

# EYE OF THE TIGER: CHINA WILL RISE UP TO THE CHALLENGE OF ITS RIVALS

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## I. INTRODUCTION

Since the opening of its economy in 1979, China has rapidly become one of the primary centers of the global economy.<sup>1</sup> It has consistently outpaced the growth of world trade for the last twenty years and it steadily represents a greater share of the international market.<sup>2</sup> Increase in commercial activity is typically accompanied by an increase in disputes.<sup>3</sup> Accordingly, the call for ADR in China has increased substantially along with this economic reform.<sup>4</sup> China ratified the New York Convention<sup>5</sup> in 1987<sup>6</sup> and has made a series of changes and additions to its procedural law and international agreements over the past two decades.<sup>7</sup> Yet, enforcement of foreign judgments in Mainland China is one of the most troubled

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<sup>1</sup> U.S. DEP'T OF STATE, BUREAU OF EAST ASIAN AND PACIFIC AFFAIRS, BACKGROUND NOTE: CHINA (Oct. 2007), available at <http://www.state.gov/r/pa/ei/bgn/18902.htm>.

<sup>2</sup> Thomas Rumbaugh & Nicolas Blancher, *China: International Trade and WTO Accession 3* (International Monetary Fund, IMF Working Paper No. 04/36, 2004), available at <http://www.internationalmonetaryfund.com/external/pubs/ft/wp/2004/wp0436.pdf> (data represented through 2003).

<sup>3</sup> Wu Wei, *Civil and Commercial Dispute Resolution Mechanisms: A Brief Comparative Study*, CHINA BULLETIN (King & Wood, Beijing, China) Jan. 11, 2007, [http://www.kingandwood.com/Bulletin/Bulletin%20PDF/en\\_2005-01-Wu%20Wei.pdf](http://www.kingandwood.com/Bulletin/Bulletin%20PDF/en_2005-01-Wu%20Wei.pdf) (emphasizing that the “interdependent nature” of the world’s economies have enabled arbitration to strengthen as an instrument for dispute resolution); see also Jose Alejandro Carballo Leyda, *A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Taiwan?*, 6 CHINESE J. INT’L L. 345, 347 (2007).

<sup>4</sup> Wei, *supra* note 3.

<sup>5</sup> The New York Convention is the most commonly referred to source of guidance in establishing international arbitration rules and processes.

<sup>6</sup> UNCITRAL, *Status: 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2007), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (hereinafter “Status: UNCITRAL, New York Convention”).

<sup>7</sup> Carballo Leyda, *supra* note 3.

areas in international arbitration.<sup>8</sup> The system is swollen with procedural obstacles, structural dysfunction, and protectionism.<sup>9</sup> As well, the Chinese government's efforts to improve this system have not kept up with the growth rates of its country.

These shortcomings are inevitably doomed. The speed of China's economic growth, or more directly, its growth in international commercial business, has only highlighted the inertial tendencies of legal doctrine. These tendencies cannot coexist with the position that China has assumed, and certainly not with the position that it seeks to obtain. The global economy will require expedited solutions to these issues, or it will simply begin to displace the market capacity away from China, which would seemingly force the same reformation.

This note will discuss the details of the enforcement challenges within Mainland China, identify the economic forces of the world market on China's arbitration processes, and will examine these force's certain effects on its arbitral award enforcement challenges. The perspective introduced herein describes the challenges and options that Mainland China will encounter with its arbitral award enforcement issues, and how the international, commercial market will force these difficulties to be quickly repaired. The expectations of the Chinese government's reaction to the economic markets, organizations, and countries that it now more frequently encounters extends to the judicial and arbitral enforcement practices that the Mainland now employs. Whatever the strength of China's emerging economy, it is no match for that of the world.

## II. THE EVOLUTION OF ARBITRATION IN CHINA

### A. The Three Entities of China

When discussing arbitration in China today, one must consider the nation's three components: Mainland China, Taiwan, and Hong Kong. Hong Kong only became subject to Chinese sovereignty in

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<sup>8</sup> Jessica L. Su, *Bridging the Enforcement Gap?*, FINDLAW, 1999, <http://library.findlaw.com/1999/Jun/1/131223.html> (claiming that "the People's Courts have often refused to recognize and enforce foreign arbitral awards based on the various grounds provided for in the New York Convention").

<sup>9</sup> Ariel Ye, *Enforcement of Foreign Arbitral Awards and Foreign Judgments in China*, 74 DEF. COUNS. J. 248, 251 (July 2007).

1997 when it reverted from the United Kingdom.<sup>10</sup> Taiwan is a province of China whose government is autonomous. Its laws, though similar, are not always identical to China's.<sup>11</sup> Mainland China is the mass nation that is the central government of the country,<sup>12</sup> the most commonly referred to when discussing China, and the core subject of this analysis.

### 1. Mainland China

The CCIPT<sup>13</sup> created and entered into many international contracts between Western and Asian countries in the 1950s.<sup>14</sup> These contracts required disputes to be handled through arbitration institutions that were organized and located in Britain and Sweden.<sup>15</sup> China thus began to explore the concept of its own institutions, and implemented the Foreign Trade Arbitration Commission ("FTAC") in 1956.<sup>16</sup> This Commission had a questionable reputation and never accepted any complex or sophisticated cases. Over the next twenty years it mediated no more than sixty cases and twelve arbitrations.<sup>17</sup> The late 1970s brought about the open trade policy in China, and its foreign arbitration system began developing rapidly in the 1980s.<sup>18</sup> It was then that FTAC was renamed the Foreign Economic and Trade Arbitration Commission ("FETAC"), and the scope of disputes that it was positioned to handle increased dramatically.<sup>19</sup> In 1987, China ratified the New York Convention with the stipulation that all judgments must be affirmed by the Supreme People's Court network,<sup>20</sup> and renamed the Commission once again to its current iteration, CIETAC.<sup>21</sup>

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<sup>10</sup> Edward A. Gargan, *China Resumes Control of Hong Kong, Ending 156 Years of British Rule*, N.Y. TIMES, July 1, 1997, available at <http://www.nytimes.com/specials/hongkong/070197hongkong.html>.

<sup>11</sup> Bruce Jacobs, *Taiwan's History—And Destiny—Of Freedom From China*, THE CHRISTIAN SCIENCE MONITOR, Dec. 13, 2006, available at <http://www.csmonitor.com/2006/1213/p09s02-coop.html>.

<sup>12</sup> The State Council Information Office, White Paper on China's Political Party System, Nov. 15, 2007, available at <http://www.china.org.cn/english/news/231852.htm>.

<sup>13</sup> China Council for the Promotion of International Trade.

<sup>14</sup> WILL W. SHEN & IRIS H. Y. CHIU, *ARBITRATION IN CHINA: A PRACTICAL GUIDE* 1.2.a.i. (Sweet & Maxwell Asia 2004).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1.2.a.ii.

<sup>19</sup> *Id.*

<sup>20</sup> Carballo Leyda, *supra* note 3.

<sup>21</sup> *Introduction*, CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION (CIETAC), [http://www.cietac.org.cn/english/introduction/intro\\_1.htm](http://www.cietac.org.cn/english/introduction/intro_1.htm) (last visited Mar. 8, 2009).

There were two conditions to its signatory, the reciprocity reservation and the commercial reservation.<sup>22</sup> The reciprocity reservation “foreclosed the possibility of applying the New York Convention to foreign awards rendered in Mainland China.”<sup>23</sup> The effect of this is that neither the New York Convention nor the International Chamber of Commerce (“ICC”) rules are applied to foreign arbitral awards that are rendered in China. The commercial reservation limits the New York Convention’s application to legal, commercial disputes.<sup>24</sup> Rather than adopt the 1985 UNCITRAL Model Law (“Model Law”), China drafted its own Arbitration Law in 1994, but followed the Model Law closely.<sup>25</sup> In 2001, China joined the World Trade Organization (“WTO”), which has significantly fueled its international market activity.<sup>26</sup>

## 2. Hong Kong

Until July 1, 1997, Hong Kong was subject to the legal and political systems of Great Britain, and had been under its power and people for over one hundred and fifty years.<sup>27</sup> Once the final British colonial governor relinquished control, it immediately fell under China’s rule.<sup>28</sup> China’s domestic dispute protocol, however, was entering a state of flux, and the arbitral authority of those disputes was soon to change.<sup>29</sup>

Most recently, in 2006, Mainland China and Hong Kong entered into the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of Mainland China and Hong Kong Special Administration Region Pursuant to Choice of Court Agreement between Parties Concerned (“HK Arrangement”), which provides that each will enforce the other’s arbitral awards.<sup>30</sup> These changes still leave large gaps in the fulfillment of foreign arbitral awards due to conditions left around the agreement and the procedural difficulties with implementing such an extensive agreement. This is discussed *infra* in much greater depth.

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<sup>22</sup> Carballo Leyda, *supra* note 3.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Edward A. Gargan, *Hong Kong’s Inner Circle: Rich and Autocratic*, N.Y. TIMES, June 13, 1997, available at <http://www.nytimes.com/specials/hongkong/061397hongkong-elite.html>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Ye, *supra* note 9.

### 3. Taiwan

Taiwan has recently become a “thriving democracy and an economic powerhouse.”<sup>31</sup> In 1979, the United States withdrew its local, military support in an effort to strengthen its relationship with Beijing.<sup>32</sup> Although this had no detrimental effects on Taiwan’s economic potential, it seemingly did nothing helpful to its tenuous relationship with Mainland China.<sup>33</sup>

China claims Taiwan as part of its own sovereignty, although the official relationship status will vary depending on whom you ask, particularly the Taiwanese.<sup>34</sup> The primary arbitration body in China, CEITAC, after a rule revision in 1994, now has jurisdiction over Taiwan, along with Hong Kong and Macao.<sup>35</sup> In 1998, Mainland China passed monumental legislation that specifically embraced the recognition and enforcement of civil judgments in its country.<sup>36</sup> This is notable, as discussed *infra*, as the aforementioned conditions on the HK Arrangement narrow the types of suits that are reciprocally recognized

#### B. Developments in Mainland China Over the Last Decade

The past ten years of China’s arbitration reform have been quite productive. “Indeed, in the past decade, China has itself become a big provider of arbitration services.”<sup>37</sup> The changes are generally thought to be improving the arbitral landscape, and are addressing the larger obstacles in the system.<sup>38</sup>

Until 1998, the infrastructure for foreign-related disputes was completely separate from that which managed domestic disputes.<sup>39</sup>

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<sup>31</sup> Patrick E. Tyler, *Question After Hong Kong: Is Taiwan Next for China?*, N.Y. TIMES, May 3, 1997, available at <http://www.nytimes.com/specials/hongkong/archive/050397taiwan-china.html> (arguing that Taiwan may “very much be in charge of its own destiny”).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Jacobs, *supra* note 11 (outside of a period following World War II, between 1945 and 1949).

<sup>35</sup> SHEN & CHIU, *supra* note 14, at 1.2.a.ii.

<sup>36</sup> *Id.*

<sup>37</sup> Ian Cheng, *A Question of Judgment: The Unreliability of China’s Legal System Means Arbitration is Popular*, FINANCIAL TIMES (London), Oct. 29, 2003, at 12.

<sup>38</sup> Andrew Jeffries & James Kwan, *INVESTING IN CHINA: Making a Case for Arbitration*, FT.COM, July 27, 2004, <http://search.ft.com/nonFtArticle?id=040728001239> (suggesting that insolvency of the debtor has become a more common problem in award enforcement than any legal, structural issues).

<sup>39</sup> SHEN & CHIU, *supra* note 14, at 1.3.a.

This presented persistent jurisdictional issues that were inevitably litigated in the People's Courts.<sup>40</sup> The change has had a tremendous impact on CIETAC, and it is seen largely as forward progress.<sup>41</sup> It is now possible for CIETAC to participate in any foreign or domestic dispute, removing an element of challenge to arbitral awards and their enforcement.<sup>42</sup> However, this change is very recent, and the primary emphasis of CIETAC remains foreign arbitrations.<sup>43</sup>

In 2001, after approximately fifteen years of negotiation, China finalized its agreement with the World Trade Organization, and was accepted as a member.<sup>44</sup> This theoretically improved the relationship with other members of the WTO. As a result, China was able to implement some drastic price controls and regulations on its economy.<sup>45</sup> Many powerful figures around the world commended this event, perceiving, then and now, that this was a major step in the right direction for China, both economically and socially.<sup>46</sup>

The most recent changes to China's arbitration system are the reciprocal enforcement arrangements it has entered with neighboring countries. For instance, the HK Arrangement is simply an agreement that allows parties that receive judgments under designated courts in Mainland China or Hong Kong to apply to have the judgment enforced in the other sovereignty's courts.<sup>47</sup> It mainly facilitates money judgments of civil and commercial cases,<sup>48</sup> and specifically excludes "employment contracts and contracts to which a natural person acting for personal consumption, family or other non-commercial purposes is a party."<sup>49</sup> This agreement attempts to

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1.2.a.ii ("One of the important recent changes made to the CIETAC jurisdiction was to extend the jurisdiction of CIETAC to domestic arbitration.").

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1.3.a ("[D]omestic arbitration is still very much a work in progress although the theoretical framework has been put into place.").

<sup>44</sup> WTO News: 2001 Press Releases, *WTO Successfully Concludes Negotiations on China's Entry*, Sept. 17, 2001, available at [http://www.wto.org/english/news\\_e/pres01\\_e/pr243\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr243_e.htm).

<sup>45</sup> *Id.*

<sup>46</sup> Mike Moore, *China's WTO Deal: A Defining Moment for Global Cooperation*, INT'L HERALD TRIB., Sept. 19, 2001, available at [http://www.iht.com/articles/2001/09/19/edmoore\\_ed2\\_.php](http://www.iht.com/articles/2001/09/19/edmoore_ed2_.php).

<sup>47</sup> Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements Between Parties Concerned art. 1, P.R.C.-H.K., July 14, 2006.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

improve the efficiency of enforcement judgments between the two entities.<sup>50</sup>

Similar to the HK Arrangement, in March of 2006, Mainland China entered into an agreement with Macao called the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of Mainland China and Macao Special Administration Region.<sup>51</sup> Some scholars indicate that the drafters and proponents of this pact are still struggling to have the Act really put into effect.<sup>52</sup>

There is generally one factor that has pushed these revisions and implementations into place. The rapidly increasing flow into China of international businesses and investors has steered them around its courts, and into arbitration agreements.<sup>53</sup> While this process has improved dramatically since its inception, there is still a very large issue of the actual enforcement of the awards once they are issued.<sup>54</sup>

### C. Difficulties in Arbitral Award Enforcement

In June of 1988, Revpower Ltd., an industrial battery company located in Hong Kong, entered into a manufacturing contract with Shanghai Far-East Aero-Technology Import & Export Corporation ("Far-East").<sup>55</sup> The relationship reached an insurmountable dispute shortly thereafter, and, after several failed attempts at resolving amicably, Revpower filed an arbitration request with the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") in July of 1991.<sup>56</sup> Revpower claimed damages of approxi-

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<sup>50</sup> Ye, *supra* note 9.

<sup>51</sup> *Id.*

<sup>52</sup> *Mainland, Macao sign pact to facilitate enforcement of arbitration*, PEOPLE'S DAILY ONLINE, Oct. 31, 2007, available at <http://english.peopledaily.com.cn/90001/90776/6293693.html> (last visited Mar. 8, 2009).

<sup>53</sup> Cheng, *supra* note 37.

<sup>54</sup> Jeffries & Kwan, *supra* note 38.

<sup>55</sup> Yanming Huang, *Price in Denying the Validity of an Arbitration Agreement and Refusing to Participate in Arbitral Proceedings Without Grounds*, in 21 MEALEY'S INTERNATIONAL ARBITRATION REPORT 1, 2 (Jan. 2006), available at <http://www.sccietac.org/cietac/admin/files/arb012706YanmingCm.pdf>.

<sup>56</sup> *Id.* (noting that the relevant clause of the contract (Clause 14(c) ("Disputes, Claims and Arbitration")) stated:

Should either party, after 60 days after the dispute arises, believe that no solution to the dispute can be reached through friendly consultation, such party had [sic] the right to initiate and require arbitration in Stockholm, Sweden, in accordance with the

mately \$4.5 million, plus interest and costs.<sup>57</sup> Later that year, Far-East submitted a letter claiming that the SCC did not have jurisdiction over the dispute.<sup>58</sup> In 1993, just seven weeks before the final hearing, Far-East notified the tribunal that it was withdrawing from the arbitration.<sup>59</sup> The panel commenced proceedings nonetheless, and in July of 1993, after four days of hearings, it announced a unanimous decision to award Revpower its full damages claim.<sup>60</sup>

Revpower immediately applied to the Shanghai Intermediate People's Court ("SIPC") to enforce the award against Far-East.<sup>61</sup> Two years later, the court finally registered Revpower's application and refused to enforce its award.<sup>62</sup> Revpower filed its enforcement application with a second SIPC, and in March of 1996 the award was enforced. Far-East's assets were ordered frozen, and to the extent there was a remaining balance, further assets would be auctioned or sold. By this time, however, Far-East had filed for bankruptcy, and Revpower never recovered its award.<sup>63</sup>

This case is often cited when discussing arbitral enforcement in China because it so clearly articulates the difficulties with enforcement that can be encountered.<sup>64</sup> Although there have been many changes and developments since, the case represents a number of issues that are still very much alive, particularly in respect to award enforcement. For instance, there is no provision for ad hoc clauses that allow the parties to choose their forum.<sup>65</sup> This forces these parties into established Chinese arbitral institutions.<sup>66</sup> Additionally, CIETAC is generally thought to be slow, and many of its arbi-

Statute (R & P) of the Arbitration Institute of the Stockholm Chamber of Commerce.).

<sup>57</sup> *Id.* at 3.

<sup>58</sup> *Id.* at 2.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (stating that the award included attorneys' fees and interest accrued from the date of the submission of the claim in 1991).

<sup>61</sup> Su, *supra* note 8.

<sup>62</sup> Huang, *supra* note 55 (noting that subsequent to the arbitral award Far-East filed the same dispute in the SIPC. Revpower challenged the court's jurisdiction, and this issue remained open, along with Revpower's arbitral award enforcement application for the next two years. The court finally rejected the enforcement due to the jurisdiction question that sat before it in the Far-East case).

<sup>63</sup> Huang, *supra* note 55, at 5.

<sup>64</sup> Carballo Leyda, *supra* note 3 ("One of the most publicized examples of the problems facing a foreign company seeking to enforce an arbitral award in China involved Revpower . . . [and] Shanghai Far-East Aero-Technology Import & Export Corporation.").

<sup>65</sup> Aboul Enein & Zhang Yuqing, *More Work Needed on System Environment*, CHINA DAILY, May 18, 2004.

<sup>66</sup> *Id.*

trators to be of questionable ability.<sup>67</sup> The real difficulty, however, lies in the enforcement of the award.<sup>68</sup> There is a great deal of protectionism and a widespread challenge to enforce an arbitral award or court judgment in Mainland China.<sup>69</sup> This is clearly present in the Revpower case, *supra*.

### III. THE COMPELLING ECONOMIC FORCES

At the Twenty-First Century Forum in 1996, Hu Sheng, vice-chairman of the National Committee of the Chinese People's Political Consultative Conference, gave a keynote speech that sounded the common trumpets of the Chinese reform mentality.<sup>70</sup> "Facts have proved that economic development in China has benefited both the Chinese people as well as countries that have economic links with China," said Sheng. He went on, "It seems certain that this momentum of development will continue in the 21st century. Any external force trying to contain this developmental momentum will be unjustified and doomed to failure."<sup>71</sup>

There is a common notion that Mainland China, through its dealings with the West, will respond to the market forces and institutional requirements of other powerful countries with the adoption of democratic practices.<sup>72</sup> This notion is partly based on the historical accounts of countries such as Chile, South Korea, and Taiwan, whose economic transformations provoked successful democratic systems to follow.<sup>73</sup> It is reasonable to extend this concept to the legal framework of Mainland China, and furthermore to the arbitration processes and challenges that currently exist.<sup>74</sup> The

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<sup>67</sup> Meg Utterback, *China Watch: Arbitration in India and China—Concerns and Options*, MONDAQ, July 5, 2006.

<sup>68</sup> Jeffries & Kwan, *supra* note 38.

<sup>69</sup> *Id.*

<sup>70</sup> *China: a positive force in 21st Century*, CHINA DAILY, Sept. 6, 1996, at 4.

<sup>71</sup> *Id.*

<sup>72</sup> Ying Ma, *China's Stubborn Anti-Democracy*, POLICY REVIEW, Feb. and Mar. 2007, available at <http://www.hoover.org/publications/policyreview/5513661.html>. Ma discusses this theory of inevitable change as a flawed concept. Her perspective is that the true force that will, and she does claim that it will, influence or change the anti-democratic oath of the National Congress is the people of the Mainland. *Id.*

<sup>73</sup> *Id.* (quoting, "[i]ndeed, two decades-plus of U.S.-China trade have drastically altered the face of Chinese society, resulting in an unprecedented expansion of economic, social, and personal freedoms for ordinary Chinese citizens.").

<sup>74</sup> Wei, *supra* note 3.

Mainland is very aware of the connection of its foreign investments to its judicial and arbitral difficulties.<sup>75</sup>

Enthusiasm comparable to Sheng's remarks has been pervasive throughout Mainland China for some time, and certain efforts and milestones are the most notable points to explore in understanding the provoking forces that have driven China's economy to where it is today.

### A. The Opening Door

"For decades, the . . . Chinese econom[y] . . . plodded along, isolated from and ignored by the rest of the world . . . Their peoples were poor, with little hope for a better life." In 1978, China opened its economy and "'their fortunes began to change.'"<sup>76</sup> Since then they have intensely focused on their open-door policies, economic reform, and the modernization of the socialist structure.<sup>77</sup>

Immediately prior to this shift, the Great Proletarian Cultural Revolution had severe consequences on the economy of China.<sup>78</sup> The general decline in business and productivity brought the government's budget down to crisis levels, and the situation was exacerbated by an earthquake in 1976 and the death of Chairman Mao in that same year.<sup>79</sup>

The subsequent opening of the trade economy opened many eyes along with it. By the 1990s, "China had become the 11th largest trading country."<sup>80</sup> Its foreign trade had increased twenty-three percent in less than twenty years, foreign capital investment skyrocketed, and it became the second largest foreign investment target in the world.<sup>81</sup> Perhaps one of the most important theories to note is that the government of China has clearly learned that its

<sup>75</sup> Jeffries & Kwan, *supra* note 38.

<sup>76</sup> Pankaj Mishra, *It's a round world after all: India, China, and the global economy*. (The Elephant and the Dragon: The Rise of India and China and What it Means for All of Us) (Escape from Empire: The Developing World's Journey Through Heaven and Hell) (Book Review), 315 *HARPER'S BAZAAR*, Aug. 1, 2007, at 83.

<sup>77</sup> *China: a positive force in 21st Century*, *supra* note 70.

<sup>78</sup> James K. Galbraith & Jiaqing Lu, *Sustainable Development and the Open-Door Policy in China* (UTIP Working Paper No. 16, May 5, 2000), available at [http://utip.gov.utexas.edu/papers/utip\\_16.pdf](http://utip.gov.utexas.edu/papers/utip_16.pdf) (stating that the decade long (1966-1976) "catastrophe" was "first and foremost a fiscal problem").

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Galbraith & Lu, *supra* note 78.

own funding is substantially less burdened when it is subsidized with foreign cash and assets.<sup>82</sup> Additionally, it has been able to import technology that it would not otherwise have access to.<sup>83</sup>

The implementation of the Open Door policy was the beginning of a development rate almost unprecedented in history.<sup>84</sup> This prompted the immediate development of FETAC,<sup>85</sup> which was quickly augmented with the formation of CIETAC when China ascended to the New York Convention in 1987.<sup>86</sup> Also within this first decade, China began negotiations in what would result in its agreement to join the WTO.<sup>87</sup> This undertaking, although it would take more than a decade to agree upon, would also have profound effects on arbitral proceedings in China.<sup>88</sup>

## B. Unprecedented Growth

China is currently experiencing some of the greatest growing pains in history. The National Development and Reform Commission of China states that between 2000 and 2005, China received \$383 billion in foreign investments.<sup>89</sup> Two-way trade between the U.S. and China alone was approximately \$244 billion in 2005.<sup>90</sup> Between 1980 and 2002, both import and export activity in China increased over 130 percent.<sup>91</sup> “China in the past three decades of reforms and opening-up of its economy has maintained an average annual growth rate of 9.6 percent.”<sup>92</sup> Their gross domestic product (GDP) ranks fourth in the world, and they are the third largest

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<sup>82</sup> *Id.* (stating that “Chinese leaders well understand that they need capital from external sources to finance their development goals, and that they need it on terms they can afford.”).

<sup>83</sup> *Id.* (establishing aircraft as a primary example of new technological availabilities (China has an agreement with Boeing to produce many of its commercial aircraft)).

<sup>84</sup> *China’s Open Door*, J. COM., Feb. 13, 1995, 1A (portraying a graph that represents economic growth from 1950 to 1994).

<sup>85</sup> SHEN & CHIU, *supra* note 14, at 1.2.a.ii.

<sup>86</sup> CIETAC, *supra* note 21.

<sup>87</sup> Carballo Leyda, *supra* note 3.

<sup>88</sup> *Id.*

<sup>89</sup> Dennis M. Horn & Kai Yang, *Riding the Chinese Juggernaut*, PROBATE AND PROPERTY, Sept.-Oct. 2007, at 9.

<sup>90</sup> JOHN FRISBIE & MICHAEL OVERMYER, THE US-CHINA BUSINESS COUNCIL, US-CHINA ECONOMIC RELATIONS: THE NEXT STAGE 243 (2006), <http://www.uschina.org/public/documents/2006/08/us-china.pdf>.

<sup>91</sup> Rumbaugh & Blancher, *supra* note 2 (data represented through 2003).

<sup>92</sup> Syed Ali Nawaz Gilani, *58 Years of New China*, BUSINESS RECORDER (Oct. 1, 2007); *China: a positive force in 21st Century*, CHINA DAILY, Sept. 6, 1996, at 4 (“During the last two decades of the 20th century, China focused its efforts on the socialist modernization drive and

trading country.<sup>93</sup> “[S]ince joining the WTO in 2000[, China] . . . has created about 10 million jobs for the exporting countries and regions concerned.”<sup>94</sup>

“Since 2000 Asia’s GDP has grown by over six percent annually, contributing to twenty percent of the world economic growth.<sup>95</sup> Presently Asia’s economy, [international] trade and foreign exchange reserves make up one fourth, one third, and three fourth[s] of the world total, respectively.”<sup>96</sup> The GDP is over \$2.5 trillion U.S. dollars, and the per capita gross domestic product is over \$2000.<sup>97</sup>

There is no reason to believe this trend will slow down soon.<sup>98</sup> “Its leaders are slowly creating a legal framework and a judicial system that balances the principles of a socialist government with the necessity of providing for private ownership as an engine for economic growth.”<sup>99</sup> There is still substantial room for growth in its manufacturing output,<sup>100</sup> and its gross domestic product is not yet competitive with the United States.<sup>101</sup> If the market were to stand still as it is now, China would be one of the leading economies in international trade, and that installs the necessary economic forces which will influence the speedy progression of arbitration methodology.

### C. Hong Kong

Hong Kong recently celebrated the 10th anniversary of its return to the sovereignty of Mainland China, where President Hu Jintao hailed the success of the “one country, two systems” concept.<sup>102</sup> The handoff of Hong Kong by the British government was tailored to leave “Hong Kong people administering Hong Kong.”<sup>103</sup> There is much more autonomy, much more of a demo-

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stucks [sic] to the reform and open-door policies. China’s economy in these 20 years grew at an average annual rate of about 9 percent.”).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> BACKGROUND NOTE: CHINA, *supra* note 1.

<sup>98</sup> FRISBIE & OVERMYER, *supra* note 90.

<sup>99</sup> Horn & Yang, *supra* note 89, at 12.

<sup>100</sup> FRISBIE & OVERMYER, *supra* note 90.

<sup>101</sup> Horn & Yang, *supra* note 89, at 12.

<sup>102</sup> *Hu Hails Hong Kong as ‘Window and Bridge,’* CHINA DAILY, July 2, 2007.

<sup>103</sup> *Id.*

cratic system, than in Mainland China.<sup>104</sup> This has made Hong Kong's economy one of the five strongest in the world, exceeding such countries as Japan, Great Britain, and France.<sup>105</sup>

Some specific suggestions of the foundation of this success are Hong Kong's "protection of property rights, the rule of law, and a market-oriented, laissez-faire approach to governance."<sup>106</sup> Although an Asian financial crisis in 1997, along with the transition of Hong Kong from Britain to Mainland China, slowed Hong Kong's economic growth, it is still one of the world's most powerful economies.<sup>107</sup> The Mainland and Hong Kong have been particularly synergistic since Hong Kong's return to China, lowering tariffs for trade and implementing preferential policies between them.<sup>108</sup>

However, this, along with its stronger legal infrastructure and proximity to Mainland China, is shifting arbitral proceedings away from Mainland China and into Hong Kong.<sup>109</sup> The HK Arrangement skirts the issue of China's reciprocity reservation to the New York Convention. Hong Kong is to enforce arbitral awards made in China, who in turn must enforce Hong Kong's awards as if the New York Convention were in place between them.<sup>110</sup> The HK Arrangement also does not contain a commercial reservation.<sup>111</sup> These features have made Hong Kong a more preferred venue for arbitration than China.<sup>112</sup>

#### D. Political Factors

The Communist Party of China (CPC) has existed since 1921, and formed the People's Republic of China in 1949.<sup>113</sup> The National Congress is the governing body of the Party. It is convened every five years by the Central Committee, which is elected by the

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<sup>104</sup> *Id.*

<sup>105</sup> Nicolaas Groenewold & Sam Hak Kan Tang, *Killing the Goose that Lays the Golden Egg: Institutional Change and Economic Growth in Hong Kong*, 45 *ECON. INQUIRY* 787 (Oct. 1, 2007) (discussing the correlation between democracy and economic growth).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *CEPA plays important role: HK Finance Secretary*, XINHUANET, June 27, 2006, available at [http://news.xinhuanet.com/english/2006-06/27/content\\_4755871.htm](http://news.xinhuanet.com/english/2006-06/27/content_4755871.htm) (last visited Mar. 8, 2009).

<sup>109</sup> Cheng, *supra* note 37.

<sup>110</sup> Carballo Leyda, *supra* note 3.

<sup>111</sup> *Id.*

<sup>112</sup> Cheng, *supra* note 37.

<sup>113</sup> Communist Part of China, CHINATODAY.COM, Sept. 19, 2007, <http://www.chinatoday.com/org/cpc/>.

National Congress.<sup>114</sup> In the few years following the death of Mao Zedong in 1976, “the Chinese leadership moved toward more pragmatic positions in almost all fields.”<sup>115</sup> However, the progress and speed of political reform has ebbed and flowed ever since.<sup>116</sup> Further political and legal reform took place in the 1990s, which bolstered economic development easily highlighted by the beginning of China’s WTO membership.<sup>117</sup>

The National Congress is the most available window into the political infrastructure of the country.<sup>118</sup> In the fall of 2007 the 17th National Congress convened, but that window was far from transparent into the future platform of the CPC.<sup>119</sup> This lack of perspicuity has been consistently present throughout the history of the Party.<sup>120</sup> Many of the CPC leaders and organizers have espoused a very centralized and protective government.<sup>121</sup> While China has made great strides in improving their legal framework across the board, there is substantial residue of the vague and opaque.<sup>122</sup>

Wang Shengchang, vice-director of CIETAC, has spoken openly about the need for “a more flexible and opened arbitration system.”<sup>123</sup> Much of the state-run practice is limited by the communist and socialist factors, such as the sub-standard pay the arbitrators receive,<sup>124</sup> or the high volume of disputes that they handle simultaneously.<sup>125</sup> Ultimately, much of the nation’s arbitral system is tied to the political program, and it is a reflection of the current administration’s focus and practice.

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<sup>114</sup> *Id.*

<sup>115</sup> Asia for Educators, *Overview of China’s Political System* (Taken from the U.S. Department of State’s *Background Notes: China*), <http://afe.easia.columbia.edu/china/gov/backgrnd.htm> (last visited Jan. 17, 2008).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Naoki Tanaka, *Political Factors Dominate China’s Business Cycle*, NIKKEI WEEKLY, Dec. 10, 2007.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Asia for Educators, *supra* note 115.

<sup>122</sup> *Id.*

<sup>123</sup> *Minimize Losses with Arbitration*, CHINA DAILY, Mar. 16, 2004.

<sup>124</sup> *Id.*

<sup>125</sup> Jerome A. Cohen, *Time to Fix China’s Arbitration*, FAR E. ECON. REV., Jan. 1, 2005, at 31.

### E. Mainland China's Current Economic Status and Forward Agenda

It is not difficult to find opinions that China will progress to the top ranks of economic power within the first quarter of the 21st century.<sup>126</sup> In March of 2006, China adopted another Five Year Plan for National Economic & Social Development for the years 2006-2010.<sup>127</sup> This plan includes two key objectives: to increase the GDP by 7.5 percent annually, and to reduce energy consumption per unit of GDP by twenty percent. This also includes plans for increasing land that is cultivated and increasing jobs for both urban and rural citizens.<sup>128</sup>

Not to say that this will be an easy task for the country, its government, and its people. Hu Sheng noted that “[m]any politicians and scholars believe this provision may be realized, yet it requires painstaking efforts.”<sup>129</sup> While China strives to improve its stature in the global market, it will, in parallel, have to tend to improving the internal quality of life.<sup>130</sup>

Government policy in 2009 will be guided by sustainable environmental measures and economic growth.<sup>131</sup> The next few years are on schedule to continue well-paced growth of exports, increased GDP, and the reduction of the government's deficit.<sup>132</sup> As well, there is an express campaign to improve the democratic accountability of the party members within the CPC. This is an effort purely aimed at reducing corruption of officials within the Party.<sup>133</sup> The basic trend of growth should continue, accelerating the stream of foreign business, which will increase the associative disputes, and thus increase arbitration proceedings.

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<sup>126</sup> *China: a positive force in 21st Century*, *supra* note 70, at 4 (stating that research institutions around the world believe this could happen “in the first two decades of the 21st century”).

<sup>127</sup> Gilani, *supra* note 92.

<sup>128</sup> *Id.*

<sup>129</sup> *China: a positive force in 21st Century*, *supra* note 70, at 4.

<sup>130</sup> *Id.* (declaring that “[China’s] requirements are to implement a socialist market economy as the objective of economic restructure, and improve and expand the socialist political democracy while developing the economy”).

<sup>131</sup> Economist.com, Country Briefings: China, Country Forecast, Feb. 17, 2009, <http://www.economist.com/countries/China/profile.cfm?folder=profile-Forecast>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

## IV. ECONOMIC AND ARBITRAL MIRACLES

China is not the first to experience such monumental economic acceleration, nor is it the first to face accompanying challenge in its legal system. There are several occurrences in recent history that have compelled great stories of economic triumph. They provide a prime example of the effects that a nation's opening economy can have on its arbitral system. West Germany, in post-World War II, displayed a stunning show of brilliant reform.<sup>134</sup> Likewise, South Korea, following the Korean War, established new trade policies that have strengthened its economy into one of the strongest in the world.<sup>135</sup> Most recently, Chile's implementation of laissez-faire economic policies in the 1970s has boosted its economy into one of the most competitive countries in Latin America, and a leading nation in international trade.<sup>136</sup> These economic ascensions are commonly referred to as the "Miracle on the Rhine," the "Miracle on the Han,"<sup>137</sup> and the "Miracle of Chile,"<sup>138</sup> respectively.

The key ingredient to these instances has been the initiation of a free market,<sup>139</sup> "an economic market operating by free competition."<sup>140</sup> Each of these nations implemented a number of changes that included currency reform, the abolishment of price controls, export-oriented trade policies, and an increase in foreign investment.<sup>141</sup> These operating principles, among others, have helped

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<sup>134</sup> David R. Henderson, *German Economic "Miracle,"* LIBRARY OF ECONOMICS AND LIBERTY, <http://www.econlib.org/library/enc/GermanEconomicMiracle.html> (last visited May 7, 2008) (stating that "[t]he effect on the German economy was electric").

<sup>135</sup> See *OECD lifts South Korean GDP growth estimate, citing consumer spending gains*, AP WORLDSTREAM, May 23, 2006; see also Korea.net, Korea expected to be the ninth largest economy by 2025, Dec. 12th, 2005, [http://www.korea.net/news/news/NewsView.asp?serial\\_no=20051211008&part=104&SearchDay=](http://www.korea.net/news/news/NewsView.asp?serial_no=20051211008&part=104&SearchDay=) (last visited May 12, 2008).

<sup>136</sup> Aaron Leitner, *Chile—An economy emerging into a developed market?*, JERUSALEM POST 17, Nov. 11, 2007, at Economics.

<sup>137</sup> Kim Dae-jung, President, Republic of Korea, Speech at University of Berlin (Mar. 9, 2000).

<sup>138</sup> Paula Escobar, *Chile's Formula: All Realism, No Magic*, WASH. POST, Aug. 7, 2006.

<sup>139</sup> See *id.* (claiming that the Chilean "economy boasts strong and steady growth stemming from sensible free-market policies . . ."); see also Peter Mallory, Editorial, *The German Miracle*, ORLANDO SENTINEL, July 13, 1990, at A16 (stating that the German miracle "came about almost totally because the German leadership . . . created an almost completely free market condition in West Germany").

<sup>140</sup> MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 465 (10th ed. 1993).

<sup>141</sup> See Henderson, *supra* note 134; see also Thomas Ginsberg, *South Korea for Sale, but Many Firms Resist, the Government Always Saved the Big Companies Before. Some Firms Believe it Will Do So Again*, PHILADELPHIA INQUIRER, Aug. 16, 1998, at D1 (noting President Kim Dae

these economies to compete effectively, both domestically and internationally.<sup>142</sup> All three countries have strong GDP figures and show great promise for their continued incline.<sup>143</sup>

To be clear, these miracles are in reference to the economic events that occurred. The arbitral systems that followed were collateral necessities of an extension into international trade.<sup>144</sup> The development of successful dispute resolution capabilities has been essential to these economic flourishes.<sup>145</sup> Each country has invoked and continued respectable, reliable mechanisms for the resolution of international commercial disputes, primarily through arbitration.<sup>146</sup> Free trade and arbitration must co-exist in order to maximize economic potential, particularly in a recently developed market. Each structural, legal change not only responds to needs that have been put forth, but predicts the coming requirements, and allows for greater advancement.<sup>147</sup> Without the appropriate arbitration rules and standards set in place, these would be stories of failed economic attempts, most certainly not miracles.

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Jung's efforts to install foreign direct investment); Rafael X. Zahralddin-Aravena, *Chilean Accession to NAFTA: U.S. Failure and Chilean Success*, 23 N.C. J. INT'L L. & COM. REG. 53, 56 (Fall 1997) (suggesting that "[t]he key to Chile's recent rapid and consistent growth has been free market reforms . . . . emphasiz[ing] strong export orientation").

<sup>142</sup> See Henderson, *supra* note 134 (noting that "[o]utput continued to grow by leaps and bounds after 1948").

<sup>143</sup> See generally WORLD ECONOMIC OUTLOOK: INTERNATIONAL MONETARY FUND, GLOBALIZATION AND INEQUALITY (Oct. 2007).

<sup>144</sup> Wei, *supra* note 3.

<sup>145</sup> Han-Gak Jang, *Republic of Korea*, 14 TUL. MAR. L. J. 321 (Spring 1990) (stating that the Korean Arbitration Act of 1966 was a preemption "to meet the inevitable increasing demand for the resolution of international disputes more effectively and economically, as well as more amicably").

<sup>146</sup> Chul-Gyoo Park, *A Comparative Analysis of Arbitral Institutions and Their Achievements in the United States and Korea*, 15 AM. REV. INT'L ARB. 475 (2004) (speaking to South Korea's practices, that "with the exception of arbitration and mediation (or conciliation), Korea scarcely utilizes other types of ADR, either in the private or public sector").

<sup>147</sup> Scott R. Jablonski, *¡Si, Po! Foreign Investment Dispute Resolution Does Have a Place in Trade Agreements in the Americas: A Comparative Look at Chapter 10 of the United States—Chile Free Trade Agreement*, 35 U. MIAMI INTER-AM. L. REV. 627, 636 (Summer 2004) (discussing the "countries' commitment to predictable rules and international law" and that dispute resolution "solidifies the applicability of international law to foreign investment disputes").

B. *Wirtschaftswunder*

“I didn’t alter the regulation, I got rid of it.”<sup>148</sup> These words from Ludwig Erhard, generally considered the father of the “*Wirtschaftswunder*,”<sup>149</sup> the “Miracle on the Rhine,” spell out one of the key changes in the post-war, West German economy.<sup>150</sup> Following the Soviet withdrawal from the Inter-Allied Control Council, on Sunday, June 20, 1948, Erhard effectively dissolved price control and implemented a very complex currency reform.<sup>151</sup> These two actions had an instant impact. “The spirit of the country changed overnight.”<sup>152</sup> “Shops on Monday, June 21, were filled with goods as people realized that the money they sold them for would be worth much more than the old money.”<sup>153</sup> The stamp “Made in Germany” took on new form, portraying a level of quality that was enthusiastically sought all over the world.<sup>154</sup>

These effects on the citizens of West Germany were met with a reciprocal improvement in labor. Absenteeism at work was cut in half, and industrial production increased by fifty percent in just six months from Erhard’s implementations.<sup>155</sup> By 1958, annual, industrial production had increased over 400 percent.<sup>156</sup> West Germany began to welcome immigrants from its lower economically positioned neighbors in Southern Europe to fill the vacant jobs that were created by the rising output.<sup>157</sup> Over the next decades, the nation pushed forth “like a clever marathon runner.”<sup>158</sup> By the fall

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<sup>148</sup> Terrence Petty, *Germany Marks Centenary of Architect of Postwar ‘Economic Miracle,’* AP ONLINE, Jan. 29, 1997, at Finance (quoting Ludwig Erhard, the “architect” of Petty’s piece, in response to an American military governor’s scolding for “altering an occupation regulation”).

<sup>149</sup> *Id.* (translating the commonly used term, “*Wirtschaftswunder*,” to “economic miracle”).

<sup>150</sup> *Id.*

<sup>151</sup> Henderson, *supra* note 134 (discussing the currency reform as basically substituting a much smaller amount of deutsche marks for reichs marks, thus contracting the money supply and diminishing shortages).

<sup>152</sup> *Id.* (quoting Henry Wallich, in his 1955 book, *MAINSPRINGS OF THE GERMAN REVIVAL*).

<sup>153</sup> *Id.*

<sup>154</sup> Petty, *supra* note 148.

<sup>155</sup> Henderson, *supra* note 134 (stating that the May 1948 absenteeism average was 9.5 hours per week per person, compared to the October 1948 average of 4.2 hours per week per person).

<sup>156</sup> *Id.* (further noting that the per capita industrial production had increased over 300 percent).

<sup>157</sup> Anne Marie Seibel, *Deutschland ist Doch ein Einwanderungsland Geworden: Proposals to Address Germany’s Status as a “Land of Immigration,”* 30 VAND. J. TRANSNAT’L L. 905, 907 (Oct. 1997).

<sup>158</sup> John Hillkirk, *Germany Gears Up; It’s Poised to be Economic Powerhouse*, USA TODAY, Feb. 22, 1990, at 1B.

of the Iron Curtain, West Germany was the world's largest exporter, it had a record trade surplus, their gross national product (GNP) was \$1.3 trillion, and the West German deutsche mark was the strongest currency in the world.<sup>159</sup> Some scholars suggest that it is under-attribution to call these accomplishments a miracle, that it was the vision, the expectancy, of Ludwig Erhard and his peers.<sup>160</sup> Nomenclature aside, for millions of people, the results were perceived as miraculous, and the global economy benefited tremendously from the changes in West Germany, quite notably, from its international arbitration policies.

Looking at the historical development of West Germany's dispute resolution processes "provides a window into the forces propelling the country's reintegration into the international economic community."<sup>161</sup> Before the 20th century, Germany had turbulent receptiveness to arbitration, favored among some and despised by others.<sup>162</sup> After World War I, during the rise of the Republic of Weimar, arbitration became a prolific practice in an attempt to build a liberal democracy.<sup>163</sup> Following the fall of the Weimar Republic, the means of resolving conflicts in Germany was, of course, war. Post-World War II, the practice of arbitration both domestically and internationally began to solidify. The framework of economic law became exposed to forces outside of its sovereignty as international commerce grew.<sup>164</sup> This quickly led to many multi-lateral treaties that simultaneously enhanced the economy and the arbitral framework on which it rested.

The European Coal and Steel Community (ECSC) was formally established in 1951 and is considered one of the initial steps toward the European Union.<sup>165</sup> Although this agreement placed

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<sup>159</sup> *Id.* (noting that at the end of the 1970s, West Germany had a severe stall in its economic progress, most attributable the competitive rise of the Japanese economy).

<sup>160</sup> Henderson, *supra* note 134.

<sup>161</sup> Hannah L. Buxbaum, *German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement*, 23 BERKELEY J. INT'L L. 474 (2005).

<sup>162</sup> TIBOR VARADY, JOHN J. BARCELO III & ARTHUR T. VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE C51-52 (Thomson/West 2006) (2006).

<sup>163</sup> Manfred Weiss, *The Role of Neutrals in the Resolution of Interest Disputes in the Federal Republic of Germany*, 10 COMP. LAB. L. & POL'Y J. 339, 341 (Spring 1989).

<sup>164</sup> Buxbaum, *supra* note 161, at 486 (stating that the "enforcement culture was therefore shaped by a process of influence and resistance").

<sup>165</sup> Gerhard Bebr, *The European Coal and Steel Community: A Political and Legal Innovation*, 63 YALE L. J. 1, 2 (Nov. 1953) (quoting French Foreign Minister Robert Schuman who first proposed the ECSC, "[t]he pooling of coal and steel production will immediately assure the

heavy weight on the courts of the member countries, it is explicitly noted that the parties may agree to arbitrate and submit their judgments to the courts.<sup>166</sup> In 1956, UNIDROIT issued their Draft Uniform Law on the International Sale of Goods, and composed a commission, of which West Germany was a part, to revise and improve it through its enactment.<sup>167</sup> Eight years later, they were one of only nine countries to sign the Uniform Law on the International Sale of Goods (ULIS).<sup>168</sup> It ratified the New York Convention in 1961.<sup>169</sup> Also in that timeframe, West Germany and Pakistan signed the first bilateral investment treaty, a species of agreements that are purposeless without a reliable arbitration process.<sup>170</sup> The United Nations Convention on Contracts for the International Sale of Goods (CISG) was signed in 1981.<sup>171</sup> The CISG is a source of law for international commercial arbitration, and has been ratified by over seventy countries.<sup>172</sup> West Germany, continuing through the unification of Germany to present, has persisted in its assumption of trade agreements and treaties that improve its economic position and arbitration structures.

Today, Germany is one of the largest users of international arbitration as a commercial dispute mechanism.<sup>173</sup> Through a series of domestic laws, enforcement of an award can be complicated,

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establishment of a common basis for economic development, which is the first step for a European federation”).

<sup>166</sup> The Treaty establishing the European Coal and Steel Community (The Treaty of Paris), Art. 89, Apr. 18, 1951; *see also* Bebr, *supra* note 165, at 2 (“[T]he Court has compulsory jurisdiction over disputes among Member States concerning the application and interpretation of the Treaty.”).

<sup>167</sup> Maureen T. Murphy, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law*, 12 *FORDHAM INT’L L. J.* 727, 734 (Summer 1989).

<sup>168</sup> *Id.* (noting that the ULIS was never very popular, primarily due to the low number of members).

<sup>169</sup> *See* Status: UNCITRAL, New York Convention, *supra* note 6.

<sup>170</sup> Kelley Connolly, *Say What You Mean: Improved Drafting Resources as a Means for Increasing the Consistency of Interpretation of Bilateral Investment Treaties*, 40 *VAND. J. TRANS-NAT’L L.* 1579, 1584-87 (Nov. 2007) (stating that “bilateral investment treaties [(BIT)] will offer no credibility if they have no legitimacy, as indicated by arbitration decisions that uphold the intent of the parties to the BIT”).

<sup>171</sup> Status: 1980—United Nations Convention on Contracts for the International Sale of Goods, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (last visited May 11, 2008) (indicating that the CISG was not ratified in Germany until 1989).

<sup>172</sup> *Id.*

<sup>173</sup> *See generally* THE LONDON COURT OF INTERNATIONAL ARBITRATION, DIRECTOR’S GENERAL VIEW OF 2006 (Jan. 2007).

but only requires abiding execution of the procedure.<sup>174</sup> Germany is attentive to the idiosyncrasies of the New York Convention, and, with some countries, has installed or relied on treaties that help to circumvent some of its issues.<sup>175</sup> Germany has become a venue of reliable arbitration proceedings and enforcement, and its efforts to improve will continue as they have for over half a century.

This highly abbreviated outline of the contemporary development of arbitration in West Germany serves as a basis for the remaining examples given, North Korea and Chile. The notions here tie directly into the current actions of Mainland China, and will be discussed further *infra*. However, the cumulative presentation of these three economic forces establishes a foundation of empirical support for the conclusion that China's enforcement policies will align with these predecessors. Perhaps West Germany will be the model.

### C. Miracle on the Han

#### 1. Park's Plan

Beginning in 1910, Korea was under Japanese control.<sup>176</sup> Shortly after the attack on Pearl Harbor, Korea joined the allied forces against Japan and Germany.<sup>177</sup> On August 15, 1945, following the bombing of Hiroshima and Nagasaki, Japan surrendered, thus ending the occupation of Korea.<sup>178</sup> The American military proposed dividing Korea at the 38th parallel to delineate the harsh, political distinctions that followed between North and South Korea.<sup>179</sup> This had little effect on the tensions that mounted. In June of 1950, following continued disagreements of borders and election protocol, North Korea attacked the South, beginning a bloody war

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<sup>174</sup> See generally Otto Sandrock & Matthias K. Hentzen, *Enforcing Foreign Arbitral Awards in the Federal Republic of Germany: The Example of a United States Award*, 2 *TRANSNAT'L LAW*. 49 (Spring 1989).

<sup>175</sup> *Id.* (referring to Germany's reliance on the Treaty of Friendship, Commerce and Navigation of 1954 between West Germany and the United States in recent cases where enforcement was tenuous under the New York Convention).

<sup>176</sup> AsiaInfo.org, Establishment of the Republic of Korea, [http://www.asianinfo.org/asianinfo/korea/history/establishment\\_of\\_the\\_republic\\_of.htm](http://www.asianinfo.org/asianinfo/korea/history/establishment_of_the_republic_of.htm) (last visited May 10, 2008).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

that lasted until the ceasefire was signed in July of 1953.<sup>180</sup> This only tempered the bullets and bombs. South Korea continued to deal with internal, political conflicts that unarguably reduced the nation to an economic dud.<sup>181</sup>

This all began to change in 1961 thanks to a bloodless military coup led by Park Chung-hee (Park).<sup>182</sup> South Korea restored a civilian government and elected Park as President in 1963 (although he assumed power in 1961).<sup>183</sup> Many of his subsequent actions were met with great resistance. In 1965, for instance, relations with Japan were normalized, creating a mass denouncement from the population.<sup>184</sup> Yet, it was this determined approach to an export-oriented economy that would ultimately favor South Koreans well beyond their foresight.

When Park came into power the per capita income of the nation was less than \$100 USD per year, and North Korea was by far the dominant power on the peninsula.<sup>185</sup> The primary exports were raw materials such as lumber, fishing goods, minerals and agricultural goods, and the economic dependency on trade was only 2.4 percent.<sup>186</sup> He quickly put a plan into place that established a “central government direction to economic development.”<sup>187</sup> The normalization of relations with Japan brought with it \$800 million in aid.<sup>188</sup> In 1967, the Trade Transaction Act was implemented, giving entire control of international trade to the government.<sup>189</sup> Park decided to assist the United States in the Vietnam War, which

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<sup>180</sup> AsiaInfo.org, The Korean War, [http://www.asianinfo.org/asianinfo/korea/history/establishment\\_of\\_the\\_republic\\_of.htm](http://www.asianinfo.org/asianinfo/korea/history/establishment_of_the_republic_of.htm) (last visited May 10, 2008).

<sup>181</sup> Donald Gregg, *Despite a dictatorial streak, South Korea's long-serving President converted an economic basket case into an industrial powerhouse*, TIME ASIA, Aug. 23, 1999, available at <http://www.time.com/time/asia/asia/magazine/1999/990823/park1.html> (referring to the economy less affectionately as a “basket case”).

<sup>182</sup> AsiaInfo.org, The Military Revolution and the Third and Fourth Republics, [http://www.asianinfo.org/asianinfo/korea/history/establishment\\_of\\_the\\_republic\\_of.htm](http://www.asianinfo.org/asianinfo/korea/history/establishment_of_the_republic_of.htm) (last visited May 10, 2008).

<sup>183</sup> Jessy S Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L. J. 2480, 2501 (Symposium 2006).

<sup>184</sup> Gregg, *supra* note 181.

<sup>185</sup> *Id.*

<sup>186</sup> Eun Sup Lee, *Foreign Trade Regulation of Korea in the WTO World*, 8 J. TRANSNAT'L L. & POL'Y 231, 232 (Spring 1999).

<sup>187</sup> Gregg, *supra* note 181.

<sup>188</sup> *Id.*

<sup>189</sup> Eun Sup Lee, *supra* note 186.

funded a tremendous transformation in industrial production.<sup>190</sup> While he was in office, the per capita income of South Korea increased tenfold.<sup>191</sup> In 1982, the trade dependency had risen to an astonishing 30.6 percent.<sup>192</sup>

Halfway through his tenure, Park installed a much more dictatorial constitution that perpetuated his term of Presidency.<sup>193</sup> After a year of student protests against mandatory military service requirements, unemployment and corruption, he declared a national state of emergency.<sup>194</sup> Under his amended constitution, he was consistently re-elected without opposition.<sup>195</sup> His exercise of authority extended broadly into the infrastructure of the nation. "President Park did not hesitate to use his new emergency powers, and human rights abuses were rampant."<sup>196</sup> His disfavor grew pervasively and passionately throughout the 1970s. Park was assassinated in October of 1979 by his own director of the Korea Central Intelligence Agency.<sup>197</sup> By this time, the general population of the country welcomed his demise.<sup>198</sup>

Nonetheless, his contributions to the economy are very much recognized in South Korea.<sup>199</sup> Kim Dae-jung, one of Park's most prominent opponents, is able to speak positively about him, "citing his role in transforming Korea from an underdeveloped country into an industrial power."<sup>200</sup> This transformation, however, was a "growth-at-all-costs approach."<sup>201</sup> Park's implementations, for the most part, were strictly authoritarian. This continued through 1991 under the regimes of Chun Doo-hwan, Syungmun Rhee, and Noh

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<sup>190</sup> Gregg, *supra* note 181 (stating that these funds helped launch South Korea to becoming a "world leader in iron and steel production, shipbuilding, chemicals, consumer electronics and other commodities").

<sup>191</sup> *Id.*

<sup>192</sup> Eun Sup Lee, *supra* note 186.

<sup>193</sup> Martinez, *supra* note 183, at 2502 (declaring that Park had a "blanket power of emergency.") (quoting C.I. Eugene Kim, *Emergency, Development, and Human Rights: South Korea*, 18 *ASIAN SURV.* 363, 366 (1978)).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> James M West, *Marshall Lawlessness: The Legal Aftermath of Kwangju*, 6 *PAC. RIM. L. & POL'Y J.* 85, 90 (Jan 1997).

<sup>198</sup> *Id.* (noting that "Park's death was generally believed to have been occasioned by growing challenges to his high-handed and brutal Yusin autocracy.").

<sup>199</sup> Gregg, *supra* note 181.

<sup>200</sup> *Id.*

<sup>201</sup> Julia Tonkovich, *Changes in South Korea's Legal Landscape: The Hermit Kingdom Broadens Access for International Law Firms*, 32 *LAW & POL'Y INT'L BUS.* 571, 572 (Spring 2001).

Tae-woo.<sup>202</sup> South Korea's first truly democratic election lifted Kim Young-sam to presidency in 1992.<sup>203</sup> Kim implemented great measures to internationalize South Korean production and export under the new, democratic system.<sup>204</sup> The overarching flaw maintained was the nation's strong reliance on its family-owned businesses, or *chaebol*.<sup>205</sup> As their protection from the preceding government systems dissolved, the *chaebol* autonomously failed to react to a realistic, open economy.<sup>206</sup> The economic acceleration was halted in 1997, precipitated by the failure of many of the *chaebol*, along with other less impactful, international factors.<sup>207</sup>

This prompted another monumental progression in the South Korean economy. Kim Dae-jung was finally elected President, and took office with a tremendous burden upon him.<sup>208</sup> The IMF entered the picture to support the repair that was desperately needed.<sup>209</sup> The long-time strategy of South Korea was to “push foreigners—and their influence and control—away even while penetrating their markets abroad.”<sup>210</sup> The laws that provided these restrictions were repealed, and this change has been one of the key elements in the recent reprise of the South Korean economy.<sup>211</sup> In this same time frame, the Foreign Trade Act was substantially revised to minimize the perception that the government was restricting free trade and relaxed the interaction with the administration in the trade practice.<sup>212</sup> As well, there was a succession of treaties and agreements entered into, including the Organisation for Eco-

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* (noting that Kim's election victory was “a winning platform on a policy of globalization”).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 573 (citing examples of Samsung, the country's third largest company, opening a car division despite oversupply both nationally and internationally; Haiti, a smaller *chaebol* that previously produced sweets and ice cream, introduced their electronics and construction extensions and went bankrupt in 1997).

<sup>207</sup> Julia Tonkovich, *Changes in South Korea's Legal Landscape: The Hermit Kingdom Broadens Access for International Law Firms*, 32 *LAW & POL'Y INT'L BUS.* 571, 572 (Spring 2001).

<sup>208</sup> *Id.* at 575.

<sup>209</sup> *Id.* at 574 (describing the IMF's demand that South Korea comply with the WTO and Uruguay Round requirements through “(1) increased transparency in corporate accounting methods; (2) higher ceilings on foreign ownership of Korean companies; and (3) stricter lending requirements for Korean banks”).

<sup>210</sup> Thomas Ginsberg, *South Korea for Sale, but Many Firms Resist/The Government Always Saved the Big Companies Before. Some Firms Believe it Will Do So Again*, *PHILADELPHIA INQUIRER*, Aug. 16, 1998, at D01.

<sup>211</sup> Tonkovich, *supra* note 201, at 575 (mentioning the “economic hardship and negative public sentiment” that accompanied this change).

<sup>212</sup> Eun Sup Lee, *supra* note 186, at 232.

conomic Co-operation and Development, the Asia-Pacific Economic Co-operation forum, the Asia Europe Meeting, the United Nations Development Programme, the UN Conference on Trade and Development, and the UN Economic and Social Commission for Asia and the Pacific.<sup>213</sup> This leads us to the current status of the nation.

South Korea currently holds the eleventh largest economy in the world.<sup>214</sup> Private consumption increases annually in routine fashion.<sup>215</sup> Goldman Sachs has stated that the nation is one of the eleven countries in the world with the most economic potential.<sup>216</sup> The current GDP is \$680 billion, and the GNP is on track to be the third largest in the world by 2025, behind the United States and Japan.<sup>217</sup> From the beginning of the twentieth century, Korea has had a tumultuous, violent, and struggling time. President Park brought in a new way of economic thinking, but it was through the guise of the political forum under which he came to power. Like West Germany, this movement was preceded by terrible conflict. Yet, in this case, the authoritarian principles extended well toward the end of the century, through many of the progressive steps in economic reform. A review of the dispute resolution structure throughout this period helps to shed light on the starts and stalls of the country's economic progress.

## 2. Arbitration in Response

Reaching out internationally was not easy for the country once known as the "Hermit Kingdom."<sup>218</sup> Modern commercial arbitration in South Korea first appeared in the Treaty of Friendship, Commerce and Navigation of 1957 with the United States.<sup>219</sup> In 1966, the first comprehensive arbitration legislation was enacted, the Korean Arbitration Act.<sup>220</sup> This represented a departure from Korea's Code of Civil Procedures in handling matters of private

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<sup>213</sup> ECONOMIST INTELLIGENCE UNIT, MAIN REPORT §1.6, COUNTRY COMMERCE SOUTH KOREA (2004).

<sup>214</sup> *OECD lifts South Korean GDP*, *supra* note 135.

<sup>215</sup> *Id.*

<sup>216</sup> Korea.net, *supra* note 135 (identifying these countries as Bangladesh, Egypt, Indonesia, Iran, South Korea, Mexico, Nigeria, Pakistan, the Philippines, Turkey and Vietnam).

<sup>217</sup> *Id.*

<sup>218</sup> Grant L. Kim, *The Development of Arbitration Law and Practice in the Republic of Korea*, 6(4) INT'L ARB. L. REV. 134 (2003) (stating that the term, no doubt, came from the nation's isolation for many decades).

<sup>219</sup> The Korean Commercial Arbitration Board, About KCAB: History of the Korean Arbitration System, [http://www.kcab.or.kr/jsp/kcab\\_eng/kcab/kcab\\_01.jsp](http://www.kcab.or.kr/jsp/kcab_eng/kcab/kcab_01.jsp) (last visited May 13, 2008) Note that this was before Park's era.

<sup>220</sup> *Id.*

commercial dispute.<sup>221</sup> That same year, a permanent commercial arbitration committee was put in place by the Korean Chamber of Commerce and Industry.<sup>222</sup> The Korean Commercial Arbitration Board (KCAB) was established in 1970,<sup>223</sup> and is still the sole arbitration institution in South Korea.<sup>224</sup> The New York Convention was signed and ratified in 1973.<sup>225</sup>

Almost all of these ideas and accessions happened under Park's watch, and were suffocated by the extraordinary control that his regime exercised. Through the beginning of the 1980s, arbitration was "relatively modest."<sup>226</sup> Although the firm foundation of an international arbitration platform was established, there were very few arbitrations during the 1960s and 1970s, and none before the implementation of the Korean Arbitration Act.<sup>227</sup> Between 1967 and 1973, there were a total of thirty-five arbitrations in South Korea.<sup>228</sup> In 1980, there were twenty-six.<sup>229</sup> As the economic surge continued, arbitration clauses began to appear more frequently, as did the number of arbitrations initiated.<sup>230</sup> In 1993, the first fully democratic year under Kim Young-sam, KCAB reported sixty-eight arbitrations of claims totaling over \$51.5 million.<sup>231</sup>

This marked the beginning of a respectable rise in the utilization of arbitration in international commercial disputes. The new political and economic systems, coupled with the advancing efforts of KCAB, resulted in a number of bilateral agreements that relied on arbitration.<sup>232</sup> In 1996, thirty years after the introduction of the

<sup>221</sup> *Id.*

<sup>222</sup> Grant L. Kim, *supra* note 218 (noting that the purpose of the committee was "to promote international trade and investment and to facilitate the resolution of international business disputes").

<sup>223</sup> *Id.* There are conflicting figures with the 1966 founding date given on KCAB's website, which is most likely the result of tacking the years since the creation of the Committee of International Commercial Arbitration, which KCAB succeeded.

<sup>224</sup> KCAB: History of the Korean Arbitration System, *supra* note 219 (KCAB provides a full spectrum of dispute resolution services, and are comparatively much cheaper than other, similar institutions around the world).

<sup>225</sup> Status: UNCITRAL, New York Convention, *supra* note 6.

<sup>226</sup> Grant L. Kim, *supra* note 218 (putting it nicely).

<sup>227</sup> Seung Wha Chang, *The Role of Law in Economic Development and Adjustment Process: The Case of Korea*, 34 INT'L LAW. 267, 272 (Spring 2000).

<sup>228</sup> Chul-Gyoo Park, *supra* note 146, at 484.

<sup>229</sup> *Id.*

<sup>230</sup> Grant L. Kim, *supra* note 218.

<sup>231</sup> Tae Hee Lee, *Dispute Resolution in the Republic of Korea: A General Overview*, 7 WORLD ARB. & MEDIATION REP. 16, 20 (Dec. 1995/Jan. 1996).

<sup>232</sup> See *South Korean Arbitration Pact*, VIETNAM INVESTMENT \ REV., Dec. 27, 1993, at 3.; see also *South Korea: Pact Inked with Russia*, KOREA HERALD, May 17, 1994, at 8.; *South Korea, China agree to settle trade disputes through arbitration*, BBC INT'L REP. CHINA, Apr. 14, 2001.

Korean Arbitration Act, the number of cases that KCAB reported topped 100.<sup>233</sup> The reforms of 1997, and the entry of Kim Dae-jung, put an enormous amount of fuel on the growing fire. The government agreed to WTO requirements that widely opened the country to foreign investment. This proliferated the number of contracts and the number of arbitration clauses. Two years later, Dae-jung adopted a new Arbitration Act, based wholly on the UNCITRAL Model Law on International Commercial Arbitration of 1985.<sup>234</sup> In 2002, just six years after the latest reforms, KCAB reported over 200 arbitrations,<sup>235</sup> and the ICC reported eighty-two cases with Korean claimants or respondents.<sup>236</sup> The United Nations Convention on Contracts for the International Sale of Goods took effect in South Korea in 2005.<sup>237</sup> KCAB now employs over 1,000 arbitrators, 126 of which are non-residents.<sup>238</sup>

Enforcement of foreign awards in South Korea is well recognized. The process conforms to the typical standards of national treatment, and does not review the merits of the judgments as long as the claimant shows that the judgment is valid.<sup>239</sup> The Korean courts have encouraged the proper enforcement of arbitral awards, and have adopted a “narrow interpretation of the grounds for declining enforcement.”<sup>240</sup> This mentality has served the nation’s reputation well. The transparency in government activity and international commerce has improved considerably over the past ten years.<sup>241</sup>

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<sup>233</sup> Chul-Gyoo Park, *supra* note 146, at 484 (specifying the figure as 109).

<sup>234</sup> Grant L. Kim, *supra* note 218, at 139 (noting that one significant change of the revised Act was the improvement of domestic award enforcement, based on the provisions of the New York Convention).

<sup>235</sup> Chul-Gyoo Park, *supra* note 146.

<sup>236</sup> Grant L. Kim, *supra* note 218.

<sup>237</sup> COUNTRY COMMERCE SOUTH KOREA, *supra* note 213.

<sup>238</sup> The Korean Commercial Arbitration Board, Arbitration: Introduction, [http://www.kcab.or.kr/jsp/kcab\\_eng/arbitration/arbi\\_01.jsp](http://www.kcab.or.kr/jsp/kcab_eng/arbitration/arbi_01.jsp) (last visited May 13, 2008).

<sup>239</sup> Tae Hee Lee, *supra* note 231, at 22 (providing these requirements:

- (i) a judgement [sic] which has become final (a judgement [sic] will become final when there is no possibility for further appeal), (ii) a judgement [sic] which has been pronounced with a provisional enforcement decree, (iii) an enforcement judgement [sic] of a foreign judgement [sic] which has become final or which has been pronounced with a provisional enforcement decree (iv) an enforcement judgement [sic] of a domestic/foreign arbitration award which has become final or which has been pronounced with a provisional enforcement decree).

<sup>240</sup> Grant L. Kim, *supra* note 218, at 143.

<sup>241</sup> See generally TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTION INDEXES, <http://www.transparency.org> (last visited May 13, 2008).

Kim Dae-jung said in a speech given in Berlin, “Germany and Korea share similar pains and success. In modern history, both experienced tragic wars and the subsequent division of the land. Then Germany created the Miracle on the Rhine and Korea, the Miracle on the Han River.”<sup>242</sup> West Germany benefited from the immediate implementation of a free market under democratic policies. South Korea was slower to arrive at this, but the ultimate result was a similar economic response accompanied by a similar need for arbitration.

#### D. Miracle of Chile

##### 1. The Chicago Boys

“Chile’s political economy since the turn of the twentieth century provides a[n] . . . evolution of statism, chaos, and adjustment . . . .”<sup>243</sup> Having only formally claimed their independence in 1818, the rise of the working and middle class produced a violent tension with authoritarian and military government that was at a pinnacle in the 1920s.<sup>244</sup> The Radical Party dominated from 1932 for approximately twenty years, facilitating Arturo Alessandri’s rule, and implementing a host of economic and trade policies.<sup>245</sup> The military power stood strong throughout the century, reaching Salvador Allende’s presidency in 1970, which began with promise.<sup>246</sup> This quickly diminished, and another military coup ensued, this time led by Augusto Pinochet.<sup>247</sup>

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<sup>242</sup> Kim Dae-jung Speech, *supra* note 137.

<sup>243</sup> Enrique R. Carrasco, *Autocratic Transitions to Liberalism: A Comparison of Chilean and Russian Structural Adjustment*, 5 *TRANSNAT’L L. & CONTEMP. PROBS.* 99, 103 (Spring 1995).

<sup>244</sup> See Donald J. Mabry, *Chile: General History*, HISTORICAL TEXT ARCHIVE (2001), available at <http://historicaltextarchive.com/sections.php?op=viewarticle&artid=359> (last visited May 11, 2008); see also Mundoandino.com, *The Marusia Massacre*, <http://www.mundoandino.com/Chile/Marusia-massacre> (explaining how the Marusia Massacre killed hundreds as people threw lit dynamite at each other and machine gunned women and children by the dozens).

<sup>245</sup> Steven G. Fishbach, “*The Quiet Revolution*”: *Trade and Investment Liberalization in Chile and Jamaica*, 48 *ADMIN. L. REV.* 527, 528 (Fall 1996) (stating that the most drastic result of these policies was the tariff rates on imported goods that sometimes reached over 700 percent).

<sup>246</sup> Rafael X. Zahralddin-Aravena, *Chile and Singapore: the Individual and the Collective, A Comparison*, 12 *EMORY INT’L L. REV.* 739, 815 (Spring 1998) (commenting that Allende’s favoritism followed his role in the integration of Marxism into the country without any bloodshed). *But see* Carrasco, *supra* note 243, at 105 (glorifying the first year of Allende’s presidency in which he took control of approximately sixty percent of the industrial capital of Chile, and did have positive effects on the economy initially).

<sup>247</sup> Carrasco, *supra* note 243.

Pinochet's reign was particularly barbaric. He is said to be responsible for over 3,200 deaths or disappearances, and many of these executions were quite calculated.<sup>248</sup> Simultaneously, he developed the groundwork for what would, in short time, be deemed an economic miracle. In 1973, when he took power, inflation was above 600 percent, the national debt accounted for twenty-five percent of the nation's GDP, and the industrial economy was hemorrhaging over \$500 million per year.<sup>249</sup> When the military began to relinquish its control in 1980, and unsurprisingly elected Pinochet as President the following year, inflation was down to 9.1 percent and the GDP had risen by at least five percent consistently over the previous four years.<sup>250</sup> This was not a result of Pinochet directly, who was untrained in economics.<sup>251</sup> An exchange program between a university in Chile and The University of Chicago sent a number of Chilean graduate students to study under Milton Friedman and Arnold Harberger.<sup>252</sup> Upon Pinochet's assumption of power in 1973, he immediately appointed several of these students to government posts where they managed the economy almost entirely—they are known as the Chicago Boys.<sup>253</sup> Within two years they had performed a massive overhaul of the economic structure, primarily by "privatizing state-owned industries and companies and liberalizing its extremely protectionist international trading system."<sup>254</sup> They also reduced government spending drastically, substantially reduced tariffs on imports, and uniformly abolished price controls, all of which put the economy in severe distress for two years.<sup>255</sup> By 1980, these policies began to produce highly impressive results. The exportation of goods increased and diversified, and the increase in capital began to line the pockets of the nation entirely.<sup>256</sup> This also allowed the political powers to concen-

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<sup>248</sup> Ralph Fischer, *The Expansion of Intellectual Property Rights by International Agreement: A Case Study Comparing Chile and Australia's Bilateral FTA Negotiations with the U.S.*, 28 *LOY. L. A. INT'L & COMP. L. REV.* 129, 143 (Winter 2006). See generally Caravan of Death: The Mission, [http://www.memoriayjusticia.cl/english/en\\_focus-caravan.html](http://www.memoriayjusticia.cl/english/en_focus-caravan.html) (last visited May 14, 2008) (telling the alleged story of Pinochet's execution squad that traversed the country killing "prisoners . . . under the cover of night, most of the executions attributed to 'attempts to escape'").

<sup>249</sup> Fischer, *supra* note 248, at 144–45.

<sup>250</sup> *Id.* at 145.

<sup>251</sup> Zahralddin-Aravena, *Chile and Singapore*, *supra* note 246, at 816.

<sup>252</sup> Fischer, *supra* note 248, at 144.

<sup>253</sup> *Id.*

<sup>254</sup> Fishbach, *supra* note 245, at 528.

<sup>255</sup> See Fischer, *supra* note 248, at 144; see also Carrasco, *supra* note 243, at 105 (calling this the "shock treatment").

<sup>256</sup> Fischer, *supra* note 248.

trate on other areas of social welfare, further benefiting the lower and working class population.<sup>257</sup> These results carried Pinochet into formal power, while the economy continued to soar into the 1980s.<sup>258</sup>

As his regime proceeded, the authoritarian power, once again, fueled unrest among the citizens.<sup>259</sup> Following a recession in 1982, the government restructured its foreign debt (also relying on assistance from the IMF), and the Chicago Boys strengthened their control of inflation by regulating the exchange rate.<sup>260</sup> Despite a resurrection in economic momentum, Pinochet faced harsh opposition due to his violent authority and a general lack of progress toward a democratic system.<sup>261</sup> The United States officially shunned his government in 1984.<sup>262</sup> A plebiscite was held in 1988, and Pinochet lost power to Patricio Aylwin in a democratic election the next year.<sup>263</sup> Aylwin immediately agreed to accept a free market economic system, and the true power of the Chicago Boys' concepts was unleashed.<sup>264</sup> While the economic pursuits were aggressive, Chile began to focus on the disparities of wealth among the social classes.<sup>265</sup> The democratic system also drew a significant increase in foreign investment.<sup>266</sup> The next decade revealed a laborious push toward globalization and international trade. Throughout the 1990s, Chile signed a plethora of trade agreements and treaties that extended its economic potential to new heights.<sup>267</sup> This trend has continued, and appears to be well established for the future.<sup>268</sup>

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<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 145.

<sup>260</sup> Carrasco, *supra* note 243, at 108.

<sup>261</sup> Fischer, *supra* note 248, at 145.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* *But see* Carrasco, *supra* note 243, at 105 (suggesting that the Chicago Boys knew their policies would not succeed in a democratic system because of opposition that would come from affected interest groups; Pinochet's regime provided the necessary resistance to this possibility, allowing for the safe implementation of such a drastic reform).

<sup>265</sup> Fishbach, *supra* note 245, at 532 ("Housing, health, and education spending all increased substantially in 1992.").

<sup>266</sup> *Id.*

<sup>267</sup> Fischer, *supra* note 248, at 148 (listing many of the agreements, including countries such as Mexico (1991), Colombia (1993), Ecuador (1994), Brazil, Argentina, Uruguay, and Paraguay (1996), and the European Union (1997)).

<sup>268</sup> *Id.* (citing further agreements with South Korea, Canada, and the United States).

Chile currently ranks eighth on the Index of Economic Freedom, behind Canada and ahead of Switzerland.<sup>269</sup> Its economy grew over five percent in 2007, and its annual trade surplus has reached almost \$25 billion.<sup>270</sup> The World Economic Forum named Chile as Latin America's most competitive economy in their annual competitiveness report.<sup>271</sup> The past forty years have witnessed one of the most remarkable economic explosions to date. Most of this is attributable to the teamwork of the Chilean exchange students and an economically challenged dictator.

## 2. A Short, Sweet History of Chilean Arbitration

Similar to many developing countries, the presence of international arbitration was all but absent in Chile until 1993 when it opened an arbitration and mediation center in Santiago.<sup>272</sup> Since 1975, the number of exported products has increased from 200 to almost 4,000, and the government acknowledges that a key importance to this growth is its foreign investment laws and treaties.<sup>273</sup> The New York Convention was ratified in 1975, but, like under Park's regime, it had virtually no effect for almost two decades.<sup>274</sup> In 1997, amidst the slew of trade agreements being set in place, The Association and the Chilean American Chamber of Commerce (AmCham) opened a new, comprehensive arbitration center.<sup>275</sup> This was primarily a result of the huge success of the initial center in Santiago, which had annual growth of arbitration volume that consistently neared seventy percent.<sup>276</sup> For a country that historically tended to its cross-border disputes so violently, Chile's progressive economic landscape shaped an arbitral system that had to catch up with its success.<sup>277</sup>

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<sup>269</sup> The Heritage Foundation, 2008 Index of Economic Freedom, <http://www.heritage.org/research/features/index/countries.cfm>. The Index, updated annually, is a joint effort between The Heritage Foundation and the Wall Street Journal, and measures the economic freedom and prosperity of over 160 countries.

<sup>270</sup> *Chile economy grew 5 percent through November, trade surplus strong*, AP DATASTREAM, JAN. 7, 2008.

<sup>271</sup> Leitner, *supra* note 136.

<sup>272</sup> Gonzalo Biggs, *Breakthrough for International Commercial Arbitration in Chile*, 59 DISP. RESOL. J. 65, 66 (Apr. 2004).

<sup>273</sup> Scott R. Jablonski, *supra* note 147, at 632.

<sup>274</sup> See Status: UNCITRAL, New York Convention, *supra* note 6.

<sup>275</sup> Memorandum from the American Arbitration Association on Public Service at the American Arbitration Association (Apr. 13, 2004), available at <http://www.adr.org/si.asp?id=3448> (last visited May 12, 2008).

<sup>276</sup> Biggs, *supra* note 272.

<sup>277</sup> *Arbitration Continues Gains in Once-Hostile Latin America. New White & Case Journal Finds*, PR NEWSWIRE, Sept. 27, 2007.

By 2003, Chile was party to fifty-one bilateral investment treaties.<sup>278</sup> The next year, the Chilean Congress enacted a set of laws that was modeled after the UN laws for international commercial arbitration.<sup>279</sup> As a product of complete diligence, arbitral award enforcement in Chile is straight-forward and well perceived around the world.<sup>280</sup> Chile ranked twenty-second on the 2007 Corruption Perceptions Index, immediately behind Japan, France, the United States, and Belgium.<sup>281</sup>

The current Chilean democracy took form around a dispute resolution with Argentina to begin arbitrating and mediating around border disagreements. President Aylwin declared, “[s]o as not to be labeled fools by history, [we] will take the steps we have agreed on.”<sup>282</sup> Of course, Aylwin had many steps to take to accomplish what he did, but the first was toward dispute resolution, and toward a miracle.

## V. MIRACLE ON THE YANGTZE

The Yangtze River begins near the Tibetan plateau, approximately 400 miles northeast of Nepal.<sup>283</sup> It traverses wildly toward the east for almost 4,000 miles, passing through Chongqing and Wuhan, and empties into the East China Sea just north of Shanghai.<sup>284</sup> This river delta is one of the largest metropolitan areas in China with well over 16 million people, and is also the fastest growing.<sup>285</sup> The three main developing markets in the area are investment, consumption, and exports.<sup>286</sup> The Yangtze is also the world’s

<sup>278</sup> Jablonski, *supra* note 147, at n.23 (citing agreements with Canada, Mexico, Korea, the European Union, and the United States).

<sup>279</sup> ECONOMIST INTELLIGENCE UNIT, CHILE REGULATIONS: SANTIAGO AIMS TO BECOME REGULAR ARBITRATION CENTRE, COUNTRY BRIEFING (2004).

<sup>280</sup> *Id.* (“The Chilean legislation seeks to leverage the local judiciary’s reputation for honesty and efficiency, and in the process bolster the city’s attractiveness to multinational companies as a place to site regional operations.”).

<sup>281</sup> CORRUPTION PERCEPTION INDEXES, *supra* note 241.

<sup>282</sup> Ed McCullough, *Nations Once Ready to Fight Now Settle Border Disputes Peacefully*, AP ONLINE, July 31, 1991 (referring to himself and President Menem of Argentina).

<sup>283</sup> NATIONAL GEOGRAPHIC, COLLEGIATE ATLAS OF THE WORLD 190–91 (2006).

<sup>284</sup> *Id.*

<sup>285</sup> Economic and Social Commission for Asia and the Pacific (ESCAP), Shanghai, <http://www.unescap.org/esid/psis/population/database/chinadata/shanghai.htm> (last visited May 13, 2008); see also *Growth cools in Yangtze River region*, ASIA TIMES, June 2, 2005, available at <http://www.atimes.com/atimes/China/GF02Ad01.html>.

<sup>286</sup> *Growth cools in Yangtze River region*, *supra* note 285.

largest cargo-carrying river.<sup>287</sup> Like the nation in its entirety, the government is constantly working to improve the delta, the river, and the cities that trade upon it.<sup>288</sup>

Comparing China's economic boom to those of Germany, Korea, and Chile is riddled with conflicting factors, just as it would be with most national, economic comparisons. However, there are certain principles that balance the progress of a free market, its economy, and its dispute resolution practices, and their presence or absence is worth examining.

Beginning with the differences, China is the most populated country on the planet.<sup>289</sup> Logically, it will take more time to implement strong measures of change, simply due to the inertia of engrained tradition and policy. This is buttressed by the fact that, unlike in Korea and Germany (and to an extent, Chile), this movement was not really preceded by war. As noted *supra*, the aftermath of war and toppled regimes often provides the raceway for an expedient change in economic and political course. China has had a cautious, protected growth, and its citizens have fostered a reliance on the government to instill the programs that have catapulted their economy. It provides us with a "prime example of significant constitutional development in an otherwise authoritarian regime."<sup>290</sup> The citizens have no electoral voice in the decisions of government rulers, but the economy is allowed to operate in a quasi-free market form.<sup>291</sup>

China is ranked 126th on the 2008 Index of Economic Freedom.<sup>292</sup> This is somewhat remindful of the positions of South Korea under Park's regime, and of Chile under Pinochet. Yet, these instances can be distinguished because of the highly dictatorial, and oftentimes violent, repression that those countries faced. Except for the institution of an electoral process during Pinochet's rule, in

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<sup>287</sup> Elaine BurrIDGE, *China hopes development of the Yangtze will boost the economy as the river opens up access to its central and western regions*, ICIS CHEMICAL BUSINESS, Apr. 14, 2008, available at <http://www.icis.com/Articles/2008/04/14/9114524/Yangtze-river-and-ports-development-will-give-Chinas-economy-a-major-boost.html>.

<sup>288</sup> *Id.*

<sup>289</sup> See generally CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACT BOOK 2002*, available at [http://www.mongabay.com/igapo/world\\_statistics\\_by\\_pop.htm](http://www.mongabay.com/igapo/world_statistics_by_pop.htm) (last visited May 14, 2008) (citing China's population at just under 1.3 billion, Germany at 83 million, South Korea at 48 million, and Chile at 15.5 million).

<sup>290</sup> Michael William Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 N.Y.U. J. INT'L L. & POL. 1, 2 (Fall 2002).

<sup>291</sup> *Id.* It is quasi-free, only because of the lack of a true democratic operation of the economy.

<sup>292</sup> 2008 Index of Economic Freedom, *supra* note 269.

which he essentially appointed himself President, the strongest forms of resistance came when the economic tides began to fall. If the authoritarian regime proves to strangle the potential of economic growth in China, we might see a greater call for a democratic political system.

Perhaps the biggest difference, and one that is a result of the government's strict control, is the perception of corruption and unfair-dealing within the domestic judicial system. China currently ranks seventy-second on the Corruptions Perception Index, with a terribly low score, based on the perceptions of business people and international analysts.<sup>293</sup> This is, no doubt, in large part due to award enforcement issues. The improvement of this perception is essential, and is a good indicator of the progress made in a nation's dispute resolution policies. South Korea, Chile, and Germany all rank within the top fifty, the latter two in the top twenty.<sup>294</sup> Perception of corruption might be the chicken, and award enforcement the egg, but as other countries have adopted more transparent legal infrastructures, they have witnessed strong growth in foreign investment, which perpetuates the evolution of the economic and legal systems.

The similarities among these nations are bright and promising. The primary factors in the development of these economies, as previously discussed, are currency reform, price controls, export-oriented trade policies, and an increase in foreign investment.<sup>295</sup> China has a good handle on these, despite some troubling tendencies that still require improvement.<sup>296</sup> Their export-oriented trade has been the leading force in economic growth, coupled with the tremendous population and availability of labor to produce these exports, a factor sometimes overlooked in growth cycles.<sup>297</sup> The efforts made on the international level are very comparable across the countries reviewed here. China hosted the 29th Summer Olympics in Beijing in 2008, as South Korea did in Seoul twenty years before. As previously mentioned, China has been party to an

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<sup>293</sup> CORRUPTION PERCEPTION INDEXES, *supra* note 241.

<sup>294</sup> *Id.* Chile actually ranks twenty-second, but has risen so significantly in the past that it is scheduled to break into the top twenty in 2009.

<sup>295</sup> See Henderson, *supra* note 134.

<sup>296</sup> See Dowdle, *supra* note 290, at 142 (noting that, although China is very cognizant of price regulations and market determination, their internal communication of such is deficient).

<sup>297</sup> Andrew Kim & Gil-sung Eungi Park, *Confucianism, Work Ethic and Industrialization in South Korea*, 33 J. CONTEMP. ASIA 37 (2003) ("The high level of labor productivity by South Korean industrial workers has been one of the most important factors in the phenomenal economic development of the country since the mid-1960s.").

array of foreign trade agreements,<sup>298</sup> especially since their ratification of the New York Convention in 1987.

These efforts are symbolic of the cautious, yet forward, approach of the government to assure foreign investors and trade partners that their capital is not only subject to great returns and reciprocal benefits, but is secure and protected in the event of dispute. The marginalization of control over the economy is slowly creeping out of the hands of the Chinese government, and into possession of the global constituents that make up their foreign trade partners. This is evident by looking at the reactive policy measures that have served to improve the country's arbitration system.

## A. Corrective Response Thus Far

### 1. Systemic Changes

CIETAC was introduced in 1956, and was based on a Soviet model of international dispute resolution.<sup>299</sup> Although some scholars still maintain that the entire Chinese legal system still follows that model,<sup>300</sup> the changes made to the CIETAC rules over the last twenty years have greatly improved it from the Soviet paradigm, and it much more closely resembles the institutional models of Europe and North America today.<sup>301</sup> As previously mentioned, CIETAC (formerly FTAC) performed less than one hundred mediations and arbitrations in the first twenty-four years of its existence.<sup>302</sup> It was only installed to handle trade disputes.<sup>303</sup> The reform policies implemented in 1978 brought about the first significant changes to China's arbitral models since their inception in 1956.

When the doors opened to foreign trade in 1978, foreign investors immediately became heavily involved with the Chinese econ-

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<sup>298</sup> See § III. THE COMPELLING ECONOMIC FORCES *supra*.

<sup>299</sup> JOE STUDWELL, *THE CHINA DREAM: THE QUEST FOR THE LAST GREAT UNTAPPED MARKET ON EARTH* 330, n.93 (Grove Press 2003).

<sup>300</sup> Charles McClain & Hang-Sheng Cheng, *China's Foreign Trade and Foreign Investment Law*, THE 1990 INSTITUTE, Dec. 1995, <http://www.1990institute.org/publications/pubs/ISUPAP11.html>.

<sup>301</sup> Justin Hughes, *Foreign lis alibi pendens, Non-Chinese Majority Tribunals and Other Problems of Neutrality in CIETAC Arbitration*, 13 *ARB. INT'L* 63 (1997) (providing an in-depth review of the *CNTIEC v. Sida Corporation* arbitration).

<sup>302</sup> SHEN & CHIU, *supra* note 14.

<sup>303</sup> Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 *IND. INT'L & COMP. L. REV.* 37, 43 (2005).

omy.<sup>304</sup> With this came a desire, moreover, a demand for a more stable environment. An example of this momentum was in FTAC implementing a jurisdictional expansion to include non-trade, economic disputes, renaming itself FETAC (Foreign Economic and Trade Arbitration Commission).<sup>305</sup> Still, the judicial system was (and still can be) erratic, and oftentimes displayed complete bias, self-interest, and corruption.<sup>306</sup> Consequently, foreign investors would insert clauses into their contracts that would call for arbitration in other countries.<sup>307</sup> Yet, the assets of the Chinese entities were located in China, and, once an arbitral award was issued, the successful party was forced to return to the Chinese courts to enforce the award.<sup>308</sup>

In 1987, China committed to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>309</sup> Again, this acceptance was stipulated by two reservations, a reciprocal reservation and a commercial reservation.<sup>310</sup> These still exist today. Four years later, in 1991, it acceded to the CISG.<sup>311</sup> With the New York Convention agreement came the current name, CIETAC, and another expanded jurisdictional effort to include international economics, as well as international trade.<sup>312</sup> Still, there were tremendous holes in the functional capacity of the arbitral process. In 1994, CIETAC installed rules that attempted to increase the publication of its arbitral judgments,<sup>313</sup> and from 1989 to 1994 the council increased its foreign contingency of approved arbitrators, although the majority of them were in Hong Kong.<sup>314</sup> These changes did not address a great need for “ad hoc” arbitration proceedings (those not conducted by or under a set institution such as CIETAC).<sup>315</sup> They also left alone the tremendous issues of

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 37 (“Investors [found] themselves in the same court system they initially sought to avoid and . . . encounter[ed] tremendous difficulties in recovering the promised award.”).

<sup>309</sup> McClain & Cheng, *supra* note 300.

<sup>310</sup> Carballo Leyda, *supra* note 3.

<sup>311</sup> McClain & Cheng, *supra* note 300.

<sup>312</sup> Reinstein, *supra* note 303.

<sup>313</sup> Hughes, *supra* note 301.

<sup>314</sup> *Id.* (noting that, at the time, Hong Kong was still under British rule, making them foreign, which they no longer are).

<sup>315</sup> *Minimize Losses with Arbitration*, *supra* note 123.

protectionism and the bloated bureaucracy of the administrative process required.<sup>316</sup>

In 1995, CIETAC took an “involuntary step” forward in the arbitration of *CNTIEC v. Sida Corporation* (Sida arbitration), as discussed by Professor Justin Hughes.<sup>317</sup> This contract dispute marked the first time that the Commission allowed a non-Chinese majority to sit on the arbitral panel.<sup>318</sup> This was a great advance toward achieving less biased arbitral panels, but the prevailing problem still rested, in fact, still rests, with the enforcement of the awards.<sup>319</sup> “An arbitral award is only as good as the court that is asked to enforce it.”<sup>320</sup> Foreign investors are still timid to commit to deals or capital investments where the asset collateral is located in China because they find that “enforcement of foreign awards in China is often difficult or impossible.”<sup>321</sup>

This continued tension has led to more recent efforts in confronting these enforcement challenges. Signing into the World Trade Organization had tremendous effects both in the trade practices of Mainland China, and in its perceived cooperation and evolution.<sup>322</sup> In addition to the regulation enhancements and benefits received by such an improved network of trade, the act itself carried such a significant impression of the new China.<sup>323</sup>

## 2. Reciprocal Treaties

As mentioned, the HK Arrangement, implemented in 2006, is a national treatment treaty.<sup>324</sup> Hong Kong will recognize and enforce judicial opinions and judgments made in Mainland China. In turn, Mainland China will do the same with Hong Kong’s judgments and decisions.<sup>325</sup> This has aided in some reduction of bureaucracy in the enforcement, but has had a counterpoint effect in other areas of administration. Because China has not implemented

<sup>316</sup> *Id.*

<sup>317</sup> Hughes, *supra* note 301. Professor Hughes also participated in the arbitration.

<sup>318</sup> *Id.* The panel included an American, a French, and a Chinese arbitrator.

<sup>319</sup> Reinstein, *supra* note 303.

<sup>320</sup> *Id.* at 51 (citing Michael J. Moser, *Roundtable on Arbitration and Conciliation Concerning China: Commentary* (paper prepared for the 17th ICCA Conference, May 16–18, 2004)).

<sup>321</sup> *Id.*

<sup>322</sup> WTO News: 2001 Press Releases, *supra* note 44.

<sup>323</sup> *Id.*

<sup>324</sup> Ye, *supra* note 9.

<sup>325</sup> *Id.* (noting that there are several conditions around this agreement: it only applies to commercial contests, it is subject to conditions of national public policy that can be inconsistent (particularly in China), and several other detailed provisions that could very well have an impact).

a high number of enforcement treaties elsewhere, Hong Kong (and like countries with like arrangements) is bearing the burden of recognition and enforcement so that the prevailing enterprise may capitalize on the reciprocal agreement.<sup>326</sup>

The reciprocal agreement with Hong Kong is not the only one of its type. Mainland China has entered into like agreements with Macao, Taiwan, France, and other countries, and they are increasing every few years.<sup>327</sup> The HK Arrangement will perhaps have the most immediate and significant impact on enforcement in Mainland China.<sup>328</sup> The true effects of this arrangement are more speculative, but there will certainly be change.

Hong Kong has taken great strides to capitalize on the Mainland's shortcomings.<sup>329</sup> In addition to the reciprocal arrangement, they have been discussing access for Hong Kong lawyers to practice on the Mainland.<sup>330</sup> This would present an interesting, common law influence on the state-driven system.<sup>331</sup> If nothing else, the communication and legal reach into the Mainland would increase substantially. The biggest question that really lies in waiting is whether the HK Arrangement will provide a better enforcement option than the only real alternative, foreign arbitration.<sup>332</sup>

The HK Arrangement only provides for jurisdiction over commercial disputes.<sup>333</sup> Both of the reciprocal agreements with Macao and Taiwan allow for broader subject matter, but the difference comes from reservations expressed by Hong Kong.<sup>334</sup> The Mainland has expressed its interest in expanding the agreement to cover "labour[sic] disputes, matrimonial and domestic cases."<sup>335</sup> As well, the HK Arrangement contains a provision that, like many other treaties and conventions worldwide, allows a court to reject recog-

<sup>326</sup> *Id.*

<sup>327</sup> Johnson Tan, *Coming to the Table: Arbitration and Civil Litigation in the People's Republic of China—The Legal System*, MONDAO, Nov. 8, 2004.

<sup>328</sup> *Analysis—HK Shaping Up as China Dispute Resolution Centre*, ASIA PULSE, May 9, 2002 ("Hong Kong is positioning itself to become the dispute resolution centre for mainland China.").

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> Glenda Korporaal, *Selling a Skill for Settling Disputes—Hong Kong Today: A Special Report*, AUSTRALIAN, July 1, 2002, at 4 (citing Ms. Else Leung, Hong Kong Justice Secretary, who advocates the sophistication and force of Hong Kong's attorney market).

<sup>332</sup> Graeme Johnston, *China: Resolving Disputes*, LEGAL WEEK, Oct. 26, 2006 (noting that the real comparison is between reciprocal enforcement under the New York Convention and reciprocal enforcement under the HK Arrangement).

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* (stating that Hong Kong openly questions the integrity of the civil legal system in Mainland China).

<sup>335</sup> Johnston, *supra* note 332.

dition or enforcement of an award where it is found to be contrary to public policy or to the social interests of the country.<sup>336</sup> This facilitates a “ready excuse” to deny enforcement for any reason if a court is determined to do so, and the Chinese courts are thought to be fairly unpredictable in this regard.<sup>337</sup>

Other issues come forward in individual, reciprocal treaties or agreements. The implementation will cause turbulence in existing relationships with assets in either Mainland China or Hong Kong.<sup>338</sup> Some parties may decide to claim certain assets that were previously unable, and some parties will be unable to shield their assets as they have in the past.<sup>339</sup> Additionally, administrative traffic is likely to increase in both countries’ courts due to the processing that will have to take place between them.<sup>340</sup>

These agreements, particularly the HK Arrangement, are viewed as the slow integration of Mainland China into the global market.<sup>341</sup> There is significance to the juxtaposition of civil and common law that exists between Hong Kong and the Mainland. Not only will it provide a familiar springboard into the Chinese judicial system for common law and Western attorneys,<sup>342</sup> it will present a social and political example that might influence some liberalization of Mainland China. As well, the financial protection that Hong Kong and Mainland China now share will encourage more financing of Mainland markets through Hong Kong and will “engender business confidence” between the two.<sup>343</sup>

Although this is redundant of the unaltered New York Convention, it is a step that is responsive to the force of the economic trade circling the nation. These agreements are not at all easy to negotiate and enter into.<sup>344</sup> The administrative protocol, legislative enactment, monitoring and enforcement, and maintenance of the statute are all burdensome, leaving these treaties nearly impossible to design and execute rapidly.<sup>345</sup> Although laborious and not

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<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> Iain Seow, *Arrangements for Reciprocal Enforcement of Commercial Judgments Between Mainland China and Hong Kong*, MONDAO, Sept. 1, 2006.

<sup>339</sup> *Id.*

<sup>340</sup> Ye, *supra* note 9 (acknowledging that the HK Arrangement provides assistance for companies to do business with Mainland China via Hong Kong).

<sup>341</sup> Seow, *supra* note 338.

<sup>342</sup> *Id.*

<sup>343</sup> Seow, *supra* note 338 (noting that Hong Kong is a major financial sector, and that they will now enjoy recourse against borrowers who default in Mainland China).

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

wholly effective, these individual treaties are a step in the right direction, and are sure to improve enforcement challenges.

The capital success of Hong Kong provides strong incentive for the Mainland to continuously review their structure and processes. The HK Arrangement, as well as reciprocal treaties like it, gives them a better look at fine examples of such structure and processes in other countries. The change that these initiatives bring about, once again, will not be immediate. Yet, their effects can perhaps be anticipated in light of what initiated them: economic growth.

This summarizes only a limited list of the efforts made by China. The responsive actions of CIETAC (and others) over the past fifty years, particularly the last thirty, directly correspond to the economic forces that have inclined China to become the economic center that it has become. These actions are often messaged in different ways and manifest themselves through opportunities and enactments that disguise their true provocation. Through some means of influence, the economic growth in the Mainland and the pressures from the surrounding market are what cause these responses, and they will continue. China's role in our rapidly-advancing global economy is only just beginning.

### B. China's Desire to Play the Global Game

“China will continue to adhere to its revamped socialist system in consistency with Chinese conditions in the twenty-first century.”<sup>346</sup> Hu Sheng suggests that China's forward-looking policies are congruent with a socialist platform, and that a hegemony, not even superpower status, will be sought.<sup>347</sup> He states that this “requires exchanges and co-operation with all countries in economy, trade, technology, etc., in the principle of equality and mutual benefit.”<sup>348</sup> The perspective that gives rise to the changes that will take place is based on the decisions of the people of China to construct and carry out an effective social system. Sheng closed his speech with the recognition that China must “call[ ] for the solution of international disputes through peaceful means . . . .”<sup>349</sup>

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<sup>346</sup> *China: a positive force in 21st Century*, *supra* note 70, at 4 (“This system demands that the country's endeavours [sic] should focus on economic development.”).

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

It is of no interest to China to brutally force its way into the global network.<sup>350</sup> Recollections of the nineteenth and twentieth centuries contain too much poverty and bloodshed for revenge or recapture to be the mode of operation.<sup>351</sup> China has become a primary player for the first time in many decades. Its market is exploding, it is an underwriter of massive international debt, it is hosting Olympics and International Expositions, and is generally thought of as one of the most powerful entities in the world.<sup>352</sup> This was not simply achieved.<sup>353</sup> This recent revival is precious to China, and far too productive and beneficial to jeopardize.

### C. The Effects of Current Political Conditions

The current landscapes of the economic, political, and arbitral agendas in Mainland China are rich with opportunity. Not only is the country thriving economically, it is being cast into the spotlight, which is likely to induce focus and caution on the decisions made in this respect.<sup>354</sup> For example, the Olympic Games followed by the International Exposition were major events that brought great attention to China, exposing more of the country than has been recently seen by a large percentage of the viewers and attendees.<sup>355</sup>

Additionally, the current President of the National Congress is constitutionally required to step down in 2012, which will not only bring the change that will come intrinsically with that transition, but will bring much anxiety around the transition as it approaches.<sup>356</sup> A more democratic example being set within the party, or a relaxation of the strict measures self-imposed against the Western civilization, would excite further business and econ-

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<sup>350</sup> Jean-Pierre Lehmann, *CHINA: FROM GLOBAL PAWN TO GLOBAL PLAYER, Harmony vs. Rivalry: THE Challenge of the 21st Century*, IMD, Sept. 2007, <http://www.imd.ch/research/challenges/TC073-07.cfm?bhcp=1>

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> Justin Pritchard, *Hosting the Olympics is Putting a Bright Spotlight on China*, ST. LOUIS POST-DISPATCH, July 8, 2007, at B8.

<sup>355</sup> *Id.*

<sup>356</sup> *China Grooms New Leaders*, CINCINNATI POST, Oct. 23, 2007, at A (“The question to outsiders is how much of this apparently smooth and transition [sic] is a façade.”).

omy in the country, and reinforce the capitalistic notion that has peaked its head out rarely and briefly over the past few decades.<sup>357</sup>

Yet there was little sign of this at the most recent National Congress.<sup>358</sup> There may be a hesitancy to implement too much change for fear of slowing down what has been, to be sure, an economic windfall.<sup>359</sup> As well, this reinforces their practice of a one-party system running a “fast-growing capitalist economy.”<sup>360</sup> “For better or for worse . . . [China] has become more assertive about charting its own course for development, as it becomes more confident in its role as a rising global power.”<sup>361</sup> The economic success may in fact be fueling the government’s ability to control.<sup>362</sup> After all, Mainland China’s “growth has created jobs, raised living standards, delivered modernization and boosted national pride.”<sup>363</sup> Recent United Nations reports show that between 1980 and 2005, China removed over 250 million of its citizens from poverty.<sup>364</sup> While these are truly wonderful statistics for social welfare of the Mainland, they do not help to catalyze a change in the party system.<sup>365</sup> The 17th National Congress in 2007 spent a great deal of time and focus on ensuring the regime’s continuation in five years.<sup>366</sup>

There were indications of self-improvement that are in line with democratic ways. Hu Jintao, President and Communist Party chief, spoke specifically about increasing “accountability, transparency, and feedback for a 73 million-member political or-

<sup>357</sup> Arthur Waldron, *How Would Democracy Change China?*, ORBIS, Spring 2004, Vol. 48, No. 2, 247-61 (discussing the many positive effects a democratic government would have on China, including economics, foreign policy, and internal interests).

<sup>358</sup> Ting Shi, *Steady as She Goes: The 17th National Congress Was the Key Event in a Year When the Communist Party Showed its Resilience*, SOUTH CHINA MORNING POST, Dec. 26, 2007 at 10.

<sup>359</sup> *Id.* (stating that this belief is “that a minor tinkering with the existing political templates was best to continue China’s prosperity and reinforce Beijing’s authoritarian role.”).

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* (citing China scholar, Bruce Gilley).

<sup>362</sup> Ma, *supra* note 72. Ma criticizes the common belief that China will evolve into a democratic system through its economic development. At one point, she even calls this theory “delusional.” She goes on to say that the change is likely to occur, but instead because of internal unrest and the increased opportunities to voice government disapproval. *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* (“Ironically, impressive economic growth has bolstered the government’s legitimacy and reduced pressures for it to liberalize politically.”).

<sup>366</sup> *China Grooms New Leaders*, *supra* note 356 (stating that, among the many of objectives of the Central Committee, the “real business of the congress” was focused on the 2012 election).

gani[z]ation.”<sup>367</sup> The front runner for the 2012 National Congress, Xi Jinping,<sup>368</sup> is said to represent this next step.<sup>369</sup> As Ying Ma suggests, but perhaps more internal to the government itself, there is an apparent fear of infighting and self destruction.<sup>370</sup> This appears to invoke change within the party that is designed to adapt to the growing requirements at home and abroad.<sup>371</sup> These changes are precisely the result Mainland China’s growth will continue to have. Progress is not defeated because it is slow and cautious.

The political and economic factors have definitely improved since 1978, and most certainly from what they were in 1949.<sup>372</sup> Although they cause tension in the legal sphere of Mainland China, particularly by putting strain on the enforcement of arbitral awards, it does not go unrealized that an inefficient dispute resolution system impedes progress and the development of new business.<sup>373</sup> There have been distinct efforts that are responsive to political concerns within the party.<sup>374</sup> For instance, they have recently appointed two non-communist cabinet members for the first time in decades.<sup>375</sup> In an effort to address complaints of protectionism, the Supreme People’s Court now requires their review of all refusals of foreign arbitral awards.<sup>376</sup> There is also a current overhaul of the bankruptcy law that is intended to have a strong impact on award enforcement.<sup>377</sup> These changes are all on the heels of Mainland China’s entry into membership in the World Trade Organization.<sup>378</sup>

So while there is confidence in the system in place, the National Congress is responding in a manner that indicates their flexibility and a willingness to change in order to fit into the global,

<sup>367</sup> Shi, *supra* note 358 (elaborating on Hu’s description of the political organization “being hampered by rampant corruption, decay of grass-roots party structures and growing cynicism towards its rulers”).

<sup>368</sup> Xi Jinping is the Shanghai Communist Party chief.

<sup>369</sup> Shi, *supra* note 358.

<sup>370</sup> *Id.* As the economic success of the country pervades through the generations of the Communist Party, there is speculation that the level of authority will diffuse substantially.

<sup>371</sup> *Id.* (claiming that the changes in the party’s processes were “for the purpose of facilitating growth, making governance more effective, or easing public anger over social injustice”).

<sup>372</sup> Ma, *supra* note 72.

<sup>373</sup> Johnson Tan, Peter Wang, Iain Seow, Victor Change & Marianne Chao, *Dispute Resolution in Greater China*, MONDAQ, Oct. 25, 2004.

<sup>374</sup> Shi, *supra* note 358.

<sup>375</sup> *Id.*

<sup>376</sup> Jeffries & Kwan, *supra* note 38.

<sup>377</sup> *Id.* (claiming that there is a “widespread reluctance to enforce an arbitral award . . . that would force a debtor into bankruptcy or out of business”).

<sup>378</sup> *Id.*

commercial network. They will continue to harmonize with the forces that have gotten them this far, despite the fact that the pace of this reform calls upon great patience of the rest of the world.

## VI. CONCLUSION

A Chinese miracle may not look like those of Germany, Korea, or Chile. Those countries, for the many reasons discussed, have had unprecedented growth margins in almost surreal amounts of time. China's growth has been, and will continue to be, much more deliberate, cautious, and calculated. Nonetheless, it is highly likely that the retrospect of China's rise, twenty years from now, will be perceived as a miracle. Perhaps it will ultimately serve as the model for closed market economies, and become the paradigm of hope for the economic miracles that lie ahead.

In May of 2002, the first foreign arbitration award was recognized in Ho Chi Minh City.<sup>379</sup> This occurred over twenty years after the opening of the trade economy and almost fifty years after the initiation of FTAC in 1956. According to ICC data, the number of parties from Mainland China increased over 350 percent between 2001 and 2005.<sup>380</sup> Mainland China's membership in the World Trade Organization may end up being one of the most significant economic decisions in its history.<sup>381</sup> These are responses and changes of substantial proportion. The sheer size of China's population, the magnitude and force of its economy, and the deeply entrenched political system are powerful forces to move quickly and responsively. However, these instances along with the many pointed out *supra* are clear examples of a nation that is evolving through natural selection of the international market.

Although the initial reasons for restructuring the legal system, and, in particular, initiating arbitral committees and programs, may not have been in response to economic forces, these forces have certainly now taken control and have generated a momentum that will perpetuate through the future generations of leaders. As far as China's economic reform has already compelled its arbitral system to conform, it is not yet nearly enough. The economic momentum

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<sup>379</sup> *Recent Arbitration Precedent Grabs Local and Foreign Interest*, VIETNAM INVESTMENT REV., Sept. 9, 2002, at 8.

<sup>380</sup> Yuwu Liu, *ICC Arbitration in Mainland China: Validity of Arbitration Clauses and Enforcement of Awards*, MONDAQ, NOV. 19, 2006.

<sup>381</sup> Carballo Leyda, *supra* note 3.

will prevail. China has shown its flexibility in adapting to the monumental transition of its newly opened economy, and this is all that is necessary to quickly shape the framework to an accommodating position. The global market critically depends on the ability to resolve disputes, and Mainland China has already attached itself too completely to this market.

It will be in due time that we will see Mainland China's enforcement procedures correspond to the requirements of an international, commercial economy. The weight of the global market is too much to withstand while remaining a primary power. China has shown that it can roll with the punches and change form to accomplish the goals that it has set. This will continue; it is destined to become an institution of economic power *and* international justice. It fully recognizes that its reputation regarding these enforcement challenges affects and impedes its economic growth.<sup>382</sup> Foreign investors must have confidence in the dispute resolution mechanisms in place,<sup>383</sup> and they have watched this prove itself true to their benefit for several decades. This presents a direct correlation between arbitration practices and the economics of the country. If investors feel confident that their risk is encouraged by the judicial support of the land, they are much more likely to invest there.<sup>384</sup>

As discussed, China has no interest in steering away from a brighter economic light. If it does not evolve as it must, its economic growth will plateau, consequently forcing business and investments into other markets. At the same time, it will be missing not only the financial opportunity that slips away from it due to the malpractice, but the opportunity that comes with fashioning a system that might capture the collateral benefits of an explosive economy.<sup>385</sup>

It seems that no one is more aware of this than China itself. Although the political system of the country is not well received by the majority of the Western world, the National Congress is strategic and careful to address the growing concerns of the watchful public. Again, it is quite difficult to change the direction of 1.3 billion people and substantially alter the form of government that

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<sup>382</sup> Jeffries & Kwan, *supra* note 38 ("This potential complication has a profound influence on whether a foreign investor conducts business with a Chinese company whose assets are entirely based in China.").

<sup>383</sup> Tan, Wang, Seow, Change, & Chao, *supra* note 373.

<sup>384</sup> *Id.*

<sup>385</sup> i.e. increased reputation, greater advances in science and art, higher approval ratings and quality of life statistics, etc.

has existed (and, for the time being, is quite fruitful, economically) since well before the lives of any of its members.

If China were to expand its arbitral processes and incorporate the necessary changes that would grow the practice and increase the volume of proceedings that took place in the Mainland, new jobs would be created on many fronts that are acquainted with arbitration, much like they are elsewhere in the world. This is above and beyond the collateral effects of the numerous economic benefits.<sup>386</sup> Additionally, there might be a modest amount of profit in the fees and operating expenses that are charged to international firms or parties.<sup>387</sup>

These realizations will occur, one way or another. It would not be surprising to witness China embrace the entire notion and make significant changes on its own at some point in the near future. There are many opportunities for great change right around the corner, and there is no way to predict what social or economic influence might develop. China took initiative in changing its nation, and putting itself into the global market—a task that might have seemed impossible beforehand. This same self-starting mentality could reappear to address any number of issues discussed here.

If it does not, and the world's economy continues to fuel its growth and revive its culture, the accompanying forces will put into practice what is required to maximize the efficiency that can exist around the dispute process. This is slowly happening now. Each and every change since the economy opened has been a reaction to that process. Mainland China has made tremendous leaps in its arbitral development, and it must be commended for that—whether it was its own doing, or it was simply responding to the call of the global market. Either way, the economic forces are in motion, their influence is inevitable, and the result is only a matter of time.

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<sup>386</sup> i.e. new jobs to manage more capital stream, increases in production lines, manufacturing jobs, sales jobs—overall industry expansion.

<sup>387</sup> This is certainly the most peripheral of justifications for improving or expanding the arbitral processes within Mainland China.