

Opening the Red Door to Chinese Arbitrations: An Empirical Analysis of CIETAC Cases 1990-2000

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I. INTRODUCTION

Consider this: a U.S. multinational enters into a contract with a Chinese party – this could be a state-owned enterprise, a private corporation, or even a Chinese subsidiary of another multinational. Suppose, after a year, a multimillion-dollar dispute has arisen out of the contract, resulting in irreconcilable differences between the parties. The question is: in which forum should the dispute be resolved?¹

For decades, the inevitable answer to this question has been CIETAC, the China International Economic and Trade Arbitration Commission. Today, CIETAC represents itself as the premiere arbitral institution for resolving foreign trade and investment disputes in China, functioning as an independent provider of practical dispute resolution services.² Likewise, it boasts that it is one of the busiest arbitral institutions, handling billions of disputed dollars each year.³

Indeed, as China's originally designated forum for foreign trade and investment disputes, CIETAC's caseload has grown at a frenetic pace since the late 1980s. During these years, foreign investors were so eager to get a foot into China, described by one commentator as the "Wild East," that they made business decisions that minimized the high risks and potential complications of these deals.⁴ As foreign

1. Zhuang-Hui Wu, *International Arbitration for Chinese-Foreign Disputes: Emerging Choices in 2012*, 41 INT'L L. NEWS 1, 1 (2012). See also E. Norman Veasey & Grover C. Brown, *An Overview of the General Counsel's Decision Making on Dispute Resolution in Complex Business Transactions*, 70 BUS. LAW. 407 (2015) (describing myriad considerations in drafting provisions for arbitration in complex international and domestic commercial transactions); Arthur Ma, Benjamin Miao & Helen Shi, *People's Republic of China*, in ASIA ARBITRATION HANDBOOK 113 (Michael J. Moser & John Choong eds., 2011).

2. GU WEIXIA, *ARBITRATION IN CHINA: REGULATION OF ARBITRATION AGREEMENTS AND PRACTICAL ISSUES* 7-8, 10 (2012); KUN FAN, *ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS* 128 (2013); Randall Peerenboom & Xin He, *Dispute Resolution in China: Patterns, Causes and Prognosis*, 4 E. ASIAN L. REV. 1, 28-29 (2009). See also *CIETAC Introduction*, CIETAC, <http://www.cietac.org/index.php?m=page&a=index&iid=2> (last visited Feb. 26, 2017).

3. JINGZHOU TAO, *ARBITRATION LAW AND PRACTICE IN CHINA* 29 (2004) (noting that since 1993, CIETAC ranked first among international arbitral institutions for number of cases accepted annually). CIETAC may have a broader array of dispute resolution services and lower total costs including arbitration fees, providing it with some competitive advantages. FAN, *supra* note 2, at 128, 130-31; WEIXIA, *supra* note 2, at 29 (noting CIETAC's importance).

4. See Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 BERKELEY J. INT'L L. 329, 331-32 (1997).

trade and investment grew, commercial disputes inevitably developed. Thus, CIETAC and Chinese foreign trade and investment became naturally linked, as business parties needed a reasonably efficient, fair, and effective way to resolve these disputes.

At the same time, China's early developing legal and political environment made it difficult for foreign investors to resolve disputes in forums other than CIETAC. Chinese laws raised questions about the validity of arbitration in other domestic and international arbitral forums, and the Chinese court system was viewed suspiciously.⁵ Meanwhile, CIETAC appeared sympathetic and somewhat responsive to foreign concerns about its adherence to international standards in its arbitral proceedings.⁶ Thus, CIETAC became and continues to be a pivotal player in the complex development of foreign business in China.

For these reasons, CIETAC's arbitral proceedings and arbitrators' decision-making are of great interest to lawyers, academics, businesspeople, and politicians. However, prior to this paper, the actual functioning of CIETAC arbitrations was a black box. As with other international arbitrations that are presumptively confidential, only parties and CIETAC staff have access to the proceedings. The arbitrators' written explanations of their decisions in these disputes, typically called arbitration awards, are also rarely released. Even when CIETAC does release an arbitration award, there is no way of determining whether that award is representative of awards in general. Likewise, CIETAC's public footprint, its website, offers only limited and very general information on caseloads and case analyses.⁷ Thus, learning accurate details about CIETAC arbitral proceedings and arbitrators' decision-making has been extremely challenging for the business and research communities.

5. See WEIXIA, *supra* note 2, at 4–5 (summarizing foreign parties' concerns over Chinese arbitration, remaining skeptical of receiving fair hearing). See also CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011) (noting various concerns about Chinese justice system more generally).

6. See *infra* notes 34–36 and accompanying text.

7. See, e.g., *Case Analyses*, CIETAC, <http://www.cietac.org/index.php?m=Article&a=index&id=205&l=en> (last viewed February 25, 2017) (providing a sampling of only a few cases).

Fortuitously, the authors discovered in the summer of 2013 that CIETAC had published a comprehensive collection in 2004 of its written arbitration awards between 1990 and 2000.⁸ They are the original decisions, scanned by CIETAC staff and sent to the publisher. These CIETAC awards, coinciding with an especially active and formative period of Chinese economic and legal development,⁹ were previously unknown to U.S. scholars and practitioners. Since CIETAC has not released any other comprehensive collection of arbitrations, this information represents a true breakthrough in this area.

This article reveals, for the first time, evidence-based details of CIETAC arbitral proceedings, allowing an unprecedented opportunity to better understand the institution's previously mysterious dispute resolution process. Part II of the article sets the historical and institutional context for our study of CIETAC arbitrations, confirming the prominence of Chinese foreign trade and foreign investment in China in the global economy and CIETAC's critical role in securing that prominence. Part III introduces the empirical study of CIETAC awards and explains its unique research contribution. Part IV, the heart of the article, explores the key inquiries and findings of the study. It provides data on CIETAC arbitrations: How are the cases resolved? Who are the claimants, and what are their nationalities? What are their disputes? Who selects the arbitrators? Who wins and who losses in the arbitration? Part V and the Conclusion synthesize the implications of these CIETAC discoveries.

II. HISTORICAL AND INSTITUTIONAL CONTEXT

Especially highlighting the 1990-2000 decade, this section begins with a brief summary of China's history of foreign trade and direct investment, followed by a synopsis of China's legal and economic reforms for foreign trade and investment. Finally, it offers an overview of CIETAC's institutional structure.

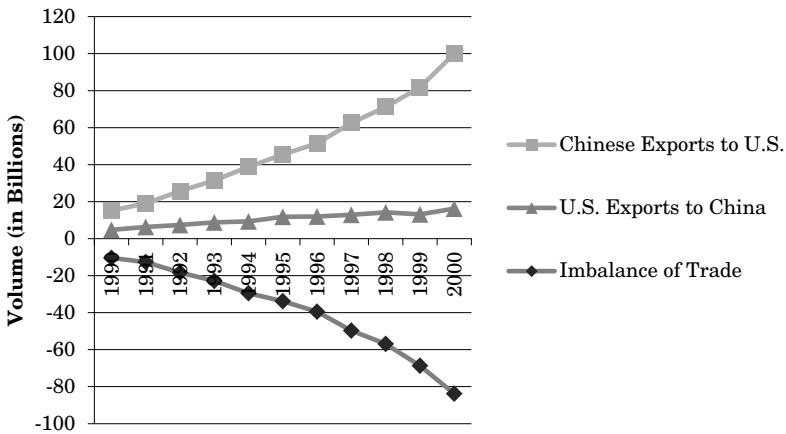
8. CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION: COMPILATION OF ARBITRATION AWARDS (2004) [hereinafter CIETAC COMPILATION] (32 volume set published by China International Economic and Trade Arbitration Commission). See *infra* notes 45–47 and accompanying text. The Compilation also includes a small number of cases between 1964 and 1989. See Pat K. Chew, *Announcing Discovery and Research on Chinese Arbitration Awards* (U. of Pittsburgh Sch. of Law, Working Paper No. 2014-20, 2014), <http://ssrn.com/abstract=2443122>.

9. See discussion *infra* Parts II.A, II.B.

A. *Chinese Foreign Trade and Direct Foreign Investment*

China experienced phenomenal growth in foreign trade and in direct foreign investment after it opened its door to international businesses in the 1980s.¹⁰ The trade relationship between China and the U.S. exemplifies this. As shown in Figure 1, Chinese exports to the United States were \$15 billion in 1990, growing multifold to \$45 billion by 1995.¹¹ By the end of the decade, Chinese exports to the U.S. were over \$100 billion, more than six times the face amount at the beginning of the decade. U.S. exports to China also grew but not as dramatically and beginning with a smaller base amount at the beginning of the decade. U.S. exports began at \$4.8 billion in 1990, rising to \$11.8 billion in 1995, and reaching \$16 billion in 2000.¹² Within this context, although American exports to China also grew significantly, they did not keep pace with the rapid increase in Chinese exports to the U.S. This asymmetry set the stage for the huge ongoing imbalance in import-export trade between the two countries.

FIGURE 1: CHINESE AND U.S. EXPORT VOLUME



10. See *Foreign Direct Investment, Net Inflows (BoP, Current US\$)*, THE WORLD BANK, <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD> (last visited Feb. 26, 2017). See also William B. Greener, *The Evolution of Foreign Trade Arbitration in the People’s Republic of China*, 21 INT’L L. & POLITICS 293, 293 (1989); Ma, *supra* note 1, at 114; see also DANIEL C.K. CHOW, A PRIMER ON FOREIGN INVESTMENT ENTERPRISES AND PROTECTION OF INTELLECTUAL PROPERTY IN CHINA 15–32 (1st ed. 2002); see also William P. Alford, *The More Law, the More . . . ? Measuring Legal Reform in the People’s Republic of China* (Stanford Ctr. for Research on Econ. Development and Policy Reform, Working Paper No. 59, 2000) (questioning how foreign trade and investment are measured).

11. *Trade in Goods with China*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/balance/c5700.html> (last visited Feb. 26, 2017).

12. *Id.*

While trade typically involves a buy-sell transaction for goods or services, direct foreign investments take a variety of forms and often involve foreign capital investment in an enterprise in the host country. An equity joint venture between a Chinese party and a foreign party, for instance, may have both parties sharing ownership, management, and intellectual property of a Chinese enterprise, depending on the terms of the particular joint venture agreement. Other popular forms of direct foreign investments, particularly during the 1990-2000 decade, were cooperative joint ventures and wholly foreign-owned enterprises.¹³

Direct foreign investment in China grew from 1982,¹⁴ when it received \$430 million, to 2014 when it received \$128 billion. In 2014, China was reportedly the largest recipient of direct foreign investment in the world,¹⁵ topping both Hong Kong and the United States.

The decade of the present study, 1990-2000, also was remarkable with regards to foreign investment, fueled in part by China's concerted efforts to attract foreign businesses. As shown in Figure 2, foreign investment went up dramatically from approximately \$3.5 billion to over \$35 billion a year between the beginning of the decade and 1995.¹⁶ Foreign investment continued to escalate for the next two years and then leveled off, ending the decade with over \$38 billion a year.¹⁷

13. See CHOW, *supra* note 10, at 144 (defining different joint ventures, including percentages of each); *id.* at 9–11 (describing range of issues and resulting conflicts of direct foreign investment enterprises).

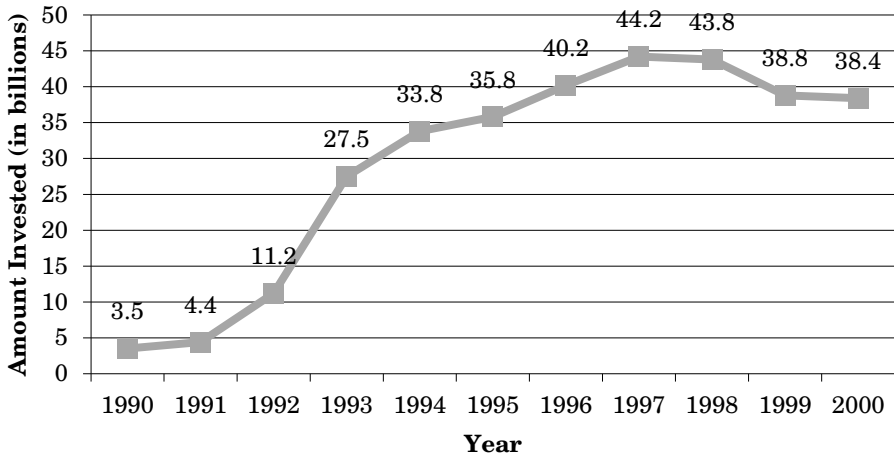
14. See *Trade in Goods with China*, *supra* note 11.

15. See *China overtakes US for foreign direct investment*, BBC NEWS SERVICES (Jan. 30, 2015), <http://www.bbc.com/news/business-31052566> (last visited Feb. 26, 2017).

16. *Foreign Direct Investment, Net Inflows (BoP, Current US\$)*, *supra* note 10.

17. *Id.*

FIGURE 2: CHINESE DIRECT FOREIGN INVESTMENT



B. *Legal Reforms*

China's acceleration of its foreign trade and investment in the late 1980s coincided with the launching of legal reforms designed to attract, yet control, the "foreign element" in China's emerging economy and society.¹⁸ China was open for business with the world, but to the extent possible, China was determining how that business would be conducted. The invitation to invest came with myriad and often opaque—at least to the Western mind—rules of engagement.

During the next two decades, a flurry of major new laws continued to create a legal infrastructure for the burgeoning inflow of foreign investment and trade with China. The Chinese government's pattern was to introduce reforms on a trial basis and then refine the details over time as it deemed appropriate in its juggling of political, economic, and social stability goals.¹⁹

The 1990-2000 decade was especially formative. Numerous foundational laws were drafted, including the Contract Law of the PRC (promulgated 1999 and effective 1999); Sino-Foreign Co-operative Joint Venture Law (promulgated and effective 1991, revised 2000); Sino-foreign Equity Joint Venture Law of the PRC (promulgated and effective 1979, revised 1990 and 2000); and the Civil Procedure law

18. See FAN, *supra* note 2, at xxxiii–xlvi (Table of Chinese Legislation and Legislative Instruments). See also WEIXIA, *supra* note 2, at 3–15; FAN, *supra* note 2, at 9–28 (describing regulatory framework of arbitration in China).

19. See, e.g., FAN, *supra* note 2, at xxxiv (illustrating patterns in legislative history of the Civil Procedure Law of the People's Republic of China); Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122 (1996); TAO, *supra* note 3, at 8.

(promulgated and effective 1991, revised 2007 and 2012, and effective 2013). Professor Fan offers a detailed table of legislation.²⁰

Especially pertinent here, the Arbitration Law of the PRC was adopted in 1994 and became effective in 1995. Intended as a milestone in arbitration law and in the development of the Chinese legal system more generally,²¹ the law remains the major legal framework for foreign and domestic arbitration in China.²² Among other topics, it addresses arbitration agreements, arbitral tribunals, procedural rules, and arbitral awards. It was intended to reform the Chinese arbitration system in response to a “rapidly changing economic and legal environment.”²³ This reformation recognized that the existing domestic arbitration regime was outdated and hindered the development of an increasingly used commercial arbitration system.²⁴ Consistent with this purpose, the law sets out the following principles:

- i) Party autonomy (*xieyi yuanze*). The arbitration must be based on the parties’ agreement to arbitration.
- ii) Arbitration or litigation (*huocai huosong*). The parties’ valid agreement to arbitrate or litigate shall be honored.
- iii) Independence (*duli zhongcai*). The arbitration shall be conducted independently according to the law without judicial or administrative interference.
- iv) Finality (*yicai zhongju*). The arbitral award shall be final.²⁵

The Chinese government’s legal reforms in this formative decade signaled to foreign investors its willingness to address investors’ concerns. These laws established a foundation for the huge growth in foreign investment into the country in the next decade, moving from \$44 billion in 2001 to over \$111 billion by mid-decade.

20. See FAN, *supra* note 2.

21. TAO, *supra* note 3, at 7 (describing history of foreign-related arbitration including arbitration laws); FAN, *supra* note 2, at xxxvii (identifying numerous regulations on arbitration-related issues; *id.* at xlvi (Model Provisional Rules for Arbitration Commissions, issued and effective 1995); TAO, *supra* note 3, at 1–32 (history of domestic and foreign-relation arbitration).

22. WEIXIA, *supra* note 2, at 5–12 (describing arbitration-related regulatory framework, including the Arbitration Law, State Council notices, judicial interpretations, arbitration commission rules, and international agreements). Chinese arbitration rules are based primarily on Arbitration Law and Supreme People’s Court interpretations, notably its Interpretation of Some Issues on the Application of the Arb. Law of the PRC, effective Sept. 8, 2006. *Id.*

23. WEIXIA, *supra* note 2, at 6.

24. *Id.*

25. *Id.* at 6–7.

C. CIETAC

CIETAC is the earliest established and most dominant arbitral institution for disputes between Chinese and foreign parties in China.²⁶ It was originally founded in 1956 as the Foreign Trade Arbitration Commission (FTAC) as part of the China Council for Promotion of International Trade (CCPIT). CCPIT is the government apparatus dedicated to developing and encouraging foreign trade and investment. In these early days, CIETAC had relatively few cases and was largely unknown to the international business community.

CIETAC's international visibility increased with China's opening-up policies beginning in late 1978.²⁷ As foreign trade and investment grew, so did the need for a credible and proximate arbitral institution to help resolve those disputes. FTAC changed its name to CIETAC in 1980, and expanded the types of disputes within its scope as well as the number of arbitrators and staff to service its growing caseload.²⁸ Concurrently, the Chinese government effectively mandated CIETAC as the arbitral institution for trade and investment agreements between Chinese parties and "foreign" parties. While in theory other arbitral institutions or ad hoc arbitration designed by the parties without institutional supervision were possible, Chinese law and business practices effectively required institutional arbitrations in disputes between foreign and Chinese parties.²⁹

26. Peerenboom & He, *supra* note 2, at 28–30 (noting CIETAC as premier institution and its overall progress, but citing investors' biggest challenges); Sarah R. MacLean, *CIETAC, From Underdog to Role Model: Bringing the ICC Back to the Forefront in the Field of International Arbitration*, 16 GONZ. J. INT'L L. 62, 64 (2012); Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 1 FRONT. L. CHINA 393, 397 (2006). More recently, CIETAC has handled more domestic cases than foreign-related ones. In 2015, for instance, CIETAC reported 1,531 domestic cases compared to 437 foreign-related ones. See *Cietac Annual Caseload (2006-2015)*, CIETAC, <http://www.cietac.org/index.php?m=page&a=index&id=40&l=en> (last visited Feb. 26, 2017).

27. FAN, *supra* note 2, at 121.

28. *Id.* at 134–137; MacLean, *supra* note 26, at 63–64, 72 (CIETAC as state controlled).

29. While the Arbitration Law of 1995 and Chinese contract laws do not expressly prohibit arbitrations by foreign institutions such as the ICC, other laws and business customs indicate that CIETAC should be the arbitration institution in Chinese-foreign disputes. This was particularly the case during the more formative years of People's Republic of China foreign trade and investment. See, e.g., Brown & Rogers, *supra* note 4 (noting People's Republic of China's insistence on CIETAC). At the same time, the validity of an agreement providing for ad hoc arbitration outside an arbitral institution is legally questionable. See WEIXIA, *supra* note 2, at 19–22 (noting the law does not appear to envision a non-CIETAC arbitration possibility); but see *id.* at 30 (indicating investors would appear to have choice under contract law of ad hoc arbitration outside of China).

Thus, CIETAC, as the default provider for resolving foreign trade and investment disputes, experienced substantial growth. It was estimated that between 1980 and 1988, CIETAC accepted over 400 cases involving parties from 23 countries and five continents.³⁰ In addition, cases were increasingly complex and involved large sums of money.³¹

As earlier described, the following 1990-2000 decade was both a very formative period for China's legal, political, and economic reforms and a period of CIETAC's continued accelerated growth and expansion.³² CIETAC's dominance in administering foreign trade and investment arbitrations continued.³³ CIETAC was a key player in China's foreign trade and investment agenda. At the same time, it was critical that CIETAC was viewed as a credible and reliable arbiter of disputes between Chinese parties and foreign parties.³⁴ CIETAC had the challenging task of managing both roles: one as a promoter of foreign business activities, the other as an unbiased decision-maker for any subsequent disputes.

Within this context, foreign investors and scholars voiced concerns about the perceived differences between CIETAC rules and

30. FAN, *supra* note 2, at 121 n.24.

31. *Id.*; CHOW, *supra* note 10, at 97-139, 179-204 (noting examples of complicated operational and licensing issues).

32. Ge, *supra* note 19.

33. See WEIXIA, *supra* note 2, at 29 (noting CIETAC's importance to China). The volume of CIETAC cases appeared to peak in 1995, then stabilizing for the rest of the decade. See *infra* Appendix. Beginning around 1995, foreign investors were able to consider alternatives to CIETAC, including other Chinese institutions and also other international bodies. In addition, economic ups and downs in South East Asian countries also likely affected their trade and investment (and subsequent disputes) in China. See Wu, *supra* note 1, at 122; FAN, *supra* note 2 (noting Chinese competition after 1995 law); FAN, *supra* note 2, at 122 (describing economic crises in South East Asian countries).

34. At the same time, many critiques of the Chinese judicial system's vagaries about the rule of law discouraged foreign investors' use of the court system. See, e.g., WOO & GALLAGHER, *supra* note 5; Randall Peerenboom, *Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in PRC*, 49 AM. J. COMP. L. 249 (2001).

generally accepted international standards on arbitration.³⁵ In response, CIETAC amended its rules repeatedly.³⁶ The Chinese government also acceded to international agreements, most notably for arbitration, the Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the New York Convention).³⁷ Detailed comparisons between Chinese arbitration rules and international standards, such as those of the International Chamber of Commerce, suggest numerous similarities but also persistent Chinese characteristics.³⁸

III. EMPIRICAL STUDY OF CIETAC AWARDS

This study is unique. There is no other large-scale empirical study of Chinese arbitrations of foreign trade and investment disputes covering an extensive time period. Furthermore, CIETAC indicates that this collection of arbitration awards is comprehensive for this time period, so there is assurance that the study's observations are valid and provide an accurate picture of CIETAC arbitrations for this time period.

Other empirical research on CIETAC is exceedingly limited. Existing research includes anecdotal reports rather than studies based on representative data.³⁹ Others allow only narrow generalizations

35. CIETAC, whose purpose is to promote and to the extent possible satisfy the demands of foreign trade, is technically part of the CCPIT. FAN, *supra* note 2, at 122. At the same time, CIETAC is technically independent of the government and administers arbitrations at its discretion. However, despite its non-governmental status, CIETAC still has governmental ties. *See id.*; *see also* WEIXIA, *supra* note 2, at 27; Daniel Arthur Lapres, *The Role of Foreign Lawyers in CIETAC Arbitration Proceedings*, CHINA BUS. REV., 46 (May-June 2009), available at <http://www.lapres.net/forlawyers.pdf> (commenting on particular cautions for foreign lawyers).

36. In response, CIETAC has amended its rules numerous times in part to better reflect international standards. WEIXIA, *supra* note 2, at 31–32. For examples, *see id.* at 7–12 (describing State Council notices, judicial interpretations, arbitration commission rules, and relevant international agreements).

37. *See* FAN, *supra* note 2, at 14 (noting China's adoption of both the reciprocity reservation, recognizing only those awards in other signatory states, and the commercial reservation, recognizing only awards in commercial cases).

38. *See* FAN, *supra* note 2, at 124–27 (comparisons with international standards as illustrated by the International Chamber of Commerce operations and rules including structure and personnel management); WEIXIA, *supra* note 2, at 6–12 (indicating similarity between CIETAC rules and those of other international institutions or standards, such as the UNCITRAL Model Law of Commercial Arbitration). *See also* Ma, Miao & Shi, *supra* note 1, at 116 (giving an overview of Chinese arbitration and arbitration in other Asian countries).

39. For example, the American Chamber of Commerce survey of American companies regarding their impressions of CIETAC was a small and not representative sample of companies in Beijing in 2001 based on self-reports. Johnson Tan, *A Look at CIETAC: Is it Fair and Efficient?*, CHINA L. & PRAC. 24–26 (2003).

about CIETAC awards.⁴⁰ Finally, others focus only on a specific aspect of CIETAC. Preenboom's empirical study, for example, is of judicial enforcement of arbitral awards⁴¹ rather than a study of the decision-making process for the arbitral awards themselves.

Indeed, empirical studies of arbitrations of international institutions in general are unusual. This is true and not surprising for many reasons. First, access to large and representative, much less comprehensive, collections of arbitral awards is rare.⁴² Likewise, international arbitrations, including those in China and elsewhere, are as a rule confidential and private. Releasing comprehensive collections of awards takes time and resources, and the arbitral institutions have to figure out a way to do so while maintaining the parties' privacy. Arbitral institutions also have limited incentives to release large representative datasets. Instead, given their finite resources, they are more likely motivated to release a select few awards to illustrate a point they are trying to make. Finally, foreign arbitration awards are written in the language designated by the arbitral institution (Chinese in the case of CIETAC), which often makes them inaccessible to English language researchers.

A. *CIETAC Arbitral Compilation*

This empirical study is based on a database of 4,686 cases brought before CIETAC arbitrators and resulting in 4,686 arbitration decisions for the period 1990 to 2000.⁴³ This CIETAC Compilation consists of full-text, unedited original arbitration awards that CIETAC indicates are "all" the awards from the designated time period. The CIETAC Compilation consists of 32 volumes of hardbound books written in Chinese, organized chronologically by year and by

40. For example, one study compared the win and loss rates of U.S. companies in CIETAC arbitrations 2004-2006. See LIJUN CAO, *RULE OF LAW IN CHINA: CHINA LAW AND BUSINESS: CIETAC AS A FORUM FOR RESOLVING BUSINESS DISPUTES* (2007). Cao found that in cases involving US parties (81 cases), U.S. parties' winning percentage is approximately equal to their losing percentage, thereby concluding that CIETAC arbitrations were "fair." *Id.* at 2. While this study provides useful initial data, the comparison of the success rates of U.S. parties in comparison with the success rates of Chinese parties, for instance, would be a more meaningful way to study whether CIETAC arbitrators treat U.S. parties as even handedly as Chinese parties.

41. Preenboom, *supra* note 34.

42. There is limited empirical research on international arbitration. See, e.g., Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007); Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825 (2011); Christopher R. Drahozal, *Arbitration by the Numbers: The State of Empirical Research of International Commercial Arbitration*, 22 ARBITRATION INT'L 291 (2006).

43. See *infra* Appendix.

general category of dispute. Currently, there is no digital version and no English language version.

While the term “award” is typically used in international arbitration, the awards in this Compilation are more than the arbitrators’ decision; they also include the arbitrators’ elaboration of their decision-making process. Typically, each award includes a description of the dispute including the nationality and roles of the parties, the arbitrator(s)’ analysis of the facts and of the law, and the arbitrator(s)’ decision/award. The arbitration’s date and location, as well as the size of the arbitral panel, are also known. In the interest of confidentiality, the parties’ names and the arbitrators’ names are not included. Some awards are brief, while others are many pages and elaborate on the arbitrators’ analysis and decision-making. In format and content (except for the confidentiality of the parties and arbitrators’ names), these awards are similar to published judicial opinions.

CIETAC published this Compilation as a one-time commemorative event in 2004. As described in a translation of CIETAC’s Preface to the Compilation:

CIETAC has cumulated abundant precious experiences over the past 40 years. Compiling and publishing all arbitration opinions are to summarize past practical experiences and are of great significance.⁴⁴ First, the compilation of arbitration opinions is to meet the needs of the public. With the background of globalization, arbitration is now the first option for business people to resolve disputes. Without doubt, arbitration opinions are an important window for the public to know more about arbitration. Satisfying the needs of the public is the major motive for us to publish the arbitration opinions. Second, the compilation of arbitration opinions fills a blank in legal research. Since the enactment of the Arbitration Law, arbitration has obtained tremendous progress in China. However, no complete compilation of arbitration opinions has ever been published, although few edited arbitration judgments are accessible. This is the first time CIETAC has published its arbitration opinions. Giving a real and full picture of arbitration judgments made by CIETAC, this compilation is to provide a complete research source to legislators, universities, researchers, lawyers and business people. Third, the compilation has important historical significance.⁴⁵

44. The Preface to the CIETAC Arbitration Compilation, CIETAC COMPILATION, *supra* note 8, indicates that not all arbitration awards are included, excluding for instance those cases where the parties settled their dispute and withdrew their application for arbitration. It remains that this generally comprehensive collection of 4,685 opinions constitutes a very large presumptively representative database. *See id.*

45. *Id.* at 1–2. Translation by Professor Margaret Woo and Jingjing Xia.

B. *Methodology*

Recognizing the unprecedented opportunity to learn more about CIETAC arbitrations and how CIETAC decisions are made, the authors and a research team launched a two-phase empirical study. CIETAC organized the awards in the Compilation by year and by these general categories of disputes: Investments, Sales and Trade, and Property. The research team selected twenty-five percent of the awards from the Compilation within each year and within each type of dispute (stratified random sampling) to create an ample representative sample size of 1,172 awards to study in detail. A random numbers table helped assure that the study dataset is representative of the Compilation awards as a whole. Two fluent Chinese language and legally-trained research assistants independently reviewed each award, collecting and coding information on a range of variables for each award. In the event there were any differences between the assistants in their data collection, the principal author reconciled those differences. Basic descriptive statistical analysis and correlational studies between the variables and the case outcomes were used as appropriate.

IV. INQUIRIES AND FINDINGS

This section provides the findings of the first phase, beginning with how cases were resolved—what were their outcomes? It then studies the following variables and their effect on outcomes: The categories of disputes, the nationalities of the parties, who the claimants were, the arbitral panel's composition, who selected the arbitrators, where the arbitration occurred, and when the arbitration occurred.

A. *Case Outcomes*

The outcomes in international business disputes often have significant monetary and reputational implications. Thus, the outcome of the dispute is ultimately most important to the parties: Who is the winner and who is the loser? Are certain characteristics of the dispute or the arbitration process positively or negatively associated with the case outcome?

Considering the arbitration process more generally, arbitration is widely used for resolving international business disputes, and, in

countries like the U.S., also widely used for resolving domestic disputes.⁴⁶ While the parties can modify the arbitration process by agreement, the process typically has these characteristics: (i) the parties designate the arbitrator and general procedures of the arbitral proceedings⁴⁷; (ii) the process is adjudicatory, where the parties argue their respective positions; (iii) an external party (the arbitrator) decides who is correct and who by default is incorrect; and (iv) the arbitrator's decision (award) is final and binding. The award thus reflects which party is the winner and which is the loser.

A contrasting dispute-resolution process to arbitration is mediation.⁴⁸ Unlike an arbitrator, the mediator is not the decision-maker; it is up to the parties to resolve their own dispute. The mediator's role is to facilitate the parties' problem solving, often by identifying the parties' common ground and the comparative strengths and weaknesses of each party's position. In addition to the parties' respective arguments on the stated issues, mediation often strives to reveal and satisfy the parties' broader "interests."⁴⁹ The parties "interests" are their priority concerns—what they believe is really at stake in addition to the specific issues and their respective formal positions in the dispute. For instance, the parties may be arguing about who is responsible for damaged goods. The buyer's formal position is the seller bears the loss, and the seller's formal position is that the buyer bears the loss. But one or both of the parties may also be very concerned about how the resolution of the dispute will affect their business reputation or their ongoing business relationships—their actual "interests." The mediation process legitimizes and may incorporate both the parties' formal positions and their interests into the dispute-resolution process. Given this more conciliatory and broader mindset, mediation is more likely to result in an outcome that serves mutual gains (and interests) rather than winner-take-all.⁵⁰

46. See generally LEONARD L. RISKIN, ET AL. *DISPUTE RESOLUTION AND LAWYERS: CASES AND MATERIALS* 561–752 (5th ed. 2014); JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL* 161–234 (4th ed. 2013).

47. Parties can in theory negotiate terms in their agreement, but in practice, many parties agree to use rules of the arbitral institution such as CIETAC rules.

48. See generally NOLAN-HALEY, *supra* note 46, at 75–160; RISKIN, *supra* note 46, at 301–560; JACQUELINE NOLAN-HALEY, HAROLD ABRAMSON & PAT K. CHEW, *INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESSES* (1st ed. 2005).

49. ROGER FISHER, WILLIAM URY, & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 40–55 (2nd ed. 1991) (explaining the concept of "interests" versus "positions").

50. See, e.g., *id.* at 70–75.

Social scientists, legal scholars, and businesspeople have observed that the Chinese approach to dispute resolution is more conciliatory and compromise-oriented.⁵¹ This approach appears to be more similar to the mediation mindset than a traditional arbitral adjudicatory mindset, or perhaps it functions like a hybrid of the two mindsets. A Chinese inclination, for instance, of exploring both sides of any argument and carefully looking for fault and merit in each party's position, has been called "dividing one-into-two."⁵²

What kinds of outcome patterns did CIETAC arbitrations have and to what extent did they evidence the traditional arbitration mindset rather than mediation mindset? Case outcomes were coded in the following way: First, the researchers compared what the claimant's argument with the arbitrator's decision. If the claimant received everything it wanted, it was coded as a "full win;" if the claimant received some but not all of what it wanted, it was coded as a "partial win;" if the claimant received none of what it wanted, it was coded as a "full loss."⁵³

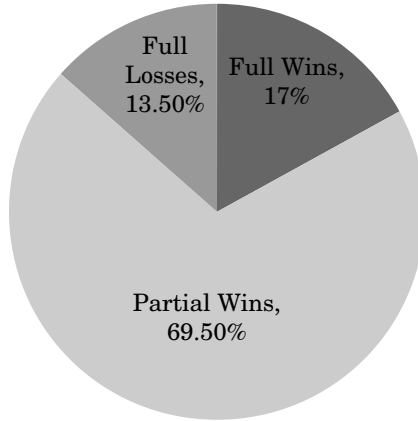
From the claimant's perspective, its ideal outcome would be a full win. But if it could not have that outcome, its next preferred outcome would be a partial win. Its least preferred outcome would be a full loss. Thus, in viewing claimants in the aggregate, setting aside partial wins, they would prefer that (that is, they are "better off" if) they have *more* full wins and *fewer* full losses. Their least preferred set of outcomes are (that is, they are "worse off" with) *fewer* full wins and *more* full losses.

51. See WEIXIA, *supra* note 2, 32–38 (describing influence of history of "harmonious arbitration"); FAN, *supra* note 2, at 137–68 (discussing combination of mediation and arbitration processes).

52. Pat Chew-LaFitte, *The Resolution of Transnational Commercial Disputes in the People's Republic of China: A Guide for U.S. Practitioners*, 9 YALE J. OF WORLD PUBLIC ORDER 236, 253–54 (1982).

53. Prior studies on arbitral award patterns sometimes described awards according to the percentage of the monetary amount of the claim that was awarded (e.g., 1–20%, etc.). This description of awards in the CIETAC study, however, was not possible or appropriate here. While some claimants in CIETAC arbitrations stated their claims in monetary terms, that was often not the case. Instead, claimants often asked for some form of specific performance. For instance, in foreign investment disputes claimants asked for revocation of the joint venture agreement, altering the management structure, or compliance with the terms on intellectual property exchanges. In trade disputes, parties claimed, for example, return of the goods or compliance with quality controls or delivery terms. In other words, it was not possible to objectively quantify or monetize the claimants' demands or the arbitrations' awards, given the nature and variety of the claims themselves.

FIGURE 3: OUTCOMES FOR CLAIMANTS (ALL NATIONALITIES)



Outcomes for Claimants (All Nationalities)

Full Win		Partial Win		Full Loss		Total
#	%	#	%	#	%	#
176	17.0	720	69.5	140	13.5	1,036 (100)

As shown in Figure 3, CIETAC arbitrators have a distinctive decision-making pattern. They are much more likely to award claimants a partial win than a more clear-cut win/lose outcome. Only 30.5% of the awards were either full wins (17%) or full losses (13.5%). In contrast, 69.5% of the awards were compromise partial wins. This decision-making pattern evidenced a dispute resolution approach that was more conciliatory, presumably by recognizing that both sides’ position had some merit. In this way, CIETAC appeared to be using a decision-making process that incorporated a more mediation-like mindset.

B. Nationality of the Parties

Who used CIETAC? What were the parties’ nationalities? Did Chinese and foreign parties have the same success rates? In the interest of confidentiality, CIETAC did not identify the parties in these disputes by name, but the nationality of the claimants was typically identifiable. Numerous and diverse nationalities participated in CIETAC arbitrations.

Claimants were from over fifty nationalities; respondents were from over fifty nationalities. As shown in Figure 4 below, claimants were most likely to come from China and Hong Kong, followed by the United States, Japan, South Korea, and others. Respondents followed

the same general nationality patterns. While parties from many countries used CIETAC, China and Hong Kong were clearly the major users, together representing close to three-quarters of the claimants and over two-thirds of the respondents.

FIGURE 4: CLAIMANTS AND RESPONDENTS BY NATIONALITY OF THE PARTY

	Claimants		Respondents	
	#	%	#	%
China	638	54.6	552	47.2
Hong Kong	250	21.4	270	23.6
USA	47	4.1	79	6.9
Japan	28	2.5	30	2.6
South Korea	27	2.4	37	3.2
Germany	17	1.5	11	1.0
Singapore	17	1.5	26	2.3
Taiwan	16	1.4	26	2.3
Soviet Union	11	1.0	0	0
United Kingdom	10	0.9	10	0.9
Canada	7	0.6	11	1.0

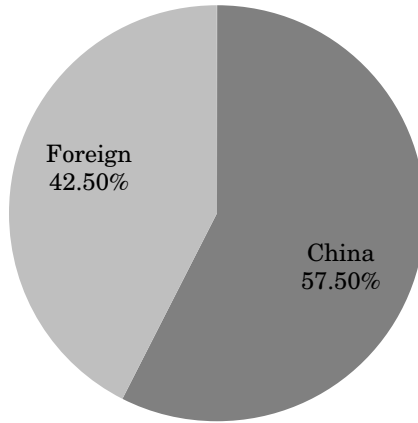
While the authors' subsequent research will explore in detail how the particular nationality of the party affects case outcomes, this article considers more generally whether it makes a difference if the claimant is Chinese versus foreign.⁵⁴

CIETAC is truly an international arbitral institution in the sense that foreign parties were almost as likely as Chinese parties to be complainants and respondents. Among claimants, 42.5% were foreign and 57.5% were Chinese. Among respondents, 51.5% were foreign and 48.5% were Chinese. Most typically, one party to a dispute was Chinese and the other was foreign. However, in a relatively small number of cases, neither party was Chinese or both parties were Chinese.⁵⁵

54. Cases involving parties from Hong Kong, Macau, and Taiwan are considered "foreign-related" even after the British handover of Hong Kong to China. WEIXIA, *supra* note 2, at 25.

55. In 44 of the cases, neither the claimant nor the respondent is from China. In 67 of the cases, both the claimant and the respondent are from China.

FIGURE 5: CLAIMANTS' NATIONALITY



Claimants' Nationality and Claimant Outcomes

	Full Win		Partial Win		Full Loss		Total
	#	%	#	%	#	%	#
China	115	19.3	423	71.0	58	9.7	596 (100)
Foreign	61	13.9	297	67.5	82	18.6	440 (100)
Totals	176	17	720	69.5	140	13.5	1036 (100)

p=.000

Patterns differed in their outcomes, however. While both Chinese and foreign claimants were the most likely to have a partial win, the full wins and full losses contrasted. The Chinese party was more likely than a foreign party to have full wins (19.3% v. 13.9%) and less likely to have full losses (9.7% v. 18.6%). Again, from the claimants' point of view, this was the preferred better-off situation. Foreign claimants, on the other hand, had comparatively fewer full wins and more full losses. From the claimants' point of view, this was the less preferred worse-off situation. These differences were statistically significant (P = .000).

C. *Category of Dispute*

CIETAC organized the awards into three categories according to the type of dispute: trade, investment, and property. The "property" awards are more accurately described as miscellaneous disputes including some dealing with property. Thus, making any generalizations about these disputes was difficult. Hence, the authors focused on the two remaining categories: "trade" (which were typically disputes arising from buy-sell transactions) and "investment" (which

were disputes arising from direct foreign investment arrangements, particularly joint venture arrangements).⁵⁶

During 1990-2000, both China and foreign parties had incentives to partner in direct foreign investment ventures, such as joint ventures.⁵⁷ China wanted the foreign parties' financial, management, and intellectual property resources for its economic development. The foreign partner wanted to establish or expand a Chinese presence and hoped to profit from the country's enormous business potential. These same motivations continue to drive Chinese direct foreign investments today. At the same time, joint ventures are often based on very complicated and risky equity, management, and licensing arrangements.⁵⁸

In contrast, the terms of basic buy and sell trade transactions are often more straight forward and limited, with the terms focused on the sale and delivery of goods or services. Trade transactions, however, are not necessarily problem-free. Many potential problems such as disputes over quality standards, delivery deadlines, and payment delays or defaults can arise. Trade transactions also are much more numerous than investment arrangements.

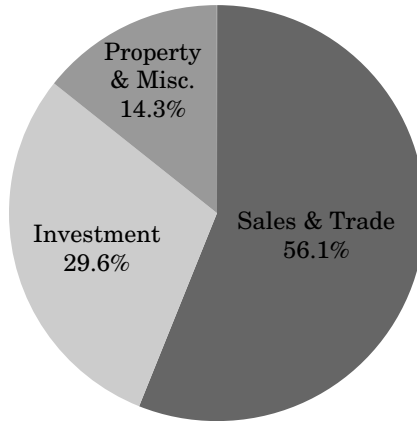
What kinds of disputes were more prevalent in CIETAC arbitrations? Did outcome patterns vary by type of dispute? A substantial number of disputes in both trade agreements and in investment arrangements suggested that plenty of disputes existed in both categories. However, the number of trade cases was almost double that of the investment cases, indicating it was by far the most common category of dispute that CIETAC administered.

56. See CHOW, *supra* note 10, at 38-46.

57. See *id.* at 33-38.

58. *Id.* at 63-67 (establishing joint ventures); *id.* at 71-96 (issues in joint ventures).

FIGURE 6: CATEGORY OF DISPUTE



Category of Dispute and Claimant Outcomes

	Full Win		Partial Win		Full Loss		Total
	#	%	#	%	#	%	#
Sales/Trade	120	20.0	409	68.2	71	11.8	600 (100)
Investment	33	10.4	228	72.2	55	17.4	316 (100)
Prop./Misc.	30	19.6	105	68.6	18	11.8	153 (100)
Totals	183	17.1	742	69.4	144	13.5	1069 (100)

P = .002

An analysis of how outcomes varied by the category of dispute indicated that the most common outcome for all categories was partial wins (68% in trade disputes and 72% in investment disputes).⁵⁹ This result again suggested the more conciliatory Chinese approach toward resolving disputes. Differences in full wins and full losses among trade disputes and investment, however, were observable. Claimants in investment disputes were less likely to fully win and more likely to fully lose. In contrast, claimants in trade disputes were better off in the sense that they were more likely to fully win and less likely to fully lose—the claimants’ preferred position.

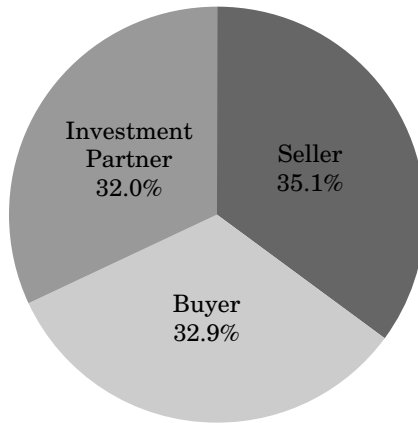
D. *Role of Claimants*

Was it more likely for the buyer or the seller to be the complaining party in a trade dispute? Buyers, for instance, might have

59. As with the statistics on this and the other variables, the total number of cases analyzed is based on the cases where this variable (i.e., the category of the dispute) is identifiable. Hence, with many of the variables, the total number of cases analyzed may be different than the total cases in the study as a whole.

complained about whether the goods met specifications or whether delivery deadlines were met; sellers might have argued about delayed or refused payment or buyers' guarantees on the volume of products purchased.

FIGURE 7: CLAIMANTS' ROLES



Claimants' Role and Claimant Outcomes

	Full Win		Partial Win		Full Loss		Total
	#	%	#	%	#	%	#
Seller	91	26.3	225	65	30	8.7	346 (100)
Buyer	38	11.7	239	73.5	48	14.8	325 (100)
Investment Partner	34	10.8	227	71.8	55	17.4	316 (100)
Totals	163	16.5	691	70	133	13.5	987 (100)

P = .003

The percentage of claimants who were buyers and who were sellers was about equal, with each group representing about a third of all claimants.⁶⁰ Investment participants were also significantly represented as claimants, constituting about a third of all claimants. Thus, it appeared that no one group had a disproportionate percent of cases. Sellers, buyers, and investment participants all were active claimants.

When studying outcomes, did it matter whether the claimant was a buyer, seller, or investment partner? Yes, statistically significant differences in case outcomes for these different roles occurred (P

60. This analysis does not include the category designated as "property" disputes. See *supra* Part III.B.

= .003). Sellers were more likely than either buyers or investment partners to fully win, and also considerably more likely to win than claimants in general (26.3% v. 17%). When combining full wins and partial wins (indicating the awards where the claimant gets something), the seller again was better off and the investment partner was worse off.

E. *Composition and Selection of Arbitrators*

Arbitrators play a pivotal role in arbitrations. They determine how the disputes are resolved and their decision is final and binding; there is generally no recourse to judicial review of the arbitral award. While parties have little input on selection of judges in their court cases, parties select their arbitrators. Arbitral institutions, however, can shape and constrain their choices. CIETAC, for instance, has imposed certain limits on the parties selecting their arbitrators.⁶¹ Arbitrators must be selected from CIETAC rosters, which have been vetted by CIETAC administrators.⁶² During this time period, the arbitrators were most likely Chinese. Foreign investors voiced concerns that the resulting limited pool of prospective arbitrators could favor Chinese parties over foreign parties, reinforcing a kind of home-court advantage.⁶³

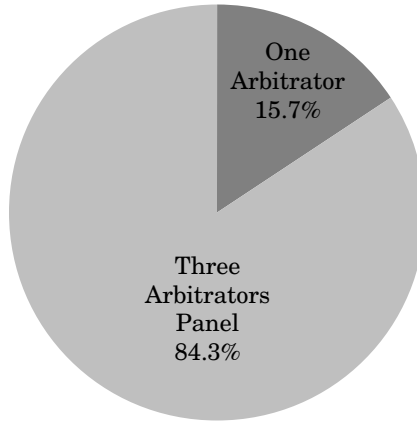
In the interest of confidentiality, CIETAC did not indicate the specific arbitrator in the awards. However, the composition and the selection process for the arbitrators were indicated in most of the cases. Were single arbitrators or arbitral panels more common? Did the parties or CIETAC select the arbitrator(s)? Did the size or selection process make a difference in case outcomes?

61. WEIXIA, *supra* note 2, at 23–24, 31. *See also id.* at 121–152 (features and challenges of arbitral formation); FAN, *supra* note 2, at 61–67 (comparing Chinese and international standards in arbitral formation).

62. CIETAC is one of the few international arbitral institutions that requires that arbitrators be selected from its own panel roster. WEIXIA, *supra* note 2, at 24 n. 29.

63. *See, e.g.,* Jerome Cohen, *Time to Fix China's Arbitration*, 168 *FAR E. ECON. REV.* 31, 32–37 (2005). *See supra* notes 36–37 and accompanying text.

FIGURE 8: NUMBER OF ARBITRATORS



Number of Arbitrators and Claimant Outcomes

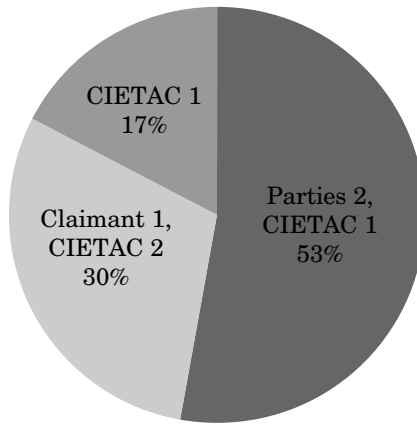
	Full Win		Partial Win		Full Loss		Total
	#	%	#	%	#	%	#
1 Arbitrator	41	24.4	110	65.5	17	10.1	168 (100)
3 Arbitrator Panel	142	15.8	632	70.1	127	14.1	901 (100)
Totals	183	17.1	742	69.4	144	13.5	1069 (100)

P = .016

Arbitrators heard cases either individually or as part of a three-person panel. As depicted in Figure 8, the three-person panel was, by far, the most common composition: 84.3% of the cases were before the arbitral panels with only 15.7% before a single arbitrator. In theory, the three-person panel has the advantage of each party selecting one member with the third arbitrator selected in a way that is acceptable to both parties. Agreeing on a single arbitrator is problematic for two already disputing parties.

Did the size of the arbitral panel affect case outcome? The analysis suggested yes; it appeared that single arbitrators were more likely than three-person arbitral panels to find full wins and less likely to find partial wins and full losses. While this difference was statistically significant at P = .016, its significance was not as pronounced as that of other variables.

FIGURE 9: ARBITRATORS' SELECTION



Arbitration Selection Process And Claimant Outcomes

	Full Win		Partial Win		Full Loss		Totals
	#	%	#	%	#	%	#
Parties 2, CIETAC 1	51	10.3	350	70.6	95	19.2	496 (100)
CIETAC 2, Claimant 1	74	26.4	195	69.6	11	3.9	280 (100)
CIETAC 1	40	24.5	106	65.0	17	10.4	163 (100)
Totals	165	17.6	651	69.3	123	13.1	939 (100)

P = .000

Given the critical role of arbitrators, the process of selecting them deserves careful attention. As indicated in Figure 9, the study indicated three ways that CIETAC arbitrators were selected: (i) each party selected one arbitrator and CIETAC selected the third for the arbitral panel; (ii) the claimant selected one arbitrator and CIETAC selected the other two arbitrators for the panel; and (iii) for single arbitrator cases, CIETAC selected that arbitrator.

The most common process was the first (52.8% of all cases, 64% of panel cases), where each party selected one arbitrator and CIETAC selected the third. This allowed each party to have input, but it also indicated CIETAC's important role in selecting the third potentially tie-breaking arbitrator. The second process, where the complainant selected one arbitrator and CIETAC selected the other two, occurred with surprising frequency (36.1% of panel cases 29.8% of all cases). Why might this have occurred? It might be because the respondent was Chinese and presumed that CIETAC would make arbitrator choices not contrary to their interests. Another possible explanation

is that the respondent was in default (for instance, not showing up for the arbitration as required by the contract's requirements), and that CIETAC was therefore left to select the remaining arbitrators. Whatever the explanation, this selection process put a great deal of control in CIETAC's hands, with them selecting a majority of the panel. If the complainant was Chinese, the Chinese party and CIETAC selected the entire panel. Finally, in the third process, if a single arbitrator was selected, CIETAC selected this individual. This occurred in 17.4% of the cases. Thus, in a substantial number of cases (451 out of 939 or 47.2% of all cases), CIETAC selected either the only arbitrator or selected the majority of an arbitral panel. This finding reveals considerable CIETAC involvement in selecting the arbitrators, and thus a notable departure from party autonomy in this critical decision.

Did this selection process affect case outcomes? It appeared that it did ($P = .000$). At first glance, across all three selection processes, partial wins were the most common result and the percent of partial wins were very similar. The outcome differences between processes, however, occurred in the full win and full loss categories. In the most common arbitrators' selection process, where each party selected an arbitrator and CIETAC selected the third, the percentage of full wins was 10.3%, which was considerably less than the full wins in the other selection processes. Moreover, claimants were considerably more likely to get full losses (19.2%) in this selection process. In contrast, when CIETAC selected two of the three arbitrators or when CIETAC selected the single arbitrator, claimants got a full win about a quarter of the time and received a full loss much less frequently (3.9% and 10.4%, respectively). In these two processes, CIETAC had more involvement. Thus, it appeared that with more CIETAC involvement in the selection process, claimants were in the preferred better-off situation of obtaining more full wins and avoiding full losses.

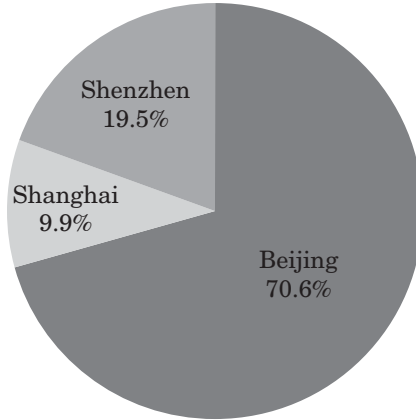
F. *Arbitration's Location and Time Period*

CIETAC arbitrations took place in three different cities over the course of a decade. A closer look at the place and time of the arbitrations offered some insight into whether those variables were meaningful.

Regarding location, the main CIETAC office was located in Beijing. CIETAC sub-commission offices were in Shenzhen and Shanghai. While Beijing may have had the advantages of better-established facilities and resources, one of the other locations might have been

more convenient for the parties. Shenzhen is a special economic zone for foreign investors and is in close proximity to Hong Kong. Shanghai is recognized as a major financial center.

FIGURE 10: LOCATION



Location And Claimant Outcomes

	Full Win		Partial Win		Full Loss		Totals
	#	%	#	%	#	%	#
Beijing	127	16.8	523	69.3	105	13.9	755 (100)
Shanghai	12	11.3	81	76.4	13	12.3	106 (100)
Shenzhen	44	21.2	138	66.3	26	12.5	208 (100)
Totals	183	17.1	742	69.4	144	13.5	1069 (100)

P = .240

Where did the arbitrations take place? To what extent do the outcomes vary depending on the location? The most common site by far was Beijing, with over 70% of the arbitrations occurring there. Shenzhen was a distant second with 19.4% of the cases, followed by Shanghai with only 10% of the cases.

Partial wins were the most common outcome, comprising over two-thirds of the cases in all three locations. It appeared less likely for the claimant to get a full win in Shanghai especially compared to Shenzhen. However, when taking all the data into account, the location of the arbitration was not statistically significant to outcomes. This suggested that parties could have selected the arbitration’s location based on their convenience or other factors since the claimants did not appear to have an advantage in any particular location.

Did the time of the arbitration make a difference? As earlier noted, major legal, political, and economic events occurred during 1990-2000.⁶⁴ Notably, during the second half of the decade, the national Arbitration Law became effective in 1995.⁶⁵ In addition, after 156 years of British rule, the British government turned over the governance of Hong Kong to China in 1997.⁶⁶ We decided to tentatively explore whether major events such as these affect CIETAC arbitration, at least in terms of its case outcomes.

To test this, outcome patterns in the first half of the decade (1990-1994) and the second half (1995-2000) were compared.

FIGURE 11: TIME PERIOD BY CLAIMANT OUTCOMES

	Full Win		Partial Win		Full Loss		Total
	#	%	#	%	#	%	#
1990-1994	30	13.6	156	70.6	35	15.8	221 (100)
1995-2000	153	18.0	586	69.1	109	12.9	848 (100)
Totals	183	17.1	742	69.4	144	13.5	1069 (100)

P = .196

Our findings suggested generally consistent patterns in outcomes in these periods. Claimants had fewer full wins and slightly more full losses in during 1990-1994 than during 1995-2000. Partial win patterns were very similar. When all the data is considered, however, there was no statistically significant difference in overall outcome patterns between the two periods.⁶⁷ Thus, this evidence tentatively suggested that major legal, political, and economic events did not disrupt the arbitrators' decision-making patterns, indicating some consistency and endurance in CIETAC decision-making across time.

V. DISCUSSION AND IMPLICATIONS

This unique empirical study of CIETAC arbitrations between 1990 and 2000 revealed remarkable findings about the parties, their disputes, the arbitrators, and the outcomes of cases. This section begins by discussing the general outcomes, noting a distinctive pattern

64. See discussion *supra* Parts I.A, I.B.

65. See discussion *supra* Part I.B.

66. See Edward Gargan, *China Resumes Control of Hong Kong, Concluding 156 Years of British Rule*, N.Y. TIMES, July 1, 1997, at 1, available at <http://www.nytimes.com/learning/general/onthisday/big/0630.html>.

67. Although there were more cases during the later period, there is a sufficient number in both periods to make some initial observations.

of compromise awards. It follows with a graphic summary of the different variables' characteristics and their impact on case outcomes. Overarching patterns in the findings are then highlighted. First, we note that certain parties appeared better off: namely complainants that are sellers (rather than buyers or investment partners) and complainants in trade disputes (rather than investment disputes). Also, of particular note, Chinese complainants appeared better off than non-Chinese complainants. Second, the analysis indicated that the arbitrators' composition (whether a panel or a single arbitrator) mattered to case outcomes, as did the process used for selecting the arbitrators. Finally, the evidence suggested that the location and time period of the arbitration proceedings did not matter to case outcomes.

Pattern of Compromise Awards. While there are some full wins and full losses in these disputes, there was a strong tendency toward compromise awards. Almost 70% of the claimants received partial wins. This decision-making pattern was consistent with a more conciliatory Chinese approach to dispute resolution. Thus, one possible explanation is that arbitrators evaluated each party's position from that party's vantage point, and tried to appreciate each party's narrative of what occurred and why. This approach also may have served other CIETAC goals: both parties feeling like they did not go away empty-handed and thus more likely to feel positive about and inclined to participate in the future in CIETAC arbitrations. In addition, CIETAC would not appear partial to any one party, thus contributing to CIETAC's reputation as unbiased.

This more compromising approach has its advantages and disadvantages for the parties. Parties that firmly believe that they should receive a full-win will be less satisfied with a compromise award. On a policy level, if arbitrators consider more than the technical arguments on the merits of the specific issue on the table (each party's formal position), the parties, including future parties, may have a less predictable guide on what actually matters in the arbitrators' decision-making process. In addition, to the extent that arbitrators analyze disputes in ways that are contrary to the parties' contracts or appear in conflict with the laws, questions about the arbitrators' adherence to the rule of law are raised.

On the other hand, parties fearing a full loss would prefer this compromise outcome. Compromising awards may also allow parties to continue business relationships more amicably since there is not the animosity engendered by an outright winner and loser. As with mediation, arbitrators may also be accommodating the parties' interests in ways that ultimately serve their relational needs.

Party, Arbitrators, Dispute Variables. In addition to studying case outcomes in general, we also analyzed different characteristics of the disputes, the parties, and the arbitrators. As a final step, we considered how these characteristics affected the case outcomes. For instance, did the type of dispute affect how cases were resolved? Were foreign parties or Chinese parties more likely to win? Did outcomes differ depending on whether the arbitral panel was selected by the parties or by CIETAC?

Our findings are highlighted in Figure 12 and summarized further below. Figure 12 captures the variable's general effect on outcome from the Claimant's perspective.

FIGURE 12: SUMMARY OF VARIABLES AND EFFECTS ON OUTCOMES FROM CLAIMANTS' PERSPECTIVE
 VARIABLE DESCRIPTION
 EFFECT ON OUTCOMES PARTIES

Variable	Description	Effect on Outcomes
Parties		
Nationality of Parties	Chinese and foreign claimants about half & half; many foreign nationalities	Chinese CL better off
Role of Claimants	Comparable % of buyers, sellers, investors	Seller CL better off
Category of Dispute	Twice as many trade disputes as investment disputes	Trade CL better off
Arbitrators		
Arb. Composition	Approx. 90% 3-person tribunals, remaining single arbitrator	CL before single arb. better off
Arb. Selection Process	For panel: About 2/3 selected by parties and CIETAC; about 1/3 majority arbs. Selected by CIETAC. For single arb.: CIETAC selects	As CIETAC involvement goes up, CL better off
Disputes		
Location	Over 70% in Beijing	No effect
Time Period	Over 80% 1995-2000	No effect

Chinese Parties, Sellers, and Trade Claimants All Better Off.

Consistent with CIETAC's claim as a true international forum, entities of many nationalities used CIETAC. Both Chinese and foreign parties initiated arbitration process as claimants, with 42.5% of the claimants being foreign. Foreign claimants were most likely to come from Hong Kong, followed by the United States, Japan, and South Korea. The most frequent foreign respondents were from the same countries. If Hong Kong were removed from the list of foreign claimants, however, only 21.8% of the remaining claimants were foreign.

A striking finding was that Chinese and foreign parties have different outcome patterns. While both Chinese and foreign parties were most likely to have partial wins, the patterns of full wins and full losses differed. The Chinese parties were more likely than foreign parties to have full wins and less likely to have full losses – the claimants' preferred better-off pattern.

Thus, these findings offered some basis for foreign concern about China's home court advantage. It could have been that arbitrators were more likely to believe Chinese claimants had stronger arguments given cultural, economic, ideological identifications between the arbitrators and the Chinese parties. On the other hand, it was possible that Chinese claimants, objectively speaking, simply had stronger arguments. Further exploration is needed to better understand what is occurring; the authors' subsequent follow-up research will address varied possibilities.

Outcomes also differed based on whether the party was a seller, buyer, or investment partner. As compared to those in the other two roles, sellers were most likely to be successful. Did arbitrators have a reason to be more disposed, perhaps unconsciously, toward sellers? For instance, given China's economic developmental needs, arbitrators may have prioritized (perhaps unconsciously) sellers because they provided the essential materials, equipment, and expertise necessary to fuel the emerging growing economy. Or perhaps sellers, given their advantageous bargaining positions, were able to negotiate stronger supplier-preferred contract terms which provided advantages in the event of a dispute. Finally, to the extent that sellers were more likely to be Chinese and arbitrators were Chinese, perhaps arbitrators were more likely, consciously or unconsciously, to favor sellers.

Arbitrators' Composition and Party Autonomy Matters. The arbitrators are critical to the dispute-resolution process. Their role is to resolve disputes. Furthermore, their decision is presumptively final and binding. This study revealed information about the composition

and selection process of arbitrators. Regarding its composition, a three-person arbitral panel was the most frequent (82.6% of the time); there were fewer single arbitrator cases (17.4%). Furthermore, the composition appeared to make a difference. Single arbitrators were more likely than arbitral panels to find full wins than partial wins or full losses. Perhaps as single decision-makers, they went with their impression of a clear winner—and did not have to contend with alternative perspectives of other arbitrators. Or perhaps CIETAC appointed more expert and established single arbitrators who could more clearly assess the dispute.

Regarding the selection process, each party selected an arbitrator and CIETAC selected the third in 64% of the arbitral panels. However, about a third of the time (36%), CIETAC was more involved, selecting two of the arbitrators and leaving the claimant to select one. When there was only a single arbitrator, CIETAC made the selection.

An analysis of the selection process, composition of arbitrators, and outcomes revealed an interesting pattern. With increased CIETAC involvement in the selection process (that is, when CIETAC selected the sole arbitrator or when it selected two of the three arbitrators), the claimant was more likely have full wins and less likely to have full losses. In other words, claimants were better off when CIETAC was more involved.

Two possible explanations come to mind. First, it could be that the cases where CIETAC selected two of the three arbitrators are ones where the respondents had the weaker positions on the merits or were more likely to default (thus perhaps requiring CIETAC to select two of the three arbitrators). Second, the claimants were the party that initiates the arbitration process. They would be more inclined to initiate the arbitration process if they believed that the process will be generally satisfactory and worthwhile. CIETAC wanted claimants to use CIETAC and was concerned about its reputation among claimants—so it could be that it went out of its way to select arbitrators they knew would give claimants at least a fair assessment. Whatever the explanation, the result in cases where the claimant is Chinese and CIETAC selects the other two arbitrators is a great deal of Chinese-affiliated influence in selecting the arbitrators.

Location and Time of Disputes Do Not Matter. The study also found tentative evidence of enduring and consistent patterns in arbitral decision-making. In particular, arbitrators had the same decision-making patterns regardless of the location of the arbitration.

That is, the same general pattern of claimants' full wins, partial wins, and full losses occurred in Beijing, Shanghai, and Shenzhen.

Arbitral decision-making also seemed generally consistent over time. The study considered in particular whether claimants' outcomes differed in the first part of the decade versus the latter part of the decade. Significantly, in the second half of the decade, major political and legal events such as the British turnover of Hong Kong to China in 1997 and the national Chinese Arbitration Law in 1995 occurred. The general outcome patterns, however, did not significantly differ in the second half from the first half of the decade. Thus, the study provided tentative evidence that the arbitration process appears consistent and enduring over time and place.

VI. CONCLUSION

Ever since China opened its doors to foreign trade and investment in the 1980s and CIETAC became its premier arbitral institution, foreign investors have speculated about CIETAC operations and decision-making. Is CIETAC as widely used by foreign investors as CIETAC boasts? What types of disputes and what types of outcomes did CIETAC administer? How do CIETAC arbitrators decide cases and what affects the case outcomes? How are the arbitrators selected and does it matter? Do foreign parties and Chinese parties have different experiences? Rumors circulated and individuals offered their "China stories," but there was no way of determining these stories' truth or how representative individual experiences were. Was one person's truth the same as the next person's?

This article replaces speculation, rumors, and stories with empirical evidence. This unique study offers an analysis of a large and comprehensive collection of Chinese CIETAC arbitration cases. Studying over 1,000 cases, taken from a stratified random sampling of over 4,000 cases from 1990-2000, this pioneering research opens the door to CIETAC arbitrators' decision-making and outcomes in foreign trade and investment disputes.

Among other findings, the study supported CIETAC's representation as a busy and international forum. Over fifty countries were included as parties to CIETAC's thousands of arbitrations. Also confirmed was that CIETAC arbitrators used a more Chinese mediation-like process, at least as evidenced by the large percentage of compromise outcomes. In addition, there was tentative support for CIETAC arbitrations favoring certain parties, including Chinese parties, sellers, and complainants in trade disputes. Findings about arbitrators also were noteworthy and surprising. While three-person panels

heard most of the arbitrations, claimants appeared to have better results in the remaining single arbitrator proceedings. In about two-thirds of the panel proceedings, arbitrators were selected as one would expect, with each party selecting one and CIETAC selecting the third. However, in the remaining panel proceedings and in the single arbitrator proceedings, CIETAC took a more active role in the selection process. Interestingly, the claimant appeared better off when CIETAC was more involved.

What didn't make a difference? The location of the arbitration (whether it was one Chinese city or another) and the time period (whether it was in the first or second half of the decade) did not seem to matter significantly, suggesting a consistency in outcomes wherever or whenever the arbitration took place.

In particular, the finding that Chinese parties appeared to fare better than foreign parties is especially troubling to foreign business parties and bears further analysis. The author intends more research on this topic to find explanations for this disparity and a more detailed consideration of which foreign parties are comparatively worse off and better off relative to the Chinese parties. Finally, to the extent that this finding suggests that Chinese parties have a home court advantage, the author intends to research to what extent that advantage is an historical aberration of this formative decade versus a more enduring pattern.

VII. APPENDIX

A review of the entire CIETAC Compilation of Awards shows the following volume of cases by dispute categories and year of award.

Year	Investments	Sales and Trade	Property	Total
1990	17	121	14	152
1991	24	103	23	150
1992	25	46	19	90
1993	48	144	27	219
1994	163	238	43	444
1995	258	409	77	744
1996	147	342	104	593
1997	186	344	68	598
1998	203	312	87	602
1999	192	268	92	552
2000	153	279	110	542
Total	1,416	2,606	664	4,686