Foreign-Related Commercial Disputes Resolution in China After WTO

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Abstract

This thesis will discuss the WTO’s DSU system and examines the influence of the WTO's transparency principle and ruled-based dispute settlement system on future dispute resolution within China. Due to the risk of commercial disputes, foreign business people are anxious that they be resolved swiftly and efficiently. There are two general options when it comes to dispute settlement: resolving them “within China” or “outside of China”. The three ways to resolve a commercial dispute “within China” are negotiation (or mediation), arbitration and litigation. The major reforms of the dispute resolution system brought about by the WTO accession are the application of WTO principles in “within China” resolution methods and the creation of an “outside of China” resolution method, the WTO dispute-resolution mechanism. The terms and conditions of WTO agreement reflect the demands of legal globalization. However, globalization of law is a common challenge. It should be channeled or managed cooperatively by all countries. What China hopes to achieve through the WTO accession is to develop a justice and flexible dispute resolution system in an increasingly interconnected world, and China can only do this with the co-operation and support of the global community, governments and companies.
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Introduction

While conducting business in China, foreign business people occasionally find themselves embroiled in disputes with Chinese parties. Due to the risk of commercial disputes, foreign business people are anxious that they be resolved swiftly and efficiently. In order to ensure that business transactions run smoothly, more and more successful businesses even decide on possible settlement methods for disputes with the government or business partners before such disputes arise.

There are two general options when it comes to dispute settlement: resolving them "within China" or "outside of China". The three ways to resolve a commercial dispute "within China" are negotiation (or mediation), arbitration and litigation. The best approach to dealing with disputes from within the country depends on each individual case. Although negotiation does not always lead to a resolution, negotiations should be employed before other dispute settlement mechanisms are pursued.

Arbitration is usually the preferred mode of dispute settlement. There are currently about 150 arbitration commissions in China. In 2000, they reported dealing with over 7,400 cases involving RMB 17 billion yuan (US$2 billion). One important factor in favor of arbitration is the enforceability of awards guaranteed by China being a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
(hereafter referred to as the New York Convention). However, unless the underlying contract includes a specific arbitration clause or unless parties agree on arbitration after the dispute has arisen (which is usually very difficult), Chinese law does not permit parties in a foreign-related dispute to resort to arbitration.

Another way to resolve a commercial dispute "within China" is through litigation in Chinese courts. According to Chinese law, foreign individuals and companies have the same right to bring action to court as Chinese citizens and companies. As the system of market economy is coming into being and the pace for realizing the rule of law speeds up in China, the courts are becoming more and more common for adjusting civil relations.

Over the past 10 years, Chinese courts have conducted hearings for 37 million civil cases, of which 25,100 were related to foreign parties and to parties from Hong Kong, Macao and Taiwan. The total number of cases relating to Hong Kong, Macao, Taiwan and foreign residents in 1999 was 3.15 times more than that in 1990.

Although litigation in Chinese courts may be an option for routine disputes such as debt collection, few would want to litigate major cases in Chinese courts which, although improving, are still known for their lack of efficiency and fairness. Because of the lack of confidence in the courts, foreign companies have long preferred to insert arbitration

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4 According to the Supreme People's Court internal regulation, until now civil cases in China have included economics, intellectual property and maritime cases, as well as cases involving marriage, family and other aspects of daily life.
clauses into their contracts with Chinese parties. Yet, it is usually not escaping PRC courts. In the case when the foreign party wins and the Chinese side refuses to comply with the ruling and pay the award, the foreign party still needs to go to the Chinese court to apply for enforcement.

The major reforms of the dispute resolution system brought about by the WTO (i.e. the World Trade Organization) accession are the application of WTO principles in “within China” resolution methods and the creation of an “outside of China” resolution method (i.e. the WTO dispute-resolution mechanism, DSU).

Current developments in foreign-related dispute resolution reflect the Chinese government’s attempt to encourage foreign investments by bringing China in line with the developed nations. One significant aspect of this policy is China’s participation in WTO negotiation and the accession that follows. It appears that China’s top leaders came to believe that China would benefit from greater participation in the globalization after the Asian financial crisis. Just as President Jiang Zemin pointed out that WTO accession is a strategic decision made by the Chinese leaders under economic globalization and is in line with China’s reform and opening-up policy and the goal of establishing a socialist market economic system. Chinese government begins to perceive a number of important advantages to embracing the globalization of economy. Billions of foreign investments are attracted by the cheap labour force and potential size of the Chinese market. Foreign funded enterprises have contributed to more than one-third of Chinese exports.

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However, the two decades negotiation indicates that it has been an unprecedented challenge to China and to the WTO to bring a developing giant in transition from planned economy to market economy into the multilateral trading system. As a concomitant of the globalization of trade and investment, WTO implies a long-term movement toward the globalization of law, a uniform or harmonized globe legal and regulatory framework. The terms and conditions of WTO agreement reflect the demands of legal globalization.

Globalization of law is a systemic phenomenon in that it entails a highly complex system or collection of systems in ongoing and rapid expansion. It is a phenomenon that shapes the future of human society and environment as well. By globalization of law, we often refer to a single set of legal rules, competent and accountable governance, and rules-based systems of justice in the whole world. But globalization of law is also a disruptive catalyst, exposing latent tensions in the outer pressures. It has clearly exacerbated a number of pre-existing tensions in the Chinese legal system, such as: large-scale corruption, lack of transparency, local protectionism. Barriers and distortions are interconnected. But the primary challenge is China’s rigid government bureaucracy. Successful adaptation to legal globalization requires a flexible and adaptive political system.

This thesis will discuss the WTO’s DSU system and the “within China” dispute settlement system in light of the WTO accession. This study of legal problems arising from legal globalization will focus only on the foreign-related commercial disputes in China. It will also illustrate the difficulties that China face in a changing world, brought
about by increasing globalization. The attempt to discuss WTO influence on “within China” resolution methods requires the analysis of basic principles of WTO agreements. Choosing which principle to discuss about is a challenging task, as Transparency, National Treatment Principle and Most Favored Nation principle all can be important to this discussion.

Transparency requires not only open publication or dissemination of regulations affecting trade and investment, but also a whole host of other supporting benchmark standards and information based on which the regulations are drafted, including not only tariffs and quotas but also subsidies, licensing requirements, and other measures. The National Treatment Principle requires China to treat foreign firms the same as domestic firms are treated in the Chinese market, especially in the trade and investment field. The Most Favored Nation principle dictates that China cannot impose one level of trade barriers, such as tariffs against one member country and another level for others. These are all the basic requirements of a global market.

Since this thesis does not aim to provide a comprehensive overview of the WTO influence; instead, it only provides an empirical analysis of the Transparency principle, which can be most directly applied in China’s dispute resolution system after the accession. Transparency and accountability are very big issues in the current trend of globalization of law. They will ensure that everybody has a fair chance to assess the prospects and risks. It is therefore very important to the current international trade and investment environment, i.e. a global market, in which non-tariff barriers have become
major concerns. Business across the border needs greater transparency and participation in the bureaucratic decision-making of different countries to ensure its global operation. It is clear that globalization of law after the World War II is an instrument for achieving greater transparency and accountability of bureaucracies across border. Unless you see the full picture of the globalization of business, it would be difficult to understand why transparency is so crucial to the continued development of globalization of law.

The focus of this thesis on the Transparency principle can also be explained by the influence of the author's supervisor, Professor Pitman B. Potter, who has been working in this area of study for many years. The discussion of the "within China" resolution methods is also based on the author's personal experience as a clerk in the Chinese Maritime Court. Chinese litigation is, therefore, the main focus of the discussion.

Equally important, China will participate in the WTO's dispute settlement mechanism, a big step toward the rule of law. WTO trade disputes between member countries are conducted in accordance with the DSU. The Dispute Settlement Body of the WTO (hereinafter referred to as DSB) administers the rules and procedures set forth in the DSU in order to bring a multilateral outlet for trade disputes.\(^6\) China's agreements being subject to WTO principles and the DSU are very important for the enforcement of the international trade rules and practices in the country. After China's accession into WTO, DSU is becoming an important choice for the resolution of commercial disputes outside China. However, the WTO mechanism, the "outside of China" dispute resolution method, only handles disputes between governments. A company can try to convince its

\(^6\) *Ibid.* at Article 2, paragraph 1; and Article 3, paragraph 2.
government to take China through a dispute settlement process in order to resolve trade disputes, whether or not it has first used the “within China” dispute resolution methods.

This thesis examines the influence of the WTO's transparency principle and ruled-based dispute settlement system on future dispute resolution within China. Although it may take some time for China to build up laws and enforcement procedures for the accession, in the long term, China's development of a dispute resolution system that incorporates WTO principles may make it easier to resolve disputes within China. Chapter I demonstrates the influence of the transparency principle on the legal system. Chapter II discusses the “outside of China” resolution method (i.e. DSB). Chapter III discusses the features of Chinese foreign-related litigation. This Chapter also explains how the WTO accession will affect foreign-related litigation in China. Chapter IV presents some new developments in China's commercial arbitration.
Chapter I. WTO Principle

WTO membership will bring China into the world trading system formally and completely. After China joins the WTO, its laws and legal system will have to be substantially revised. WTO agreements are not only concerned with trans-national trade in goods, but also deal with a wide range of issues such as trade in services, intellectual property, trade-related investment measures and dispute resolution.

China's WTO accession would require China to lower its trade barriers, afford "national treatment" to foreign firms, make its trade laws more transparent, and subject its trade regime to reviews by the WTO dispute resolution process. However, PRC laws and administrative regulations, as well as the PRC courts that interpret them, will be the controlling factors in future trade and investment disputes (i.e., foreign-related cases). Only if a WTO member elects to launch a dispute settlement proceeding in Geneva will the actual language of the WTO and its predecessor, the General Agreement on Tariffs and Trade (hereinafter refer to as GATT), become legally relevant.

Many analysts have raised concerns over the ability and willingness of China to implement its WTO commitments fully after obtaining membership.\(^7\) Despite remarkable achievements of China's trial-mode reforms, there is still much to be done in establishing a fairer, more open and procedurally enhanced adjudication system that meets WTO's requirements. This Chapter will begin by addressing a major aspect of the Chinese

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judicial system, transparency, which will be significantly impacted after China joins the WTO.

1.1 The Background

Transparency is one of the basic principles governing the post-war international trading system constructed under American leadership. In fact, the idea of transparency as the norm for the trading system was based on the American administrative law.\(^8\) It was formerly embodied in the GATT\(^9\) and now it is embodied in WTO documents.

Article X of the GATT duplicates the American approach almost completely. The word "transparency" does not directly appear in the article, but the article spells out the rules for "publication and administration" of trade regulations. At the time the article was drafted, transparency was not a significant issue because the main focus of the trade negotiations at the end of the war was to reduce the more obvious border barriers, such as tariffs and quotas.

After the establishment of the WTO, the barriers to access new areas of tradable services, intellectual property and investment were not controlled by borders, but involved domestic regulatory regimes and domestic institutional infrastructure, including formal

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\(^8\) Federal Administrative Procedure Act, 553. Parallel Sections of 1946 Act Rule making.

legal regimes and enforcement practices. Therefore, transparency in the administrative legal system became the focus of the new system. One key feature of WTO is the expanded concept of transparency. Transparency now required the publication of laws, regulations and a mode of administration in tradable services (or, to a more limited extent, investment regimes). The member countries of WTO have to submit a report to the WTO Secretariat every year, which should include all modifications to laws, policy documents or public announcements. The Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter refer to as TRIPS) agreement lays out the transparency issue in Article 63. The agreement establishes a separate council, the Council for TRIPS, to monitor compliance with WTO regulations. Countries must provide notification of all regulations and administrative arrangements to the council. Meanwhile, the "General Agreement on Service Trade" (hereinafter refer to as GATS) also provides that the member countries shall, at least once every year, inform the Council of their newly promulgated (or modified) service trade related laws, regulations or administrative rules that greatly affect concrete WTO commitments. Even if there were an objective criterion for determining the transparency of laws, the reasonableness, objectiveness and fairness of such an evaluation would be directly related to the history, culture and tradition of the WTO member in question. The greater degree of transparency requires more than a change of policy or law. It requires a change of culture for member countries.

1.2 China's Transparency Issue

The transparency of China's practices has been troubling foreign investors for many years. The accession to the WTO requires that China, which is characterized by a lack of transparency within the administrative legal system, undergo an extensive transformation. The Protocol of the Accession of the People's Republic of China to the WTO encompasses the requirements for transparency.\(^\text{12}\) The new rules include the extension of coverage, goods, services, TRIPS and foreign exchange control; the publication before implementation and the right of comment from interested parties; the enforcement only of those laws and regulations which are published; and the creation of a single inquiry point with a time limit for response. However, full implementation of these important changes will take a few years to accomplish. China still has many problems in this regard.

First, the Chinese legal system is built on a value system different from the one that exists in the West. In China, law is seen as an instrument to promote the prevailing policy of the Communist Party. Chinese laws are often written in vague and general terms, so as to be flexible enough to meet changing circumstances. The flexibility often generates uncertainties as to the application of the law. Therefore, in order for the central government to communicate the prevailing policy and to ensure that the local governments adhere to these policies, the central government often issues “normative documents” (neibu hongtou wenjian).\(^\text{13}\) The government of China is “used to issuing


internal documents about the change of economic and trade policy.\textsuperscript{14} These documents usually supply technical details necessary for the concrete application of the primary law that are missing from legislation and regulations. They are of particular importance to foreign investors, as they provide practical insight into how the law is applied.\textsuperscript{15} However, the documents are often unpublished and kept hidden from outsiders. Alternatively, they might be released, but only after extensive delays. Companies can find themselves expected to comply with regulations that they have never even seen. In some instances, foreign investors may not find out about changes in policy and regulations or in the content of the internal documents until they encounter difficulties.\textsuperscript{16}

Foreign firms and their lawyers are usually told that the problem in question is regulated by some "internal document" which, unfortunately, cannot be shown to them. This practice gives excessive power to agency bureaucrats, breeding corruption, making it virtually impossible for foreign businesses to know what actions they are permitted to take and generally making it difficult for foreigners to conduct business in China. The Chinese Ministry of Trade and Economic Cooperation (hereinafter refer to as MOFTEC) is purportedly trying to eliminate such problems.

Second, since Chinese commercial law is often regarded as an instrument for enforcing economic policy, the central government delegates local officials some authority to enact local law in accordance with local circumstances. Allowing local authorities the flexibility to adopt and enact laws and regulations fit to "local circumstances" causes the

\textsuperscript{15} Supra, note 13.
\textsuperscript{16} Supra, note 14.
laws to become even more uncertain and makes it difficult for foreigners to comprehend the law.\textsuperscript{17} "The legislative and administrative action at the local level, which technically is controlled by Beijing, still operates with very limited supervision and virtually no transparency."\textsuperscript{18} Even if the law is stated clearly, the implementation of the law in different areas of the country takes entirely different paths. This often confuses foreign investors who are already conducting business in China. The multi-layered complexity of the Chinese law also makes the transparency requirement very difficult to implement. In addition to the laws promulgated by the National People's Congress, there exists in China a numerous and complicated array of rules and regulations put forth by the State Council, various ministries and commissions, as well as various local laws and regulations.

Even worse is China's track record for publishing administrative and judicial decisions, which are often essential to understanding what laws and regulations mean. On occasions when government and quasi-government actions or decisions are made available to the public, they are frequently left unexplained and are, therefore, of limited use. In October 1993, the MOFTEC established its own gazette for the publication of laws, regulations and administrative rules related to foreign trade and investments. However, the gazette does not include state and local laws. Therefore, there is no "single inquiry point" that can provide comprehensive coverage of all the legislation and regulations in China at present. Such access, however, is required by the WTO. Although in view of China's size and complexity it does not seem wise rigidly to require that all trade related laws and regulations be made available at a single inquiry point, the PRC will be expected to make

\textsuperscript{17} Supra, note 13.  
\textsuperscript{18} Supra, note 10.
them available in a number of convenient ways, including publication in journals and on internet sites.

The "right of comment" is also not a common rule in China. While consultation with the general public and sometimes even with foreign interested parties takes place during some important legislative drafting, there are no mandatory requirements for consultation when it comes to administrative legislature. According to the new WTO-enforced system, no norm will be enforceable prior to official publication, except for in certain emergency situations.

To conclude, the internal policy documents, the local multi-layered law regime, the lack of a "single inquiry point" and the lack of right of comment are all characteristics of the current Chinese law regime that may impede China's entry into the WTO.

China is in the process of taking some steps towards meeting the transparency requirement. The Chinese government is working towards the establishment of an official journal from which other WTO members, individuals and enterprises can obtain current information regarding existing and proposed PRC laws, regulations and other measures pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property (TRIPS) or the control of foreign exchange.\(^\text{19}\) The Protocol on the Accession of the People's Republic of China mandates the creation of such a journal.\(^\text{20}\) In the case of proposed laws, regulations and so forth, a reasonable comment period must be provided

\(^{19}\) Sean Leonard, "WTO-What's the Hold-up?" (2001) 15, No. 3, China Law& Practice, 53.  
\(^{20}\) Supra, note 12.
to interested parties after publication thereof. Such a journal will be published by MOFTEC. In addition, policies and regulations must be published in designated journals, giving details of the organs responsible for their implementation as well as all relevant procedures.

Efforts are also being made towards establishing a new office, agency or an inquiry point within the central government, perhaps under MOFTEC, from which governments and businesses may request information about existing and proposed PRC laws, regulations and other administrative rulings affecting trade, in goods, services, trade-related aspects of intellectual property (TRIPS) or the control of foreign exchange. Replies to such enquiries by individuals or enterprises must be provided within 30 to 45 days and they “shall represent the authoritative view of the Chinese Government.” Foreign parties’ complaints concerning differing provincial and local implementation standards could also be referred to this office. For example, a company that believes that a certain act or ruling of a local government might violate China’s WTO commitments could write to this office and inquire as to China’s official position on the matter. Such inquiries may rectify the problem before it becomes a WTO dispute. The effectiveness of such an office in attaining remedies for parties embroiled in a dispute, however, will depend on its staff, its budget and the power granted to it by the central government.

In addition to regular submission of reports on policy changes regarding foreign investment to the WTO, a mechanism for the timely dissemination of these policies by

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21 Supra, note 12.
designated media sources need also be established. MOFTEC has already established specialized departments to promote WTO domestic awareness, WTO information inquiries and WTO enforcement assistance. The Supposed Shanghai WTO Consultation Centre will be another place where foreign companies can go to inquire about matters that appear to violate China’s WTO commitments.

Transparency does not only call for all laws or regulations to be publicly known; how they are applied must be made known as well. With the increasing visibility of the law in China, there will not only be increased transparency, but also increased accessibility to laws, law enforcers and legal decisions.\textsuperscript{23} The People’s Supreme Court now requires that local courts, which have been previously publishing only selected judicial decisions, to make available to the public all relevant judicial awards in order to meet the requirement of the WTO. This is an expensive but a desirable task.\textsuperscript{24} WTO provisions do not require any contracting parties to disclose confidential information that could potentially impede law enforcement, be otherwise contrary to the public interest or prejudice the legitimate commercial interests of particular enterprises, public or private.\textsuperscript{25}

WTO regulations are not broad enough to cover every kind of non-transparency encountered in China. China’s non-regulated ruling system will also make it very difficult for foreigners to challenge WTO-inconsistent actions effectively once they have been discovered. The violation of transparency is difficult to monitor, since, by definition,

\textsuperscript{24} Supra, note 14.
\textsuperscript{25} Supra, note 9 at Art. X.
governments do not broadcast non-transparent directives or “administrative guidance.” It would be very difficult for foreign business interests to demonstrate that the Chinese government (rather than private entities which, as of yet, remain beyond the reach of the WTO dispute-resolution mechanism) is responsible for WTO violations. Because of non-transparency and resulting inability to provide accurate economic information, China may find it difficult to defend itself before a WTO dispute-resolution panel.

26 In the Japan-Film case, for example, the panel decided that unpublished decisions of the Government of Japan, which Japan had refused to provide to the United States despite repeated requests, could not be found to be inconsistent with Article X, because the United States had not been able to show the panel the content of the decisions. Sander M. Levin, D-Michigan, “REMARKS ON CHINA’S WTO ACCESSION, Statement on China and the World Trade Organization, A Conference Hosted by the Institute for International Economics 29 June 1999 online: Institute for International Economics <http://www.iie.com/papers/levin0699.htm>.
28 Supra, note 26.
Chapter II. International Dispute Resolution Method: the WTO Dispute Settlement Mechanism

One of the major benefits of integrating China into the WTO is that China will be subject to the WTO's formal dispute settlement procedures in the event of complaints brought against it by other WTO members. The jurisdiction of the DSB is compulsory and even China's inclination to resort to unilateral trade remedies will be restrained by it. China will begin implementing the WTO agreements under the scrutiny of WTO members. Whenever a member feels that China's trade measures are violating WTO agreements, it can bring its case to the DSB. China will actively participate in the panels proceedings, either as an accuser or a respondent. The participation of China in the DSB will be a powerful force that encourages it to adopt international practices, thus further integrating China into the international community.

Foreign company working in the various areas covered by WTO regulations should be completely knowledgeable of China's commitments in the relevant areas and should do anything to protect its interests under these agreements. The WTO dispute settlement procedures are state-to-state dispute resolution mechanisms and only states can use it. A company cannot take China to a panel before WTO by itself. But it can lobby and persuade its own government to do so instead. Under the WTO principle, a breach of the WTO commitments or other prejudice to the company is in fact a 'nullification and impairment of benefits' to the affected corporation's country. Actually, it will depend on the affected company to first bring the breach to the attention of its government. On the
other hand, in each of the next eight years, there will be a review of China’s implementation of its commitments and a report prepared to the General Council. A final review will be held in the 10th year after accession. Foreign governments may submit statements to WTO on any obligation that such government feels is not being met by China. Foreign companies may seek to enforce obligations by petitioning their own government to raise the issue as part of the annual review mechanism.

Therefore, foreign companies need to educate themselves about the basic procedure and principles of WTO dispute resolution mechanisms to corporate with their own government in respect of WTO issues to ensure that agreements in which they have an interest are properly implemented.

The DSU was negotiated during the GATT Uruguay Round trade negotiation launched in 1986. Rather than resorting to the bilateral settlement mechanism, disputes thereafter could be brought before a respected and established panel. According to the DSU, the WTO also established a DSB that is in charge of administering the rules and procedures of the DSU. It has authority to create panels, adopt panel and appellate body reports, monitor compliance with decisions and recommendations and authorize unilateral retaliation, such as suspension of concessions or other commissions under the agreement.

The main objective of DSU is to provide security and predictability to the multilateral trading system. Essential to the enforcement of WTO agreements, the DSU is the most important international trade dispute settlement mechanism. Since 1995, WTO members

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29 Supra, note 12.

30 Supra, note 5 at Article 3.
have brought 243 international disputes on trade and trade related matters to the DSB for resolution.

The DSU is WTO's revised version of the GATT's old dispute settlement system. It is a tried and tested system. It has been in development over the last fifty years, since the early 1950s. The GATT's formal dispute settlement system can be found in Articles XXII and XXIII. Article XXII establishes the right to consult with another member parties on matters related to GATT. Article XXIII provides that a consultation is a prerequisite to invoking the dispute resolution procedure.

2.1 Features

DSU substantially strengthened the GATT dispute settlement system. Articles XXII and XXIII are still central to the system. The DSU sets out some detailed rules and procedures and contains new features, thus bringing about a more rule-based system. It makes the DSU different from other forms of international dispute settlement. Some of its features are set out as follows:

The object of the system The aim of any dispute settlement mechanisms is to secure a just solution to disputes. The DSU prefers mutually acceptable solutions consistent with the WTO Agreement. In the absence of such a solution, the aim of the DSU is to obtain the withdrawal of measures in question if they are found to be inconsistent with the provisions of the WTO Agreements covered by the DSU. If the immediate withdrawal of
the measure is not possible, compensation may be granted pending the withdrawal of the measure in question. The last resort available within the DSU is the possibility of suspending the application of obligations in that Agreement, subject to authorization by the DSB.\textsuperscript{31}

\textit{Jurisdiction} The DSU is an integrated dispute settlement mechanism that applies to all the different WTO agreements. At the same time, some additional rules and procedures are provided in a number of agreements. The DSB has jurisdiction over any dispute concerning the WTO issues among WTO members. The members of the WTO must follow the rules and procedures laid down in the DSU and other agreements. They may not resort to alternative modes of dispute settlement and take unilateral action without the permission of the DSB.

Only Members of the WTO may bring a case before the DSB. A WTO member cannot prevent another WTO member from bringing a dispute to the WTO for resolution, whereas in the International Court of Justice a case can only be heard when both parties recognize the jurisdiction of court. As a member of the WTO, a country must accept the compulsory jurisdiction of the DSB. Once the formal DSU processes are initiated, WTO jurisdiction is compulsory for the defendant. The DSU processes can be suspended or withdrawn by the claimant at any stage up before the formal adoption of a legal ruling by the WTO.

\textsuperscript{31} \textit{Ibid.} at Article 3 (7).
Causes of Action The DSU provides for some causes of action upon which a party may base a complaint. Other than the violation of the regulation, which is the most common cause of actions, a party can raise a claim when it considers that any benefit occurring to it directly or indirectly under the relevant covered agreement is being nullified or impaired. Alternatively, they may raise a claim if the attainment of any objective of the Agreement is being impeded as the result of an application by a Member of any measure that does not directly conflict with the provisions of that Agreement.

Rules-based system The DSU is a rules-based system, not a power-based system. It establishes the dispute resolution system based on the rights and obligations of the members according to the law and not based on the relative economic and political strength of the parties in a dispute.

The actual adjudicative body of disputes is an independent court-like body. Its first level is ad hoc panels and, at the appeal level, the standing appellate body. The DSB only plays a limited role at this stage. The rulings and recommendations of the appellate body only become binding when they are adopted by the DSB. Once adopted by the DSB, the rulings are legally binding upon the parties in the dispute.

While developed countries such as USA, EC, Japan and Canada are still the most frequent users of the system, there has been a greater involvement of small and developing countries in WTO disputes. The developing countries are taking WTO rights and obligations seriously and are enjoying the benefits of the DSU.
Strict Procedures and Time Limits The DSU contains a strict set of procedures with specific time limits for every step, including consultations, establishment of panels, terms of reference, panel deliberations and the issuance and adoption of reports. For instance, panel proceedings should be finished in the time period between six months and nine months after the time they are initiated. The appellate review should be finished between 60 days to 90 days after its initiation. There are a total of nine to twelve months allowed for a full legal ruling to take place.

2.2 The Proceedings

2.2.1 General Provisions

Like any other dispute resolution system, the DSU recognizes the importance of achieving a satisfactory settlement of a dispute. The WTO encourages members to settle their disputes through consultation. At the same time, consultations are also a necessary procedural step in initiating a formal WTO legal process.\textsuperscript{32} Between 1995 and the middle of 2001, 32 out of 203 DSU cases were settled in this way.

If the parties come to an agreement and resolve the problem during consultation, they must notify the DSB of their agreement, so that any other WTO member may check whether or not the agreement is consistent with WTO rules and regulations. If there is no settlement achieved during the 60 days of consultations, the complaining party can

\textsuperscript{32} Ibid. at Article 4.
request the establishment of a panel. If all the parties involved agree that the consultations have failed, the complaining party may request to establish a panel before the 60 days allowed for consultations are over.

The procedures of good offices, conciliation and mediation\textsuperscript{33} consist of involving a third party in settling disputes. However, since the panel procedure is usually preferred by the parties, the procedures of good offices, conciliation and mediation have never been used in practice.

There are many special regulations providing favorable treatment to developing countries over the developed countries. For instance, if a dispute relates to a measure taken by a developing country, the time limit of 60 days allowed for consultations may be extended by the Chairman of the DSB.\textsuperscript{34} Under Article 4.10, members should give special attention to the interests of developing country members during consultations.

2.2.2 Panels Procedures

If consultations fail and the dispute is formally submitted to the DSB, a ruling will be made by a panel of experts. The DSU sets out specific rules and time limits for deciding on the establishment of panels, terms of reference and panel composition.\textsuperscript{35}

\textsuperscript{33} \textit{Ibid.} at Article 5.
\textsuperscript{34} \textit{Ibid.} at Article 12 (10).
\textsuperscript{35} \textit{Ibid.} at Article 6, 7, 8.
A request for the establishment of a panel goes directly to the DSB. At the latest, a panel must be established at the DSB meeting following the one when the request for it first appears on the DSB agenda. This is unless all the members present refuse to establish such a panel.36

The terms of reference are generally standard, unless the parties agree otherwise within 20 days from the establishment of the panel.37 Panels must address the relevant provisions in any covered agreement or agreements cited by the parties in the dispute.38

A panel shall be composed of three persons, unless the parties in the dispute agree to a panel composed of five persons. Panelists should be selected carefully, to ensure the appropriate background and experience of the panel.39 Unless the parties in the dispute agree otherwise, citizens of the countries involved in the dispute must not serve on the panel concerned with the dispute.40

Panels are usually composed of Geneva-based trade diplomats or former Geneva-based trade diplomats, including persons who have served on or have presented a case to a panel, served as a representative of a member country, or as a representative to a Council or Committee of any covered agreement. They can also be academics in the Secretariat

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36 Ibid. at Article 6.1.  
37 Ibid. at Article 7.1.  
38 Ibid. at Article 7.2.  
39 Ibid. at Article 8.2.  
40 Ibid. at Article 8.3.
who taught or published on international trade law. Alternatively, they can be senior trade policy bureaucrats of a member country.\textsuperscript{41}

Panelists serve in their individual capacities and not as government representatives or representatives of any organization.\textsuperscript{42} Member countries must permit their officials to serve as panelists,\textsuperscript{43} but may not give them instructions nor seek to influence panelists as individuals with regard to matters before a panel.

The WTO Secretariat will propose potential panelists to the parties in the dispute. The parties should not object to these proposals except for “compelling” reasons.\textsuperscript{44} However, in practice, ‘compelling’ reasons have been getting very broad and less compelling in nature.\textsuperscript{45}

If no compromise on the panelists is reached within 20 days after the date of the establishment of a panel, the Director-General can, at the request of either party, determine the composition of the panel by appointing the panelists.\textsuperscript{46}

Articles 12, 13, 14, 15 and Appendix 3 of the Understanding sets out the function, procedures and rights to the information of the Panel.

\textsuperscript{41} Ibid. at Article 8.1.
\textsuperscript{42} Ibid. at Article 8.9.
\textsuperscript{43} Ibid. at Article 8.8.
\textsuperscript{44} Ibid. at Article 8.6.
\textsuperscript{46} Supra, note 5 at Article 8.7.
The panel must follow the Working Procedures set out in Appendix 3, unless the panel decides otherwise after consulting with the parties involved in the dispute.\textsuperscript{47}

After consulting the parties in the dispute, the panelists determine the timetable for the panel process within one week from the composition of and the provision of the terms of reference for the panel.\textsuperscript{48}

As a general rule, the period in which the panel conducts its examination must not exceed six months, from the date that the composition and terms of reference are agreed upon until the final report is issued to the parties in the dispute. In urgent situations, the panel may issue its report within three months.\textsuperscript{49} If the panel considers that it cannot issue the final report within the general time limit, it can inform the DSB of the delay and the period may be extended to nine months.\textsuperscript{50}

Panels should set deadlines for written submissions by the parties. The panel must provide sufficient time for the parties to prepare their submissions and the parties should respect those deadlines.\textsuperscript{51}

Following the consideration of rebuttal submissions and oral arguments, which is generally two meetings with the parties and one meeting with third parties, the panel

\textsuperscript{47} \textit{Ibid.} at Article 12.1.  
\textsuperscript{48} \textit{Ibid.} at Article 12.3.  
\textsuperscript{49} \textit{Ibid.} at Article 12.8.  
\textsuperscript{50} \textit{Ibid.} at Article 12.9.  
\textsuperscript{51} \textit{Ibid.} at Article 12.5.
issues the descriptive (factual and argument) sections of its drafted final report to the parties. Within a period of time set by the panel, the parties must submit their comments on the sections.\textsuperscript{52} After the set period, an interim panel report including both the descriptive sections and the panel's findings and conclusions is issued to the parties, so as to allow them to request the panel to review specific aspects of its report prior to the circulation of the final report among the members. If no comments are received from any party within a period of time set by the panel, the interim report is be considered the final panel report. The interim review stage is included in the six to nine months time limit set out in Articles 12.8 and 12.9.

If the parties in the dispute cannot develop a mutually satisfactory settlement, the panel must submit a final written report to the DSB.\textsuperscript{53} The report shall include the findings of fact, which include the description of the facts and the discussion of the arguments of the parties made at the interim review stage,\textsuperscript{54} the applicability of relevant provisions and the basic rationale behind any findings and recommendations that the panel has made. If a settlement of the matter among the parties to the dispute has been reached, the report will be a brief description of the case and the solution.\textsuperscript{55}

Panel deliberations are confidential. Opinions of individual panelists are anonymous in the report.\textsuperscript{56}

\textsuperscript{52} \textit{Ibid.} at Article 15.
\textsuperscript{53} \textit{Ibid.} at Article 12.7.
\textsuperscript{54} \textit{Ibid.} at Article 15.3.
\textsuperscript{55} \textit{Ibid.} at Article 12.7.
\textsuperscript{56} \textit{Ibid.} at Article 14.
The panel report is a confidential report at first, but it is eventually circulated among all WTO members. Within sixty days after the date of the circulation of the panel report, it will either be adopted at a DSB meeting by an inverted consensus or be appealed. Parties can only appeal issues of law covered in the panel report and legal interpretations developed by the panel.\textsuperscript{57} If a party notifies the WTO of its decision to appeal, the report may not be considered for adoption by the DSB before the completion of the appeal.\textsuperscript{58}

2.2.3 Appellate Review

The significant development that has brought certainty and predictability to the WTO dispute resolution is the establishment of the Appellate Body as a standing forum.\textsuperscript{59}

The Appellate Body is composed of seven persons who serve four-year terms.\textsuperscript{60} The members of the Appellate Body are recognized authorities with a demonstrated expertise in law, international trade and the subject matter of the covered agreements.\textsuperscript{61} Appeals are heard by a division of the Appellate Body. Three out of seven members of the Appellate Body may be involved in any one case.\textsuperscript{62}

Only parties in a dispute, not third parties, may appeal to the Appellate Body. Appeals are limited to issues of law covered by the panel report. Third parties with a substantial

\textsuperscript{57} \textit{Ibid.} at Article 17.6.
\textsuperscript{58} \textit{Ibid.} at Article 16.3.
\textsuperscript{59} Leora Blumberg, "WTO Dispute Settlement: Implications for China and Opportunities for Hong Kong online: <http://www.hk-lawyer.com/2001-12/Dec01-cover.htm>.
\textsuperscript{60} \textit{Supra}, note 5 at Article 17.2.
\textsuperscript{61} \textit{Ibid.} at Article 17.3.
\textsuperscript{62} \textit{Ibid.} at Article 17.1.
interest in the case may make written submissions to and be heard by the Appellate Body if they notify the DSB of a substantial interest in the matter pursuant to Paragraph 2 of Article 10.\textsuperscript{63}

Generally, the duration of appellate proceedings, from the notice of appeal by a member to the date the Appellate Body circulates its report, should not exceed 60 days. If the Appellate Body considers it impossible to provide its report within 60 days, it shall inform the DSB of the delay and extend the appellate proceedings to 90 days.\textsuperscript{64}

The proceedings of the Appellate Body must be confidential. Opinions expressed in the Appellate Body report by individual members are anonymous.\textsuperscript{65}

The Appellate Body must address any of the issues raised legally.\textsuperscript{66} The Appellate Body can uphold, modify or reverse any of the legal findings and conclusions of the panel.\textsuperscript{67}

The Appellate Body report must be adopted by the DSB and be unconditionally accepted by the parties, unless there is a consensus against its adoption within 30 days following the circulation to the members.\textsuperscript{68} Alternatively, the DSB must adopt the Appellate Body report within 12 months from the date of the establishment of the panel. Where

\textsuperscript{63} Ibid. at Article 17.4.
\textsuperscript{64} Ibid. at Article 17.5.
\textsuperscript{65} Ibid. at Article 17.10, 17.11.
\textsuperscript{66} Ibid. at Article 17.12.
\textsuperscript{67} Ibid. at Article 17.13.
\textsuperscript{68} Ibid. at Article 17.14.
appropriate, an additional period for the preparation of reports must be added to the
12 month time limit, under Articles 12.9 and 17.5.\textsuperscript{69}

There are also some articles providing more favorable treatment for developing country
members at this stage. For instance, when a dispute is between a developing country and
a developed country, the panel includes at least one panelist from a developing country
member, if requested by the party.\textsuperscript{70} In the consultations involves a measure taken by a
developing country, the parties may agree to extend the regular time periods allowed for
the procedure. While examining a complaint against a developing country, the panel shall
accord enough time for the developing country to prepare and present its
argumentation.\textsuperscript{71} It is also provided that Appellate Body membership is broadly
representative of the WTO members.\textsuperscript{72}

2.2.4 Implementation

The DSB must monitor the implementation of recommendations or rulings made by the
panel or appeal body by including the matter on its agenda until the dispute is resolved.\textsuperscript{73}

If implementation cannot take place within a “reasonable period of time,” the parties can
negotiate mutually acceptable compensation and suspension. For example, the
responding party may offer tariff reductions to the complaining party. However,

\textsuperscript{69} Ibid. at Article 20.
\textsuperscript{70} Ibid. at Article 8.10.
\textsuperscript{71} Ibid. at Article 12.10.
\textsuperscript{72} Ibid. at Article 17.3.
\textsuperscript{73} Ibid. at Article 21.6.
according to the most favored nation principle, the tariff reductions will be applicable to all other WTO members.

It is specifically provided that these measures are temporary. Neither compensation nor suspension of concessions is considered preferable to the full implementation of a recommendation bringing a measure into conformity with the covered agreements.\textsuperscript{74}

If satisfactory compensation arrangements are not agreed upon within 20 days, the complaining party may request authorization from the DSB to retaliate against the responding party. This can be done through the suspension of concessions or other obligations for an amount equivalent to the level of nullification or impairment such as, for instance, the imposition of prohibitive tariffs on a selected list of goods or services from the responding party.\textsuperscript{75} The complaining party's request for authorization to retaliate can only be rejected by inverted consensus. The WTO has never had to apply such sanctions.

The DSU also provides for an arbitration procedure by the original panel or by a designated arbitrator if there is a disagreement over the proposed level of suspension.\textsuperscript{76}

This part also contains some articles stating that members should give special consideration to the problems and interests of developing countries and less developed countries involved in a dispute. For instance, particular attention should be paid to

\textsuperscript{74} Ibid. at Article 22.1.
\textsuperscript{75} Ibid. at Article 22.3.
\textsuperscript{76} Ibid. at Article 22.6.
matters affecting the interests of the developing country. If the matter is raised by a developing country, the DSB must consider what appropriate further action it might take under the circumstances. The DSB shall take into account the trade coverage of measures complained about and their impact on the economy of the developing country.

Article 24.1 states that members shall exercise due restraint in raising matters under these procedure involving a less developed country and in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

Under Article 27.2 of the DSU, the Secretariat will assist members with respect of dispute settlement at their request. The Secretariat shall also make available a qualified legal expert from the WTO Technical Cooperation Services to any developing country member that requests it. This expert shall assist the developing country member in a manner ensuring the continued impartiality of the Secretariat.

2.3 Concerns and Outlook

While the dispute settlement mechanism has been working well, members agree that the system is not perfect. Currently, the whole process is under review. The 1994, Marrakesh Ministerial Decision called for the DSU review to be completed by the end of 1998.

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77 Ibid. at Article 21.2.
78 Ibid. at Article 21.7.
79 Ibid. at Article 21.8.
80 Ibid. at Article 24.1.
81 Ibid. at Article 27.2.
However, it soon became clear that the review would not be finished by the end of the year and the General Council extended the period to 1999. A draft amendment was presented to the 1999 Seattle Ministerial Conference, but it was not formally accepted. By November 2001, the members participating in the Doha meeting agreed to negotiations on improvements and clarifications to the DSU and aimed to agree on improvements and clarifications no later than May 2003. Generally, there is no need for dramatic changes, but amendments to a number of areas have been proposed.

The increased number and complexity of disputes within the WTO may well be a sign of the system’s success and the growing trust in the DSB. However, the WTO's limited resources have been getting more and more strained. The caseload is putting pressure on the Secretariat to find persons with adequate expertise to serve as panelists, and there was a suggestion to introduce a system of more permanent panelists to improve panel skills and to guarantee panel neutrality.

Time frame requirements of each stage of the dispute resolution process are provided by the DSU. However, due to the complexity of some cases, the number of appeals, the occasional non-compliance with rulings and the shortcomings of judicial procedures, time frames are often exceeded. Although time frames can be more flexible in complex disputes, the increase in real time frames requires additional resources. Finding efficiencies in panel procedures can speed up the process whenever this is feasible and

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83 Ibid.
justified. For instance, the consultation period can be shortened to 30 days from 60 days. The establishment of panels would have to be decided upon during the first subsequent DSB meeting, without considerations of objection of the defendant member in most cases.

Trade disputes can involve issues of importance to society and subjects of great public interest. Transparency is needed to secure public support of and to foster more trust in the WTO system. Although the system has been improved over the last few years, the degree to which the proceedings are open to the public is still unsatisfactory to many members and organizations. Some measures have been suggested to open panel proceedings, accept opinion statements from outsiders (hereinafter referred to as “amicus briefs”), and the timing of release of panel and appellate body reports and information regarding the implementation process.

Granting non-governmental organizations the right to give testimony to dispute resolution panels or the appellate body is an issue of much concern. Some members are opposed to open panel proceedings. Since the WTO is an inter-governmental organization, non-governmental organizations should theoretically only be allowed to attend DSB meetings under exceptional circumstances in individual disputes that require it. Parties presenting non-governmental organizations should be able to be used to provide their submissions to

84 Ibid.
85 Supra, note 5 at Article 17.3.
86 Ibid. at Article 6.1.
87 Supra, note 82.
the panel. Currently, there is no organized process for this. It is up to the panel to pursue unsolicited briefs.\textsuperscript{88}

Criticism has also been coming from environmental and labor rights activists concerning health and labor standards issues. Panelists often have little knowledge of members’ obligations to protect workers and of the environment or human rights. Non-governmental health organizations have been calling for trade decisions to take into account public health, environment and human rights.

Although there are some concerns regarding the DSU and proposals have already been made concerning ways to reform the system, it is fair to say that the DSU has provided an effective means of resolution many international trade disputes.\textsuperscript{89}

2.4 China Issues

Whether the DSU would be able to handle disputes that will arise after China’s accession is still a big concern for China’s trade partners. There are some challenges to the system that should be expected following China’s accession. China’s accession will increase the number of cases brought before the WTO, because China is a major player notorious for its non-transparent administrative system. Thus, the question of limited capacity and resources of the DSB may be exacerbated by the accession of China. WTO agreements also require member to ensure the observance of WTO commissions by its regional or

\textsuperscript{88} Supra, note 45.
\textsuperscript{89} Supra, note 59.
local governments. Therefore, even though it is a sub-national or regional government rather than the national government that is responsible for the breach, the injured member should be able to initiate a DSB procedure against other national governments.

Considering the situation of law enforcement and judgments in Chinese provinces, there may arise a lot of disputes regarding local compliance in China. China is a developing country in the UN context and may demand the benefits that the DSU accords to developing countries. WTO is mandated to provide technical legal assistance if a developing country so demands, but the situation in China is different from the situation in the other developing countries. China was actively involved in the negotiations and the establishment of the WTO and has a number of experts involved in it. Therefore, considering the limited resources of the DSB, the issue of whether China should be treated as a developing country in the DSB context should still be addressed.\(^{90}\)

In cases where a complainant exposes China’s violation of WTO rules, the DSU can make decisions that require China to change its behavior and comply with WTO rulings. However, the problem would be the detection of any violations. The integration of rights of the Party, the government and the military in China allows the Chinese government to operate in a non-regulated way that has very limited transparency. Under the DSU, the complaining member bears the burden of showing that a WTO rule has been violated by the law or measure of a WTO member. The lack of transparency inside the Chinese government means that members would be virtually unable to detect actions inconsistent with WTO rulings in China, making it impossible to illustrate the nature and the extent of violations to the WTO. For example, it will be extremely difficult for the US to

\(^{90}\) Supra, note 45.
demonstrate that the lack of market access opportunities in China is the fault of the Chinese government. The DSU, therefore, does not provide effective tools that enable members to detect whether a country like China is living up to its WTO commitments. The DSU is also unlikely to provide a remedy for such behavior even if it undermines the WTO principles.\footnote{Supra, note 26.}

It should be pointed out that the DSU can only play a role in areas covered by WTO agreements. China’s political and economic systems are not accounted for by the WTO agreements. When practice effects are in dispute between a member country and China, the DSU may be frustrated in dealing with them. To resolve these problems, Professor Pitman B. Potter suggests that “(1) There needs to be greater attention in the WTO accession to look at the institutions of China that might succeed in establishing the right line between government actors and commercial decision makers; (2) There is a burden on the WTO to give careful attention during this review of DSU, to the development of more standardized procedures of evidentiary requirements and to equip the panel with more resources.”

In conclusion, the 1995 DSU is one of the cornerstones of WTO. It gives all members the confidence that WTO agreements will be respected. After seven years, the system is still working well and has helped to ensure the opening of markets worldwide. By providing a compulsory multilateral mechanism for settling disputes, the DSU protects developing countries against unilateral action of the developed countries. However, there is still room for improvement here. Discussions for amendments of the DSU based on experience
gained from individual cases are in progress. They aim at making the system more
effective, predictable and transparent.\textsuperscript{92}

\textsuperscript{92} Supra, note 45.
Chapter III. Litigation

The number of disputes between Chinese and foreign investors has never been higher. Among the three ways are discussed in this thesis, litigation as the final method of settling disputes has thus become increasingly more important. China needs a modern trial system for handling civil cases relating to economic affairs, intellectual property and maritime disputes in order to conform to international civil and commercial practices.

Litigation is not the only procedure available for settling disputes. Yet, it is a kind of social mechanism that reflects a state’s sense of law and justice, as well as its mode of life.\(^3\) Thus, Chinese culture on judicial system and the ideology held as for the power and moral of judge should be given enough attention. China’s forthcoming WTO accession is creating some challenges for Chinese courts. For one thing, following the accession there will be a rise in disputes relating to trade, investment and protection of foreign-related intellectual property. On the other hand, Chinese courts to which WTO members would normally look for an impartial review of all relevant administrative actions, are not up to international standards.\(^4\) The purpose of this Chapter is to give a general overview of the troubles faced by the judicial system and the system’s possible future development after the WTO accession. The first section will address some aspects of the four key issues that affect Chinese judges in making impartial decisions as well as some strategies that might be considered in dealing with Chinese courts. The second section will discuss how the laws might change and ways in which they might be applied

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following the accession. This section will begin by talking judicial review, and then, enforcement issues and uniformly implements laws issues will be discussed.

3.1 The Judges and Their Work

3.1.1 The Problems---Injustice and Ineffectiveness

Just as a sound financial system is indispensable for healthy economic development, a functioning judicial system is extremely important for economic growth. Since the end of the Mao era, China has made a remarkable effort to reconstruct its judicial system. However, "the people are still not satisfied with some aspects of court work, and the majority of their complaints are centered on injustice and low efficiency in handling civil disputes."95 Xiao Yang, the president of the Supreme People's Court (hereinafter refer to as SPC), is quoted saying, "fairness and efficiency will take center stage in the work of people's courts in the new century."96

Litigation in Chinese courts represents a challenge for domestic as well as foreign litigants. The ineffectiveness and lack of impartiality still exist within China's judicial system.

First, the inefficiency of Chinese courts is against the litigant's interests, since substantial losses can be suffered if a case drags out for a long time. To enhance trial efficiency and

95 Supra, note 3.
to handle cases within the time frame set by the law are big problems faced by the People's Court. It is very important for judges to improve their efficiency, as they will be expected to deal with a rapidly increasing number of economic disputes between Chinese and overseas litigants following China's entry into the WTO.

Second, Chinese judge usually cannot decide on matters impartially, on the basis of the facts of the case and in accordance with the law. In 1998, the Supreme People's Court even launched a nationwide campaign for judicial fairness. However, the trial judge is still very susceptible to the internal and external pressures. Corruption, which is rampant and has led to widespread abuse of power, has been widely noted as a serious problem in rendering fair judgments in Chinese courts. About 1,517 court employees violated various laws and were disciplined in the first 11 months of last year. Some of the so-called "major and important" corruption instances committed by judges and court officials have included intentional errors in judgment and forging court papers.

The court is the last resort for resolving conflicts and seeking justice. An impartial and fair judiciary system is one of the most important safeguards for healthy economic development. In China, problems with the laws themselves are minor as compared to the drawbacks in the way courts function in implementing law. All these drawbacks could be attributed mainly to outside pressure from local officials, the internal organization of the court, the personal qualities of the judges, and the litigation procedures.

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3.1.2 The Reasons Four Issues Judges Face

3.1.2.1 Local Political Pressure

First, judges often succumb to outside pressure from local governments and Party leadership. According to the Constitution, the People's Court exercises independent judicatory power in accordance with the law, and is not subject to interference by government organs, social groups, or individuals. However, the Party retains the overall right of control over the courts. The law and the courts are still expected to be secondary to party policy. The incestuous Party-State relationship seriously influences the daily operations of the courts. The judge selection system and the financial arrangements of the People's Courts in China have greatly undermined the capability of the courts to counter political interferences. Judges and their courts have close connections with local governments and are usually responsive to local influences more than allowed by the legal norms.

The president, vice presidents and judges of the courts are appointed and removed by the local people's congresses, which have long been supervised and controlled by the Party and the various government organizations. The term of office of judges is not secure

98 In Article 126, the PRC constitution of 1982 provides for the judiciary's independence and freedom from the interference of other state organs, as do Articles 3 and 49 of the Administrative Litigation Law.


100 The Organic Law of the People's Court Articles 35 and 36.
and is subject to influences by political bodies.\textsuperscript{101} Most local judges are former or future local government officials and maintain close ties with local officials. For instance, the president of the local court is, in fact, subordinate to the vice secretary of the local Party Committee, the leader of the local Party Political-Legal Committee, who is in charge of the politics and law affairs (\textit{zhengfa gongzuo}). Over 90\% of the country's 180,000 or so judges are Party members. The courts are undoubtedly under the control of the local Party Political-Legal Committee. This situation has inevitably compromised judicial independence and impeded the execution of justice.

Furthermore, local judges are paid by local governments rather than by the central government in Beijing. The financial resources of the local People's Courts are also provided by their respective local governments. In order to sustain or procure more resources, the courts may need to take into consideration the effects of their judgements on the local administration. This is why it is very difficult to win cases brought against local government officials in China, and even if an injured party is successful, it often cannot obtain an award for damages that reflect their actual losses. In China, the courts have traditionally exercised considerable discretion regarding the compensation of damages that they award.\textsuperscript{102} For instance, when a foreign party is the successful plaintiff and the local party is the defendant, the court usually award damages based on the ability of the local party to pay, rather than the on the full extent of the foreign party's losses.\textsuperscript{103}

“Reserve water for the fish” (\textit{fang shui yang yu}) is a popular principle used in the

\textsuperscript{103} \textit{Ibid.}
awarding of damages and the enforcement of the award usually does not seriously weaken the local party's ability to continue their business.

The current low status of the courts will make it very difficult to extricate them from the web of Party influence. This situation may be improved by transferring the powers to appoint, promote, compensate and dismiss judges to the Supreme People's Court, thus prying judges away from their financial dependence on local governments. This would grant them the security of tenure subject to conditions that are common to Western countries' judiciary systems. The judicial independence from political control is the primary goal of judicial reforms in China. However, given the magnitude of the task, it could take a long time to achieve.

3.1.2.2 Internal Pressure

The second prospect that may affect a judge's decision is the internal organization of the courts. In China, judges are subject to internal interferences in adjudication. The main reason for this is that in China it is the court, not the judge, that is vested with the independent power of adjudication. This is different from many other countries' judicial systems where judges are independent.

105 The Constitution and the law of court organization allow the People's Courts to exercise state judicial power independently, free from interference from any organization or individual. The word "court" is of pivotal importance and, according to the authoritative explanation, means that the individual judges do not have the judicial power. It is instead with the courts, where the judges perform their duties.
The four levels of Chinese courts have similar internal organization. Each level has criminal, civil, economic, administrative, and enforcement divisions. Within every court level there is one president, several vice presidents, and a judicial committee. Within every division there is one director, several vice directors, judges, assistant judges and clerks.\(^\text{106}\)

Their interrelationship is, in many aspects, that of a hierarchical bureaucracy.\(^\text{107}\) For instance, the president is in charge of substantive and administrative affairs of each court level and controls the finances, the personnel and the appointments, salaries and promotions of judges. The courts are so functionally undifferentiated from the rest of the Party state that they should be characterized as bureaucratic rather than as judicatory organs.\(^\text{108}\)

The case can be heard either by a collegiate panel or a single judge. A collegial panel, usually composed of three judges, is not a permanent body, but is put together for each individual case. Simple and small civil claims can be tried by a single judge. The judgments are made in the name of the courts, not the individual judges or the collegial panels, since the independent power of adjudication is vested in the courts and not in the judges. Based on this principle, however, the president and the divisional directors have a legitimate right to review and change draft judgments prepared by the judge. Judges must resort to the court president and the divisional directors for approval of important verdicts

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\(^{106}\) *Supra*, note 100 at Articles 19, 24, 27 and 31.  
\(^{107}\) Susan Finder, “Inside the people’s Court: China’s Litigation System and the Resolution of Commercial Disputes in Dispute Resolution in the PRC, (Hong Kong: Asian Law & Practice Ltd, 1995) 63 at 67.  
\(^{108}\) *Supra*, note 99.
before they can be announced. Undoubtedly, the president can become involved in any case which he is interested. Thus, the collegial panel does not have the final say in making judgments.

If a case is considered particularly difficult or important, the final decision is made by the judicial committee, the directions of which judges and collegial panels must follow. A judicial committee is usually present in each court. It exercises collective leadership in judicial work and is usually composed of a president, vice-presidents, division directors, and experienced judges. The members of the committee are nominated by the president of the court and are appointed or removed by the standing committee of the People's Congress at the corresponding level. The judicial committee is also responsible for reviewing and summing up judicial experiences, although some members of the committee such as division directors may have no judicial experience at all. In the case of differing opinions within the committee, the majority's opinions shall be adopted. On practice, it is the president who, in the name of the majority, makes the final decision.

The judicial committee decides the case behind closed doors and its discussion and decision are not made available to either the court or the public. Even the judge who is in charge of the case cannot hear the committee's discussion of the cases. The judicial committee members who make the final decision do not hear the testimonies of witnesses and the verification of evidence before the court. They make their decision based on the reports of the judge in charge, their own experience or, if they lack relevant experience, the experience of other committee members. Obviously, this denies the litigants the right

\[109\] Supra, note 100 at Articles 11.
for a fair and open trial; it also denies the judge independent power of adjudication. The judge’s decision may at any time be over-ridden by the adjudication committee within the local people’s court, ignoring the principle of transparency and democracy. The purpose of this mechanism is to safeguard the impartial exercise of judicial powers, but on practice it may also be used to interfere with the proper adjudication.

This internal organization of the courts makes it obvious that any important litigation matters are decided by leading court officials, either individually or through a judicial committee, even though these court officials may have no legal training and limited acquaintance with the case.

Aiming to deal with some of the above problems, China planned to introduce a chief justice system. So far, 50% of local courts have adopted the system, enabling a group of high-quality judges to be nominated as chief justices. The system will increase the responsibility of the chief judge in collegiate panels and single judges in adjudication. According to the plan, except for very important and difficult cases that will be submitted to the judicial committee for judgement, the collegiate panels and single judges will decide on all cases independently. Presidents and the divisional directors cannot alter their judgments following a decision. This is a step forward for China. However, it is still the president and the judicial committee that have the power to decide whether a case is

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important or difficult, making it their responsibility. The independent power of adjudication of judges thus remains limited.\textsuperscript{111}

3.1.2.3 The Qualifications of Judges

The third aspects that may influence the way Chinese judges approach a case is the judge’s personal qualities, such as his professional training, his social status and his social relations.

Prior to China's economic reform there was little need for trained legal professionals. In addition, most of the few professional Chinese legal experts were eliminated during the Cultural Revolution. When the court system was reconstituted in the beginning of the 1980s, there was a serious shortage of judges. To solve this problem, many local party officials and military men were assigned the positions of judges. Most of them did not have any previous legal training. Even in 1995, only about 5\% of the judges were university graduates. The newly passed Judge Law stipulates that all newly elected judges must pass a standard examination. This may be helpful to improve the quality of newly recruited judges. Yet, the small number of professional judges currently employed by the courts cannot be increased in this way. The best way to deal with this problem is to improve the quality of legal employees through the reform of the judge selection system as well as regular training of the judges currently employed by the system.

Currently, the four court levels in China employ over 200,000 people. It was a big task to recruit and train all this personnel. Although law schools have been in operation for two

\textsuperscript{111} Supra, note 101.
decades now and tens of thousands of bright young people graduate from Chinese law schools every year, the majority of judges have to be recruited from the pool of former soldiers and party officials who are the mainstays of the old judiciary and who have minimal or no legal training. The president of the People’s Supreme Court has admitted that the current personnel recruitment system has made it possible for unqualified persons to become judges and has prevented incompetent persons from being replaced by new graduates.\textsuperscript{112}

On the other hand, the status of judges has traditionally been linked to bureaucratic ranking. Judges are paid according to the same salary scale as local government officials.\textsuperscript{113} Many local People’s Courts are currently in a difficult financial situation. The judges’ salaries are relatively low, especially when compared to the salaries of lawyers or company executives. Also, judges do not have a guaranteed tenure. When drafting the Judge’s Law, the Supreme People’s Court suggested that judges be paid high salaries as a way of reducing corruption. However, the National People’s Congress disagreed with this provision on the ground that judges have the same status as procurators and police officers. Therefore, they should not be treated differently.

Thirdly, litigation activities have become progressively more dependent on the judge’s personal network of social relations instead of legal rules. Judges generally work in their hometowns, where they have long-standing ties with relatives, classmates, workmates or friends who maybe local lawyers, business people, or government officials. Many former

\textsuperscript{112} Supra, note 96.
\textsuperscript{113} Supra, note 107.
judges and clerks who retire or resign also join the team. They engage in litigation and commercial activities only because they have good relations with current judges. Judges are also particularly sensitive to the backgrounds of disputing parties and the social, political, and economic implications of their decisions.\textsuperscript{114} Therefore, to maintain good relations with local powerful individuals or companies, judges may favor the local party.

Undoubtedly, the professional quality of Chinese judicial staff is not very high. Being treated likes any other officials rather than having a distinctive professional and ethical aura around them has increased the incentive for corruption among judges. In fact, the corruption of judges is a widespread phenomenon. Some judges regard themselves as members of a privileged class and do not have a respectable work ethic. Chinese law often gives judges a lot of discretion in the exercise of their power, creating ambiguity in the legal regime and law implementation. Furthermore, due to the absence of any consistent system of case reporting, there are few available precedents for handling similar legal problems. Therefore, some judges do not strictly observe the law and have abused their power for personal gain. As a result, the quality of trials is greatly affected.

The People's Supreme Court plans to reform the judge selection system over the next five years. For example, higher court judges could be selected from among the lower court judges, high-performance lawyers, or other high-level legal professionals; judges newly recruited based on the recruitment examination could only work for basic and intermediate level courts; finally, the unqualified judges could be dismissed before the retirement age. All these measures can help increase the quality of judges. However,

\textsuperscript{114} Ibid.
sufficient financial resources must also be provided to the courts to raise the salary and social status of judges to attract and retain the best staff.\textsuperscript{115}

3.1.2.4 The Litigation Procedure

The last aspect of the legal process is civil litigation. Civil litigation in the Chinese courts is conducted in a different way from many other countries' jurisdictions. Although procedural practices are improving in all spheres, many important principles of fair trial procedures have not yet been put into practice in China.

One of the problems is that judges often meet with litigants privately out of court. This is considered normal practice. Neither is there any violation of law or principle in judges' meeting with one party in the court, without the opposing party being present. Although prohibited by the civil procedural law, it is a frequent practice for lawyers to meet with the judges involved in their case over the dinner table or in places of entertainment.\textsuperscript{116}

Second, Chinese judges have many other duties apart from hearing adjudication, such as property conservation, attachment of goods, investigation of evidence, mediation and civil litigation procedures enforcement. Depending on the circumstances, these actions maybe expensive. Since the financial situation of the courts is usually very difficult, litigants are frequently asked by the judges to provide supplementary funding and vehicles, and to come along with the judges to arrange their accommodations. It also

\textsuperscript{115} Supra, note 101.
\textsuperscript{116} Supra, note 107.
provides the judges with the opportunity to contract with one party privately. Such financial support and personal contract with the parties involved may influence the eventual judicial decision. Additionally, because judges are often personally involved in the litigation of one party’s position, they may form their opinion on the case before trial.

Another problem is the unusual pressure of appeals on Chinese judges. Judgements made in the first trial can be appealed in a higher court. The higher court may set aside the first judgement and remand the case for a retrial, or amend the judgement, which is regarded as equivalent to having committed an error during the first trial within the Chinese judicial system. The vice president of the SPC once even said that supervisory bodies of the courts should look closely at cases that have been remanded for retrial or amended in order to trace malpractices by judges. To avoid judgements being set aside or amended, judges in lower courts often seek ‘instructions’ from higher courts regarding important cases. However, the higher courts are often under heavy political pressure. Also, high court judgements might be affected by personal interests of the high court judges. Higher court judges may make themselves involved in a trial by seeking to mediate disputes instead of imposing judgements. Successful mediation of a case means that there is no possibility of appeal and, accordingly, no possibility of the decision being reversed following an appeal. Almost 80% of settlements in civil litigation in China is mediated settlements. The litigants, therefore, are usually forced to accept the judge’s mediation plan.

118 Supra, note 107.
3.1.3 Some Strategies

Many of the difficulties discussed above are tied to structural problems in the Chinese judiciary system and do not submit to easy solutions. Good planning, however, can help business people avoid some problems. This thesis recommends that foreign companies consider the following:

Legal service Choosing a lawyer must be done diligently and carefully. Settling on a lawyer must follow a careful examination of his or her experience and personal relationships. Companies must not attempt to enter into litigation without sound legal advice. More details about this can be found in the next section of this thesis.

Government relations Every company, foreign or not, needs strong government contacts in the localities where they operate their business. Today, it is virtually impossible to exclude completely the possibility of external interference by government officials in litigation. Officials have a variety of channels through which to influence the judge’s decision. In general, parties should try to bring their case to the highest court possible. The higher the court, the less susceptible to interference from the government it is. If the foreign party has a good relation with the local government, however, the interference by the local authorities might prove beneficial.

Court relations Generally speaking, in a Chinese court, there are many people who can decide upon or influence the outcome of a case. The Chinese society places a lot of value

\[119\] Ibid.
in the maintenance of proper relations, both among institutions and individuals. Any number of powerful local citizens might have a special relationship with one of the parties involved in a dispute. Therefore, in order to predict and influence the outcome of a case, a company needs to find out which judge is speaking for its opponent and why.

_Litigation procedure_ Companies must pay careful attention to litigation procedures and know exactly what the differences between litigation in different courts are. It will make an important positive impression on the judges if a company can facilitate the court’s task by being familiar with the requirements and procedures.

3.1.4 Legal Representation

When a foreign firm experiences difficulties in directly negotiating a solution to a dispute with its Chinese partner, companies can seek assistance from lawyers. Lawyers can represent foreign clients in negotiations or litigation. Simple negotiation with a business partner through lawyers is generally the best method of dispute resolution. It can preserve the working relationship of the parties involved.

If a foreign citizen or firms needs a lawyer to act as its agent in court, they must appoint a Chinese lawyer for the task. Any Power of Attorney agreement made outside China must be notarized by a local notary and authenticated by the Chinese embassy or consulate accredited to the country. The selection of Chinese counsel is very important. It is

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120 _Ibid._
important to have counsel who understand the facts of the case, know the law and have
good contacts with the judges most directly involved with the case.\textsuperscript{121}

In recent years, China's legal service institutions have been gradually amplified and the
number of legal practitioners has been growing. In addition, there is a large number of
government legal specialists and in-house counsel working for large companies.
Statistical findings of the Chinese Ministry of Justice last year showed that there were
about 110,000 Mainland lawyers, of whom about 80,000 were practicing. However,
there were only about 5,000 or 6,000 Mainland lawyers who were capable of handling
international legal practice, most of them working in large coastal cities such as Beijing
or Shanghai. It is not easy to find lawyers in middle and small-sized cities who are able
to provide legal services on foreign-related business. China's legal profession, though it
has gained unprecedented development momentum during the last two decades, is still
plagued by issues such as corruption, violation of lawyer's rights and under-the-table
dealing.\textsuperscript{122} Currently, "rule of law" has been commonly recognized as an issue in China,
and a lot of importance is being attached to it. Lawyers have the responsibility to promote
and maintain the rule of law in China. The role of lawyers should be strengthened to
defend the rights of the accused parties. They could check the judicial process, thus
restricting the judges who wish to decide on case arbitrarily. The lawyers' actions would
be grounded in legal knowledge: judges would be restricted by lawyers in the aspects of
the procedure, power, knowledge and legal interpretation.

\textsuperscript{121} Ibid.
\textsuperscript{122} China Daily, "Lawyers may face WTO Challenges," online: China Daily
The Tentative Provisions of Foreign Law Offices Establishing Offices in China was jointly issued by the Ministry of Justice and the State Administration for Industry and Commerce in 1992. From then on, the Ministry of Justice issued some licences permitting foreign law firms to open branch offices in China. The number of foreign law firms, including firms from Hong Kong, has been growing considerably since then. Before April 12, 2001 there were 128 foreign law offices in major Chinese cities. The rapid development of China's export-oriented economy has given strong impetus to the opening of China's legal service sector. On the other hand, the introduction of foreign law firms has played an important role in China's efforts to standardize the market and conform to international practices, although they are mainly devoted to out-of-court cases. This is important for the reform and regulation of the country's legal system and the improvement of quality of the entire legal profession in China.

The foreign firms welcomed by the Ministry of Justice vary from international heavyweights to small local firms. The Chinese government hopes to make the legal services market more diversified and more international in the near future. The approval of a business application depends mainly on the following factors: the attitude of the country where the applicant is friendly towards China; the country has corresponding favorable policies concerning the admission of legal services for China, which ensures that China's law firms are also able to establish offices in that country; the applicant business has been established in its homeland for a certain length of time (for example, over 10 years); the applicant's business is China-oriented, which ensures its ability to develop the business after entering China; finally, the applicant's offices in China are
able to promote friendly exchange and cooperation between Chinese and foreign law firms. In addition, reputation, influence and professional capacities of each applicant are taken into consideration.\footnote{Beijing Review, “Legal Service Sector to Open Wider online: China Internet Information Centre \textlangle http://210.77.134.148/pls/wcm/Show_Text?info\_id=6990&p\_qry=court\rangle (date accessed: 25 January 2001).}

Every foreign law firm with a licence can set up only one branch office in China. Usually, Beijing, Shanghai and Guangzhou are the primary destinations. Many foreign companies have set up operations in these cities. It is not surprising to find that foreign law firms choose these cities for their good client base.

Foreign legal firms primarily offer legal consultation to clients in fields such as investment, finance, trade and securities in China. The Tentative Provisions does not permit them to issue legal opinions, advise on Chinese law or handle litigation in Chinese courts. They are not permitted to interpret Chinese law, appoint Chinese lawyers or represent their clients in court. They can only act as legal consultants and provide foreign legal opinions to local or foreign clients. Legal services relating to litigation, public listing, loans, real estate and intellectual property rights must be provided by local lawyers.

WTO membership will generate great demand for high quality legal services in China. Foreign law firms will surely watch for opportunities to capture a large share of the foreign-related businesses. According to agreements with the U.S.A. and the European Union, China will open up its service sector, including legal services. Like many WTO
members, the PRC declined to allow foreigners to hold majority control in local legal practitioner firms. However, China did promise to allow foreign law firms to offer advice on Chinese law and to ease the restrictions on their recruitment of attorneys. China has also promised to lift all geographical and quantitative restrictions on foreign law firms one year after its entry into the WTO. Since foreign law firms are already allowed to set up offices in 15 major cities, the lifting of geographical limitations will have only a small impact on the industry. However, the removal of quantitative restrictions will be a big help to foreign business expansion in China. Although a large number of foreign law firms are expected to gain access to the Chinese market after its WTO entry, they would not be allowed to represent their clients in Chinese courts. Many foreign law firms that are already in the country are co-operating with local lawyers when they need to represent their clients in court.

3.2 Chinese Litigation After WTO

3.2.1 Judicial Review

3.2.1.1 Background

Today, Chinese courts have the responsibility to oversee and review decisions and disputes arising from different non-judicial forums, including decisions made by government agencies in accordance with the law.
The new judicial review requirements\textsuperscript{124} of the WTO would thus present a challenge to the Chinese judicial review system. Article 10 of GATT requires this of the judicial review with regard to the trade issues:

"3 (b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, \textit{inter alia}, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers;"

Thus, not only does the WTO require transparency of and accessibility to law, it also calls for an independent power of judiciary review, as these are the core components of the Rule of Law.\textsuperscript{125} The essence of the problem is not the forum of the tribunal, which can be judicial, arbitral or administrative, but the independent nature of the tribunal that should be maintained by member countries. This is because the administrative law in Western countries seeks to constrain the expanding administrative power and to control the bureaucrats.

According to China’s Protocol of Accession, all governmental administrative actions having adverse effects may be brought before Chinese courts for judicial review by the

\textsuperscript{124} Which can be found in TRIPS, GATS and GATT etc.

injured party.\textsuperscript{126} For example, the disputes with the Foreign Trade Administration could be appealed directly to the courts, which do not to have an interest in the outcome of the matter.

WTO entry will boost China's prospects for establishing a genuine judicial review system. However, for the foreseeable future, China will have great difficulty providing independent judicial review of administrative actions. The Chinese Government has not paid sufficient attention to democracy and the rule of law in the past. Although Chinese leaders talk about the rule of law, they seem to mean “rule by law” (or using rules as instruments for maintaining social discipline, rather than limiting the power of the state).\textsuperscript{127} In the past, the affairs of administration mainly depended on the policies issued by the Party, rather than on laws. Deciding whether or not the administration had complied with a law was the capacity of the next level of administration itself or the organization of the party issuing the policy. The decision was not in the hands of the courts.

Yet, it also would be a mistake to believe that China's prospects for developing independent judicial review of administrative actions are entirely bleak.\textsuperscript{128} Chinese administrative law began to emerge in the 1980's, as the Party realized the importance of the rule of law to the establishment of a market-driven economy. In China, the courts have no inherent jurisdiction to review the legality of the behavior of executives. The

\textsuperscript{126} Supra, note 12.
legal source of judicial review in China was based on the 1982 Constitution and the 1989 Administrative Litigation Law (hereinafter referred to as the ALL). Since October 1, 1990 when the ALL came into effect, it has become the formal legal source for judicial review in China. The ALL provides for the rights of persons affected by decisions of administrative agencies to appeal to the courts; private legal action against administrative agencies; rights of appeal both to administrative authorities and to the courts; and external, non-judicial review of certain administrative acts. The ALL established general principles and procedures for the exercise of judicial review over administrative action. These above efforts suggest that better days may be on the way for China, especially if these laws are revised to expand their scope, remove existing obstacles to their use and strengthen their remedies. The effectiveness of administrative review and litigation is diminished to some extent by some specific features of the Administrative Litigation Law and the Administrative Review Regulations. Judicial review is limited by the delegation to the agencies of final decision-making authority over some matters such as certain trademark, patent, public security or real estate ownership disputes.

3.2.1.2 Limits On the Chinese Judicial Review

3.2.1.2.1 Limits On the Scope Of Review

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129 Section 41 of the Constitution Law of the People's Republic of China.
130 Supra, note 128.
According to the provision of the ALL, the courts can examine only the legality and not the propriety of concrete administrative acts.\textsuperscript{131} Generally, the courts do not review the reasonableness of concrete administrative acts. Only when the administrative penalty is obviously unfair, can the courts examine its reasonableness and amend the administrative penalty.\textsuperscript{132} The administrative organs have been granted certain discretion in their daily operations. Any complaints against the appropriateness of the exercise of these discretionary powers are not handled by judicial review.\textsuperscript{133} This limitation substantially undermines the courts’ review power over administrative actions.\textsuperscript{134} The ALL’s focus on judicial review of the legality rather than the propriety of administrative decisions suggests that the law’s major purpose is to promote compliance of administrative agencies with substantive law, rather than to establish procedural safeguards for persons subject to administrative decision making. China need to revise this provision to meet the GATS requirement stating, “Each Member shall maintain or institute judicial, arbitral or administrative tribunals or procedures which provide for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services.”\textsuperscript{135}

3.2.1.2.2 Limits On the Range of Cases Subject to Review

\textsuperscript{131} Article 5 of ALL.
\textsuperscript{132} Ibid. at Article 54(4).
\textsuperscript{133} Lin, Feng, Administrative law procedures and remedies in China, (Hong Kong: Sweet & Maxwell, 1996).
\textsuperscript{135} GENERAL AGREEMENT ON TRADE IN SERVICES, Article VI 2. (a).
The ALL gave the courts the power to review the lawfulness of administrative acts such as the imposition of fines, denial of business licenses and restriction of property rights. However, Section 12 of the ALL provides that there are four kinds of administrative acts that are not subject to judicial review.\(^\text{136}\) They are the acts of the State, rulemaking acts, the validity of administrative personnel’s decisions, and the concrete administrative acts that are final as provided by the law.\(^\text{137}\)

The ALL fails to empower the courts with regards to reviewing rule making, setting standards and other administrative norm-making activity. All of these constitute important powers under typical administrative law.\(^\text{138}\) In other words, most procedural activity is beyond the scope of the review of the courts.\(^\text{139}\) Courts are not allowed to review any legislation or administrative regulation even if it conflicts with the Constitution or the WTO requirements. This limit reflects the political limits to judicial review of administrative conduct in China. The administrative organ can easily circumscribe the courts’ review. An administrative decision can only be overturned by the courts if it violates the organ’s own rules. The recently passed PRC Legislative Law clearly denies the judiciary the power of review of conflicts between law and regulations. Instead, this power is given to the Standing Committee of the People’s Congress and the State Council. In order to avoid unnecessary actions against China at the WTO level and in order to prevent politicizing trade disputes among member countries, judicial review

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\(^\text{136}\) Supra, note 131 at Article 12.

\(^\text{137}\) Supra, note 133.

\(^\text{138}\) Supra, note 10.

\(^\text{139}\) Supra, note 134.
should be adopted in China and should extend not only to “specific administrative actions,” but also to legislation and regulations.

The finality of concrete administrative acts is another issue that needs to be revised according to the WTO rules. TRIPS requires that parties in any intellectual property-related proceeding have the opportunity for final administrative decision’s review by a judicial authority.\textsuperscript{140} However, in China some kinds of intellectual property-related proceeding are not subject to judicial review.\textsuperscript{141} For example, under the Trademark Law of the Peoples Republic of China 1990 (hereinafter refer to as CTL), all decisions on trademark matters made by the Trademark Review & Adjudication Board (hereinafter refer to as TRAB) are final. This is contrary to Article 62 of TRIPS, which requires all administrative decisions regarding acquisition or maintenance of an intellectual property rights to be open to review by judicial or quasi-judicial authorities.

The Chinese government is amending its laws to meet this requirement. The concrete administrative acts that are final can only be provided by law. Any administrative regulations or local regulations provide that certain kinds of concrete administrative acts are final will still treated as void and the aggrieved party can ignore their existence and bring a case to the people’s courts for judicial review.\textsuperscript{142} The amendment focuses on the CTL and the Patent Law. Under the amendment, any applicant who is dissatisfied with the decision of the TRAB may initiate proceedings in the People’s Court.

\textsuperscript{140} TRIPS, Article 41.
\textsuperscript{141} The PRC Patent Law, Article 43 and The PRC Trademark Law Article 21, 22, 29 and 35.
\textsuperscript{142} Supra, note 133.
3.2.1.2.3 Limits On Power to Revise Administrative Decisions

According to Section 54 of the ALL, a court cannot tailor a direct remedy to a party in a dispute, but rather must ratify the administrative agency’s decision or send the matter back to the agency to utilize a new concrete administrative act. The strictures against revising administrative decisions impose significant limits on flexible adjudication by the courts.\(^{143}\) Thus, in the case of abuse of the enforcement procedures,\(^{144}\) the courts do not have the authority to grant the victim a remedy directly. In contrast, the TRIPS provides that the judicial authorities shall have the power to order the party at whose request measures were taken and which abused enforcement procedures to provide to the wronged party with adequate compensation for the injury.

TRIPS also provides that judicial authorities shall have the power to order the applicant to pay for the defendant’s expenses, which may include appropriate attorney fees. In practice, the Chinese courts are usually reluctant to grant the attorney’s fees to the victim in civil cases. This is because Chinese judges think that the legal system does not strictly require the applicant to have a lawyer represent him in court. The attorney fee is not, therefore, an unavoidable cost.

Overall, China needs to increase its efforts to re-shape its laws and regulations, so that they conform to standards set by the WTO. Most importantly, however, there is currently no clear separation of power in China -- only a separation of functions. Therefore, there

\(^{143}\) Supra, note 134 at Page 284.
\(^{144}\) Supra, note 131 at Article 54 (2).
cannot exist an independent judiciary in China. If the courts do not have the power to interfere in the exercise of administrative powers of the state, it follows that it is not possible for China to fulfill the judicial review requirement in the Protocol of Accession.

Other than merely rectifying a number of shortcomings in the law, the effectiveness of the judicial review must also be addressed by China. Currently, it is limited in its scope by institutional obstacles such as the weakness of the courts and practical considerations such as fear of reprisals.

When considering administrative review or litigation, parties must consider the big picture. They must weigh immediate gains from the reversal of a particular adverse decision against the long-term costs associated with alienating those who control their fate. Given the long reach of administrative officials and their wide discretionary authority over a variety of specific commercial issues, investors may find that they have won the battle only to lose the war. Not surprisingly, the number of administrative cases is miniscule when compared to the total number of specific acts. Moreover, most cases are minor and involve lower level administrative entities.

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145 *Supra*, note 10.
147 Although administrative officials make millions of decisions every year, in 1997 there were just 90,000 administrative litigation suits. There have been even fewer review petitions. Indeed, there were only 220,000 administrative review cases from 1991 until 1997 nation-wide. In Harbin in 1991, for instance, administrative agencies issued 88,329 fines and penalties, but only 211 (0.24%) were challenged through administrative review and only 81 (0.1%) through litigation. Yi Wen Law Firm, “Reining-in the Bureaucracy: Administrative Review and Litigation.”
Investors should always keep administration litigation and review in mind when conducting business in China. In the right circumstances, these are useful tools for combating abuses of authority and arbitrary decision-making by administrative officials.\textsuperscript{148}

3.2.2 Uniform Enforcement

Another legal challenge confronting China's WTO accession is the enforcement of the law. The WTO has the potential to provide foreign firms with great opportunities for investment and trade with China. However, the firms must recognize that before they can realize these benefits, the Chinese government must uphold its WTO commitments at both the central and local levels. The Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 reiterates the obligation of Article XXIV: 12, stating that each member "shall take such reasonable measures as may be available to it to ensure" observance of the provisions of WTO agreements by regional and local governments and authorities within its territories. The failure to define "such reasonable measures" suggests that commitment to WTO obligations will be less strong in de-centralized countries than in highly centralized countries. The relative weakness of the central government with respect to local entities is likely to reduce the effectiveness and meaningfulness of WTO undertakings.

\textsuperscript{148} Ibid.
China has agreed to apply WTO rules throughout its territory.\textsuperscript{149} With regard to local protectionism versus national legislation, China has made a commitment to the uniformity of its laws. Any local law that is inconsistent with federal law must, therefore, be changed. China's legal system has been developing rapidly in recent years, but its ability and willingness to enforce its WTO obligations has nonetheless been widely questioned.

China's numerous WTO-inconsistent laws at provincial and local levels will not be addressed directly by the accession package. Real changes at provincial and local levels need time and can be implemented by local officials and judges after they have received training, education and some relevant experience. They will be directly in line of line in terms of the fallout of WTO accession as it starts to affects the weakest state-owned enterprises in China. They will need a great deal of convincing that the long-term benefits outweigh the short-term pain.

Although foreign companies have ample reasons to expect China's strong efforts to live up to those commitments, it is probably fair to say that in recent years the enforcement of central policy at the local level has not always been consistent or uniform. China is "a very big country and it doesn't behave as one entity, so it'll be more difficult for them to enforce the regulations nationwide."\textsuperscript{150} Corruption and local protectionism are rampant in

\begin{footnotesize}
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\item \textsuperscript{149} The Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 reiterates the obligation of Article XXIV:12 that each member "shall take such reasonable measures as may be available to it to ensure" observance of the provisions of WTO agreements by regional and local governments and authorities within its territories.
\item \textsuperscript{150} Said by Madeleine Sturrock, Deputy Chief Executive of the Great Britain-China Business Council, which represents UK investors. But she also said, "We're confident that China will use its best endeavours to enforce the rules." Mary Hennock, BBC News Online, "China concedes in WTO talks," online: BBC
\end{itemize}
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China, and gaining the cooperation of local officials and government bureaucrats who oversee various affected industries could prove difficult in the short run. China's development of a legal environment of dispute adjudication must continue in all areas of the country. China will have to find an effective means of policing and enforcing the changes at the local level and overcoming deeply ingrained local protectionist tendencies. If unchecked, these protectionist tendencies could greatly erode the benefits of the WTO Accord to foreign investors.

China has also agreed to administer its trade-related policies uniformly throughout the country. However, it remains to be seen how China will be able to sweep away the many different applications of policy (such as, for example, in special economic zones, autonomous regions, border trade regions, open coastal cities, economic and technical development zones). It may not be practical or even wise to attempt to enforce uniform administration of rules in different parts of a country with such diverse regional conditions.

Creating a legal system that uniformly implements laws on a nationwide basis is a daunting task. Market reform has been accompanied by decentralization and, ironically, the increased power of regional and local bureaucrats to thwart administrative and legal mandates from Beijing. Prime Minister Zhu Rongji has often lamented that "resistance to the principles, policies and measures of the central authorities" is strong and unrelenting. Even following China's accession into WTO, it is difficult to foresee a

truly reliable legal system emerging in the near future. This is especially true due to the varying quality of law enforcement and judicial officers in localities across the country, as well as the continuing influence of local government over judicial decisions. An independent, qualified judiciary must be established before reliability can be fully achieved in China.

3.2.3 Application of WTO Rules in Chinese Courts

There are no provisions in the Constitution on whether international law is a source for Chinese law. However, there are some expressed provisions in the General Principles of Civil Laws, the Law of Civil Procedure and the Law of Administrative Litigation that, when China joins the WTO, will be automatically implemented as part of PRC law and shall prevail over inconsistent rules of Chinese law in foreign-related litigation. Where there is a conflict between a provision of domestic law and a provision of a treaty binding on the PRC, the treaty provision will prevail in foreign-related litigation, unless the PRC has made a reservation with regards to the provision. China has established specialized tribunals (i.e. Economic Tribunals) to deal with economic cases and to ensure that obligations from international commitments are interpreted correctly.

The international agreement with WTO is regarded as having more legal force than conflicting legislation and regulations within China. Upon China becoming a member of the WTO, the related agreements resulting from the Uruguay Round (including all the agreements between its members entered into after its establishment) will be binding on
Creating a legal environment amenable to the doings of international conventions is a crucial task if China wishes to play the WTO game well.

Because the WTO is intended to confer rights only on member countries rather than on individuals or enterprises, Chinese courts applying WTO agreements in foreign-related litigation could still be a problem. China's Supreme People's Court has pledged to step up the drafting of judicial interpretations to clear the way for the work of judges after China's entry into the WTO.

WTO rule enforcement requires an efficient and independent court system staffed by trained legal professionals. The challenges to Chinese judges come not only with the growth in the number of cases involving overseas parties, but also the increased application of international treaties and rules in handling cases. The National Judges College has already started to provide Chinese judges with a series of WTO-related training courses. However, systematic training of judges nationwide about WTO rules has already become a pressing task.

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151 Vice-President of the Supreme People's Court, Li Guoguang, said Chinese courts will give priority to WTO rules over China's domestic laws when handling civil cases involving foreigners after the nation joins the organization, if the two laws are inconsistent. In cases where Chinese law is consistent with WTO rules, Chinese laws will be applied, he added. (Xinhua 10/30/2000) China Daily, “Laws pave Way for WTO Entry,” online: China Internet Information Centre, <http://210.77.134.148/pls/wcm/Show_Text?info_id=3341&p_qry=court> (last modified: 30 October 2000).

152 Ibid. How Chinese courts should adapt after China joins the WTO is among the major topics to be looked into by the Supreme People's Court this year.

To conclude, China's accession to the WTO poses a significant challenge to China's judicial adjudication. China has indicated to the WTO that it is willing to play by the rules. Beyond simple economics, WTO accession should also serve to boost the rule of law in China. The WTO seeks to uphold the fundamental principles of transparency, non-discrimination, efficient administration and independent judicial review. New and revised structures firmly founded on these principles should contribute to the evolution of China's legal system. China's commitment to legal principles set forth in the WTO agreements makes it apparent that the rule of law has never been so close to incorporation into the Chinese legal culture and its dealings with foreign businesses.

These changes need time, of course. The notion that major institutional and normative developments such as the rule of law can take place overnight is unrealistic. The effective transmission and enforcement of central-level laws and policies to the local level courts remains a particular concern for businesspeople. The inadequate protection of foreign firms in the Chinese local courts can impose real and substantial costs. Those costs may substantially limit benefits to foreign firms from concessions China has made on market access. One must not underestimate the significance of more obscure barriers to trade to the foreign firms' interests, as these barriers are not as blatant as, for example, high tariffs.

In addition, the WTO rules themselves may be weak or failing to address several important issues. The trade agreement was not designed to deal with a large political economic system like that of China which appears to be transitioning from a centrally
planned communist system to another system which has not been fully defined as of yet. The WTO system implicitly expects that members have an effective and impartial judicial system, which is crucial to the effectiveness of many WTO obligations. The limited mandate requirements will help China reap the benefits of the rule of law. Thus, the WTO’s substantive rules in China may not be helpful to the resolution of disputes that would likely accompany Chinese accession.

Because of the remaining problems, the WTO and its members should continue monitoring China’s situation after the WTO accession. China has long welcomed and benefited from legal cooperation with foreign governments, public international organizations, charitable foundations, NGOs and foreign universities, law firms, bar associations and individual lawyers. Given the immensity and duration of the legal reform task, foreign legal assistance would be extremely desirable for China.  

\[154\] Supra, note 128.
Chapter IV. New Developments in Chinese Arbitration

In recent years, Chinese economic growth has been followed by a growth in commercial arbitration, because increased business means increased numbers of commercial disputes. An arbitration clause is found in most commercial contracts and in almost all investment contracts between Chinese and foreign parties. In China, arbitration offers many advantages over litigation. Judges in China are often not qualified, while arbitration panels are made up of a panel of experts who can be chosen by the parties. The proceedings and rules of arbitration are also more transparent than litigation.

Chinese law endorses arbitration as a useful method of resolving international commercial and investment disputes. Chinese arbitration laws and regulations are revised almost every year. For instance, the China International Economic and Trade Arbitration Commission (hereinafter referred to as CIETAC) rules have been changed three times in the last 5 years.

Three important things affecting Chinese arbitration in recent years are the establishment of local arbitration commissions, CIETAC’s new rules and entry into the WTO. The purpose of this study is to give an overview of these issues and the most recent status of the Chinese arbitration law. It also aims to discuss the problems that still exit in the regime. The first part sets out the legal framework and the second part introduces the proposed changes to the system by discussing the general arbitration procedure.
4.1 Legal Framework

With the development of the economy, the Chinese government has come under ever increasing pressure to rectify the existing arbitration laws. As a result, the Arbitration Law of the PRC (hereafter referred to as the Arbitration Law) was adopted at the Ninth Session of the Standing Committee of the Eighth National People's Congress on August 31, 1994. It was carried out from September 1, 1995 and it generally tracks the general regulations of the 1991 Civil Procedure Law of the PRC. The purpose of the Arbitration Law is to provide a system of arbitration in China that meets both foreign and domestic demands for efficient resolution of disputes. The Arbitration Law regulates the operation of arbitration commissions, sets out arbitration procedures and stipulates certain matters relating to the enforcement of arbitration awards. The Arbitration Law is supplemented by rules issued by different arbitration commissions.

After the promulgation of the Arbitration Law, the Supreme Court has issued more than 30 judicial interpretation documents, or documents having the nature of judicial interpretation,\textsuperscript{155} provided for the problems concretely related to the Arbitration Law. These judicial interpretations illustrate the Chinese Supreme Court's intention of fully respecting the party's autonomy of arbitration and encouraging and supporting the development of arbitration. A comprehensive set of arbitration legislation has been established in China since then.

\textsuperscript{155} "These judicial interpretations have all judged in favour of the enforcement of arbitral awards," said Wang Shengchang, vice-chairman of the China International Economic and Trade Arbitration Commission. (China Daily 06/05/2001).
In 1987, China acceded to the New York Convention. Under the New York Convention, arbitral awards rendered in other signatory countries are recognized and enforceable in China. By the same token, arbitral awards by Chinese arbitration bodies are enforceable in other countries signatory to the New York Convention. When acceding to the Convention, China made both the "reciprocity" reservation and the "commercial" reservation. Under the reciprocity reservation, China "shall apply the Convention to arbitral awards made in the territory of other contracting states" only on the basis of reciprocity.\(^{156}\) Under the commercial reservation, China will apply the New York Convention only to disputes which, according to PRC law, arise from "commercial legal relationships of a contractual nature or a non-contractual nature." Treaties are self-executing in China and take precedence over domestic law in the case of conflict, except when it comes to reservations made by China at the time of the accession. Awards excluded from the New York Convention can be enforceable under bilateral judicial assistance agreements.\(^{157}\) However, there are still some issues that need attention.\(^{158}\) According to Article 269 of the Civil Procedure Law, the People's Court will recognize and enforce a foreign award if the courts in the country where the award was made will reciprocally enforce the award made in China.

China is also a signatory to another major convention, the Washington Convention of 1965, which applies to the recognition and enforcement of arbitral awards rendered by


\(^{157}\) For instance, the *Convention on the Settlement of Investment Disputes* (1965) and the *Convention Establishing the Multilateral Investment Guarantee Agency* (1985).

tribunals established within the International Centre for the Settlement of Investment Disputes. Other bilateral and multilateral treaties China has signed with various countries for the enforcement of arbitral awards affect the conduct of arbitration in China as well. The UNCITRAL Model Law on International Commercial Arbitration, which has not been adopted in China, served as a guide when the CIETAC Arbitration Rules were amended in 1988, 1995, 1998 and 2000.

4.2 Foreign and Domestic Arbitration

There are three types of arbitration under Chinese law: foreign, foreign-related and domestic. Foreign arbitration refers to any arbitration taken up outside of China. Foreign-related arbitration is Chinese arbitration concerning foreign-related affairs. Domestic arbitration is Chinese arbitration between domestic legal persons without foreign elements.

Article 65 of Arbitration Law states: “the arbitration of the dispute that happened in the course of trade, freightage and maritime-concerning foreign affairs, is suitable to the special rules about arbitration concerning foreign affairs that was ruled by Arbitration law.” According to Article 178 of “Opinion of Implement and Execution of ‘General Principles of Civil Law of the People’s Republic of China,’” foreign affairs are ones where either two parties or one of the parties which signed the contract are foreigners, stateless people, foreign artificial persons, or other economic forms; the subject matter of the contract is “outside of China”; the juridical factors that affect civil rights and duties
are “outside of China”. Arbitration concerning Hong Kong, Macao and Taiwan is also treated as arbitration concerning foreign affairs. An important issue here is whether a JV is deemed to be a foreign element. In the famous *China International Engineering Consultancy Company v. Lido Hotel Beijing* case, the Beijing No.1 Intermediate People's Court held that a joint venture which involved a foreign partner, who had assumed the status of a PRC legal person, would not be considered to be a foreign case. The dispute must contain at least one foreign element, such as the establishment, modification or termination of a commercial relationship or the performance of the contract outside the PRC.

Chinese arbitration laws treat the three types of arbitration differently in several important ways. For example, according to Chinese law, parties to a dispute involving foreign elements are free to have arbitration inside or outside of China. However, domestic legal persons might not choose outside arbitration. The two-track system is a feature in most aspects of the Chinese commercial legal system. As an incentive to invest in China foreign companies are accorded different and in general more favorable treatment than the one accorded to local firms. Therefore, this is usually a less important issue for foreigners than for the Chinese parties involved. However, in the

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159 Pursuant to article 65 of the Arbitration Law, where arbitration arises out of economic, trade, transport and maritime disputes involving foreign concerns, Chapter VII entitled "Special Provisions for Arbitration Involving Foreign Concerns" will apply. Other relevant parts of the Law may also apply if there are no applicable provisions in Chapter VII.


161 Ibid. at “From China's point of view, a two-track system appears to be a necessary stop-gap measure in the evolution of its economic and social reforms. It was obvious, when the process got underway, that the general reform of the Chinese legal system would take time. But the special need for foreign trade and foreign investment law could not wait. China had to start with the latter first, while at the same time beginning to build a body of domestic law.”
arbitration field the more favorable treatment that is accorded to the foreign arbitration usually cannot be enjoyed by joint venture firms and FDI companies, which are assumed to be Chinese legal persons. Chinese arbitration between joint venture firms, FDI companies and local firms is generally treated as domestic arbitration or foreign-related arbitration. According to WTO's National Treatment principle, China may have a single law applicable to both foreign and foreign-related arbitration. The present three-track system may be replaced after China's accession to WTO.

4.3 Arbitration Commissions

The PRC arbitration system consists primarily of the CIETAC, the China Maritime Arbitration Commission (hereinafter referred to as CMAC), and over 140 local arbitration commissions set up in large cities throughout China.162

4.3.1 CIETAC and CMAC

The CIETAC is China's most well-known arbitration body and has already become one of the main and most important international arbitration institutions in the world. The CIETAC accepted 238 cases in 1990, 274 cases in 1991, and 633 cases in 2000. It already holds the lead among world arbitration institutions,163 with parties coming to it

162 Article 10 of the Arbitration law.
163 Jerome A Cohen, Recent Developments in Setting Business Disputes with China <http://www.amcham.org.hk/archives/speeches/2001/11-13-01-jerome-Cohen.PDF>. He also say, "Although CIETAC has become a spirited and successful competitor for the world's business arbitration market, it has recently shown a willingness to accommodate the needs of rival foreign institutions to hold hearings in China. Foreign parties that insist on arbitration outside of mainland China may now obtain the best of both worlds by providing, for example, for Singapore, Stockholm, ICC or Hong Kong as the place
from more than 40 countries and districts, most of which are Hong Kong, United States, Singapore, Korea, Japan, Taiwan, Australia, Germany, Canada, Switzerland, Russia, Italy and New Zealand. The CIETAC claims value amounts up to RMB 74.8 billion in 2000 alone. This is not surprising, given the enormous increase in international business with China.

The CIETAC was established in 1956 by the Chinese Chamber of International Commerce (hereinafter referred to as CCOIC), when it was known as the Foreign Trade Arbitration Commission. In 1989 it was renamed China International Economic and Trade Arbitration Commission, as it is known today. From October 2000, CIETAC has also included the Court of Arbitration of China Chamber of International Commerce (CCOIC Court of Arbitration). CMAC was originally established as the Maritime Arbitration Commission in 1959. Its name was changed in 1988. Although CMAC's jurisdiction has expanded over the years, it remains limited to maritime matters. CMAC's caseload is small in comparison to that of CIETAC, averaging only fifteen to twenty five cases a year. CIETAC's and CMAC's headquarters are in Beijing. CIETAC has sub-commissions in Shanghai and Shenzhen.

Article 73 of the Arbitration Law makes special provisions for the CCOIC to establish foreign-related arbitration commissions, CIETAC and CMAC, and draw up special

The Commission is prominent in China's legal system because of its recognized independence from political control, its adherence to transparent and internationally endorsed arbitration procedures and its reputation for fairness. In contrast, local courts and arbitration commissions enjoy neither the independence nor the stature of the CIETAC.

4.3.2 Local Arbitration Commissions

In addition to CIETAC and CMAC, there are over 140 local arbitration commissions that have been established and operating under the Arbitration Law. Prior to 1995, there are many local arbitration commissions under the local Bureau of Industry and Commerce, which is itself under the supervision of the National Administration of Industry and Commerce. Their place at the bottom of this bureaucratic hierarchy bespeaks their lowly status. In keeping with economic development, the Arbitration Law called for the establishment of arbitration commissions independent of the government.

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165 Supra, note 160.
166 Ibid.
Since the passing of the Arbitration Law, more than 140 centres have been established, even though in some cases there seems to be little economic demand for them. New local arbitration commissions would operate autonomously, not under the supervision of the government administrative authorities, but under the supervision of the yet-to-be established China Arbitration Association (hereinafter referred to as CAA). CAA is a self-regulating social organization with legal person status. Its members consist of local arbitration commissions, CIETAC and CMAC. CAA would not accept cases. Rather, its main functions will be to supervise other commissions and to formulate rules for domestic arbitration commissions.

Although local arbitration commissions are civil institutions and not government units according to the Arbitration law, they remain closely tied to the government in financing and personnel appointments. Thus, they remain susceptible to local government pressures in the same way as the local People’s Courts.

The Beijing Arbitration Commission (hereinafter referred to as the "BAC") was established on September 28, 1995, following the approval by the Beijing People's

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169 Article 14, 15, and 73 of the Arbitration Law.

170 Supra, note 168 at “Only some commissions in major business center cities are on their way to financial independence: according to BAC officials, it has been fully self-financing on the basis of arbitration fees since August 1999, and the commissions in Guangzhou, Shanghai, and Shenzhen may soon be so.”

Government in accordance with the Arbitration Law. The BAC is widely regarded as the flagship of the new local arbitration commissions.

The BAC arbitration rules essentially track the provisions of the Arbitration Law and generally conform to international practices. The BAC has expanded the measures deemed to constitute adequate service of documents, notices and other materials in connection with various proceedings.

Despite initial misgivings of the foreign investment community about the quality of arbitration by local commissions (as opposed to CIETAC), so far experience indicates that at least some commissions such as the BAC are performing better than previously expected. BAC caseloads have risen sharply. It accepted 149 cases in 1996, 233 in 1998 and 326 in 1999, making it the busiest of all local arbitration commissions.

4.3.3 Jurisdiction

Chinese arbitration commissions have traditionally been divisible into those handling "foreign-related" (shewai) disputes and those handling purely domestic disputes, although now any commission may handle any dispute.

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172 Article 10 of the Arbitration Law.
172 Supra, note 171.
174 Supra, note 168.
175 A foreign-related dispute in one in which at least one party is a foreign person or entity, the contract was established, modified, or terminated in a foreign country, or the object of the action is in a foreign country. Art. 304, Supreme People's Court Opinion on Questions Concerning the Implementation of the Civil Procedure Law (1992).
Prior to the 1995 Arbitration Law, CIETAC and CMAC were the only arbitration commissions in China that had the jurisdiction over foreign-related arbitration, as they were established purely for that purpose. Local arbitration centres were originally set up to hear domestic disputes only. However, the Arbitration Law has now institutionalized the new domestic arbitration system in China. Local arbitration commissions may exercise jurisdiction over disputes involving a foreign element, provided that parties in the disputes choose to have their differences resolved by them.\textsuperscript{176} CIETAC also accepts domestic arbitration cases in accordance with Arbitration Rules of CIETAC 2000 in order to adapt to the new development of arbitration in China that have come into being since the implementation of the Arbitration Law in 1995.\textsuperscript{177} CMAC began accepting domestic cases from 1995.

Although CIETAC does not have an exclusive jurisdiction to hear foreign-related disputes, in reality litigants prefer to have their cases heard by CIETAC. CIETAC and CMAC have handled most of the foreign-related cases in China. This is due to the fact that CIETAC has a lot of experience in dealing with arbitration and has gained a reputation for professionalism.\textsuperscript{178} The growth of the BAC and other local arbitration commissions broke the monopoly of CIETAC. The competition is good for the development of Chinese arbitration, even though domestic institutions are yet to make substantial headway in attracting foreign-related cases.

\textsuperscript{176} Several Problems to be Clarified Concerning the Thorough Implementation of the PRC Arbitration Law, June 8, 1996 (issued by the State Council): "The main duties of the reorganized arbitration commissions shall be to accept domestic arbitration cases. Where the parties to a foreign-related arbitration case voluntarily select arbitration by a reorganized arbitration commission, such commission may accept the case."

\textsuperscript{177} The CIETAC 2000 rule, article 2.

\textsuperscript{178} As of May 25, 1999, the BAC had accepted a total of 683 cases. Only 20 of these cases have involved either a foreign party or a Foreign Investment Enterprise.
4.4 General Procedure of Chinese Arbitration

4.4.1 The Validity of an Arbitration Agreement

Under the Arbitration Law of China, an arbitration agreement shall include the following:

1. Indications applying for arbitration;
2. Arbitration matters and items;
3. Selected arbitration commission;

The Arbitration Law states that a valid arbitration clause must designate the appropriate arbitration institute. Under Article V of the New York Convention, a court could find an agreement for ad hoc arbitration invalid only "under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." Therefore, an agreement on ad hoc arbitration in China failing any indication of the governing law or an agreement made "outside of China" stating to be governed by Chinese law could well be held invalid. In these cases the awards are unenforceable under the New York convention in China and other NY convention

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179 Art. 16 of the Arbitration Law.
180 Supra, note 171 at “According to an unpublished, internal document of the Supreme People's Court, an arbitration clause calling for "arbitration under UNCITRAL rules in China" is unenforceable because it calls for ad hoc arbitration. However, authoritative sources have informed the authors that arbitration clauses calling for hearings in China under the auspices of the International Chamber of Commerce and the Singapore International Arbitration Centre are valid and enforceable.”
countries.\textsuperscript{181} Foreign ad hoc arbitration awards, however, are enforceable in China under the NY convention.\textsuperscript{182}

The rules governing Chinese arbitration commissions differ from those of many other arbitration institutions in the important role they assign to the commission as a body, as opposed to the arbitration panel itself: “CIETAC, not the arbitrators, decides such matters as the existence and validity of an arbitration agreement and fixes the dates for hearing.”\textsuperscript{183} Chinese arbitration commissions have the power to make decisions on disputes concerning the validity of an arbitration agreement or jurisdiction over a specific case. Any party in dissent of the validity of an arbitration agreement may apply for arbitration commission to make a decision. Alternatively, they may apply to a People's Court to decide on this. However, if a party in a dispute applies for an arbitration commission to make a decision and the other party in the same dispute applies for an order from a People's Court, the court's order shall be the ruling one.

\textsuperscript{181} Article 5 of the NY convention.
\textsuperscript{182} Gao Fei, Judicial Support and Supervise to Arbitration by The People's Court: Special Interview with Xiao Yang, the President of the Supreme Court of PRC, <http://www.arbitration.org.cn/en/viewcontent.asp?id=7>. The Chief Judge said that “From the angle of consideration of giving full play of the parties' arbitration autonomies, encouraging the development of arbitration cause, and creating a good invest environment, the Chinese court shall in principle in individual cases recognize the effect of ad hoc arbitration agreement in foreign elements related cases, if the laws of the country where the arbitration taken place permit the ad hoc arbitration in an ad hoc arbitration agreement.”
\textsuperscript{183} Supra, note 163 at “One recent unpublicized example is worth noting. When a Chinese claimant invoked CIETAC jurisdiction and the Hong Kong respondent, before the arbitration panel was established, pointed out that the contract's arbitration provisions were self-contradictory and/or unintelligible, CIETAC might nevertheless have required each party to appoint its own arbitrator and go through the process of confirming the presiding arbitrator so that the panel could decide the jurisdictional issue. This is how most arbitration institutions would have handled the problem, but to do so would have delayed the decision and added considerably to the expense of the proceedings. Instead CIETAC itself reviewed the matter and promptly decided that it lacked jurisdiction because the arbitration clause was invalid.”
Under CIETAC's 1998 Rules, any parties that have difference on the validity of an arbitration agreement shall raise the difference before the arbitration tribunal opens its first hearing. However, such stipulation gives a chance to the party in bad faith by raising the challenge at the last minute, thus delaying or destroying the arbitrate proceedings. For instance, if a party raises challenges several minutes before an arranged hearing, the hearing has to be postponed even if the other party had come all the way from another country or another city or province to attend the hearing.

In view of these facts, Article 6 of the CIETAC adds: “Any objection to an arbitration agreement and/or the jurisdiction over an arbitration case shall not affect the hearing of the case according to the arbitration procedures.” Article 30 further provides that the challenged arbitrator shall continue to perform the duties of an arbitrator before any decision is made by the Chairman with respect to the challenge. Such provisions ensure that the arbitration proceeding is quick and smooth.

An arbitration agreement is invalid if:

1. The agreed arbitration matters and items are not within the arbitration scope as provided by the law;

2. An arbitration agreement is made by persons having no capacity for civil conducts or by persons with limited capacity for civil conducts;

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184 Supra, note 171.
3. An arbitration agreement where one party has forced the other to make by means of threats to agree.\textsuperscript{186}

The ruling confirming the validity of an arbitration agreement made by the court is final. However, the decision made by an arbitration commission is not final, as the parties may request the court to confirm the effect of the arbitration agreement on the litigation applying for setting aside the arbitral award. They might also request that the court not enforce the arbitrate award. The People’s Court will not accept applications for determining the effects of an arbitration agreement if the arbitration commission has accepted the application and has already made the decision that the arbitration agreement is valid. However, if the arbitration commission has made a decision that the arbitration agreement is invalid and the parties have not made an agreement again, the parties may take the matter to the courts.\textsuperscript{187}

As to the problem of validity of arbitration agreement in foreign-related cases, China has established a reporting system. If the courts hold that an arbitration agreement in a foreign-related contract is invalid, they must report their decision to the Supreme Court. The case shall not be decided before the reply of the Supreme Court is received.

4.4.2 The Scope of Arbitration

\textsuperscript{186} Art. 17 of the Arbitration Law.
\textsuperscript{187} Supra, note 182.
In China, an arbitral commission is not permitted to handle any matters beyond the scope of the arbitration agreement. At the same time, any subject matter to be heard during arbitration will be strictly confined to issues that fall within the scope of arbitration disputes under the Arbitration Law. According to the Arbitration Law, the scope of arbitration disputes is contract disputes and other disputes relating to property rights and interests arising between civil subjects such as citizens, legal persons and other organizations with equal status may be arbitrated. Disputes relating to marriage, adoption, guardianship, support and inheritance as well as administrative disputes must be handled by administrative organs in light of the fact that laws cannot be arbitrated. Arbitration relating to labor disputes and disputes over agricultural contracts within agricultural collective economic organizations are not regulated by the Arbitration Law and shall be separately provided for by other laws.

The official justification of the above indicates that the scope of arbitration is determined by the commercial nature of arbitration and the following principles:

1. Both sides of disputes should be parties with equal subject status;
2. Matters of arbitration should be those that parties had the right to disclose;
3. Scope of arbitration must mainly include contract disputes and some non-contractual economic disputes.

188 Article 2 of the Arbitration Law.
189 Article 3 of the Arbitration Law.
190 Article 77 of the Arbitration Law.
191 "The Explanation concerning the Arbitration Law of the People's Republic of China (Draft)" supplied by Mr. Gu Angran, Director of the Legislative Affairs Commission of the Standing Committee of the National People's Congress, at the 9th Session of the Standing Committee of the 8th National People's Congress.
Obviously, disputes involving Chinese governmental departments are expressly excluded by the terms of the Arbitration Law and cannot be arbitrated by the PRC arbitration commissions. Such disputes are normally submitted to the administrative tribunals of the People's Courts. Following its accession to the WTO, China does not plan to give arbitration commission the judicial review power to resolve disputes between foreign business people and Chinese governmental departments, even though the WTO states that arbitrate tribunals and quasi-judicial authorities may have such rights.\(^{192}\)

Since China is a signatory to the International Centre for the Settlement of Investment Disputes Convention (hereinafter referred to as ICSID), disputes between foreign investors and Chinese governmental sub-divisions may be arbitrated before the ICSID, if both parties agree to do so.

4.4.3 Rules of Arbitration

The CIETAC 2000 Rules do not give the parties full rights to choose rules of arbitration. Article 7 states that "where the parties to a contract have agreed to arbitrate their disputes by CIETAC, the arbitration shall take place in accordance with the Rules of CIETAC.

\(^{192}\) AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES: Article 23 Judicial Review: "Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review."

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS Article 62: "5. Final administrative decisions in any of the procedures referred to under paragraph 4 shall be subject to review by a judicial or quasi-judicial authority. However, there shall be no obligation to provide an opportunity for such review of decisions in cases of unsuccessful opposition or administrative revocation, provided that the grounds for such procedures can be the subject of invalidation procedures."
However, if the parties have agreed otherwise, and subject to consent by the CIETAC, the parties' agreement will prevail.

It is not quite clear from the above that, for instance, if the parties select CIETAC as the arbitration body and desire the application of UNCITRAL Rules or rules of any other institution, the agreement may not be denied by CIETAC. It is even less clear how to proceed if an agreement specifies a detailed timetable, a place of arbitration and a procedure for the arbitration proceeding. The parties are subject to many potential risks due to this uncertainty.

4.4.4 The Combination of Arbitration with Mediation

In China, an arbitration tribunal may mediate cases in the proceedings of arbitration. This is not a unique arbitration practice in recent years, which is referred to as the combination of arbitration with mediation. Under the Arbitration Law, an arbitration tribunal may mediate prior to making an arbitration award; the arbitration tribunal shall mediate only when the parties desire to do so.\textsuperscript{193} The tribunal may not initiate mediation without the agreement of the parties. If mediation fails, an arbitration award shall be made instantly. When an agreement is reached, the arbitration tribunal shall draw up a reconciliatory statement or an arbitration award according to the outcome of the agreement.\textsuperscript{194}

\textsuperscript{193} Article 51 of the Arbitration Law.

\textsuperscript{194} \textit{Ibid.}
Based on the above-mentioned principle, the new CIETAC 2000 Rules take this further by introducing a new provision. Article 44 states that “if the parties reach a settlement agreement by themselves through conciliation without involvement of the CIETAC, any of them may, based on an arbitration agreement concluded between them providing for arbitration by the CIETAC and their settlement agreement, request CIETAC to appoint a sole arbitrator to render an arbitration award in accordance with the contents of the settlement agreement.” The parties can, therefore, reach a settlement agreement and resort to the summary procedure to get an enforceable arbitration award according to the agreement before involving any arbitration procedures.

The combination of the two measures benefits both parties’ interests and their long-term relationship. It also offers a way for the disputants to resolve their disputes both efficiently and in an enforceable manner. However, foreign parties frequently claim that when they conduct mediation in the middle of arbitration, information disclosed during the mediation cannot be clearly erased from the arbitrators’ mind. This is especially important if the conciliation or mediation fails and the parties return to arbitration. This needs to be taken into account when conducting the combination of arbitration and mediation.

4.4.5 Interim Measures of Protection

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Under the Arbitration Law, the parties may apply for interim measures of property preservation, such as attachments, injunctions or orders safeguarding and preserving perishable property and evidence. This can be done during the arbitration and depends on the behavior of the other party or other reasons that make it impossible to execute the award or make it difficult to execute the award.\(^{196}\)

The party shall submit their application to the arbitration commission first, and then the commission shall forward the application of the party to the People's Court in accordance with the relevant provisions of the Civil Procedure Law. The court will then make a decision on the issue. The arbitration tribunal and commission have no power to take interim measures directly.

However, it may take up to several months to set up an arbitral tribunal. Therefore, it is not uncommon for the parties to require an interim measure before the formation of the arbitral tribunal. After the enforcement of the Maritime Special Procedure Law, parties in a maritime arbitration can apply directly to the court for interim measures before the arbitration or the forming of the arbitral tribunal. However, there are no regulations or rules to govern such interim measures. The Arbitration Law is silent on this issue. On practice, the court occasionally allows the parties to apply for interim measures directly before the formation of the arbitration tribunal, although there are still some uncertainties on such issues.

\(^{196}\) Article 28 of the Arbitration Law.
Although the Civil Procedure Law of China does provide for emergency protection of property measures (which could be taken within 48 hours from the application), the Arbitration Law is also silent on such protection. If a party has to transfer the application through CIETAC after the beginning of arbitration, emergency interim measures are usually meaningless.

The applicant for a conservation order is also required to provide security. If an application for property preservation is wrongfully made (for example when an applicant ultimately loses the case or when a measure is proven to be unnecessary), the applicant must compensate the respondent for any losses incurred from property preservation.\(^{197}\)

4.4.6 Arbitrators and Legal Representation

Parties to Chinese arbitrations must choose their arbitrators from the Arbitration Commission’s panel. There are 492 arbitrators on CIETAC’s list, including 124 from foreign countries other than Hong Kong, Taiwan or Macao. There are also 219 arbitrators on BAC’s list, 6 of whom are from Hong Kong and 2 from Taiwan. CIETAC arbitrators are selected and appointed by CIETAC from among well-known Chinese citizens or foreigners who possess special knowledge and practical experience in the fields of law, economics, trade, science and technology. Many are from commercial, industrial and law circles of the United States, the United Kingdom, Singapore and Hong Kong. The BAC does not have nor does it plan to add foreign arbitrators to the list due to financial constraints.

\(^{197}\) Article 28 of the Arbitration Law.
The parties have the freedom to appoint foreigners to act as arbitrators.198 When CIETAC and CMAC hear domestic disputes, such as disputes between foreign investment enterprises or Chinese domestic legal persons, arbitrators for such disputes must be chosen from a special domestic list that excludes foreigners.

According to the Arbitration Law, an arbitration tribunal may be composed of three arbitrators or one arbitrator. The parties are free to choose an arbitration tribunal composed of three arbitrators or an arbitration tribunal composed of one arbitrator. The arbitration tribunal composed of three arbitrators shall have a presiding arbitrator.199 Where the parties fail to agree on the composition model of the arbitration tribunal or to appoint arbitrators within the time limit stipulated in the arbitration rules, the chairman of the arbitration of the commission is to make such an appointment.200 According to the CIETAC 2000 Rules, when the two parties fail to appoint jointly or fail to entrust the chairman to appoint the presiding arbitrator jointly within a certain time, the presiding arbitrator will be appointed by the chairman of the CIETAC.201 This provision has been criticized by some foreign parties, because if appointed by the chairman of the CIETAC, the presiding arbitrator is generally a Chinese arbitrator. The CIETAC arbitration process, therefore, does not balance Chinese and foreign interests.202

\[198\] In fact, in some arbitration cases accepted by CIETAC, two of the three arbitrators are foreigners, including the presiding arbitrator.
\[199\] Article 30 of the Arbitration Law.
\[200\] Article 32 of the Arbitration Law.
\[201\] Article 24 of the CIETAC 2000 rules.
\[202\] Supra, note 195.
Hiring a Chinese arbitrator, however, has its advantages. It is often cheaper and more effective than hiring a foreign arbitrator. If you choose a Chinese arbitrator, the parties do not need to pay for his or her lodging, international travel costs and translation fees. When a foreign arbitrator is not well versed in CIETAC Rules or the Chinese law, there may also arise additional interpretation delays due to the fact that in Chinese law, for example, regulation and precedents usually have no official English version. Therefore, choosing a Chinese or a foreign arbitrator is a case-by-case decision. On practice, the appointed foreign arbitrators are usually not willing to deal with CIETAC’s cases due to either limited compensation or language problems.

Unlike most other international arbitration institutions, Chinese institutions do not provide biographies of their arbitrators. They think that publication of such information may enable parties or their agents to pressure or bribe arbitrators and encourage choosing arbitrators based on factors rather than their expertise. However, the limited information made available concerning the arbitrators may not be sufficient for the parties to determine if the arbitrator has the necessary specific expertise. It is, therefore, helpful to seek the advice of PRC lawyers who have extensive arbitration experience and are familiar with the arbitrators on the CIETAC's panel when choosing an arbitrator.²⁰³

There are also some provisions in the Arbitration Law governing the liability of arbitrators. An arbitrator who interviews a party or an agent privately, accepts any special

treatment or gifts from one of the parties or their agents, demands and/or accepts bribes, acts out of personal benefit or makes an award that perverts the law, shall bear legal liability. In this case, the Arbitration Commission may dismiss the arbitrator in question. However, it is still not clear whether a violator bears civil or criminal liability. No previous court decisions can be traced on the matter.

The parties in a dispute may authorise Chinese lawyers or other agents to proceed with their arbitration. The authorized lawyers or other agents must present a power of attorney to the Arbitration Commission if they wish to represent a party in arbitration. According to the CIETAC 2000 Rules, Chinese or foreign citizens can be authorized to act as arbitration agents. Like CIETAC, the BAC allows foreign lawyers or other foreigners to act as agents. Unlike CIETAC, however, the BAC limits the number of agents to three, unless the party has a "proper reason" for requiring more agents. Arbitration procedures in China are somewhat different from arbitration procedures in other countries around the world. Although CIETAC proceedings in Beijing are considered fair and unbiased, such differences require considerable experience in dealing with Chinese arbitration.

4.4.7 Fees and Costs

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204 Article 34 (4) of the Arbitration Law.
205 Article 58 (6) of the Arbitration Law.
206 Article 38 of the Arbitration Law.
207 Article 22 of the CIETAC 2000 rules.
Under the Arbitration Law, parties must pay arbitration fees according to the Commission's regulations.\(^{208}\) The CIETAC rules provide that the claimant has to pay an arbitration fee to the Commission in advance and according to its Arbitration Fee Schedule. CIETAC's arbitration fee is based on the amount in controversy of the case, not on the work actually performed in the arbitration. Therefore, apart from charging the parties arbitration fees according to the Fee Schedule, the Commission may sometimes collect additional reasonable and actual expenses such as the arbitrators' travel and boarding expenses as well as fees and expenses for experts, appraisers, interpreters, etc. The new 2000 fee schedule reduces the fee by an average of 0.5%. The main purpose of this reduction is to attract more arbitration clients and to keep in step with world arbitration institutions.\(^{209}\)

4.5 Enforcement of the Awards

Arbitration awards have the force of the law but each party executes the award voluntarily. If the losing party fails to do so within a set time limit, the other party can apply to the court for the enforcement of the award.

4.5.1 Setting Aside and Refusing Awards

A displeased party may challenge the enforcement of arbitral awards by asking the courts to set aside or refuse recognition and enforcement. In the Arbitration Law, provisions

\(^{208}\) Article 76 of the Arbitration Law.

\(^{209}\) Supra, note 195.
regarding the three different types of award are different. The following chart explains
the difference in setting aside and refusing awards:

<table>
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<tr>
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<th>Set aside</th>
<th>Refusing</th>
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<tbody>
<tr>
<td>Foreign awards</td>
<td>No such power</td>
<td>NY Convention Article V</td>
</tr>
<tr>
<td>Foreign related awards</td>
<td>Arbitration Law Article 70</td>
<td>Arbitration Law Article 71</td>
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<td>refers to Civil Procedure</td>
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<td>Law Article 260 (1)</td>
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<td>Domestic awards</td>
<td>Arbitration Law Article 58</td>
<td>Arbitration Law Article 63</td>
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<td></td>
<td>refers to Civil Procedure</td>
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<td>Law Article 217 (2)</td>
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China is a member of the New York Convention. Awards granted by arbitral tribunals in
a New York Convention Member country are recognized and enforceable in China.
According to Article V, under some circumstances the recognition and enforcement of a
New York Convention award may be refused at the request of the party against which it
is invoked. A party seeking to have the New York Convention award set aside has to do
so in the country in which the award was granted. The New York Convention provides
only that the courts may refuse the enforcement of an award for reasons set out in Article
V. This gives the courts some discretionary power to disregard minor defects. Courts
around the world are unlikely to refuse the enforcement of award payment for minor
procedural complaints. However, by using the Chinese word (yingdang), which means
shall, in its wording, the Supreme People's Court arguably requires local courts to

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210 Supreme People's Court Implementing the Participation of China in <The Convention on the
Recognition and Enforcement of Foreign Arbitral Awards> Circular.
refuse to recognize the award under any circumstances listed in Article V. This is true even if the defect is only a minor procedural one and can be disregard under the New York convention regime.\textsuperscript{211}

As for the foreign-related awards, the grounds for setting them aside are the same as those for refusing to enforce such awards according to the Arbitration Law, which refers to the provision in Article 260 (1) of the Civil Procedure Law.

The party against which the application for enforcement is made must furnish proofs that:

1. The parties have not had an arbitration clause in the contract or have not subsequently reached a written arbitration agreement;

2. The party against whom the application for enforcement was made had not been given notice for the appointment of an arbitrator or for the inception of the arbitration proceedings or had been unable to present his or her case due to causes for which the party was not responsible;

3. The composition of the arbitration tribunal or the procedure for arbitration was not in conformity with the rules of arbitration; or

4. The matters dealt with by the award falls outside the scope of the arbitration agreement or constitute matters that the arbitral organ was not empowered to arbitrate.

Generally, a foreign-related award is preferred to a domestic award because the grounds for challenging it are limited to procedural issues, whereas the grounds for challenging a domestic award include substantive reasons, such as the merits of the award.\textsuperscript{212}

4.5.2 Venue and Time limit

Parties should apply for the enforcement of the New York Convention award in an intermediate court. The venue depends on the situation of the respondent. If it is a legal person, the proper venue is where the respondent’s principal place of business is located. If the respondent is a natural person, the proper venue is his or her legal domicile. If the respondent does not have a principal place of business or legal domicile in China, the applicant shall seek enforcement at the place where the respondent’s property is located.\textsuperscript{213}

The venue for the enforcement of a foreign-related award is the intermediate court located where the party against whom the application for enforcement is made has his or her domicile or where his or her property is located.\textsuperscript{214} The venue for the enforcement of a domestic award should be the basic court located where the respondent is legally domiciled or where his or her property is located.\textsuperscript{215} The venue for the setting aside of a

\begin{footnotes}
\item[212] The main evidence for ascertaining the facts is insufficient; there is definite error in the application of the law; or Civil Procedure Law Art. 217 (2).
\item[213] The Notice of the Supreme People’s Court on the Implementation of the New York Convention.
\item[214] The CPL, Art. 259.
\item[215] The CPL, Art. 217.
\end{footnotes}
foreign-related or domestic award is the intermediate court located where the award was originally made.\textsuperscript{216}

The time limit for setting aside of a foreign or domestic award is six months from the date of receiving the award.\textsuperscript{217} Regardless of the different types of the awards, if both parties are legal persons, the time limit for the enforcement is six months, and if one of the parties is a natural party, the limit is one year.\textsuperscript{218}

If the losing party happens to have property located in another New York Convention country, enforcement of a foreign-related or domestic award may be sought outside China. Due to the complexity of the Chinese texts and the poor quality of their English translation, PRC arbitration awards are examined very carefully by foreign courts prior to their enforcement. The foreign courts will enforce Chinese arbitration awards even though the procedures employed in obtaining them are considered unacceptable by the country’s own standards. On practice, awards given by the two main commissions, CIETAC and CMAC, generally meet international standards. Concerns have usually been expressed about the quality of awards from 146 local Chinese arbitration commissions.

4.5.3 Hong Kong Awards

Prior to July 1, 1997, Hong Kong was a party of the New York Convention because of its status as a British colony. Therefore, in Hong Kong arbitration awards were enforced in

\textsuperscript{216} The AL, Arts. 58.  
\textsuperscript{217} The AL, Arts. 59.  
\textsuperscript{218} The CPL, Art. 219.
accordance with the New York Convention. Following the re-unification of Hong Kong and China in 1997, the New York Convention is no longer applied to reciprocal enforcement of arbitration awards between Hong Kong and China’s mainland, because the Convention cannot apply to enforcements within the same country. To solve this problem, the Hong Kong and PRC central governments entered into an arrangement in June 1999.\textsuperscript{219} This arrangement largely restores the legal position of Hong Kong prior to July 1, 1997.\textsuperscript{220} An award made in Hong Kong is, therefore, enforceable in China’s mainland region and vice versa.

In Hong Kong, this arrangement was given effect by the Arbitration Ordinance enacted on January 5, 2000 and taking effect from February 1, 2000. In China’s mainland region, the Supreme People's Court issued a Notice and Judicial Interpretation on January 24, 2000 and directed the local courts to observe the new arrangement.

Chinese courts are making special efforts to guarantee that arbitral awards made by foreign arbitration institutions, or those involving foreign parties, are carried out properly. In 1995, Chinese courts introduced a prior-reporting system. In this system, the Supreme People's Court has the final say in deciding if an international arbitral award is valid or

\textsuperscript{219} supra note 57. The main points of which include:
- the courts of the HKSAR agree to enforce the awards made pursuant to the Arbitration Law of the People's Republic of China by the arbitral authorities in the mainland;
- the People's Courts of the mainland agree to enforce the awards made in the HKSAR pursuant to the Arbitration Ordinance of the HKSAR;
- as far as possible, the practice under the New York Convention prior to Hong Kong's reunification with China will be preserved;
- the procedure of enforcement will follow the law of the place in which enforcement is sought; and
- refusal of enforcement of arbitral awards will be processed in accordance with the provisions of Article V of the New York Convention.

\textsuperscript{220} Ibid.
While China's efforts deserve recognition, local protectionism leaves a lot of room for improvement.

The above study is a brief outline of the current developments and problems under China's arbitration regime. The reforms in the area reflect the attempt by the Chinese government to conform to the global trend of supporting and promoting arbitration already well established in many countries around the world. One significant aspect of this policy is China's adoption of international conventions and practices in relation to arbitration of international commercial disputes. The 1995 Arbitration Law and CIETAC 2000 Rules are certainly steps in the right direction.

With the development of international trade and the imminent WTO entry, Chinese arbitration will be confronted with unprecedented opportunities. However, some aspects of the regime still need to be improved. The independence of the arbitration commissions cannot be guaranteed without further reform. The laws on arbitration in China must give more rights and freedoms to the parties aside from arbitration commission. In other words, the principle of party autonomy needs to be respected more. In order to address the problems of WTO accession, uniform legislation and judicial interpretation including foreign-related and domestic arbitration are needed. In the long run, it is the independence and impartiality that will make the Chinese arbitration commissions important players in the international dispute-resolution arena.

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221 "Because the enforcement of court rulings is still a major issue facing courts in China, the prior reporting system has demonstrated that we attach great importance to the enforcement of international arbitral awards," Li said. China Daily, “Supreme Court Official Urges Enforcement online: China Daily, <http://www.china.org.cn/english/2001/Jun/14126.htm> (06/05/2001).
Conclusion

While China's judicial system remains seriously flawed, the central government should be applauded for the tremendous strides China has made in the past twenty years. The Chinese court system, which now handles well over five million cases a year, has been erected from the shambles of the Cultural Revolution. The task of its reconstruction began in July 1979, when the National People's Congress passed the law on the organization of the courts, the 1979 People's Courts Organic Law, amended in 1983. The Law of the Civil Procedure laid the groundwork for foreign-related litigation when it went into effect on July 1, 1991. This was followed by a host of laws and regulations governing the conduct of judges and lawyers, such as the Judge Law (promulgated in 1995 and effective since April 12, 1996), the People's Court Law (effective since July 1, 1994) and the Lawyer Law (effective since 1996). The legal profession has also been revived and now includes about 120,000 practitioners plus a large numbers of governmental legal specialists and in-house counsel to PRC companies. 222 In other words, China's young judicial system continues to evolve rapidly.

Finding ways of enforcing reforms within the Chinese legal system is a convoluted issue. Long-standing traditions and the communist ideology have, for years, treated the court merely as a tool of state control, just like the military force on the other hand. In addition, both the traditional Chinese law and the Communist law reflect the primacy of collectivist norms and require that contracts and property rights be subjugated to political

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Many Chinese officials talk about cultivating judicial independence and the Rule of Law, but they talk even more about law serving the needs of economic development and political rectitude. Thus, while change is occurring, Chinese courts still must often succumb to the interference of the Party and other authorities in the judicial determination of concrete cases. In the West, the court is regarded as the head of the law empire. However, in today's China, courts do not have much real authority: "one reason why the court in China is not be highly respected is the administrative nature it has." WTO entry will boost the country's prospects for establishing a genuine judicial system-not merely a rule by or through law, but a rule of law to which the Party and the government are subject, just like every other entity and individual within the country.

It may be difficult to see how a court system that is slow, corrupt and not independent of domestic political influences could offer reliable and impartial settlement in commercial disputes. Unless the National Party and the government leaders in China give more political status and judicial power to the judges, the progress toward independent and efficient judicial review can be expected to be slow. However, as the American lawyer with a lot of Chinese experience, Stanley B. Lubman, notes: "One of the most striking defects of legal reform is the failure to raise the position of the judicial system from its current level; it remains at the same level as other bureaucratic hierarchies of the state and lacks authority over them."

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223 Ibid. at "The selection of a new generation of leaders and a restless populace over which they have diminishing control, they are too nervous and timid to surrender control over court decisions. What even Prime Minister Zhu Rongji fails to see is that his essential programmes - to reform state-owned enterprises, the banking and tax systems and the securities markets, and to create a market economy that will inspire the confidence of foreign financial investors - cannot fully succeed without systemic court reform."
225 Supra, note 93.
226 Ibid.
Other than settling disputes within a domestic mechanism such as arbitration commissions or courts, companies may lobby to their respective governments to bring a DSB case against China. Before going to DSB, however, companies must note that the primary objective of the mechanism is to seek a withdrawal of the offending practices rather than compensation or punitive measures.\textsuperscript{227} Compensation will only be endorsed by the DSB if the withdrawal of the offending member's practice is deemed "impractical" or the withdrawal of the measure is found to be inconsistent with the provisions of any WTO agreement.\textsuperscript{228} Furthermore, the DSU provides that compensation is always voluntary, even in the event of non-compliance with the panel or Appellate Body decisions.\textsuperscript{229} Many disputes arising between companies will not be related to violations of WTO principles. Such cases will not be heard before the DSB and companies will be forced to enter arbitration or litigation in China. Although some believe the organization will help strengthen China's existing system of arbitration and litigation, the WTO may resolve only state-to-state disputes, but not those between China and foreign companies. Therefore, while China's accession to the WTO and its subjection to the DSU adds an additional means for member states to enforce China's WTO obligations, companies will not be allowed to take advantage of the DSU directly. They are rather more likely to obtain fast and effective relief by using "within China" remedies.

Understandably, investors have been heartened by the possibility that the China's accession into the WTO would bring stability and transparency to China's developing

\textsuperscript{227} \textit{Supra}, note 5 at Article 3, paragraph 7.
\textsuperscript{228} \textit{Supra}, note 5 at Article 3, paragraph 7.
\textsuperscript{229} \textit{Supra}, note 5 at Article 22, paragraph 1.
judicial system. Chinese government believes that WTO accession maybe an opportunity to enhance state coherence and stability, although in the context of a more decentralized political and economic system. Furthermore, WTO itself is a complex and ever-changing mechanism. As a new member of the WTO and the global trade leadership forum, China has the opportunity to shape globalization of law, not only to be shaped by it.

Globalization of law brings dangers as well as opportunities. To date evidence indicates that this trend is having a profound effect on China's political and economic system, especially as it serves to exacerbate current tensions, hasten longer-term domestic challenges, and affect the coherence of the state and thus the government's capacity to govern. By its very nature, globalization of law and WTO jurisdiction counter to China's insistence on "non-interference" in domestic affairs. In fact, China's government has yet to resolve the tension between its belief that they have much to gain from embracing forces of globalization of law, and their traditional fear that these processes will undermine their political power and capacity to govern. However, in the age of globalization, what governments do in the management of their domestic affairs may affect far more on foreign competitors than their own subjects. For instance, if China pursues its rights in the WTO, it will necessarily interfere in the domestic affairs of its trading partners, just as those partners will interfere in China's domestic affairs when pursuing their own right.

Globalization of law is a common challenge. It should be channeled or managed cooperatively by all countries. What China hopes to achieve through the WTO accession
is to develop a justice and flexible dispute resolution system in an increasingly interconnected world, and China can only do this with the co-operation and support of the global community, governments and companies. At the same time, China's success in using WTO regulations and principles to further legal reform is a powerful advertisement for the benefits of globalization of law.
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