may continue to the point at which the parties are denied an opportunity to conclude the dispute through a determination based on the merits of the case.\textsuperscript{116} Thus, in order to ensure the speedy determination of a dispute, joint venture investors should specify a time limitation for conciliation proceedings before commencing arbitration.\textsuperscript{117} For example, the parties may agree that, if after ninety days the conciliation process has proven ineffective, either party may initiate arbitration proceedings.\textsuperscript{118} In most cases, if investors keep MOFERT informed on the progression of the negotiations, it is very likely that the foreign party will be able to negotiate a contract that is agreeable to both the Chinese party and MOFERT.\textsuperscript{119} However, if the parties did not negotiate a contract for arbitration in a third country, foreign companies may look to the PRC arbitration system for resolution of disputes which arise during the course of the transaction.\textsuperscript{120}

IV. ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA

In the 1950s the China Council for the Promotion of International Trade (CCPIT) established two entities to handle arbitration proceedings between Chinese and foreign parties.\textsuperscript{121} All maritime related disputes are resolved by the Maritime Arbitration Commission (MAC).\textsuperscript{122} Arbitration arising out of unresolvable disputes over joint venture contracts, patents and related know-how, and trademarks fall under the auspices of FETAC.\textsuperscript{123} FETAC's main office is located in Beijing, but disputes may also be heard in the branch offices located in Shanghai and Shenzhen.\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{115} FECL, \textit{supra} note 84, ¶ 5-550(37).
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} See FECL, \textit{supra} note 84, ¶ 5-500(37).
\item \textsuperscript{121} LEE, \textit{supra} note 92, at 15.
\item \textsuperscript{122} MAC was established by CCPIT in 1958 to handle maritime disputes involving foreign parties. \textit{Id.} at 13. This comment will not discuss MAC.
\item \textsuperscript{123} The Foreign Trade Arbitration Commission (FTAC) renamed FETAC was established by the China Council for the Promotion of International Trade (CCPIT) in 1954 to handle arbitration between a Chinese party and a foreign party. \textit{Id.} at 21.
\item \textsuperscript{124} Interview with Xu Sanqiao, Legal advisor to the China International Economic and Trade Arbitration Commission, Shenzhen Commission, in Shenzhen, PRC (August 5, 1991) [hereinafter Sanqiao Interview].
\end{itemize}
FETAC's procedural rules are administered during every arbitration session involving Chinese and foreign parties.\textsuperscript{125} Moreover, because FETAC is supervised by CCPIT, which is in turn supervised by MOFERT, the rules and procedures administered by FETAC are influenced by national policies.\textsuperscript{126} These procedural rules are set forth in the revised Arbitration Provisions of the China International Economic and Trade Arbitration Commission (CIETAC).\textsuperscript{127}

Although these procedures were enacted to promote foreign investment in China, investors are still skeptical about the reliability of the Chinese arbitration process.\textsuperscript{128} This uneasiness is primarily a product of investor ignorance in the process and a history of failed business relations.\textsuperscript{129} This apprehension stems from three main concerns: 1) whether the Chinese arbitration process is unbiased, so that foreign parties are ensured a fair resolution of the issue; 2) whether the process is capable of resolving the issues that may arise in a contracts dealing with technical complexities; and 3) whether the foreign party will be able to enforce a judgment award decree by the arbitral tribunal.

A. **Can Foreign Parties Obtain Fair Resolution of Disputes?**

Recent revisions have greatly improved the position of a foreign investor in the arbitration process. For example, each party has now the right to select an arbitrator from the official list of arbitrators.\textsuperscript{130} Before applying for formal arbitration, the plaintiff may select one arbitrator; after receiving the arbitration form, the defendant may nominate one arbitrator.\textsuperscript{131} However, neither party may choose an arbitrator whose name does not appear on the official list of arbitrators.\textsuperscript{132} Upon request, either side may also defer selection of their arbitrator to FETAC.\textsuperscript{133} A third arbitrator who acts as the presiding arbitrator, is appointed by the chairman

\textsuperscript{125} Goossen, supra note 1, at 331.
\textsuperscript{126} Farina, supra note 102, at 152-53.
\textsuperscript{128} Sacks, supra note 110, at 5-86.
\textsuperscript{129} Id.
\textsuperscript{130} See Arbitration, supra note 127, ¶¶ 10-505(3)-(8). This list is comprised of arbitrators appointed by CCPIT, pursuant to the procedural rules of FETAC. Id. ¶ 10-505(4).
\textsuperscript{131} Id. ¶¶ 10-505(3)-(8).
\textsuperscript{132} Id.
\textsuperscript{133} Id.
FETAC's arbitrators list includes both Chinese and foreign persons with "professional knowledge and actual experience in international economics and trade, and science and technology." Since the effective date of the new rules, the arbitrators list has been updated and is increasingly composed of foreign members. The opportunity to select foreign, as well as Chinese arbitrators should lend balance to the arbitration tribunal.

However, the arbitral voting process may be less fair than the selection process, because arbitration awards are based on a majority vote of the three-person arbitration tribunal. While FETAC presiding arbitrator has a duty to be unbiased, as a member of CIETAC, he is also overseen by a superior authority and may be compelled to vote in accordance with its wishes. Consequently, legal practitioners disfavor arbitration in China because they believe their interests will only be represented by a minority vote on the arbitration panel. Nevertheless, the number of judgments favoring foreign parties has greatly increased since the reformation of the FETAC procedural rules. The increase in the number of judgment awards for foreign parties, combined with China's current policies intended to encourage foreign investment and technical development, seems to indicate that the PRC is attempting to make FETAC a more attractive alternative to foreign investors.

Arbitration hearings are conducted as conferences. Consequently, a party will never have a case thrown out, or its claim dismissed, due to ignorance of FETAC procedures. In fact, the disputing parties may confer with FETAC on matters relating to the arbitration proceedings in person or through an attorney.

134. Id. § 10-505(14).
135. Id. § 10-505(4).
136. Interview with Lu Kun, arbitrator for FETAC (Oct. 10, 1992) [hereinafter Kun Interview].
137. Id.
138. Arbitration, supra note 127, § 10-505(33).
139. "Although the arbitration tribunals formed to conduct references are independent, they may nevertheless submit questions involving state principles and policies to [FETAC] for guidance. This is to ensure that the arbitration carried out will conform to the official policy on foreign trade." Lee, supra note 92, at 22.
141. Id.
142. Id.
143. Kun Interview, supra note 136.
144. Sacks, supra note 110, at 5-86.
145. Id.
FETAC's willingness to educate a foreign investor about Chinese arbitration procedures should help alleviate investor fears of being disadvantaged during the arbitration process.

While a case before the Chinese courts may only be litigated by an attorney who is a Chinese national, FETAC rules allow the foreign party to choose as their advisor, an attorney or representative who is a Chinese citizen or a foreign citizen. Furthermore, an attorney may act on behalf of the investor as long as he or she is granted power of attorney.

B. *Can the Chinese Arbitral Body Competently Resolve Disputes Involving Technical Contracts?*

Unlike other international methods of arbitration, Chinese arbitration involves a combination of both conciliation and arbitration. "Subject to consent of both parties, conciliation can be conducted at any time prior to or after the commencement of arbitration proceedings and before a final arbitral award is granted." The Chinese prefer that the two parties negotiate a compromise through conciliations, as illustrated by a joint venture case involving a Hong Kong corporation and a Chinese corporation in Guangzhou.

In this case, one of the two shareholder's of a Hong Kong corporation (shareholder A) signed an agreement with the Chinese corporation to set up a factory to produce a certain commodity. The Hong Kong corporation was to contribute the equipment and technology, and the Chinese company agreed to provide all the raw materials, the factory building, and workers. The contract also set forth conditions for the goods to be re-exported. The joint venture was successful until the shareholder who did not sign the

146. Sanqiao Interview, supra note 124.
147. Id.
148. In the past, the arbitration proceedings were open session hearings in which embassy officials were able to observe the arbitration and evaluate whether the awards were fairly allocated. Id. However, under the new rules, article 25 of the Arbitration Provisions states that arbitration tribunals shall not hear cases in open session unless both parties request that an open session be held. Arbitration, supra note 130, § 10-505(25).
150. Id.
151. Interview with [name withheld by request], in Hong Kong (Aug. 3, 1991) [hereinafter Confidential Interview]. The interviewee consented to the interview on the condition that his identity and those of the parties remain unidentified.
152. Id.
153. Id.
154. Id.
agreement (shareholder B) informed the Chinese party that shareholder A had left the Hong Kong corporation. Shareholder B then persuaded the Chinese corporation that it should sign another contract with him so that he could continue the joint venture. However, when shareholder A discovered what had happened he returned to the Chinese party and asked that they comply with the original agreement. When shareholder A and the Chinese party failed to resolve the dispute through mediation, they applied to FETAC for arbitration. The arbitration panel's first step was to request that both parties attempt to resolve the problems on their own through conciliation. This method proved successful in this case. The head office of the Guangzhou corporation which was located in Beijing found another factory in Beijing with which the original agreement could be carried out.

In another case, involving the sale of goods, conciliation took place during the arbitration proceedings. In this case, a foreign firm signed a contract with a Chinese company for the shipment of a certain tonnage of goods to be delivered in separate shipments to a port designated by the foreign firm. The agreement also contained a penalty clause for non-performance fixed at five percent of the non-performed amount of the contract.

The Chinese party obtained the necessary export permit license and shipped the goods. However, the goods were mistakenly sent to the wrong foreign firm. When the Chinese party tried to obtain a second export license their request was denied. Because the Chinese firm could not export the goods, it proposed that the contract be cancelled. The foreign corporation did not agree to the proposed cancellation of the contract, and applied to FETAC for arbitration, claiming the amount stated in the penalty clause, damages for loss of profits, and expenses incurred. The Chinese
party argued that it should not be responsible because the failure to deliver the goods was due to the export permit not being granted, a circumstance beyond its control. During arbitration, the tribunal, with the consent of both parties, went into a conciliation process.

The only instruction the arbitration tribunal made was that since the Chinese corporation had an export license for the first lot of goods, the Chinese corporation should at least be responsible for its failure to deliver that particular lot. The foreign firm was not allowed to claim both the penalty and damages for its lost profits. Consequently, both parties settled on a reasonable compromise, in which the Chinese party would pay a specified amount as compensation and 60% of the arbitration costs, and the foreign party would bear the remaining 40%.

In meeting the goals of arbitration to resolve problems through third party dispute resolution and compromise, the Chinese method has many positive aspects. It increases the probability that the disputing parties will continue to do business in the future. However, there are serious drawbacks to the Chinese arbitration process. For example, FETAC arbitration provisions have no discovery procedures for interrogatories or document production. Under Article 6 of the FETAC rules, the party requesting arbitration must attach documentation of the facts of the dispute to the arbitration application. The party receiving the application must, in reply, submit any defenses and relevant documents within 45 days to the arbitration commission and the plaintiff. However, neither party is obligated to submit documents or answer any questions posed by the opposing party. During arbitration, both sides are required to produce facts supporting their complaints or defenses.

This absence of a comprehensive discovery mechanism is a major weakness in the PRC arbitration, as exemplified by the serious disadvantage imposed upon the less informed party entering into the arbitration. In addition, parties can introduce new evidence at formal hearings without notice. Consequently, a party might be

170. Id.
171. Confidential Interview, supra note 151.
172. Id.
173. Id.
174. Id.
175. Arbitration, supra note 127, ¶ 10-505(6).
176. Id. ¶ 10-505(8).
177. See id., ¶¶ 10-505(6)-(13).
178. Id., ¶¶ 10-505(6), 10-505(9).
179. Confidential Interview, supra note 151.
put in a position in which it cannot adequately protect itself, having no time to adequately review new evidence and raise defenses.

Although FETAC rules give the arbitrator and the arbitration committee power to conduct their own investigation, gather further evidence, and subpoena materials for the purpose of arbitration, the rules are silent with regard to the power to subpoena witnesses. Since the power to subpoena a witness is not explicitly set forth in the procedural rule, the arbitration commission is not obligated to help parties obtain the witnesses. Therefore, a foreign party may find it impossible to compel an unwilling witness to testify.

Another concern for investors is that presiding arbitrators selected by the Chairman of the Arbitration Commission from the Arbitrational Commission's list of arbitrators, may not have the background knowledge to resolve disputes of a technical nature. This concern is mitigated by the ability of the arbitration tribunal to consult experts and/or appraisers in disputes involving sophisticated technical issues. An expert may be a Chinese national or a foreign organization or citizen. However, the rules provide no language to ensure that the selected expert or appraiser be a neutral and unbiased party.

C. Enforcement of Awards

FECL contains provisions allowing parties to appeal to Chinese courts for enforcement of arbitral awards. In order to seek enforcement of arbitral awards in courts under foreign jurisdiction, FECL expressly allows foreign investors and technology suppliers to look to the United Nations Convention of the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) for guidance. When China entered the New York Convention, it agreed that awards involving international commercial matters rendered in other contracting states would be enforced within the PRC. The convention states that:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or

180. Arbitration, supra note 127, ¶ 10-505(26).
181. Id. ¶ 10-505(28).
182. Id.
183. Id. ¶ 10-505(38).
charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on recognition or enforcement of domestic arbitral awards.\textsuperscript{185}

Consequently, under the New York Convention, joint ventures and other suppliers of technology are subject to the procedural rules of the territory where the enforcement of arbitral awards is to be made.\textsuperscript{186} If an arbitration award is to be enforced in China, Article 195 of the PRC Civil Procedure Code,\textsuperscript{187} which describes judicial enforcement of arbitration decisions, will be applied.\textsuperscript{188}

However, the New York Convention contains defenses to the enforcement and recognition of arbitration awards.\textsuperscript{189} For example, if the party against whom the award is invoked can show proof of a valid defense (e.g., incapacity of the parties, improper notification of arbitration proceedings, or invalidity of the arbitration proceeding as contrary to the contractual agreement),\textsuperscript{190} the award will not be enforceable. In addition, parties may protest enforcement of the award in China on public policy grounds. The New York Convention states:

Recognition and enforcement of an arbitral award may also be refused if the competent authority is in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the laws of that country; or

(b) The recognition or enforcement of the award would be contrary to public policy of that country.\textsuperscript{191} (emphasis added).

As far as investors engaged in technology transfers through joint ventures are concerned, subpart (a) should not be a problem because FETAC via the CCIPT is capable of settling all foreign investment disputes. However, subpart (b) may pose an obstacle because the term "public policy" is vague and open-ended. Accordingly, the "public policy" exception is considered a notoriously flexible method of avoiding the requirements of Chinese law.\textsuperscript{192}

Those countries which have treaties with China and have included provisions for the enforcement of awards are in a much bet-

\footnotesize{\textsuperscript{185} Id., art. 111.  
\textsuperscript{186} Id.  
\textsuperscript{187} The Law of Civil Procedure of the People's Republic of China (adopted March 8, 1982) [hereinafter CPC].  
\textsuperscript{188} See Sacks, supra note 110, at 5-525.  
\textsuperscript{189} New York Convention, supra note 184, art. V.  
\textsuperscript{190} Id.  
\textsuperscript{191} Id.  
\textsuperscript{192} Cohen, supra note 5, at 525.}
ter position than other countries. For example, bilateral and multilateral treaties significantly increase the effectiveness of the foreign awards, by limiting the grounds available for denial of recognition and enforcement.

Although there is a strong likelihood that foreign arbitral awards will be enforced in China, there is still uncertainty regarding the enforcement of Chinese arbitral awards. China's Civil procedure codes are too loosely drafted to adequately enforce an arbitral award made by FETAC. If the person against whom the award is made can present evidence, the court, after examination and verification, can rule to deny enforcement of the PRC arbitral award.

In addition, public policy is grounds upon which enforcement of an arbitral award may be denied. According to Article 260, if the People's Court determines that execution of an award would be against public policy, the court shall deny execution. This language leaves too much discretion in the Chinese courts, and too little security for the party seeking to enforce the award. For example, a public policy exception could be unpublished inter-departmental "neibu" documents that are kept secret for security reasons, rules not yet drafted, ideology or judicial preference.

Moreover, the Code fails to provide any procedural protection for parties seeking to enforce the award against the PRC. For example, there are no provisions in the Code for hearings at which the party enforcing the award may raise an objection to an Article 260 motion. Therefore, if the person against whom the award is being sought raises a 260 motion, the party awarded damages through arbitration has no recourse if the court decides that the award should not be enforced. In addition, there is no provision which allows FETAC to intervene or assist the party to the recipient of a decreed award. In effect, FETAC has no means of enforcing its

193. Additionally, modern treaties, statutes and judicial developments have greatly contributed to facilitation of enforcement of arbitral awards through recognition of transnational arbitral awards. Farina, supra note 105, at 170 n.215 (citing Delaume, Court Intervention in Arbitral Proceedings, in RESOLVING TRANSNATIONAL DISPUTES (C. Carbonneau ed. 1986) at 222).

194. Id.


196. Id.

197. Neibu regulations are expressions of policy and politics that China does not wish to make public but that have the force of law. Anna Han, The China Trade, RECORDER, Dec. 18, 1991, at 8.

198. See id.
awards. Consequently, Article 260 leaves the enforcement of arbitration awards to the whim of Chinese judges.

Consider a recent joint venture case, in which a foreign corporation (plaintiff) entered into a ten year contractual joint venture contract to produce a product with a Chinese corporation (defendant) in which the total registered capital was the sum of $300,000,000 Hong Kong dollars. The plaintiff contracted to contribute an investment of $180,000,000 Hong Kong dollars with $150,000,000 to apply to the purchase of necessary equipment (60% of the total registered capital). The defendant's capital contribution totalled $140,000,000 Hong Kong dollars with $100,000,000 used for the purchase of necessary equipment and machinery. The defendant was to receive 70% of the products; it was agreed that losses and profits would be split equally. Both parties located a German corporation which agreed to sell its machinery to the joint venture. The defendant sent his agent to the German corporation to negotiate the sale terms. While in Germany, the defendant's agent sought the machinery for about $257,465 Hong Kong dollars, but had the German corporation request a credit transfer for almost $384,725 from the plaintiff, alleging it as the actual cost of the machinery. The plaintiff sent the requested amount to the German Corporation, leaving the defendant with approximately $127,260 Hong Kong dollars profit.

When the plaintiff discovered what the defendant had done, it applied to FETAC for arbitration proceedings. Each party chose their respective arbitrators and FETAC selected the presiding arbitrator according to the FETAC arbitration rules. However, on the date arbitration was scheduled to commence, the defendant failed to attend. After the arbitration tribunal reviewed the facts and evidence, judgment was rendered in favor of the plaintiff. The judgment award decreed that: 1) the defendant must pay its share of the capital contribution (40%) of the joint venture to the

199. Confidential Interview, supra note 151.
200. Id.
201. Id.
202. Id.
203. Id.
204. Confidential Interview, supra note 151.
205. Id.
206. Id.
207. Id.
208. Id.
209. Confidential Interview, supra note 151.
210. Id.
plaintiff within 30 days or the plaintiff could invoke the Guangzhou county laws; 2) the defendant must return the $127,260 Hong Kong dollars within 30 days, or an interest rate of 7% would be added; and 3) the defendant must compensate for all losses within 30 days or an interest rate of 7% would be added to the total sum due and unpaid.\(^\text{211}\)

In this case, although the judgment award went to the plaintiff, the arbitration rules do not necessarily guarantee enforcement. Under the first provision, if the defendant fails to pay the plaintiff, the defendant may invoke the courts in Guangzhou county.\(^\text{212}\) The question then becomes one of whether the Guangzhou county courts will enforce an arbitral award against their local "comrade." Consequently, it is likely that many local courts may honor the local party's request not to have the award enforced. The plaintiff's success or failure will depend on which judge is presiding, which party has the most influence in the local community, and, perhaps, luck. Without an arbitral procedure that can adequately enforce its own judgment awards, FETAC cannot be considered viable means on which parties can rely for dispute resolution.

V. PROPOSED MODIFICATIONS

Although China has developed and formalized its arbitration system, procedural and structural defects remain. The most obvious of these are the unfair rules, such as those that allow parties to introduce new evidence during arbitration without notice. Consequently, the primary goal of promoting friendly dispute resolution within the Chinese arbitration system may be severely undermined.

In order to make the system more fair, the Chinese legislative body should adopt a discovery mechanism which bars introduction of evidence into arbitration if such introduction will result in prejudice against a party. A modification of FECTAC rules to allow a party to subpoena witnesses is also necessary. Furthermore, if the Chinese want to encourage technology transfer investments through joint venture enterprises, as well as establish FECTAC as an internationally recognized and respected arbitral center, the entire Chinese system must cooperate in the enforcement of arbitral awards. This includes modifying the availability of the PRC Civil Procedure 260 motion. For example, an objection provision to a 260 motion

\(^\text{211. Id.}\)
\(^\text{212. See Arbitration, supra note 127, ¶ 10-505(38).}\)
should provide the party enforcing the arbitral award with the opportunity to state both the reasons against the granting of a 260 motion and the reasons supporting the enforcement of the arbitral award. In addition, FETAC should be able to intervene through written statements or oral presentations on behalf of the party enforcing the arbitral award. This intervention could be accomplished by a written statement of support by FETAC or via oral presentations on behalf of the party enforcing the arbitral award.

However, the prevalent problem of local courts favoring their local residents may still exist even if the Civil Procedure Code is amended to allow objections to a 260 motion. One remedy to alleviate or avoid local favoritism is to have a clause permitting a 260 motion objection to be transferred to a neutral court for review. In the alternative, a special court or entity to handle enforcement of arbitral awards could be established.

Regarding the provision which stipulates that issues are to be adjudicated according to public policy, the Chinese legislative drafters should establish some reliable guidelines. For instance, Chinese administrative bodies from the central government to local municipal levels need to eliminate neibu regulations so that all parties, including foreigners, will be aware of the operative laws and requirements.

VI. CONCLUSION

Although China has taken significant steps towards realizing its goals of (1) reaching a 1990 level of technological development common to Western industrialized nations by the year 2000, (2) diffusing technology into rural areas, (3) developing an infrastructure and natural resources, and (4) promoting high technology in critical areas, it is far from reaching these goals. While the enactment of the Technology Regulations, Implementing Regulations, and other legislation advances China's interest in achieving its goals, the remaining flaws in the Chinese system are a major obstacle to maximizing foreign investment. Consequently, the rules must be modified to alleviate investor concerns. For example, the rules and regulations applicable to foreigner investors should contain detailed language and minimal bureaucratic ambiguity. In addition, the approval process should be simple and straightforward so that investors can develop both reliance and confidence in the PRC system.

213. See generally JAMES A. TOWNSEND, POLITICS IN CHINA 82-87 (2d ed. 1980) (discussion of the political organization of the PRC, including administrative entities at the state, provincial, county, and municipal level).
Because current laws and regulations are not sufficient to meet these needs, foreign investors should negotiate favorable terms that incorporate protections of the investor for neutral dispute resolution.

Furthermore, if China hopes to meet its development goals through foreign investment that encourages technology imports, it must offer foreign investors a fair, reliable and predictable environment in which to do business and resolve disputes. Unfortunately, for the investors and Chinese businesses, the present Chinese arbitration rules fail to meet these goals. In spite of the fact that the Chinese system is patterned after international arbitration organizations, the effectiveness of FETAC is undermined by problems such as the lack of judgment award enforcement procedures and/or laws. Thus, it is highly likely that until FETAC demonstrates that it is a fair tribunal, capable of issuing reliable and enforceable judgments, foreign investors will continue to be wary of investing in the PRC.