

# WTO: WILL CHINA KEEP ITS PROMISES? CAN IT?

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## HEARING BEFORE THE CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA ONE HUNDRED SEVENTH CONGRESS SECOND SESSION

JUNE 6, 2002

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## **WTO: WILL CHINA KEEP ITS PROMISES? CAN IT?**

**THURSDAY, JUNE 6, 2002**

CONGRESSIONAL-EXECUTIVE  
COMMISSION ON CHINA,  
*Washington, DC.*

The hearing was convened, pursuant to notice, at 2:38 p.m., in room SD-215, Dirksen Senate Office Building, Senator Max Baucus (Chairman of the Commission) presiding.

Also present: Representative Bereuter (Co-Chairman of the Commission), Senator Hagel, Representatives Wolf, Pitts, Levin, Kaptur, Brown, and Davis; Grant Aldonas, U.S. Department of Commerce; and D. Cameron Findlay, U.S. Department of Labor.

### **OPENING STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM MONTANA, CHAIRMAN, CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA**

The CHAIRMAN. The Commission will come to order.

At the Commission's earlier hearings, we focused on the relationship between human rights and the rule of law in China. We stressed that human rights can only be protected when there is a rules-based legal system that includes transparency and accountability.

Today, we will focus on developments in China in the area of commercial law. We will also look at the implications of this on broader legal reform in Chinese society.

Last December, we ushered in a new era with China's formal entry into the WTO [World Trade Organization]. The negotiations took over a decade. We spent a year in the Congress on passage of PNTR [permanent normal trade relations]. Now we are beginning to monitor Chinese implementation of the commitments they undertook.

What do we want to accomplish? First, we want to ensure that China complies with the terms of accession and with the global standards of action embedded in the WTO.

This is important. It is important to American manufacturers, to American service companies, to our farmers, to our ranchers, to our workers. China is our fourth-largest trading partner and is the country where we have our largest trade deficit. China's accession to the WTO should provide greater opportunities for all Americans doing business there.

Second, we want to promote continued progress in the development of the commercial rule of law in China. This will likely accel-

erate changes in the way China is governed, including in non-commercial areas.

For example, as a WTO member, China must establish and maintain judicial and administrative mechanisms to review trade-related sanctions by government agencies. These must operate independently of the agencies that carried out the actions in question. If implemented, this should contribute to the development of a more open, market-oriented society.

The government will be bound by the written rules. I believe that China's membership in the WTO can be an important force in driving the development of the rule of law more broadly.

We are now at an early stage in WTO adherence and commercial law development in China. Senior Chinese leaders are fully committed. We are already seeing changes in thousands of national and local laws and regulations.

The Chinese Government has welcomed assistance from foreign governments and NGOs [non-governmental organization] to conduct extensive training sessions on WTO requirements, on administrative law, and on judicial reform. Chinese Government officials at all levels have been eager to learn about the steps needed to ensure that they are complying with commitments.

Yet, there have been mixed signals about China's commitments. There have been reports that new barriers have been erected to replace barriers that were abolished, sanitary and phytosanitary standards that are still being used where there is no scientific basis, and regulations that were supposed to be in effect at accession that have not been promulgated.

We need to monitor these developments closely, and we need to speak out vigorously and promptly when China has fallen short. After all, what we are concerned about deals with the terms of China's accession—the terms under which we granted China PNTR status.

There are also questions about the capacity of the Chinese Government to implement the vast changes needed, and the national government's ability to impose its will on the provinces. We need to examine the problem closely and see if there are ways that our government can assist more in capacity building.

We have embarked on a long process, and that is why the Finance Committee asked the General Accounting Office [GAO] to do a long-term investigation into China's WTO compliance. We will hear more about that in a few minutes.

But let me just say that this GAO study can only proceed with full cooperation from the Executive Branch, and I expect all agencies to cooperate and be forthcoming with information, documents, and other assistance.

As we scrutinize China's WTO compliance closely, we must also remind ourselves that this is but one step, albeit a major one, in the process of economic reform that began over two decades ago.

We must evaluate the WTO process by looking both at a snapshot of the current reality and at the full video that incorporates trends over a 20-year period.

While the topic of today's discussion is China, I want to say a word about the other major non-market economy, Russia. We have

just been told that the Commerce Department plans to begin treating Russia as a market economy under United States trade law.

I recognize the considerable reforms that Russia has undertaken in recent years and agree that it may no longer be a non-market economy, but it seems to me that the web of State monopolies and state-controlled commerce in Russia still falls short of meeting the requirements for being a market economy.

I recognize the decision does not affect the Jackson-Vanik application to Russia. Still, I am concerned that today's decision will further undermine the Administration's credibility as the enforcer of U.S. trade law.

That said, we have two distinguished panels to help us examine China's access to the WTO, the commercial impact on American firms, and implications for legal reform and the rule of law in China.

We will start with Deputy U.S. Trade Representative Jon Huntsman, Under Secretary of Commerce Grant Aldonas, and GAO Managing Director Susan Westin.

We have an interesting situation today. Grant Aldonas will testify on the first panel, but because he's a member of the Commission, he will join us up here and grill the second panel.

Yogi Berra said, "When you come to a fork in the road, take it." Grant is the only person I know who can take both parts of the fork and do it well.

But, before we proceed with our panelists, I would like to open this up to the rest of the members of the Commission for any comments they might have.

Does anyone wish to speak?

Representative LEVIN. Just briefly.

The CHAIRMAN. All right. Congressman Levin.

[The prepared statement of Chairman Baucus appears in the appendix.]

**STATEMENT OF HON. SANDER LEVIN, A U.S. REPRESENTATIVE  
IN CONGRESS FROM MICHIGAN**

Representative LEVIN. Just very briefly. First of all, I would like, though it is not the topic of our meeting here, our session, to join you in your comments on the decision of the Commerce Department. We will talk about that some other time, but it is an important issue, Russia and non-market economy economics.

Also, I just wanted to underline what Senator Baucus has said about the importance of this hearing. These are busy days here and they are condensed into very few days each week, so it is hard for members to be here. It is hard for members of the Administration to be here.

But this is a subject of exceptional, and I think unusual, importance. As we all read the media, there are more reports about these issues in China than most other subjects. What is transpiring in China is going to have such a major impact not only within that country or within Asia, but in the world.

The establishment of the Commission was a reflection of the exceptional importance of China's evolution and our relationship with China. So as we proceed, I think all of us feel a special obligation to make this Commission work, to tap into the energies of all of

the members of the Commission, both those within the Congress and those within the Executive Branch.

An exceptional challenge has led to an exceptional instrumentality, a joint Congressional-Executive Commission. It worked once before when it related to Russia, to the Soviet Union. While the circumstances are different, the importance is of equal, if not potentially greater, significance.

So I hope all of you as witnesses, even though all of us could not be here today, will take into account that there is a deep and abiding interest within this institution, and I think within the Executive Branch, to make sure that we take what was on a piece of paper some months ago—it seems so long ago—and make it a reality.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you very much, Congressman.  
Congresswoman Kaptur.

**STATEMENT OF HON. MARCY KAPTUR, A U.S.  
REPRESENTATIVE IN CONGRESS FROM OHIO**

Representative KAPTUR. Thank you, Mr. Chairman. Mr. Chairman and members of the Commission, I welcome our witnesses, as does everyone else here today.

I just wanted to State for the record that the hearing today on WTO regulation implementation is an interesting choice for a hearing topic, since our Commission was charged with examining and monitoring human rights and the rule of law in China.

But I am willing to listen. I would suppose and hope that China would diligently work to come into compliance with WTO obligations. But, even if it does, what connection does that have to a new world of rights and freedoms for the Chinese people? I would like to hear the witnesses discuss that linkage.

Really, does the development of commercial relationships lead to an expansion of liberty or human rights, or labor and environmental rights globally? Commercial transactions may have a logic, but they do not really have an ethic. They certainly do not have an ethic in societies where there is no rule of law, nor transparency in the judiciary.

In closing, I would just like to say on the record that the people of China deserve our sincerest efforts, as well as of their own leaders, to uphold internationally recognized human rights, not as a condition of any trade agreement, but as a moral right and as a condition under the tenets of free peoples around this world that have respect for the dignity of every individual.

So I am very pleased to be here and look forward to the testimony of the witnesses.

[The prepared statement of Representative Kaptur appears in the appendix.]

The CHAIRMAN. Thank you very much, Congresswoman.

Any other panelists from the Commission wish to make remarks?

[No response.]

If not, we will begin with you, Mr. Huntsman. Thank you very much for taking the time to come here today. I know how hard you have been working. You are a great public servant. Thanks again.



We would love to hear what you have to say on progress we are making in this area.

**STATEMENT OF AMBASSADOR JON M. HUNTSMAN, JR.,  
DEPUTY U.S. TRADE REPRESENTATIVE, WASHINGTON, DC**

Mr. HUNTSMAN. Thank you very much, Mr. Chairman, and to the other members of the Commission. Thank you for inviting me and the other panelists to appear before you today to discuss the Administration's perspectives on the United States' trade relationship with the People's Republic of China, and in particular, the topic of China's WTO implementation.

It gives me great comfort sharing the stage with two respected colleagues whom I deem it an honor to be associated with. They add enormous professionalism to the task at hand.

China's accession to the WTO was a decisive victory for reform in China. This point should never be discounted. China's reformers clearly understood the values and benefits of openness in the economic sphere and that is why they pursued WTO membership.

They know that WTO membership will help them transform China's economy, and many hope and believe China's society generally, in positive ways. This Administration, like the previous Administration, worked closely with China's reformers throughout the many years of WTO accession negotiations.

The result was a comprehensive set of commitments with which this Commission is familiar. With the negotiations now over, we have continued to work with China's reformers on the next phase of this process as China embarks on the enormous task of implementing the numerous WTO commitments it has made.

Clearly, implementation is, and will continue to be, a major challenge for China and its reformers. They must find ways to ensure that recalcitrant ministries, state-owned enterprises [SOEs], and provincial and municipal authorities all act in conformity with China's WTO commitments.

But China's leadership appears prepared to take on this challenge. It is committed to make China competitive in the international economic arena in the 21st century. It knows that it needs to develop a market economy compatible with the WTO's rules for this to happen. It also knows that there will be a price to be paid as this transition takes place.

The ability of China to meet this challenge and implement its WTO commitments in full will depend on the outcome of several sets of dynamics.

No. 1, China's internal government coordination.

As we have anticipated and as we have seen at times during the first 6 months of China's WTO membership, there will not always be agreement among the central government's ministries on WTO compliance matters. Some of the ministries are reform-minded and generally understand the benefits of full compliance with WTO rules. The Ministry of Foreign Trade and Economic Cooperation [MOFTEC], which had the lead in the WTO negotiations, is one example. But other ministries, particularly those with proprietary functions or a domestic focus may be less interested in, and even resistant to, full compliance. In certain circumstances, they will be more inclined to seek ways to protect their, and their constituents'

existing rights and privileges, so they will present a particular challenge to the implementation process.

No. 2, center versus periphery, or Beijing versus the rest of the Middle Kingdom.

We have also anticipated a similar set of dynamics involving the central government and the localities. While some provincial and municipal authorities appeared to see immediate benefits in complying with WTO rules, others do not see these benefits or simply do not yet understand WTO rules. Historically, Beijing's influence has not extended uniformly over local authorities, and at this point the breadth and extent of this influence vis-a-vis China's WTO commitments remains unclear.

Realistically, we can expect some non-compliance as these internal struggles take place. But, it is also quite possible, if not probable, that independent of these internal struggles, China will simply be unwilling to live up to a particular WTO commitment. As you know, we still have compliance problems with longstanding WTO trade partners and there is no reason that China will be different.

Now, the short-term scorecard.

Looking back on the first 6 months of China's WTO membership, we have seen China take a good faith approach to its WTO membership and make significant efforts to implement its commitments. China has made substantial tariff reductions on industrial and agricultural goods of importance to United States businesses and farmers. It has begun to take concrete steps to remove non-tariff trade barriers in virtually every product sector. It has begun to implement far-reaching services commitments that have substantially increased market access for U.S. services suppliers. It has also repealed hundreds of trade-related laws, regulations, and other measures, and modified or adopted numerous other ones in an effort to become WTO-compliant in areas such as import and export administration, standards, and intellectual property rights, among many others.

With the aid of the United States and other WTO members and the private sector, China has also embarked on an extensive campaign to educate central and local government officials about both the requirements and the benefits of WTO membership. This is an important initiative that should help to foster fuller compliance with China's WTO commitments.

Mr. Chairman and members of the Commission, thank you for providing me with the opportunity to testify. I look forward to answering your questions.

[The prepared statement of Mr. Huntsman appears in the appendix.]

The CHAIRMAN. Thank you, Mr. Huntsman.  
Now, Secretary Aldonas.

**STATEMENT OF GRANT D. ALDONAS, UNDER SECRETARY OF  
COMMERCE FOR INTERNATIONAL TRADE, WASHINGTON, DC**

Mr. ALDONAS. Thank you, Mr. Chairman and members of the Commission. Thank you for the opportunity to appear before you.

With your permission, I would like to summarize my opening statement and submit my written testimony for the record.

The CHAIRMAN. Without objection.

Mr. ALDONAS. First of all, I welcome the Commission's interest. I agree with Congressman Levin about the importance of this. Having had the opportunity to work as a staff member of the Finance Committee with the leadership of the Senators present, and certainly the other Members of the House present, it was a remarkable opportunity to reset the foundation, in many respects, of our relationship with China.

I view Congress' involvement as integral to that process. One of the reasons for taking a Congressional staff delegation with me on my recent trip to China was to illustrate for the Chinese that there was no distance between the Congress and the Administration with respect to the fundamentals of China's adherence to its WTO obligations, and the kind of follow-through that the Chinese could expect to see, both from the Congress and from the Administration in terms of ensuring the implementation of their commitments.

I am particularly pleased to be here with Jon Huntsman and with Susan Westin, who I view as partners in this enterprise of ensuring compliance. Jon, of course, brings great strengths with his background in business. We need that kind of experience, given the level of detail we need to dig into with the Chinese in terms of their implementation.

Susan, I had the great opportunity to work with when I was on the Finance Committee and has been at this for a long time in terms of examining China's compliance. I have tried, wherever I have gone, to encourage business and non-governmental organizations to cooperate with Susan's efforts, because I really do believe that, from the point of view of keeping Congress involved, GAO's role is critical.

I think that Susan's report is likely to set the effective benchmark against which we are going to end up judging China's compliance going forward and I welcome that involvement.

I also welcomed the opportunity to have Susan and the GAO take a look at how we go about what we are doing, because we need benchmarks against which we can judge ourselves.

When Secretary Evans and I both traveled to China in April, we emphasized two points that I would like to return to today. The first, is that WTO compliance is the key issue in our bilateral trade relationship and that our commercial relationship provides the foundation for our broader bilateral ties.

The second, is what I view as the inescapable link between WTO compliance and the development of the rule of law in China.

In terms of our monitoring and compliance efforts, from the perspective of American exporters, of course, China's accession to the WTO represents the most significant market opening initiative since the NAFTA and Uruguay Round.

The advantages, however, of China's accession will only accrue to our exporters with continued vigilance and a willingness to promote American exporters' exports aggressively in the Chinese market.

That is why, when Secretary Evans met with President Jiang and other senior leaders in April, he drove home the message about the importance of timely and transparent implementation of each of China's commitments under the WTO.

That was critically important for the Secretary to make that statement as a part of the first meeting during the Bush Administration of the Joint Commission on Commerce and Trade to ensure that that is the benchmark that we will return to every time the Commission meets going forward.

The subtext, of course, is that it is the benchmark against which we are going to measure everything. It provides a foundation. In meeting with Minister Shi and Vice Minister Ma, of MOFTEC, our counterpart agency, I was impressed by the intent they brought to continuing to foster change in China and to implement the WTO obligations.

On the other hand, I would like to do a little take on Zhou Enlai, who was asked back in the days of President Nixon's first trip about what he thought of the American Revolution. He said, "It is too soon to tell." My view, in terms of WTO compliance, is it is too soon to tell.

I think we have seen the commitment from the leadership in the central government. That is a very positive note. I think they have taken steps to undertake the basic implementation.

What we are always looking for is the follow-through. By that, I mean not only with the central government, but at the provincial and local level as well. That is really what we are going to have to test as we move forward as a part of this process.

One of the issues that the discussions in China raised was technical assistance. As you said, Mr. Chairman, compliance is just not the threat of retaliation for the failure to implement trade agreements, but it is also about how we provide the assistance that allows the Chinese to move forward?

During our recent visit we heard lots of requests for technical assistance, including about the development of commercial law. What concerned me most, actually, was the fact that many of our trading partners are there already with programs on the ground about standards, and a variety of other things.

Of course, that always makes me nervous in terms of our market access. If the standards are set a certain way or the regulatory process is developed along the lines of the Japanese or the European model, I am going to have concerns about the benefits actually accruing to our exporters, because we have emphasized to the Chinese we need to see transparency in their regulatory procedures to have some comfort that, in fact, they are complying with the WTO.

Let me close by talking just a little bit, which I hope will respond to Congresswoman Kaptur's question about the link between WTO compliance and the development of the rule of law. This may be a lawyer's habit in saying this, but in my view, observance of the law in any society has to become a habit. It has to be a part of the fabric of social relationships.

But that really is built through the institutions that we have. There are some who seem to think that business is something separate from the sphere of other human rights or human relations. I do not agree with that. In fact, commerce is one of the ways in which you build the trust in society and a foundation for the rule of law.

There are express links, which I know were reflected in the memo that the Commission staff did for the Commission members, in the WTO agreement itself that require an independent judiciary and the review of governmental actions.

One of the first things that we are going to have to look at as we move forward is whether, in effect, those institutions are being put in place under Chinese law. We are not there yet.

We are going to have to test whether or not they are productive and whether they do provide the seeds of political pluralism which will allow for the protection of basic rights. That, I think, is the link, but we are a long way from testing that and feeling secure that that is there.

Thank you very much.

[The prepared statement of Mr. Aldonas appears in the appendix.]

The CHAIRMAN. Thank you very much, Mr. Secretary.

Next, Ms. Susan Westin, who is the Managing Director of the General Accounting Office.

**STATEMENT OF SUSAN S. WESTIN, MANAGING DIRECTOR,  
GENERAL ACCOUNTING OFFICE, WASHINGTON, DC**

Ms. WESTIN. Thank you, Mr. Chairman. I also ask that my entire statement be put in the record, and I will just summarize my remarks.

Before I start my remarks, I would like to say how much I welcome the support that you gave in your statement to the General Accounting Office's efforts, and also the support from my colleagues here on the panel from the Administration.

I am pleased to have the opportunity today to discuss China's development of rule of law practices related to the commitments China made to the WTO when it joined in December 2001.

My observations address three areas: (1) How elements in China's WTO accession agreement seek to improve the rule of law; (2) what Chinese officials told us about their reform efforts; and (3) what the United States business community has told us about the importance of these efforts, as well as their views on rule of law implementation in China to date.

My statement today is based on our ongoing work, and therefore my observations are preliminary in nature. As you know, both the Senate Finance and House Ways and Means Committees have asked GAO to conduct a 4-year body of work relating to China's implementation of its WTO commitments.

Our work to date has included two trips to China, numerous meetings with United States and Chinese Government officials, and a mail survey of, and structured interviews with, United States companies doing business in China. We plan to report on the first phase of this work in various products by mid-October.

Turning to my three main observations. First, many elements in China's WTO accession agreement seek to improve the rule of law. When China joined the WTO it agreed to ensure that its legal measures are consistent with its WTO obligations.

In our analysis of China's accession package, we found at least 60 commitments that specifically obligate China to enact, repeal, or modify trade-related laws or regulations.

In addition, China has made a substantial number of other commitments to the WTO in the rule of law areas of transparency, judicial review, uniform enforcement, and non-discrimination.

For example, in the area of transparency, China has agreed to designate an official journal for publishing all trade-related laws and regulations and to provide a reasonable period for public comment.

Second, Chinese Government officials have emphasized their commitment to make reforms that will strengthen the rule of law. They described to us how their early efforts for reform go beyond China's WTO commitments and include broad reforms of laws and regulations at the national and provincial levels, as well as reforms of judicial and administrative procedures.

Let me give a few examples of these reforms. Provincial authorities are in the process of reviewing their laws and regulations to see if they are consistent with national laws. Some provincial officials estimate this process will take 2 to 3 years.

The Supreme People's Court has issued new regulations to improve the adjudication of civil and commercial cases involving foreign parties. In reforming administrative procedures, Chinese officials told us they are attempting to reduce the number of layers necessary to approve commercial activities.

Chinese officials acknowledge the many challenges they face in completing the necessary reforms in a timely manner. Despite an extensive training program about WTO-related reforms throughout the country, officials identified the need for outside assistance to provide more training because they lacked the expertise and capacity to meet their needs.

Turning to my third point, what we have learned from the business community. According to the preliminary results of our survey, United States businesses in China identified rule of law commitments to be particularly important to them, especially the consistent application of laws, regulations, and practices in China, and enforcement of intellectual property rights. Most businesses anticipated that these rule of law commitments would be difficult for the Chinese to implement.

In our interviews with United States businesses in China, we heard several specific concerns about vague laws and regulations and lack of transparency. We heard some positive stories as well. One businessman told us his company had recently won a judgment against a counterfeiter in a Chinese court that included an order for the counterfeiter to cease operations.

U.S. businesses expect WTO reforms, including those related to rule of law, to be part of a long-term process. Nonetheless, they believe the Chinese leadership is dedicated to carrying out WTO commitments.

Let me conclude with one last observation. It is very clear that China has shown considerable determination in enacting numerous laws, regulations, and other measures to ensure that its legal system and institutions, on paper, are WTO-compatible.

Nevertheless, the real test of China's movement toward a more rule of law-based commercial system is how China actually implements its laws and regulations in fulfilling its commitments. At

this point, it is too early for us to make any definitive judgment about China's actual implementation of its commitments.

Mr. Chairman, this completes my oral statement.

I would be happy to respond to any questions.

[The prepared statement of Ms. Westin appears in the appendix.]

The CHAIRMAN. Well, thank you all very much.

I take it from listening to you that there is some progress, not a lot because it is very early, but some, in adhering to the WTO commitments and, generally, the rule of law.

My question is this. Have you worked with China's Government, or has China's Government, on its own, developed a sequencing of issues and commitments that they are working on? That is, a timeline on how these issues will be handled?

I am especially concerned about the judicial system and whether there are certain aspects of the judicial system that the Chinese Government is working on before other aspects.

Grant.

Mr. ALDONAS. Yes. First of all, Mr. Chairman, there is a sequence within the WTO agreement as to when they stage-in a number of their obligations. We literally are so early in the process, that some of the things that we think would work through the administrative process and into their judicial procedures have not bubbled up yet.

We are at the point where the sorts of issues we are facing right now, are, for example, problems with a misvaluation or misclassification at the docks with a Customs officer in Shanghai. You find you can resolve that particular issue at a local level.

It has not become a systemic problem. It has not led to somebody essentially appealing through their Customs procedures and into their courts yet. That is why, in some respects, I feel like we are putting our finger in the stream a little early in the process with respect to those issues.

I think what the Chinese have done with their rules and their procedures on paper is consistent with their commitments. It is the implementation, which we will only be able to see over time. My sense is that, at the top-most senior levels of the Chinese Government, in our conversations, that commitment is there.

But you know, as in our own government, what happens with implementation really depends on the judge, the administrative officer, and the Customs port director in places like Shanghai, and that is where we are trying to put most of our effort at this point.

On the issue of implementation with respect to the judiciary, there is no specific timetable. In many respects, I do not want to say we are not being proactive enough, but we are waiting to see, as somebody tries to test the system, whether in fact it works.

The CHAIRMAN. All right. Ms. Westin.

Ms. WESTIN. Yes. As you know, our first effort has been to take a careful look at the entire accession package and to divide it down into really understanding, as much as we can, what the commitments are. That work is not yet completed, Senator. We expect to report on that in October.

But I can tell you that, as Grant has said, that some of the commitments have a definite time attached to them. Some of the commitments are actually phased in over an 8-year period, and some

commitments are a little vague about when they ever might be implemented completely.

I think that we found a good faith effort, to start. There seems to be a much greater understanding of the WTO agreement at the national level than there is down through the provincial level in China, and that is one of the challenges they face, moving this information down and making sure that provincial laws comply as well.

With regard to the judicial system, they are working now to set up higher level courts that will hear the commercial cases involving foreign parties. This is a change there.

One of the problems in China that businesses have complained about, is the judges do not seem to know the rules too well, so they felt they are not competing on a fair playing ground if they take a case to court. So there is this effort to establish mid-level and higher-level courts to hear the judicial cases.

The CHAIRMAN. All right. Thank you.

Ambassador Huntsman, do you have an observation here?

Mr. HUNTSMAN. Just a couple, if I might. I think, on the timeline, there are some well-established time horizons out there that are pretty much dictated by the WTO features that they have signed on to.

There is very good interagency coordination between the State Department, Commerce Department, USTR, and others in terms of really defining those issues that are most important. We get input and feedback from the private sector that will help assure us, as we move forward, that the issues that we are focused on are, in fact, those that are most salient.

But I think we always need to remember the significant task at hand. Every time I consider what we are looking at here, I am always awed by it. We are only 6 months into this process, and I think we need to remember that.

I think we also need to remember there is a significant cultural adjustment that is taking place in China. It has taken place slowly over the 15 years as they have prepared for WTO membership, and it continues today.

I think that cultural adjustment also probably impinges somewhat on their view of transparency and rule of law, even though of the hundreds of commitments that they have signed on to, I think 10 percent or so of them deal directly with rule of law. We are looking at a tremendous cultural adjustment here that I do not think should be under-played at all.

The CHAIRMAN. I appreciate it. My time has expired. I think it would be appropriate for our Commission, working with GAO and the Administration, to develop some kind of timeline or game plan with benchmarks so we know where we are and where we are not over a certain period of time. Perhaps we can flesh that out more precisely in the next few days. But at the very least, let us begin thinking about that.

Our Commission works on the early bird rule. That is, the early bird gets the worm. Our first arrival is Mr. Cameron Findlay, to my right.

Mr. Findlay, we are honored to have you here.



Mr. FINDLAY. Thank you very much, Mr. Chairman. It is an honor to have my colleagues to torment for once, at least in public. [Laughter.]

My view as well on the question that Congresswoman Kaptur raised, is that accession to the WTO and compliance with its terms are absolutely critical to human rights in China, especially over the long term.

It seems to me that the historical record shows that market economies are better at protecting human rights than non-market economies.

I just wondered if each of the panelists could comment on that and talk a little bit about what the record shows from other nations in terms of the nexus between opening up economies and protecting human rights.

Ambassador Huntsman, do you want to give it a try?

Mr. HUNTSMAN. Let me just take a quick shot at that. I think we can probably look at the cases of Korea and Taiwan, as these economies have transformed over the years, and the improvements that have been made in basic human rights and the extent to which their economic policies have led to more open political systems.

But I guess in the case of China—and I have been visiting there over the last 20 years and with an adopted daughter from China who I look at every morning and am reminded of some of their challenges—I have to say that when I step into manufacturing plants in China as I have over the years, I am reminded that Western standards are on display, that Chinese employees, those who are coming into the workforce, are introduced to standards they probably have not seen or heard about before, those that deal with an open market economy, those that deal with manufacturing quality products, those that deal with interacting with other people from different countries.

I think that there are some very important lessons that are learned through all of this. I have seen over the years the ways in which people have been transformed within the workplaces as they have embraced some of these Western standards.

So I would have to say that, over time, at least in my experience, I have seen the extent to which trade and investment in China have, in fact, transformed the behavior, and the recognition and acceptance of outside standards.

Representative KAPTUR. Would the gentleman yield?

Would the gentleman yield on that?

Mr. FINDLAY. Sure.

Representative KAPTUR. I would just appreciate, Mr. Ambassador, if you could provide to our record the list of firms that you have visited and what the wage level is of the people working therein, and whether they are Western investment in China or whether they are Chinese-owned companies, state-owned or otherwise.

Mr. HUNTSMAN. I would be happy to.

Representative KAPTUR. Thank you.

[The information requested appears in the appendix.]

Mr. ALDONAS. I was actually going to pick something a little closer to home. My beat has always been Latin America and the West-

ern Hemisphere more than Europe or China when I have been in government. I have to say, I remember when I did my first tour as a Foreign Service officer in Mexico.

This was in the days of Jose Lopéz Portillo, when the percentage of government ownership in the Mexican economy was actually higher in Mexico than it was in the former Soviet Union. What you saw at that time was, essentially, to operate or to be in business, you had to pay a fee to the ruling party and that fee was paid, as a practical matter.

One of the things that has come as a benefit out of the North American Free Trade Agreement [NAFTA] is that a lot of small businesses in places like Monterey that had continually resisted paying simply for the right to do business, had a market. They could sell elsewhere.

I firmly believe, based on my own experience in Mexico, that a lot of the changes in Mexico economically coming out of the NAFTA also sowed the seeds of what we have today in the way of President Fox, and a different outlook and a different relationship between Mexico and the United States, as a practical matter.

I would not say that that was a direct cause. Nor would I say that NAFTA was a sufficient condition. But, I would say NAFTA was a necessary condition, and it has certainly pushed Mexico in the right direction.

Ms. WESTIN. I would only like to add that I think that it is difficult for human rights to flourish in a society where there is not rule of law. You see on the first page of my statement, rule of law does not have a commonly accepted definition.

But one of the definitions, is a society in which law is what guides people and government in the conduct of their activities, rather than by the direction of a single person.

It would seem to me that in China's meeting its WTO commitments and the other reforms in the areas of judicial form, transparency, etc., that it has committed to, that it is going to lay the groundwork for encouraging human rights to flourish in China.

Mr. FINDLAY. Thank you very much for your statements. I will yield the remainder of my time.

The CHAIRMAN. Thank you very much, Mr. Findlay.

Next, Congressman Jim Davis from Florida. Congressman.

Representative DAVIS. Thank you, Mr. Chairman. I have two very different questions, and the first follows up on Representative Kaptur's question.

I know there are a lot of existing benchmarks that are used now to measure the extent of political freedom, religious freedom in China. Now that we are measuring compliance with the WTO, should we be thinking about developing another benchmark to start judging this belief which we are all espousing today that there are going to be some discernible political and civil rights benefits to the citizens as we move more to the commercial rule of law?

Mr. ALDONAS. I think, certainly, we ought to be thinking seriously about the benchmarks of whether or not there is an independent judiciary and they have followed through on their obligations to implement the same. But there are specific provisions of the WTO agreement that require that in different sectors.

I think the problem that Susan alluded to is one that we have to test, which is, if you have judges who for a very long time have tried to read what the Party wanted in terms of making their decisions and they are now being asked to, in fact, render a decision based on the law and the facts in front of them, there is an ability to test whether that system is working. That is one of the things that we ought to do with respect to WTO implementation.

I would submit it also has implications for whether or not you are inculcating that same sort of habit in the judiciary more broadly, not just in terms of implementing the Customs rules or what it might be. I think that is a fair way to assess both WTO compliance and whether you are seeing the knock-on effect in the rest of the judiciary.

Representative DAVIS. Is there a recognized system that someone is already using in other countries that somehow qualitatively judges the extent to which a country has moved to an independent judiciary and enforcing the rule of law?

Mr. ALDONAS. I do not know of one. One source we might look to, as I know from my own experience volunteering with them, is the American Bar Association's Central and East European Law Initiative. They did a lot of the sort of seminal work in helping draft constitutions, commercial codes, things like that in Eastern Europe and the former Soviet Union.

They probably have the most experience of any group in terms of assessing that, and that might be one source of information we could turn to to test the proposition.

Representative DAVIS. I have heard some horror stories anecdotally about businesses trying to go into China. Do you think the extent to which businesses in the United States will actively engage in China depends upon their judgment as to how much independence and integrity is taking place in developments of the judiciary and the rule of law there?

Mr. ALDONAS. Sure, in part. Although I have to say—and this is based more on my experience in private practice with clients investing and exporting to China—you can also test it by the degree to which they opt out of the Chinese legal system.

More often as not, as I was counseling clients, my reaction was, you had better have an arbitration clause. What you do not want to rely on was the Chinese court system. That is a pretty easy way to test whether lawyers have confidence in the system. I think that would be a fair way to look at contracts and a fair way to look at investments.

Ms. WESTIN. If I could answer that also. My team was there interviewing businesses, American businesses that do business in China, and talked to over 50 companies about 2 weeks ago.

Some of the companies had been in China doing business for a fair number of years, more than a dozen years, others were fairly new. The thing that we heard expressed the most was concerns about these rule of law issues from companies that had been there for a long time.

In our preliminary look at our total results, they seem to say we found a way to work within the system. Companies that had not been there so long seemed to be having more difficulty. I think that

would apply to American companies now that are thinking of starting to do business there.

I believe that they will look carefully at how they would be treated in the courts, and I think it is a promising sign that they are putting in these higher level courts to hear cases where the judges will be trained in the law that applies.

Representative DAVIS. The success you are referring to are people using the judiciary system and not bypassing it through arbitration or some other basis?

Ms. WESTIN. No. I did not mean to imply that. They have learned how to work within the Chinese system, is what they said, not necessarily that they would go through the judicial system.

Representative DAVIS. So, in closing, one of the things we probably ought to be watching is the extent to which, as people write these contractual relationships, they are willing to submit themselves to the Chinese judiciary system, because to the extent they opt out, it really undermines this argument that is being made today that promoting the rule of law and the judiciary are somehow going to have a broader impact on political and civil rights.

Mr. ALDONAS. Congressman Davis, it is one test, and I think it is a valid one. Now, there are certain instances, I just want to be clear, where you cannot opt out of the system. When you are trying to enter your goods and Customs has made a classification about it, you have got to go through the Chinese court system. It is not like you can agree to arbitrate that. So we need to be looking at that as well. We need to make sure that that system is working.

Just to make one point, which is that lots of times when we open markets we have a tendency to think that it is all for the big guys. Generally, the big guys can both export or invest, depending on how they want to gain access to a market. Where the rubber really hits the road, is for the small- and medium-sized enterprises. When the tariffs drop, since they can only export, they benefit most. But they are also the folks who depend most on the transparency of the process, both regulatory and judiciary.

If we are going to see this agreement work out for their benefit and expand the number of small- and medium-sized enterprises that play in the Chinese market, this is really where the rubber hits the road, because they cannot afford the cost of a difficult system, as a practical matter. Transparency really is key for that end of the spectrum in our own market.

The CHAIRMAN. Thank you. Thank you very much, both you, Mr. Secretary, and Congressman Davis.

Next, Senator Chuck Hagel.

Senator HAGEL. Mr. Chairman, thank you. I want to welcome the three of you and appreciate, like we all do, your time and your contributions to our efforts.

Ambassador Huntsman, you and Secretary Aldonas mentioned in your testimony the importance that the Administration places on the coordination of interagency work.

I would be interested in your taking that down two or three levels and explaining some specific examples of that interagency coordination and how it fits, how it works, how it is coordinated, who coordinates it. And, Ms. Westin, your reflections on this would be welcome as well.

So, with that, again, thank you each for your time with us today. Ambassador Huntsman.

Mr. HUNTSMAN. Thank you for the question. I think it is a very good one. I think this is a process that we are still trying to perfect as we move forward.

Essentially, out of the U.S. Trade Representative's Office we have a Trade Policy Staff Committee [TPSC] that chairs the review of China's WTO implementation. It is an interagency process that basically invites all of the relevant agencies, State Department, Treasury Department, Commerce, Customs, that would have some stake in the trade discussion.

Since December of last year, they have met on a monthly basis. It is in those meetings that they review, in collaboration with those people on the ground working out of the Embassy in Beijing and the four or five consulates throughout the country, folks who are involved either as ECON officers or agricultural officers, or Customs attaches, in bringing information to this coordinating committee.

It is this committee, as they meet on a monthly basis, that basically is able to determine what the priorities ought to be as we go forward, those issues that we ought to be most focused on in terms of where China might be derelict in terms of its compliance, and indeed what the Administration's response to those issues ought to be.

Mr. ALDONAS. Senator, it is a terrific question, because lots of times we find ourselves not being able to sort it out. I think China is one of those examples. The TPSC process that Jon referred to is one where there is a monthly meeting. It really does keep the agenda for everyone.

From the Commerce Department's perspective, we think our value added is an intake mechanism for that process. We have our Foreign Commercial Service officers on the ground in China. It is the single largest representation of what I like to call commercial diplomats that we have in any single post around the world.

We also have our China desk, where we have added another five members in this fiscal year, precisely to provide, again, that intake mechanism when there are complaints from American business, so we can table those and get them onto the agenda for the TPSC.

Now, Secretary Evans, since he demands accountability, has also asked me to establish something that he calls a "tiger team." Tiger teams, conventionally, are folks who come in from the outside and try to break into your computer system just to test whether your security system works.

What Secretary Evans has wanted us to do, is really have an alternative look at our own processes. Just by way of sort of underscoring the level of cooperation, as soon as we were asked to do that, the first thing I did was call Jon and Charles Freeman, who is the Deputy Assistant USTR for China, and say you have got to be a part of our tiger team to test whether or not our conventional systems are working as a practical matter, and if they are not, tell us how to improve them as a part of the process. So, that is sort of the level that we have gotten to in terms of coordination.

Senator HAGEL. Ms. Westin.

Ms. WESTIN. Yes. We are not part, of course, of this interagency process, but we have been tasked to look at it as part of the request from Senate Finance and House Ways and Means. We determined, with those two committees, that it would really be fair for GAO to start such a look after they had time to put together their plans, and started implementation.

So that is really the fourth body of work that we intend to start, probably late 2002, early 2003, taking a specific look on how they are monitoring China's enforcement and how the interagency process is working.

Until then, though, there is information and documents that we need from all the agencies involved with us to help us understand how China is implementing its commitments.

Senator HAGEL. Thank you.

Representative BEREUTER [presiding]. Thank you.

Next on Senator Baucus' list is the gentleman from Michigan, Mr. Levin.

Representative LEVIN. Thank you.

One of the provisions inserted in the House into the China PNTR bill related exactly to this, and that is the review process. There was a provision inserted that we request, through the WTO and in the WTO, for an annual review. There was some skepticism that could be achieved. If it were not, there was only going to be an every-4-year review. It was achieved, and resources were appropriated to help you carry that out.

I think it would be helpful, even before the annual report, if you could give in writing to this Commission an analysis of what you are doing, how the interagency mechanism works, where you are with the hiring of additional people to make sure that this annual review is truly meaningful, so that when GAO undertakes its first review, it does not give you an E, or even a D.

[The information requested appears in the appendix.]

But let me pick up, if I might, a question that has been opened. It was played off of, or taken off of, Grant, your comment on page 2, "Accession to the WTO will further development of an impartial judiciary, neutral regulatory bodies, transparent legal processes, and regularity in the administration of law in China."

Then the important sentence. "To the extent that entry into the WTO reinforces the development of the rule of law in China, it does suggest broader lessons for China's leadership as they attempt to build a new foundation for Chinese society."

One of the issues that tends to divide us in Congress and about which there are differing perspectives on this Commission relates just to this. I think we wanted to become a forum, not for automatically choosing up sides, but trying to be an effective instrumentality.

You within USTR have a person who is working on worker rights, and this Commission, I think, has hired, or is about to hire, somebody to do that. So I want to ask you a question in that regard.

I do not think there is any automatic process. You mentioned Mexico. Let us not go into a debate over that.

Someone could say the introduction of further market principles in Chile certainly did not lead to more freedom, at least right away,

until the people who introduced it were thrown out. I think that is a fair comment. I do not think Mr. Pinochet became an instrumentality of freedom.

So let us talk about China, because this is our focus. As China privatizes—as it moves away from these state-owned enterprises, we have already seen a lot of volatility in terms of labor markets. We have seen an immense question arising as to what is going to happen to the workers who are displaced.

We have seen it best in an immensely uneven pattern. Sometimes people being able to exercise rights that in other societies would be, hopefully, easily exercised, in other cases those rights are just snuffed out, to put it charitably.

So let us talk for a few minutes. Give us your responses to what you think is your role, what is the role of this Commission, as China goes through this process that is going to involve a lot of disruption and a lot of issues about the rights of workers in a society where there have been, on paper, some rights, but in reality, essentially none in terms of exercising, speaking out, defending their rights.

So, there is only a minute left. Who wants to chew on that? I think the Chairman may give you an extra 30 seconds.

Mr. ALDONAS. I will take a shot at it, Congressman. There are two questions. One, is have they, in fact, fairly implemented their WTO obligations, which, as you well know, do not reach your fundamental point about labor law and labor markets.

The second question is, what is the knock-on effect of implementing the WTO in terms of loosening up the society? I think there has been a consensus of economists indicate recently that what you need is strong government in terms of setting the rules of a society, but also government restraint to allow for the full interplay of human freedom which drives the economic process forward.

Representative LEVIN. But what is our role, Grant? What is our role?

Mr. ALDONAS. I am going to get there. I am sorry. I think our role in looking at that is to test both whether they have implemented their WTO obligations, as well as whether or not they have put in place the constraints on their own actions that really do allow for the interplay of market forces.

Those really are two different things, but I would suggest the Commission has to focus as much on the latter as it does on the former. There is the traditional process, frankly, of the Ways and Means and Finance Committee that can provide the oversight on those specific issues.

The real question, is whether or not you are starting to see the follow-on effects of economic change and whether the Chinese have begun to see an interest themselves in ensuring that there are constraints on the government to not interfere in people's lives.

That is a longer-term process, not just the 3 to 8 years of WTO implementation. But that is where I think shining a light on that part of the process is the most useful role of the Commission.

Representative BEREUTER. Ambassador Huntsman, do you have a response?

Representative LEVIN. If you would allow it, I would be interested.

Mr. HUNTSMAN. I think our role is to monitor and to encourage. We are very early in this process, as I mentioned earlier, 6 months into it only. We have got a long way to go. I think we need to keep our dialog open and alive.

I am simply referring to trips like the one Grant made, like other Administration officials are making, like Members of Congress can make, where they can actually articulate some of our beliefs and the principles on which we stand tall. I think that, as we keep this dialog open, we are going to have to realize that so much of the labor problems, the challenges, deal with the state-owned enterprises, the over 100,000 of them around the country.

Therein lies a huge challenge, because China is having, I think, a difficult time articulating the WTO and the provisions of the WTO to some of the outlying regions. There is some resistance for all kinds of understandable reasons. This is going to take some time as the leaders in Beijing continue to kind of spread the WTO message and try to get various outlying provinces in compliance. We are going to have to follow this closely and we are going to have to visit not only Beijing and Shanghai, but I think some of the outlying provinces and meet with provincial leaders, and make certain visits where we are able to articulate a message that is meaningful.

It is going to be a long, iterative process, but it is one that I think will require us to be engaged on both sides of this table, and it is one I think we are going to have to approach with some patience.

Ms. WESTIN. Can I add something?

Representative BEREUTER. Yes.

Ms. WESTIN. As you know, GAO's role is looking specifically at the WTO-related commitments. But when we were in China, we did meet with government officials. I recall a conversation that I had with the deputy mayor of Shanghai, in which he expressed one of their concerns in implementing WTO commitments was throwing a lot of people out of work, frankly. There are a lot of companies in China, the state-owned enterprises, that they know are not going to be competitive as foreign companies come in.

Because GAO had done a body of work on trade adjustment assistance, I offered to share with him some of those reports, and said, frankly, it is a problem that the United States has faced as well in terms of providing support for people who have lost their jobs because of trade impacts. So, we had a discussion on that.

But I think it is one of their big concerns as they implement WTO commitments, what it is going to mean as to the impact on their labor force.

I might suggest to the Commission that that is one of the things that you might want to keep a close eye on as China does implement its WTO commitments, is have they put in some kind of safety net for workers that are thrown out of work.

Does it mean that rights are lost because they are so concerned about the unrest, or do human rights, perhaps, start to build?

Representative LEVIN. Thank you.

Representative BEREUTER. The gentle lady from Ohio, Ms. Kap-  
tur, is recognized.



Representative KAPTUR. As you were talking, I was thinking, we have not done such a good job of that in our own country. What is happening in Ohio, is our jobs are being displaced to China and the workers in Ohio are left behind. It is very interesting, what is going on here.

The first question I really have, is China is now the largest holder of United States dollar reserves. Why is that an advantage? Of what advantage does that serve the United States in this trading relationship?

Mr. ALDONAS. Well, the irony there is that China is actually an exporter of capital. A lot of those investment dollars flow back into the United States. That money had been recently going exclusively into the private sector. We earned a rate of return on that that allows us not only to fund the obligations, but to create a lot of wealth in the United States.

Representative KAPTUR. Do you have specific examples of that?

Mr. ALDONAS. I will tell you what. I can come up with some, to lay them out for you in writing, if that would be helpful.

Representative KAPTUR. Is this direct investment?

Mr. ALDONAS. There is some Chinese direct investment in the United States.

Representative KAPTUR. Or is this portfolio investment?

Mr. ALDONAS. Well, but even portfolio investment, if you think about it, flows through to the bottom line in terms of the access of companies in the United States to capital markets to fund their investments.

My only point in saying that is that I would probably agree with you at the end of the day, China should not be in the position of being a surplus country. It is a classic developing country. It ought to be in deficit, frankly. It ought to be importing capital, as a practical matter.

The fact that they put themselves in a position with a mercantilist trade policy to try and ensure that they have preserved their currency reserves and focus on that to that extent is perverse in terms of their own development strategy, to be honest with you.

You think about our history in the United States, we were a deficit country for a long time as we had tried to attract capital and tried to expand across the expanse of the western United States. That is essentially what China is trying to do, and they are hobbling themselves by maintaining a very, very large trade surplus.

Representative KAPTUR. Well, this is of great concern to me. At the same time as I see jobs being cashed out in Ohio, China ends up being the largest holder of our dollar reserves.

I would be very interested in any information you could provide for the record on what is being done with those dollars, both inside China or outside China.

Alan Greenspan has said that, overall, the U.S. trade deficit, which now totals 5 percent of GDP, is unsustainable and is unwise for our country. China is one of the largest components of that growing trade deficit. It seems to me we ought to focus some attention on that.

I wanted to get a sense from any of our witnesses today if you could give me a feel about the market transition within China. If one looks at the millions of businesses that must exist and what

percentage of them and their contribution to their country's economic growth would be defined as state-owned enterprises today, what percent would be what I would call oligarchical control, those who would come from the state-owned enterprises or had political connections in the country and managed to end up being CEO of whatever?

Third, freestanding, independent companies that operate in a market sense as we know it in the West. Give us a sense of the texture there of what is going on.

Mr. ALDONAS. I could not quote you the specific figures, particularly on the middle one, Congresswoman. I think what I could say, just as a starting point for further reflection and then we can try and come back with more specifics about that, trying to match those categories, is if you think about China's development where you really see the ability to lift people out of poverty over the last 10, 20 years, has really been on the coast where you have seen the foreign direct investment, where you have seen the private investment, and the opening up of those economies.

That represents between 200 and 300 million people out of 1.2 billion. What that means, is for the 900 million, 800 million on the land, while they can do private farming, a lot of what goes on out there is still controlled by the state, as a practical matter.

You still do have State controls over work permits, which limits labor mobility many times, so the migration to the city is oftentimes actually illegal under Chinese law. But, nonetheless, they are drawn by the investment in those sectors.

So I think what you could say based on that is where you have seen the strongest growth, and in fact in places like Shanghai the strongest commitment to WTO, because they see the benefit of liberalization.

It is precisely where you have got private enterprise, where you see the least movement in the direction I think we would all like to see, is where you do have that stronger State control, and that is in the countryside.

Representative KAPTUR. Well, we have seen that in economies that are transitioning from what had been called Communist to something else. I mean, the traditional pattern has been oligarchical control, first of the market mechanism and then of the political system, almost hand-in-hand.

My guess would be, in China, it is no different than in some of the other countries I am thinking about as I make this statement.

So I am trying to get a sense from you. Could any of the witnesses provide kind of a textural feel as to the ownership of these enterprises, as I have asked?

Ms. WESTIN. Congresswoman, I do not have that information at my fingertips. We will certainly try to get back to you.

I did not quite understand your second category, though.

Representative KAPTUR. All right. Well, I would say those who had been known in the former regime as having a great deal of political power and who then move into control of given companies.

Ms. WESTIN. All right.

[The information requested appears in the appendix.]

Mr. ALDONAS. Can I come back on that one, Congresswoman? It is an interesting question. There was a period of time as China

started to open up, from 1979 forward, where there was this possibility of wearing two hats, literally being a government official as well as a part of it.

That was part and parcel, frankly, of the run-up, in terms of the complaints about corruption, to the events in 1989. It led to changes that divorced the ability of the People's Liberation Army and a variety of other government officials to wear those two hats, and you have seen a pretty strong movement away from that.

The other thing that I think people are finding, is that you need professional management to create enterprises that can compete in the world economy, so increasingly you are seeing not a turn to people who are former Party members and things of that nature, but if you want to put up a wafer fabrication plant on the outskirts of Shanghai right now, you are going to have to import the management from somewhere else because you need that kind of management and ownership to actually drive the process in a way that will allow you to compete on the world scene. The state-owned enterprises simply cannot do that with the kind of ownership or leadership that you are describing.

Representative KAPTUR. I know my timer has expired, but I would like to know if any of you could provide for the record information as to whether the United States is the major recipient of Chinese exported goods, or are other regions of the world equally graced. Thank you.

[The information requested appears in the appendix.]

Representative BEREUTER. Thank you, gentle lady.

Next, I have on the Senator's list the gentleman from Ohio, Mr. Brown, followed by the gentleman from Virginia, Mr. Wolf.

So, Mr. Brown, you are up next.

Representative BROWN. Thank you, Mr. Chairman. As the newest member of this Commission, replacing Representative Pelosi, I wanted to make, within my 5 minutes, a brief couple minutes' statement, and then have a question for the panel.

During the 10 years or so of MFN [most-favored nation] and PNTR debates, proponents assured us over and over that increased trade with China would cause human rights to improve, labor rights to develop, democracy to flourish.

But each year, as we all know, and this Commission needs to remind us of that, I think, because of it charge in its first paragraph, as trade has increased, China's human rights record has gotten worse. The State Department's recent Human Rights Report cites crackdowns by China on freedom of speech, on freedom of belief, on freedom of association.

With continued economic success, as Sandy Levin intimated a moment ago, the PRC will have an even greater opportunity to maintain control over a workforce that can neither protest, nor assemble, nor bargain collectively.

Of course, over the last decade, more Western corporations have been looking to invest in authoritarian regimes. Statistics show they have moved from developing democracies to developing authoritarian regimes, regimes where there is little regard for, or interest in, the rule of law.

In China's case, many, if not most, decisions are made about the economy, about the rule of law are made by three groups. They are

made by the Chinese Communist Party, made by the People's Liberation Army which controls a significant amount of the businesses, as we know, in China, and are made by Western investors.

There seems to be little interest from any of these three major players in China's economy in changing the current situation. All three, Western investors, the People's Liberation Army, the Communist Party, profit too much from the status quo to want human rights and labor rights to markedly change.

About 6 weeks ago, about a dozen Members of Congress and I spoke with Zhu Rongji, and one of the first things he told us, is he receives a report every day on his desk detailing the outbreaks of labor unrest all over China.

My question is, as China makes changes in its commercial law that you advocate and many on this panel have advocated, and it seems likely to happen so as they can better comply with WTO rules, what sort of changes do each of you foresee in the area of worker rights and the area of the right to organize?

Mr. ALDONAS. I think the first and most important thing is to recognize that the Chinese themselves treat foreign-owned enterprises and their state-owned enterprises differently under their own labor law.

To the extent you see the private sector grow, they are going to be subject to a set of rules that actually do allow for labor organization the way the state-owned enterprises are not.

Most of the times where you see the labor unrest, it actually relates to state-owned enterprises which are, frankly, not economic. What they are finding is, as they try and change to become economic, they are dumping an awful lot of people, either out of the enterprise, or they are finding that they simply cannot exist any longer. That is driving a lot of the labor unrest.

So, again, I never want to try and over-sell that point. It has got to be the steady accumulation over time, of seeing that you have shifted that line gradually so that all enterprises are covered by those sorts of freedom, so that individuals do have the opportunity to bargain collectively if they so choose.

Representative BROWN. Do you probably believe, in those private, non-state enterprises, that the right to bargain collectively is markedly enhanced compared to state-owned enterprises?

Mr. ALDONAS. Absolutely. Yes.

Representative BROWN. Are the wages different in those? Are the wages significantly different?

Mr. ALDONAS. Absolutely. We will give you the documentation on that. But I think it is the sort of common-sense notion that what you have, just for the reasons you state, in a state-owned enterprise, is the state very clearly with its thumb on the pulse of everything that goes on in that enterprise in a way that is not true with respect to private enterprise.

Representative BROWN. But do not Western investors choose China because it is authoritarian and its economic and political nature that wages are low, that environmental standards barely exist, that workers' standards, if they exist, are rarely enforced?

Mr. ALDONAS. That has not been my experience.

Representative BROWN. So why do corporations, Western investors, choose authoritarian developing countries over democratic developing countries?

Mr. ALDONAS. I do not think you should confuse cause and effect. As you have seen China open up over 20 years and allow private investment, there has been a flow of capital to the Chinese market.

If you looked at the statistics of where foreign investment has gone, it has moved in the direction of China. But it is not necessarily because it was authoritarian, it was because you have a market of 1.2 billion people opening up.

Most of the investment, in fact, has gone on on the coast where they have opened up. It has not gone to the interior, which the Chinese are now trying to encourage. But the point there is, it has gone into those sectors that are most free, not into the sectors that are most controlled by the state.

So even under the assumption that the theory was you were trying to invest in an area that was governed by an authoritarian government, the experience has been, they have invested in those parts that the authoritarian government has expressly said we are going to allow you the maximum amount of freedom we are willing to tolerate in this system, and that is where they have invested, not where there is actually State control of the enterprise.

Representative BROWN. In the rare moments of candor that American CEOs lobbying the Congress during PNTR, they would, in fact, acknowledge that their interest was less than 1.2 billion consumers than it was in 1.2 billion potential workers.

Mr. ALDONAS. I have to say, that has not been my experience either in private practice with my clients, or the experience listening to American business people who are investing there now.

Representative BEREUTER. We need to move on. I think we are going to have a House vote, and I want to get to our two colleagues. The gentleman from Virginia, Mr. Wolf, is recognized.

Representative WOLF. Thank you, Mr. Chairman.

You were representing clients in China before you were here?

Mr. ALDONAS. I was representing clients before I went to the Senate Finance Committee.

Representative WOLF. All right. Fine. I just wanted to get that on the record. If you can be relatively brief because of the time.

I want to share Mr. Levin's comments. I was in Italy last year, taking my wife on a short trip for our 40th wedding anniversary. There was a large article about Nestle's and another company doing business with Nazi Germany right up to the end of the war, and it really did not bring about a change.

What is the trade deficit today with China?

Mr. ALDONAS. I think they are \$80 billion in surplus.

Representative WOLF. And what was it 10 years ago?

Mr. HUNTSMAN. It was about \$19 or \$20 billion.

Mr. ALDONAS. I think it was roughly a quarter of what it is now.

Representative WOLF. A quarter.

Mr. ALDONAS. Yes.

Representative WOLF. Can you supply for the record what it was over the last 20 years, give us each year?

Mr. ALDONAS. Yes.

[The information requested appears in the appendix.]

Representative WOLF. Second, we had a briefing by our security people saying there is a major espionage program by the Chinese Government against our private sector.

Are you aware of that? Have you had that briefing? Do you raise that when you are in China?

Mr. ALDONAS. I did not raise it when I was in China. I did not have that briefing. I am aware of that because my clients faced it when I was in private practice.

Representative WOLF. Can you all three get the briefings and then just drop a note to the committee that you have had the briefing?

[The information appears in the appendix.]

Representative WOLF. Do any American companies speak out on behalf of human rights? Do you have any record? Can you supply for the record all the companies that have spoken out, if somebody is dragged out of a factory because he happens to worship at an evangelical church, that the company has spoken out for them? Do you have any record, off the top, that you would know of?

And have any business men who are Catholics spoken out for Bishop Su who has been in prison for a number of years because he gave Holy Communion to a Member of the House? Do you know of any American businessmen that have spoken out on that case?

Mr. ALDONAS. No.

Representative WOLF. All right. Do you think it would be a good idea if the American business community did speak out on those cases?

Mr. ALDONAS. I think it would be a good idea if American business—

Representative WOLF. Do you know if the American Chamber of Commerce in Beijing has ever spoken—

Mr. ALDONAS. Congressman, do you want me to answer the question?

Representative WOLF. You did. You said no. You said it would be a good idea.

Mr. ALDONAS. But do you want me to—

Representative WOLF. My time is running out. Do you know if the American Chamber of Commerce at Beijing has ever spoken out on those cases?

Mr. ALDONAS. Congressman, you know what the American business community does do in China, is largely what it does in the United States, which is invest in its community.

Representative WOLF. No. But there are—

Mr. ALDONAS. They commit dollars to real projects on the ground that help the Chinese in the same way they do in their own neighborhoods here in the United States.

Representative WOLF. But I think you sell the American businessmen short. American businessmen in the United States speak out on many important social issues, and they do it around the world. We just saw the Secretary of Treasury, in Africa, speaking out on AIDS and speaking out on debt relief.

I think, and I will not have any more questions, frankly, some of you in the Administration have not listened and read President Bush's speeches, because I hear him say and speak out very eloquently and very passionately on this.

Then when it gets down to the second level and the third level—and I think the more we are speaking out and advocating on the persecuted, religious freedom, human rights, the better we will be and the more likely they will change.

Also, I am glad American businessmen are invested in China. I am glad they are investing. But also, if they were to speak out, if American business in China were to speak out, they would carry much more weight than a Member of Congress or anybody else.

I have seen relative silence when business trips go to China, almost total silence on behalf of American businesses operating in China. Not a lot of people in the Department of Commerce or the trade representatives speak out on behalf of human rights. I think it would be good if you got the statements that President Bush made, spoke about, and advocated.

At the beginning of every meeting, even though we want to trade and do business—because we do want to trade. I agree with the gentleman, the more we are trading with people, the less likely there will be war.

But if we put it at the beginning, we make sure it is a priority and we publicly stand with, and we also do what Secretary Baker would do, and Secretary Shultz would do, we would go meet with the dissidents, go, as the Secretary of Commerce did, to the churches and worship with the people. We would send a message a lot more than we are currently doing.

Mr. ALDONAS. Well, just for the record, when I was in Shanghai, I did go to church and it was—

Representative WOLF. But was it an underground house church or a recognized church?

Mr. ALDONAS. Well, in fact, it was a recognized church. And trust me, there were still Chinese agents sitting outside the church watching me go in. And I went there—

Representative WOLF. But did you try to go to an underground house church?

Mr. ALDONAS. But I did go to church. [Laughter.]

And part of that was trying to make a statement to the folks who I knew were following me that I was going to church in China. I wanted to exercise my rights of freedom while I was there.

Representative WOLF. Did you speak out for Bishop Su?

Mr. ALDONAS. I thought that was, at least at my level, a fairly eloquent statement about my willingness to try and exercise my right while I was there, along with other Chinese and with other foreign citizens who were in Shanghai on a Sunday.

Representative WOLF. Do you think just going to church spoke out for Bishop Su? Do you think that that spoke out for the 200 people that are in Drapchi Prison from Tibet, the Buddhist monks, the Buddhist nuns, the evangelical house churches? Your going to church spoke out on that? You should raise that in every issue and every meeting that you have.

I have no further questions.

Mr. ALDONAS. I think, if you are the Under Secretary of Commerce and you are there on a very public visit, and you go to church on Sunday, I think that does make a statement, Congressman.

The CHAIRMAN [presiding]. All right.

Representative BEREUTER. We have 10 minutes left, Mr. Chairman, so I must regretfully pass and catch up with you later.

The CHAIRMAN. All right. Congressman Pitts, do you want a few minutes anyway?

Representative PITTS. Thank you, Mr. Chairman.

The CHAIRMAN. Then we will continue.

Representative PITTS. Thank you, Mr. Chairman. Thank you for your testimony.

And just for general information, I raised the same issue that Congressman Wolf did in the last hearing, then had a visit from the Chamber of Commerce. A couple of businessmen told me that they had privately raised human rights issues with the government when they were there in China.

I just wanted to ask one thing. Some of you raised the issue of independence of the courts. I think, Ms. Westin, you mentioned the lack of independence of the courts.

What were the Chinese officials' responses when you raised this issue with them? Did it seem that they intended to allow or to strengthen the independence of the courts? How can our government encourage further independence of the courts there?

Ms. WESTIN. Yes. I do not want to leave you with the impression that, when we met with Chinese officials, we were raising issues like that. We were talking about what they were doing to implement the WTO reforms.

So meeting with various officials, including some members of the Supreme People's Court, they were telling us of the process they were going through with judicial reform.

Part of it was establishing, as I have mentioned, these mid-level and higher-level courts to deal with the foreign companies that bring cases. Part of it is working to make sure that judges get proper training so that they are making decisions based on law. So these were the things that they were telling us that were in process.

Representative PITTS. Would any of the rest of the panel like to address that issue of independence of the courts?

Mr. ALDONAS. Congressman, the same basic experience was that what they have done and what they have in process looks good on paper.

The real question, is when people have the opportunity to test that and whether they can vindicate their rights through the system. I think only time will tell. We have not really started to see enough of that bubble up through the system to be able to get a good measure of it.

Representative PITTS. Thank you.

Mr. Chairman, I am going to submit the rest of my statement for the record and I am going to go vote.

[The prepared statement of Congressman Pitts appears in the appendix.]

The CHAIRMAN. Thank you, Congressman, very, very much. I appreciate your taking the time. I know it is often a great distance to travel over from the other body.

I would like to ask all of you, very briefly, and ask you to be short in deference to the next panel—the major premise of this Commission's activities is that the rule of law will help move China



toward protection of civil rights, honoring human rights, and more toward an independent judicial system, etc.

But Congressman Wolf raises a good question, basically: Is it enough? It is a bit presumptuous to say this as Americans, but nevertheless, that is our goal as human beings morally, as Americans at a moral level and a human level, where we believe that human rights should be honored and protected worldwide, regardless of where.

But the question is, at what point does pushing for honoring human rights in China become counterproductive? We are working to help China develop a stronger rule of law, not only in the commercial area, but in the civil and political area? Where is that line?

That is, when does the advocacy of human rights, and only human rights, irrespective of anything else, help, and when does it start to hurt and detract from our efforts? Some of you have a lot of experience. Grant.

Ms. WESTIN. And I can easily defer to the Administration because GAO does not serve as an advocate, really, on any position.

The CHAIRMAN. All right. Grant.

Mr. ALDONAS. Honestly, Mr. Chairman, I think it is when you start to create a backlash against the very people you are trying to help. When I think about Ned Graham's work on behalf of religious freedom in China, Billy Graham's son, what he would say consistently is that there is a level of pressure in acting on behalf of your own values that is important as an example to the Chinese. It is not a direct confrontation to their question about who runs China so much as an expression of your own values.

But at the point where you encourage the State to focus back on the very people you are trying to help, whether it is in the Christian community or whether it is more broadly than that, Falun Gong, whatever it might be, I think you have stepped too far, as a practical part of that.

I do not so much see that as a part of WTO compliance and the development of the rule of law, as it is really trying to encourage the Chinese to understand they will succeed at what they want to do on behalf of their own citizenry, in their economic sphere where they seem focused, by trying to encourage the release of human freedom at all its levels. That is something I think you can say without having to trigger a backlash against the various people you are trying to help.

The CHAIRMAN. Mr. Ambassador.

Mr. HUNTSMAN. I agree completely with what Grant said. I think what we also need to realize, is that more and more there are students here in the United States, tens of thousands of them, and they are not learning Marxism and Leninism, they are studying Jeffersonian principles. They go back and apply those in China. I think they realize that we here in the United States have certain attributes about us. We will be very competitive in the free market, while at the same time we will espouse certain principles.

There will always be a balance that comes out of the United States, and I think increasingly China will understand that and they will learn how to deal with it without recoiling in horror whenever we want to talk about certain things.

But I also think we need to see this in the fuller spectrum of time. That is, the year I was born, China launched the Great Leap Forward, a disastrous program that left 30 million dead of starvation. That was then followed up by the great proletarian cultural revolution, which was a great policy debacle for China. Then the Open Door policy followed shortly thereafter, once Deng Xiaoping was able to consolidate his rule in the late 1970s, and you look at the progress that has taken place since then. So, I tend to look at things based upon how long I have been around and the progress that has been made.

I tend to think we do not look enough at the transformation that has occurred when we go back to the late 1950s or early 1960s vis-a-vis where we are today. I think sometimes we need to take stock of some of those changes as well.

The CHAIRMAN. Thank you. Thank you very, very much. This has been most productive. We will get back to you on a timeline and benchmarks for adherence to the commitments of the WTO. Thank you.

Our next panel consists of Chris Murck, chairman of the American Chamber of Commerce in Beijing and president of APCO Associates in China; Professor Donald Clarke of the University of Washington Law School; and Jeff Fiedler, who is former president of the Food and Allied Services Department of the AFL-CIO.

First, Chris Murck, chairman of the American Chamber of Commerce in Beijing. Mr. Murck.

**STATEMENT OF CHRISTIAN MURCK, CHAIRMAN, AMERICAN CHAMBER OF COMMERCE, BEIJING, CHINA**

Mr. MURCK. Thank you very much, Mr. Chairman. I am honored to appear before this distinguished body and am pleased to hear, by your questions to the prior panel, that the American Chamber of Commerce in China is known to you.

I would ask that my written testimony be submitted for the record, and I will just make a few remarks.

The CHAIRMAN. It will be included for all of the panelists.

Mr. MURCK. I have framed my testimony in terms of the rule of law as it affects the business environment in China rather than specifically with reference to the World Trade Organization accession commitments because I think the rule of law is a broader issue than merely WTO, and cannot really be discussed solely within that framework.

By rule of law, the business community focuses primarily on transparency and consistency. By transparency, we mean the promulgation of laws and regulations that have been developed with participation by affected parties and the general public, and which are easily accessible, objective in their terms, and clearly understandable.

By consistency, the business community refers to fair, reliable, and non-discriminatory application and enforcement not only of laws, but also of regulations and contracts.

In 1979 when China began its reform progress, it is a fair statement that it did not have a legal system. In the years since then, remarkable progress has been made to draft a large body of law, to reestablish and improve the court system, to reestablish the

legal profession. As such, there are now 300 law schools in China, where in 1979, there were none.

So, I think we can say today that China does have a legal system, but it is also clear that that legal system is neither transparent, nor consistent. We have viewed this as a major problem and we have been a strong voice of support for strengthening the rule of law in China on those grounds.

About a year and a half ago, we produced a white paper for 2001 which noted the progress that has been made over the 20-some years since the current reform process began, but also said that in our view it had stalled, and with respect to rule of law, we were even in some sense moving backward.

The WTO accession package in this area, as in others, has revived somewhat this process by making explicit a series of new commitments which are extremely important. I would just like to note two of them. They have been mentioned by the prior panel. I will just reiterate.

One of them, is to enforce only published laws and regulations, thus eliminating the legal force of internal documents, which has been a major problem for the business community, and to make laws and regulations available before their effective date, in some cases, for comment by the general public.

A second major commitment is "to administer," and I am quoting here from the Protocol, "in a uniform, impartial, and reasonable manner all its laws, regulations, and other measures of the central and local governments governing its trade and foreign investment regime."

These commitments are important statements of principle. They are, however, particularly the commitment with respect to uniform, impartial, and reasonable enforcement, extremely difficult to judge. It is not as objective as lowering a tariff rate or increasing a tariff rate quota.

These criteria will be harder from our point of view and from the Chinese point of view in terms of assessing whether or not they have actually lived up to them.

In my own view, this will be a long process. I would view it as a 10-year effort to establish a legal system which is transparent and consistent in the terms in which I have mentioned it above.

I think that process requires diverse approaches, not only from the business community, but also from governments involved, from multilateral agencies, from foundations, from the human rights community, and from many others.

The exact outcome of it cannot be clearly predicted. Although transparency and consistency are at the core of any legal system that we would characterize as respecting the rule of law, it by no means accounts for all of it.

We hope that the United States Government, which has been a strong spokesman and critic of China with respect to rule of law, will in the coming years begin to fund in a material way capacity building efforts, which it has not done to date, particularly by comparison with the Europeans.

We have not been players in providing technical assistance and training. That began to change only last year, with a \$3 million appropriation, most of which went to one program run by Temple

University in coordination with Qinghua University in Beijing. We see signs of new commitment and new effort by the U.S. Government in this respect and we would strongly encourage that.

I particularly recommend that you examine the Commercial Law Development Program in the Commerce Department, which is barred from activity in China because it is funded partially by AID funds, which are, as you know, restricted.

Mr. Chairman, thank you very much, again, for the opportunity. I look forward to your questions.

[The prepared statement of Mr. Murck appears in the appendix.]

The CHAIRMAN. Thank you, Mr. Murck.

Next, Professor Clarke.

**STATEMENT OF DONALD CLARKE, PROFESSOR OF LAW,  
UNIVERSITY OF WASHINGTON, SEATTLE, WA**

Mr. CLARKE. Thank you, Mr. Chairman and members of the Commission. I am very pleased to have the chance to come before you today to offer you some thoughts on WTO implementation in China and the rule of law.

Since you have my written testimony, I am just going to highlight a few areas of that right now.

The first issue I want to highlight is the debated issue of whether China's WTO obligations, to the extent that they call for enforcement of private rights, are directly and immediately enforceable within the Chinese legal system. I raise this issue because Chinese law, remarkably enough, is unclear on this issue.

Nevertheless, I believe the only realistic position to take is that they are not. That is, in China, as in the United States, WTO obligations become part of the Chinese domestic legal system, enforceable by domestic courts only, when Chinese Government bodies issue appropriate rules requiring courts and other government bodies to enforce or implement those obligations.

That said, however, we should recognize that in some cases China has already issued the necessary regulations, and where it has not, it is a relatively simple matter to do so. Those regulations do not necessarily have to be promulgated by the National People's Congress after a full legislative process.

In some fields, such as, for example, enforcement of judgments or procedural rights, it would be possible within the Chinese system for the Supreme People's Court to issue a directive instructing lower courts to implement those obligations. Of course, procedurally, that is a much simpler matter.

The next issue is that of local government measures. There is a substantial and legitimate concern that local governments within China might take measures that are inconsistent with China's WTO obligations.

I have mentioned in my testimony an example of that in recent legislation from Zhejiang Province, that at least on its face seems to grant privileges to Taiwanese investors that are inconsistent with MFN principles.

Now, China, in this respect, is not like the United States and other Federal systems. As you know, Chinese local governments have no legal power to defy the central government.

Because the central government has the legal capacity to require local governments to conform to WTO obligations, it therefore, under WTO rules, has the obligation to do so and it would be in violation if it did not.

As you know, though, to say all this does not solve the basic problem, which is that local governments do, in fact, enjoy a considerable amount of de facto autonomy from Beijing for various institutional reasons that I will not go into here, so they may in fact come up with inappropriate regulations and measures, and the central government may be unable, as a practical matter, to get them abolished.

I just want to make two comments about this. First, the failure of the central government to get such regulations abolished is not necessarily an example of its faithlessness in the WTO context. China is a big and not very well-governed country, and some things are very hard to do.

The second comment, is that China's trading partners are of course not helpless in the face of such violations. The dispute settlement process is a regular part of WTO life, and violative measures can be identified and sanctioned.

Finally, I want to say a few brief words about prospects for the rule of law in China. In the United States and in the West generally, we tend to identify rule of law with rule of courts. Thus, for example, the Working Party on China's accession insisted that administrative rulings in China should be made appealable to the courts.

But this procedure rests on an assumption that courts and judges are better trained to analyze legal questions and more likely to be fair and unbiased than administrative agencies.

Chinese courts, I believe, at present simply do not have the capacity to play the role that is expected of them in the standard model of the rule of law. Chinese courts are weak. They are dependent on local government for funding, and are staffed, by and large, by officials who do not know a lot about law. Perhaps 10 percent of Chinese judges have undergraduate degrees in law, and a large number have no college degree in anything.

Thus, it would be, I think, more realistic to think of them not as courts, but as something we might call perhaps a legal adjudication office. Instead of calling their officials judges, which brings to mind a dignified, black-robed official with a high degree of legal training, we might better call them hearing officers or some other name that better reflects their essentially bureaucratic and administrative role.

Unlike United States courts, Chinese courts have effective jurisdiction over only a limited class of legal rules, and a vast part of China's legal system is still under the effective and sole control of government administrative bodies.

Now, what is the policy consequence of this? I think the policy consequence is that it would be profoundly unrealistic at this time—at this time—to keep looking to China's courts as the best potential source of rule of law values.

Reading the Working Party report and other commentary, I get the impression that if the process is not ultimately appealable to courts it is considered, ipso facto, flawed, but that it is all right to

relax and stop worrying once a court has been given the last word. I think both of these assumptions are wrong.

I think there is no substitute for an informed understanding of the particular domestic tribunal that is proposed as the final arbiter of any question, and that nothing is gained by looking at whether it is labeled administrative or judicial.

Since I have about a half a minute left, I want to address one question which came up in the last panel, which is whether the use of arbitration by foreign businesses reflects a lack of confidence in the legal system.

I think it would be a mistake to look at that as a sign of lack of confidence, whether or not this lack of confidence exists. First of all, you cannot opt out of the Chinese legal system by using arbitration because you still need the Chinese legal system to enforce your arbitration award.

Second, arbitration is a very, very common part of business agreements all over the place, all over the world, in all countries. If you look at your credit card agreement, your bank agreement, your brokerage agreement, you will probably find that you have agreed to arbitration yourself even in this country.

So that is all I have to say on that, and I will be very happy to answer any questions.

[The prepared statement of Professor Clarke appears in the appendix.]

The CHAIRMAN. Well, thank you very much.

Appreciate it.

Next, Mr. Fiedler.

**STATEMENT OF JEFFREY L. FIEDLER, CONSULTANT, FOOD AND ALLIED SERVICE TRADES DEPARTMENT, AFL-CIO, WASHINGTON, DC**

Mr. FIEDLER. Thank you, Mr. Chairman.

I, too, will enter my statement into the record and will make some additional comments based on the government's earlier testimony, and some questions and some statements that folks have made.

First, though, let me say that I do not think, as a layman, that China has a legal system. I view it as a system of control that enables the Party to maintain its power. That is its purpose. Its purpose is not to adjudicate disputes among people, it is really to keep control of people.

There was a statement made that transparency is important, that commercial law may lead to the rule of law or a greater sense of the rule of law. I was sort of hopeful that, after we lost the political debates on PNTR and MFN, that we would end the discussion that capitalism brings democracy, and now it is commercial law brings the rule of law.

I do not think that that is what it is all about. I think that a great deal more goes into the building of civil society, and one of those elements of civil society is a vibrant, free, and independent labor movement which does not exist even in China's private enterprises, United States companies, and is not likely to exist in any United States company.

As a matter of fact, the only thing apparently being imported into U.S. companies these days is the Party has said that every foreign-owned enterprise now must have a Communist Party branch in it. They were more tolerant of that not existing before, that having been precipitated, I believe, largely by Falun Gong activity.

The biggest risk to the WTO is worker unrest. I find it interesting that two of the government witnesses—I do not consider Ms. Westin to be a government witness in the truest sense—only answered the question of worker unrest in the questioning, not in their testimony.

I was part of the Council on Foreign Relations' Task Force on China and the WTO, where the largest single greatest concern among those, some eminent, some not so eminent like myself, members of that task force, was worker unrest. It is the dismantling of the State enterprises, it is the slowing of the pace of the dismantling of the state enterprises because of the prospect of worker unrest that is going to slow compliance. I believe that to be true.

I also believe that the policy question that should be put before this Commission and the U.S. Government generally, is what are we going to do as a government?

What is the Congress going to do, what is the Administration going to do, when China violently represses workers when, and if—and I tend to believe when—worker unrest begins on scale and spreads from city to city? What are we going to do? That is something I believe this Commission should address.

By the way, just a couple of comments. I do not favor the U.S. Government funding any training of any so-called judges or training anybody in WTO compliance. China has enough hard currency. It is throwing it all over the United States.

U.S. business that would benefit most directly from it has plenty of money, too, to conduct that training. Worker taxpayers should not pay for training of judges who repress workers in China today. It is just an unacceptable use of U.S. taxpayers money.

I will stop early.

The CHAIRMAN. Save it up for later.

Mr. FIEDLER. It does not take much to get me going.

[The prepared statement of Mr. Fiedler appears in the appendix.]

The CHAIRMAN. Thank you very much, Mr. Fiedler.

Let me just take up on that last point about helping China develop a legal system.

I wonder, Mr. Murck—Mr. Fiedler's point is whether American workers and companies, and American taxpayers, should pay to help a country that basically subjects most of its people to a living standard and political standard which we would find unacceptable, given the fact that China has got huge currency reserves.

Mr. MURCK. Let me discuss that in a slightly broader context. Obviously, from my testimony, you can tell that I disagree with Mr. Fiedler about the policy course that the U.S. Government should pursue.

Just a point of information. China's foreign reserves are invested predominantly in United States Government bonds rather than anything else. If you look at the inflow of foreign direct investment into China since 1979, and Nicholas Lardy who is here at Brook-

ings has done this, it is almost exactly matched by the outflow of Chinese direct investment abroad, plus an increase in foreign reserves, plus the errors and omissions line.

That is very interesting because that does show, as Mr. Fiedler suggests, that China has never needed foreign direct investment purely for funding. They have a 40 percent savings rate and they have enormous liquidity in the banking system.

The problem is, they need foreign direct investment, and have always needed it for the transfer of management technology, for the allocation of capital to economically viable enterprises, and for the transfer of technology.

Part of that—and I know Mr. Fiedler will disagree with me—when American companies come into the market is a higher level of wages and a very different way of treating workers.

I do believe he is correct in saying that compliance with WTO in itself, and even the establishment of a broader rule of law in the sense in which I have outlined it, will not necessarily lead to the establishment of a free trade union movement as we know it in the United States.

But the rights of workers, as they experience them, have been significantly impacted by the fact that there are large foreign establishments, such as the Shanghai General Motors plant and others funded by American investment. That has been a major contribution and a major improvement.

The CHAIRMAN. Could you touch a little bit on EU assistance in China? I think, parenthetically, you mentioned or suggested that perhaps the EU was more heavily involved than the United States.

Mr. MURCK. The European Union has been active in this field for almost a decade. Their funding is at the level of approximately \$10 million a year. They are the largest single player in this area.

The second largest is Germany, acting individually. The GTZ, the German Technical Assistance agency, has trained MOFTEC's lawyers in trade law and WTO compliance so that it should be no surprise to anybody that MOFTEC takes a rather European view of the recent United States action on steel tariffs.

The next largest player would be Canada. The Ford Foundation has been active. After that, it drops way down in terms of dollars to a couple of small, but effective programs like Asia Foundation, which has a program of grants.

There is a new program launched by the U.S.-China Business Council which is funded by grants and by assistance from many corporations which has been active. The U.S. Government, however, until last year, was a very strong spokesman, but actually did very, very little in this area.

The CHAIRMAN. Mr. Fiedler, I deeply appreciate your comments. Certainly, no one questions your integrity, or that of anyone on the panel here. But my question is, given the current reality, that is, China is China, there is a WTO, and China is a member of the WTO, what should this Commission do to help advance things. You can choose whatever you think makes sense, either commercial law, rule of law, human rights, a combination, or whatever. What do we do?

Mr. FIEDLER. Well, I certainly accept reality. The WTO exists. China has gained entrance to it. It has said that it is going to com-



ply with 600-some-odd different aspects of various and sundry agreements associated with the WTO.

I am saying to you that in all likelihood they will not, and never intended to on the schedule everyone else thinks they are going to, because of what they call social stability.

The changes that are required for them to comply are so dramatic and so disruptive of significant numbers of people in urban areas, that it is just not going to happen on time.

The CHAIRMAN. So what do we do?

Mr. FIEDLER. Well, the Council on Foreign Relations was talking about alternative dispute mechanisms outside the realm of the WTO, its fear being that regular WTO dispute mechanisms are going to be overwhelmed, and therefore the world trading system undermined. You have to understand, I do not care so much that the system is undermined by the Chinese or not.

The CHAIRMAN. But do you have any recommendations as to what the Commission should do to advance our goal and be relevant somehow in the world?

Mr. FIEDLER. What, on compliance? I think you are doing plenty of things on compliance. I do not have any other suggestions on how you monitor and get compliance. I do not think you get compliance until and unless the Chinese want to give it, period. There is nothing you can do. What are you going to do?

The CHAIRMAN. Sometimes you can help influence a result.

Mr. FIEDLER. I think that the U.S. administration is trying to, and the business community is trying to. I particularly would like to see workers organize so that there is not the kind of unrest that is likely to disrupt the WTO.

The CHAIRMAN. I doubt that we will solve it here today. Thank you.

Mr. FIEDLER. I did not expect to when I came.

The CHAIRMAN. Thank you. All right.

Next, Mr. Findlay.

Mr. FINDLAY. I actually thought your testimony was fascinating, Mr. Fiedler, very frank and candid. But I sensed despair in your testimony, as the Chairman did. I took you to say that, given the reality that China exists and that it has acceded to the WTO, that nothing can change.

Are there any steps that the U.S. Government can take, not the Commission, which was Senator Baucus' question? Also, United States businesses in China. Are there steps that we could take to enhance labor rights in China?

Mr. FIEDLER. The first thing that the Administration could do, is that the President of the United States, when he spoke in Miami on Cuba, called for the development of a fully free and independent labor movement in Cuba. I have never heard the President of the United States, whether it be this one or the previous one, do anything similar as regards China.

It is not enough for me or for our government to send you and the Labor Department over there to teach people how to do things better in a labor context. We have to speak out for workers who lead their colleagues in a protest because they got, they thought, a raw deal.

The deal gets bettered after the workers demonstrate and after they start to talk to workers in other oil fields. But the four entrepreneurs, if you will, who suddenly got the gumption, are in jail today because they organized their peers. What did the U.S. Government do? Did not hear a word. Did not hear much out of the Congress either, sir.

So I am sorry if the top of my priority is not how China lets some product of the United States get into the country in a timely fashion, when I am much more interested in the fate of the workers who are producing the products inside China.

Mr. FINDLAY. And I think that should be all of our concern. I am grasping for ideas beyond rhetoric that the U.S. Government can do through any of our programs in our department, or perhaps through work with the Department of State.

Mr. FIEDLER. Look, the Clinton Administration, in 1994, when it delinked trade from human rights, talked about a code of conduct for U.S. corporations, which it could not get anybody to do.

We went over to the White House at that time and said, look, codes of conduct are worthless unless the code of conduct says workers have the right to organize. It is U.S. policy that we think everybody should have the right to organize. I said, but if you do that, United States companies would have to leave China.

So you are asking me what, short of the establishment of freedom of association, is acceptable in incremental fashion to make workers' lives better? I am sorry, I do not accept anything short of freedom of association. And it is not rhetorical. It is not at all rhetorical. It is a deeply held belief.

Mr. FINDLAY. I think the question is, how do we advance freedom of association?

Mr. FIEDLER. Talk about it. The U.S. Government does not talk about it.

Mr. FINDLAY. Then what, beyond rhetoric, can the government do? Is there nothing that we can do?

Mr. FIEDLER. Then you are going to get into things which you have already rejected, which are linkages. We have enough domestic fights about including labor rights in international trade agreements. We seem to have lost that fight as well.

So you are asking me again for all of the things that we have lost, and to come up with something short of that is acceptable to you when we laid out what we essentially believe is the minimum necessary.

Mr. FINDLAY. I am not even asking for ideas that are acceptable to me, I am just asking for ideas. But it sounds like—

Mr. FIEDLER. I said to you that the United States Government should impress upon the Chinese that it is matter of United States policy that it ought to allow the establishment of free and democratic trade unions. I do not think there is much more you can do.

Mr. FINDLAY. Let me ask a question that I think Professor Clarke raised in his testimony. I am just a little bit confused. I took you to say that we should not worry too much about the lack of a judiciary that looks like our judiciary because the rule of law can be put in place through other means such as administrative bodies. Is that what you were saying? If it is, could you explain more what you mean by that?

Mr. CLARKE. I am glad you asked the question so I can have a chance to enlarge. Actually, it was sort of the opposite. I was trying to say that because the courts and the judiciary are so weak, I think it would be a mistake to concentrate in a way that I see people doing a lot, in thinking that the courts are essentially like U.S. courts or courts in Western countries except that they lack a little something, they lack, maybe, some training or something like that, and that therefore, if they could be made better trained or more powerful, they could be substantial contributors to the building of the rule of law in China.

The point I am trying to make, is that courts at the moment—and it may be sometime in the future they will develop into that kind of institution—but right now I see them as essentially a kind of clerical bureaucratic institution, maybe like administrative law judges within a particular government department in this government.

Therefore, programs to train, for example, judges, can serve some purpose. I guess I disagree with Mr. Fiedler in thinking that these are universally bad ideas. I think one has to look at the particular programs and make an individualized assessment.

But one should not, for example—the way I see the Working Party having done—think that somehow the problem of arbitrary administrative action will be solved if we merely provide for an appeal to courts. I do not think that will solve the problem. I think we have to look further.

But because courts are not necessarily going to solve the problem, I think one, therefore, has to also look at the other possibility, which is maybe that there do exist other mechanisms somewhere other than courts that would be useful to investigate and to try to support.

The CHAIRMAN. Thank you, Mr. Clarke, very much.

One of the unique features of our Commission is that it sort of merges the separation of powers. We do not have an Article 3 judge here on our panel, but we do have members of the Legislative Branch, as well as the executive branch, Mr. Findlay certainly being one, and now Mr. Aldonas another.

We are very happy to have you here, Mr. Secretary, as a member of our Commission. The floor is yours.

Mr. ALDONAS. Thank you, Mr. Chairman. Of course, obviously, the first question on my mind is, when was the last time you were in church in China? [Laughter.]

In all seriousness, the one thing I heard sitting in that chair a minute ago was both the Commission and the witnesses struggle with a couple of concepts which I know

I have been trying to give some thought to. This goes to every one of the panelists, really.

How do you measure that progress in the respective areas, whether it is on the commercial side, whether it is more fundamentally throughout the Chinese legal system, or whether it is in the area of labor rights, in part, so within the Administration and on the Commission we can establish some effective benchmarks that would help guide us in determining not only whether we are making progress, but then where do we try and reinforce the effort,

whether it is through rhetoric or whether it is through the programs that we develop?

Maybe, Mr. Murck, I can start with you and sort of work my way through Professor Clarke, and end up with Mr. Fiedler.

Mr. MURCK. Well, the answer to the first part of your question is, 2 weeks ago. However, with respect to benchmarks, I think it is an extremely difficult thing to do, because much of what we are talking about is not a simple thing.

It is a question of values and a question of behavior. The kind of changes we are looking for do imply a reduction in administrative discretion, and a reduction in special privilege, and a reduction in arbitrary power.

It will be difficult to evaluate exactly what the progress is, particularly because we are looking at this across a very large country with very disparate patterns of enforcement in local courts.

I think, with respect to the business environment at least, I would look closely at progress in property rights and contractual rights. Many of the WTO commitments do run to protecting these with respect to the foreign trade and investment regime, so the first step, I would say, is to verify that that has been accomplished in some way.

It is my personal belief, and I have discussed some of this in greater detail in my written testimony, that it is not possible to compartmentalize the rule of law. If you establish, for example, contractual rights or property rights for foreign investors and foreign participants in the economy, they naturally spread to the local competitors and counter parties as well, and from there spread into other areas.

But I do not think there is a clear, easy way to quantify this progress. That suggests that the Commission's role as a forum and as a place where views, data, and information from a wide variety of observers can be gathered and pondered is a very important one, not only today, but going forward.

Mr. ALDONAS. Professor Clarke.

Mr. CLARKE. Thank you. I am pretty much in agreement with Mr. Murck on that subject. I recently looked pretty closely at that because I was writing a paper on whether one can figure out whether all these rule of law assistance programs have actually done any good. How does one measure whether they have done any good? I think it is almost impossible to answer, certainly, in a quantitative sense.

Various economists have tried to do studies where they figure out some index of rule of law or contract enforcement, then they measure it against gross domestic product, or something. But it is never very satisfactory. I think, ultimately, if one were to take certain raw numbers like percentage of the population in prison, this country would not look very good either.

So I think there is really no substitute for highly informed qualitative studies that may need a special commission to say what is going on in this particular area, or that particular area. But I regret to say, I do not have a good answer to the question. I am not sure there is one.

Mr. ALDONAS. Mr. Fiedler.

Mr. FIEDLER. A partial answer could be a reduction in number of people being arrested for doing what the average human being would think would be something commonsensical, like getting back pay for me and 3,000 other people and not having to go to jail when I do.

Mr. ALDONAS. That is a fair answer. One of the things that the China Trade Relations Act propounded or authorized was the idea of programs to look at the rule of law. There had not been specific appropriations behind that.

But if you took a look at that authorization and said, where would you dedicate resources if you had them, what would top the list of priorities? If I could just sort of go through the panel again and identify some priorities we might want to focus on.

Mr. MURCK. I would certainly focus on raising the level of training and education of the judiciary. I would focus on human rights and I would look at areas such as consumer rights and women's rights, and at criminal procedure.

I would look at administrative drafting, because so many Chinese laws are very general and they are implemented by regulations which are subsequently drafted. So I would certainly look in that area. I think all of these things deserve attention and they all, in a certain sense, flow together.

One of the great steps forward, which was taken very recently, is that the Chinese Government has now moved to a single qualifying examination for prosecutors, judges, and the bar. That implies that in the future we may see a single legal profession across all of these three sets of people, which we certainly do not have today.

In the future, we may see better-qualified prosecutors and better-qualified judges. That will be a long-term process. We are going to have to wait, I think, until a generation of people retire and disappear from the judiciary. But there is thought in China about this issue, as well as thought elsewhere.

Mr. CLARKE. Were you speaking of WTO implementation in particular or human rights advancement in general?

Mr. ALDONAS. In fact, particularly given the ambit of the panel, I think WTO is a specific focus. But the Commission's focus is actually broader than that in terms of development of rule of law.

Mr. CLARKE. Yes. I think it is difficult to come up, on the top of my head, with the best way to spend several million dollars in 5 minutes.

The CHAIRMAN. We do that here all the time.

[Laughter.]

Mr. CLARKE. I think, as a general principle, programs that focus on bottom-up change can often be more effective than programs that just focus on top-down change.

One example that I might give is, say, legal aid programs in China. Not only simply money to fund legal aid programs, but also money to fund training of people who are doing legal aid, for example, clinics in law schools and things like that. That is a kind of a bottom-up approach.

I think there is a great thirst for that kind of assistance and knowledge in China. I think that assistance does not look too political and would be welcomed by people in China also.

Mr. FIEDLER. I share Don's view on legal aid, but I am fearful that as those folks get more effective, that is being demonstrated now in rural areas and in some cases with workers, that they are shut down by the government, that they are arrested, that they are intimidated.

I think, to step outside the realm of labor stuff for a moment, it would be enormously helpful if every time a U.S. businessman were asked for a bribe or to do something illegal, that they reported it to the Party Disciplinary Committee.

That is the only section of the Party that I might help these days. The issue of corruption is what is undoing most everything in that country. It is undoing a great deal of business, it is undoing people's ordinary lives.

The simple training of judges, the looking at of this, that, and the other thing, all these technical aspects of legal systems are insufficient.

Now, the problem is, that requires political will and it requires power, and apparently even someone as powerful as Zhu Rongji threw up his hands after a while on this problem.

Mr. ALDONAS. Mr. Chairman, if I could just sort of add to what Mr. Fiedler was saying. I think we may have identified one of the sorts of things we should do on the trade front, which is try and encourage China to become part of the WTO Government Procurement Code, precisely because it forces that level of transparency on the procurement process.

Thank you very much. I appreciate it.

The CHAIRMAN. Yes. That was very informative.

I am a little concerned with the dialog—what the benchmarks should be and how to measure progress. The basic answer I got from two of you, is, gee, it is pretty hard, I don't know if it can be done, and so forth.

It seems to me that we have got to try harder.

It seems to me that with the rule of law, two main precepts are transparency and consistency, and that there are some measurements that we can develop. You also mentioned in response to Secretary Aldonas' questions some areas where more funds might be useful. That implies, at least, an area that perhaps can be measured a little bit.

I am just wondering if I can press you both a little bit more to try to give us ideas of what we might be looking at in terms of quantifying progress.

Mr. MURCK. I think progress can be discernible. The problem is to quantify it. The way I would look at this, for example, in my written testimony I discussed at some length the question of protecting intellectual property rights, which is a major issue for the business community.

I think, in general, the business community in China has agreed that extraordinary progress has been made in the last 3 years on this front in terms of—

The CHAIRMAN. And it took a lot of work, too.

Mr. MURCK. It took a great deal of work.

The CHAIRMAN. And a lot of pressure by this committee and this Congress over the years, and by several Administrations.

Mr. MURCK. There has been sustained pressure by several Administrations. What has happened in the last several years, is that we are convinced that the senior levels of the Chinese Government are now fully understanding of the point that intellectual property rights violations damage their own economy and their own companies more than they damage foreign companies and are a major barrier to further economic progress and economic growth.

That battle has clearly been won. The laws that are now in place after the recent revisions of the trademark and copyright laws, and patent laws, still have some defects but are basically reasonably acceptable.

The problem we have, is driving this down into local levels and getting it enforced consistently by police and courts across a very large country.

On that score as well, there has been some progress. For example, the leading anti-counterfeiting group in China is the Quality Brands Protection Committee, which this year held a ceremony in Beijing and made a selection from all of the court cases, hundreds of them that its members had brought over the course of the year, and actually selected 10 and brought the relevant prosecutors to Beijing and gave them a certificate and a nice weekend in Beijing, and some time on television to publicize the fact that it is now possible to go to the court system for recourse and to put violators in jail. So, on that score, we are doing reasonably well.

There is a great deal more progress to be made on that front, and we have to fight it out at the local level, training people in groups of 20 and 30, looking at hot spots, and trying to make this system work more efficiently.

We poll American companies every year and ask them what the losses are because of counterfeiting. The answer, today, is 15 or 20 percent of revenue, which is what it was 3 to 5 years ago. When we see that number start to go down, then I think we will have one indication, at least in this area, that we have a more effective legal system.

The CHAIRMAN. Right. Right. Right.

What are your thoughts about the next generation? I met Vice President Hu Jintao when he was here about a month ago. He struck me as being very direct, forthright, professional.

I am curious whether you think this next generation is any different or not and what will happen when Hu, presumably, becomes President of China.

Mr. MURCK. I think it is very hard to discern at this point anything about Mr. Hu personally. In terms of the generations, the incoming generation of leaders is about 15 years younger. They are much more technocratic. They are much more international in their thinking.

There will be basic continuity of policy direction. Whether or not the policy direction will be accelerated, I think, remains to be seen. There are those who are hopeful that it will be and others who feel that it will not be. I cannot really predict how that will come out.

My biggest worry in China is actually not that incoming generation of leaders, nor is it the young people. I think the young people are extraordinary and are very much aware of the opportunities that the future holds for them.

My worry is the generation that was born in 1950 which experienced the famine at the age of 7 to 10, which got to the age of 15 and found the school system closed down, which then went into a state-owned factory and worked for 25 years or so, and in their early 50s they are now being laid off because those enterprises are collapsing.

That generation is not going to benefit from the new growth that the Chinese reform process is generating. In my view, the only way to deal with that is to create new social safety net institutions to take care of them.

That is why WTO and the rest of the shift to the private sector is, in my view, part of the answer rather than part of the problem because you are going to have to have a group of viable companies generating a profit that can be taxed in order to deal with the huge social problems that arise because of that generation which, frankly, has had a very bad deal their entire life.

The CHAIRMAN. Thank you. We are going to have to adjourn. There is a vote going on, and the House Members have informed me they are unable to come back from their vote.

This has been, by far, the most constructive session of this Commission, and I thank all six of you panelists for being a part of that effort and helping to make this such a useful hearing.

We have a lot of work ahead of us. This was very thought-provoking and very, very helpful. Thank you very much.

The Commission is adjourned.

[Whereupon, at 4:56 p.m. the hearing was concluded.]



## **A P P E N D I X**

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## PREPARED STATEMENTS

PREPARED STATEMENT OF JON M. HUNTSMAN, JR.

JUNE 6, 2002

Thank you for inviting me to appear before you today to discuss the Administration's perspectives on the United States' trade relationship with the People's Republic of China and, in particular, the topic of China's WTO implementation. It gives me great comfort sharing the stage with two respected colleagues whom I deem it an honor to be associated with.

## CHINA AND ITS WTO COMMITMENTS

China's accession to the WTO was a decisive victory for reform in China. China's reformers clearly understand the values and benefits of openness in the economic sphere, and that is why they pursued WTO membership. They know that WTO membership will help them transform China's economy—and many hope and believe China's society generally—in positive ways.

This Administration, like the previous Administration, worked closely with China's reformers throughout the many years of WTO accession negotiations. The result was a comprehensive set of commitments, with which this Commission is familiar.

With the negotiations now over, we have continued to work with China's reformers in the next phase of this process, as China embarks on the enormous task of implementing the numerous WTO commitments it has made. Clearly, implementation is, and will continue to be, a major challenge for China and its reformers. They must find ways to ensure that recalcitrant ministries, State-owned enterprises and provincial and municipal authorities all act in conformity with China's WTO commitments.

But, China's leadership appears prepared to take on this challenge. It is committed to make China competitive in the international economic arena in the 21st century. It knows that it needs to develop a market economy compatible with the WTO's rules for this to happen. It also knows that there will be a price to be paid as this transition takes place.

The ability of China to meet this challenge and implement its WTO commitments in full will depend on the outcomes of several sets of dynamics.

*Internal government coordination*

As we have anticipated, and as we have seen at times during the first 6 months of China's WTO membership, there will not always be agreement among the central government's ministries on WTO compliance matters. Some of the ministries are reform-minded and generally understand the benefits of full compliance with WTO rules. The Ministry of Foreign Trade and Economic Cooperation (MOFTEC), which had the lead in the WTO negotiations, is one example. But, other ministries, particularly those with proprietary functions or a domestic focus, may be less interested in, and even resistant to, full compliance. In certain circumstances, they will be more inclined to seek ways to protect their and their constituents' existing rights and privileges, and so they will present a particular challenge to the implementation process.

*Center versus periphery*

We have also anticipated a similar set of dynamics involving the central government and the localities. While some provincial and municipal authorities appear to see immediate benefits in complying with WTO rules, others do not see these benefits or simply do not yet understand WTO rules. Historically, Beijing's influence has not extended uniformly over local authorities, and at this point the breadth and extent of this influence vis-a-vis China's WTO commitments remains unclear.

Realistically, we can expect some non-compliance as these internal struggles take place. It is also quite possible, if not probable, that, independent of these internal struggles, China will simply be unwilling to live up to a particular WTO commitment. As you know, we still have compliance problems with longstanding WTO trading partners, and there is no reason to expect that China will be different.

*Short-term score card*

Looking back on the first 6 months of China's WTO membership, we have seen China take a good faith approach to its WTO membership and make significant efforts to implement its commitments. China has made substantial tariff reductions

on industrial and agricultural goods of importance to U.S. businesses and farmers. It has begun to take concrete steps to remove non-tariff trade barriers in virtually every product sector. It has begun to implement far-reaching services commitments that should substantially increase market access for U.S. services suppliers. It has also repealed hundreds of trade-related laws, regulations and other measures and modified or adopted numerous other ones in an effort to become WTO-compliant in areas such as import and export administration, standards and intellectual property rights, among many others.

With the aid of the United States and other WTO members and the private sector, China has also embarked on an extensive campaign to educate central and local government officials about both the requirements and the benefits of WTO membership. This is an important initiative that should help to foster fuller compliance with China's WTO commitments.

There have also been some bumps in the road, such as the delayed and flawed allocation of tariff-rate quotas, trade-distorting biotechnology regulations, inadequate adherence to commitments benefiting foreign insurers, and restrictive measures in the area of express delivery services. These are important issues, and we have been using all available and appropriate means to obtain China's full compliance. Working closely with the affected U.S. industries, we have been addressing these and other issues vigorously through bilateral means at all levels of the U.S. Government. We have also multilateralized these efforts, where possible, by working with like-minded WTO members on an ad hoc basis, both in Geneva and Beijing, where particular issues are having an adverse impact beyond the United States. WTO dispute settlement procedures also remain available as a tool for resolving these issues.

Finally, we should keep in mind that we are only 6 months into China's WTO accession. China's WTO implementation is a long-term process, with major transformations required of China's trade regime and many important Chinese commitments, such as trading rights and distribution services, to be phased in over the next few years. We should continue to be comprehensive in our review of China's implementation efforts, but we should also realize that implementation is a complicated and ongoing process.

#### U.S. INTER-AGENCY MONITORING PROCESS

Now, let me say a word about the U.S. inter-agency monitoring process.

Given China's importance as a major trading power and the breadth and complexity of China's WTO commitments, the Administration has set up a comprehensive inter-agency monitoring effort to determine the extent to which China is complying with those commitments. USTR's China Office is coordinating this initiative, which is being formally overseen by a newly created Trade Policy Staff Committee (TPSC) subcommittee whose mandate is devoted exclusively to China and the extent to which it is complying with its WTO commitments.

All TPSC agencies have been invited to participate in this newly created subcommittee. The subcommittee held its inaugural meeting on December 4, 2001, and, since then, has met on a monthly basis as it evaluates and prioritizes the monitoring activities being undertaken, reviews the steps that China has taken to implement its commitments and decides on appropriate responses.

The activities being overseen by the subcommittee are taking place on several fronts, with continual private sector involvement. In China, State Department economic officers, Foreign Commercial Service officers, Foreign Agricultural Service officers and Customs attaches are very active, gathering and analyzing information, maintaining regular contacts with U.S. industries operating in China, maintaining a regular dialog with Chinese government officials at key ministries and agencies, and working with personnel from like-minded Embassies of other WTO members. In Washington, an inter-agency team of experts, coordinated by USTR and including principally the Departments of Commerce, State, Agriculture and Treasury and the U.S. Patent and Trademark Office, is working closely with personnel from the U.S. Embassy and Consulates General in China as well as with U.S.-based trade associations and companies. Finally, at the WTO in Geneva, USTR has been active in voicing concerns about, and working with other WTO members to address, problems with China's implementation efforts as they arise.

USTR and other agencies will also be active participants in the WTO's annual Transitional Review Mechanism, which I will discuss next.

#### THE WTO'S TRANSITIONAL REVIEW MECHANISM

Consistent with the terms of China's accession agreement, a unique multilateral review mechanism known as the "Transitional Review Mechanism" has been cre-

ated. It calls for a detailed review of China's WTO compliance annually for the next 8 years, with a final review in year 10. It requires China to provide detailed information to WTO members for purposes of this review mechanism. It also gives WTO members the opportunity to raise questions about how China is complying with its commitments, and it calls on China to submit responses to these questions.

Each year, the review will be conducted initially in 16 WTO committees and councils. Each of those bodies will review implementation matters within its mandate and then report on the results of its review. Ultimately, the WTO's highest body, the General Council, will consider these reports and then make recommendations to China about its implementation efforts.

The new TPSC subcommittee addressing China's WTO compliance will be working closely with existing TPSC subcommittees that focus on the regular work of the WTO bodies to coordinate U.S. participation in the Transitional Review Mechanism, which this year will begin with meetings in September. Together, these TPSC subcommittees will solicit input and advice from industry and actively press U.S. concerns about China's implementation efforts.

Currently, we are working with China and other WTO members to make the Transitional Review Mechanism as thorough and meaningful as possible. It is a new mechanism at the WTO, and we need to resolve various logistical matters and procedures to implement it properly, such as the dates of meetings and the time-deadlines for China to submit relevant information and to respond to other WTO members' questions. To that end, we have been holding formal and informal discussions in Geneva. These discussions have not gone as quickly as we would have liked, in part because the Chinese delegation is still trying to become familiar with WTO practices and procedures. Nevertheless, we hope to resolve these matters soon.

#### CONCLUSION

Mr. Chairman and members of the Commission, thank you for providing me with the opportunity to testify. I look forward to answering your questions.

PREPARED STATEMENT OF GRANT D. ALDONAS

JUNE 6, 2002

Chairman Baucus, Co-Chairman Bereuter, members of the Commission, thank you for the opportunity to appear before the Congressional-Executive Commission on the People's Republic of China. I welcome the Commission's interest in China's compliance with its World Trade Organization (WTO) obligations, particularly as it relates to the development of the rule of law in China.

I am pleased to be joined on this panel by Deputy United States Trade Representative Jon Huntsman and GAO Managing Director Susan Westin. Jon, of course, brings many years of experience in trade with China. This is the sort of practical experience that is at a premium at this critical juncture in our relationship with China, where so much depends on ensuring that we see the benefits of our bargain. I had the great pleasure of working with Susan over the last several years, first during my tenure as Chief International Trade Counsel to the Senate Finance Committee at the time of Congress' passage of permanent normal trade relations (PNTR), and now at the Department of Commerce. Susan and the GAO have become true partners in the effort to ensure both China's compliance with the WTO and Congress' ability to provide effective oversight of that process.

Secretary Evans and I both traveled to China in April to observe firsthand China's implementation of its commitments under the WTO. We emphasized two points. The first was that our commercial relationship provides the foundation for our broader bilateral ties. WTO compliance has become the single most important measure of our bilateral commercial relationship. In other words, early, transparent, and measurable progress on compliance is the primary goal in our bilateral trade relationship. The second point we raised may prove still more important in the years ahead—that is the inescapable link between WTO compliance and the development of the rule of law in China.

#### CHINA'S WTO COMPLIANCE AND THE DEVELOPMENT OF THE RULE OF LAW

Observance of the law in any society must become a habit—it must be woven into the fabric of social relationships. Commerce is one of the primary means by which members of a society build those bonds of common trust that allow a society to function and provide a guarantee of freedom and basic human rights.

With language bequeathed to us by a long-dead economist, we tend to talk about the changes in China as a departure from socialism or the advent of capitalism. As

has often been the case in the long, sad history of socialism, the language of Marx obscures more than it reveals. To talk of what has happened in China simply as the advent of capitalism on the one hand, or “socialism with Chinese characteristics” on the other, misses a more fundamental point. The point is that, from bitter experience with collectivization, the Great Leap Forward, and the Cultural Revolution, the Chinese have been forced to confront the fact that all good things in the economic sphere flow from one root cause—human freedom.

Therein lies the most important part of the economic equation that the Chinese are currently trying to solve. To reach a higher standard of living, the Chinese government has been forced to embrace human freedom as the engine that drives both economic growth and innovation. The Chinese leadership has demonstrated a willingness to foster significant changes in Chinese society in pursuit of a higher standard of living. Those changes have been under way for over two decades, during which time China has lifted between 100 to 200 million people out of poverty.

Significantly, living economists have come around to a very different view of the role of government in the economy than existed at the time of either Adam Smith or Karl Marx. Views have changed regarding the role government plays in contributing to economic growth. On the one hand, there should be little doubt, given the many examples we have worldwide, that strong government is essential to a functioning market economy. On the other hand, what has become equally clear is that there must also be strong constraints on the government’s ability to intervene in the market and upset the free rein of market forces. Government’s role is to create the environment in which individuals can pursue their own best interest, not to intervene on the assumption that the government knows better than individual citizens what is best for them.

What role then does adherence to the WTO and the development of the rule of law play in solving that equation? In my view, the Chinese leadership’s willingness to undertake reforms in their country’s own economic interest extends to compliance with China’s WTO obligations. The acid test will, of course, be whether their willingness to implement China’s commitments translates into action.

How that relates ultimately to the development of the rule of law generally is, in my view, simple and direct. While we should not oversell the ability of the WTO, in and of itself, to foster fundamental change in China, we should not, at the same time, overlook or devalue the positive contribution China’s adherence to the WTO can make. In adhering faithfully to the WTO, the Chinese government will, in the process, set a profound example for its own citizens about the benefits that flow from honoring the law.

I fully expect that the WTO principles of transparency, judicial or administrative review of executive action, and non-discriminatory treatment will have a direct impact on the development of the law in China. Accession to the WTO will further the development of an impartial judiciary, neutral regulatory bodies, transparent legal processes, and regularity in the administration of law in China. To the extent that entry into the WTO reinforces the development of the rule of law in China, it does suggest broader lessons for China’s leadership as they attempt to build a new foundation for Chinese society.

Let there be no doubt that the United States intends to play a constructive role in that process. It is in both our commercial interest and our interest in a peaceful, more stable world to see China succeed in honoring its WTO commitments and in building a stronger foundation for China’s future based on the rule of law.

We can help most at a very practical level. As I said earlier, observance of the law must become a habit. We can contribute to that process by ensuring that we raise our commercial problems as quickly as they surface and ensure that China strengthens its record on WTO compliance at every opportunity. In the process, we will make three important contributions. First and foremost, we will vindicate the bargain we reached with the Chinese at the negotiating table and ensure that our exporters have access to the market per the WTO agreement. Second, we will avoid turning every dispute into potential litigation at the WTO, with all that implies in the way of both politics and delay in real market access. Third, we will also help by demonstrating that the habit of observing the law is profoundly in China’s interest, as much as ours.

In practice, both the commercial importance and the broader significance of WTO compliance has led to a natural emphasis within the Administration on two different processes. One is the ongoing effort to monitor China’s compliance efforts. The other is developing a program of technical assistance that contributes both to the goal of compliance and, consistent with that goal, the development of the rule of law. It is to those two topics that I would like to turn.

## MONITORING COMPLIANCE EFFORTS

From the perspective of American exporters, China's accession to the WTO represents the most significant market-opening initiative since the North American Free Trade Agreement (NAFTA) and the Uruguay Round. But, the advantages of China's accession will only be guaranteed by a vigilance and a willingness to promote American exports aggressively in the Chinese market.

I have testified before Congress that our efforts to assist China in implementing its commitments are guided by two principles: (1) China's implementation of its WTO obligations is the key issue in our bilateral trade relations; and (2) early detection and resolution of problems is necessary to avoid protracted trade disputes.

We emphasized the importance of implementation in April when Secretary Evans led a business development mission to Beijing and Shanghai to help American companies take advantage of the opportunities that China's membership in the WTO will bring. He met with President Jiang and other senior leaders as well as his Chinese counterpart as part of the Joint Commission on Commerce and Trade, which he chairs for the U.S. side, to drive home the message about the importance of timely and transparent implementation of each of China's commitments under the WTO.

Three weeks prior to Secretary Evans's trip, I was in China myself leading a delegation of senior professional staff from the House and Senate, many of whom worked on the Congressional passage of Permanent Normal Trade Relations (PNTR) and are experts on trade matters. They participated in all of my meetings in Beijing and Shanghai. By doing so, they underscored for the Chinese the important role that Congress will continue to play throughout the WTO implementation process. The subtext—and an important point to have made—was that there is no daylight between the Administration and the Congress when it comes to China's implementation of its WTO obligations.

At the Ministry of Foreign Trade and Economic Cooperation (MOFTEC)—our counterpart agency—we met with Minister Shi and Vice Minister Ma. MOFTEC appears to have the best of intentions for tackling a very tough job. We need to do what we can to help them—especially in terms of our work with other central government agencies as well as with provincial authorities. We met with officials from the State Development and Planning Commission, the Ministry of Information Industry, the National People's Congress and local officials in Shanghai. I also discussed WTO issues with local officials in Guangzhou and Shenzhen. There is a clear recognition of the enormity of the task the Chinese leaders want to accomplish. I was impressed by the level of knowledge and familiarity that our interlocutors had with the WTO agreements and China's accession commitments.

We also talked with American businesses at functions organized by the American Chambers of Commerce and the U.S.-China Business Council and visited U.S. company facilities and one Chinese state-owned enterprise. We met with representatives of the Shanghai Film Studio, where we were told that piracy of optical disks was hurting their sales in China. It was fascinating to discover that we have a new ally in our work to enhance enforcement of intellectual property rights (IPR) protection in China and elsewhere. We saw the Shanghai Model Port Project—an APEC initiative that demonstrates how Customs officials can use technology to facilitate trade and protect IPR. I thank U.S. Ambassador to APEC Larry Greenwood for suggesting that we visit this facility. We went to the WTO Affairs Consultation Center, where Chinese officials are being trained in different aspects of the requirements of WTO membership. Members of my delegation and I were invited to come back and help them teach classes, and I look forward to doing so in the future. Capacity-building is extremely important, and I'll discuss this momentarily when I focus on technical assistance.

I took every opportunity to underscore the importance that both we, in the Administration, and Congress attach to WTO compliance. Bringing a strong delegation from the professional staff of the Senate Finance and House Ways and Means Committees helped demonstrate that point for our Chinese hosts. Our delegation was, in and of itself, a demonstration for Chinese officials of the importance that both the executive and legislative branches of our government place on WTO implementation. I plan to travel to China roughly every 6 months between now and 2005 to continue that process and I hope to take a delegation of Members of Congress or staff with me as often as possible.

Our efforts must, of course, extend beyond high-level attention. We need to ensure that we have dedicated our resources to the steady, day-to-day accumulation of successes. Where the rubber meets the road in that regard is the efforts of our Foreign Commercial Service officers on the ground in China. The Foreign Commercial Service's representation in China is the largest delegation of what I like to refer to as our "commercial diplomats" of any country in the world. We divide our staff in

mainland China into five sections (Beijing, Shanghai, Guangzhou, Chengdu, and Shenyang), and have another office in Hong Kong. The staff in mainland China comprises 18 officers and an additional 66 foreign service nationals and contractors. In cooperation with State Department Economic officers, Foreign Agriculture Service officers, and Customs attaches, Commercial Officers monitor China's WTO implementation efforts and help organize training programs to educate Chinese officials and business leaders on China's WTO commitments. In addition, Commercial Officers continue to provide the export promotion services of the Commercial Service, including counseling, market analysis, advocacy, and an array of services chiefly aimed to benefit small- and medium-sized exporters.

In March 2002, the Department of Commerce opened a Trade Facilitation Office (TFO) in Beijing to support and coordinate compliance activities in both Beijing and Washington and to act as an "early warning" system. This office will be staffed by two Market Access and Compliance (MAC) officers and two Import Administration (IA) officers. Maintaining close contact with American firms doing business in China and with Chinese officials, these officers will be able to help resolve commercial disputes before simple misunderstandings can escalate into a point of principle on one side or another. These officers will monitor and report on disputes—the primary indicia of implementation problems. In addition, these officers will serve as on-the-ground experts to answer technical questions from U.S. and Chinese government officials and business representatives. The TFO works closely with the whole China Compliance Team in Beijing and Washington, and while security clearances and training are being finalized for the four compliance officers, the office is being staffed by detailees from the China Compliance Team.

We also have augmented our staff working on China in MAC's Trade Compliance Center and on the China desk. Just 2 years ago, we had only five people in MAC's Office of the Chinese Economic Area (OCEA). We added six new officers to OCEA in fiscal year 2001 and are adding five more in fiscal year 2002. Combined, the nine officers currently in this office have approximately 40 years of expertise working on trade issues. This office is tasked with the job of monitoring China's compliance with its WTO commitments, coordinating technical assistance to China, addressing trade problems as early as possible, and promoting new trade opportunities for U.S. exporters.

As management tools, MAC maintains two important data bases. The first tracks compliance, market access and commercial disputes in China. Our staff in Washington and China routinely update the data base so that we can efficiently track these cases and share real-time information. The second data base contains information on the training programs designed to help China implement its WTO obligations that are offered by the Department of Commerce, other agencies, academia, other governments, multilateral organizations and non-governmental organizations. We are monitoring other assistance efforts to avoid duplication, identify training needs and note other countries' programs that may favor competing ways of doing business. In addition to sharing information through data bases, our Washington staff is in daily contact with our staff in China—through e-mails, phone calls, and travel. Over the last 3 months, 10 members of our China Team have been able to visit China for at least 10 days.

IA has established a team dedicated to monitoring compliance with China's WTO commitments on trade remedies and unfair trade practices. IA keeps track of China's use of antidumping and countervailing duty laws, monitors and analyzes its subsidy programs in relation to WTO disciplines, monitors imports for unusual trends, and provides a point of contact for U.S. companies that believe they face potential unfair trade problems arising from the Chinese market. These efforts, led both by technical experts in Washington and, soon, the overseas-based IA officers in the TAO, provide in-country support for the administration of U.S. antidumping and countervailing duty proceedings as well as close coordination with other offices and agencies to proactively identify and resolve problems before they develop into unfair trade disputes. The IA team also provides a point of contact for Chinese government and business representatives to obtain information and technical assistance about trade remedies.

ITA's Trade Development (TD) unit has undertaken a thorough review of China's tariff schedule and continues to work closely with industry to ensure that all obligations are fully implemented. TD's industry specialists allow us to follow China's implementation efforts on a practical level, knowing the day-to-day problems that U.S. companies might encounter.

To coordinate Commerce's action on China's implementation of its WTO commitments, the Department of Commerce has developed a China compliance team that meets internally twice a week. The goal at this stage is to make judgments as to

whether and when we need to raise issues directly at a political level with our Chinese counterparts to get appropriate action.

To strengthen the force of our efforts, Commerce works hand-in-hand with other agencies through the Trade Policy Staff Committee subcommittee on China WTO Compliance, which meets on a monthly basis to review China's progress with WTO implementation and potential WTO compliance issues; to strategically coordinate USG agencies' WTO implementation and compliance work; and to decide on appropriate responses when problems arise. We are working closely with USTR and the State Department to track China's specific WTO commitments and to raise any potential concerns. We are working closely with industry to ensure that all obligations are fully implemented.

China has committed itself to a number of major reforms. Of these, none is more critical than its obligation to allow for public comment before new laws, regulations or other measures are implemented. By allowing for input from industry and other affected parties, the Chinese can achieve regulatory and economic goals in a manner that facilitates rather than inhibits business. We are watching China's efforts to revise, create or rescind laws and regulations and are providing comments on draft regulations. We meet with MOFTEC regularly and consult with other Chinese Government entities. For instance, we recently intervened with the State Economic and Trade Commission with regard to regulations that could have prohibited companies from using independent contractors to provide a myriad of services in a flexible manner.

Beyond those standing functions, Secretary Evans has committed to send one senior Commerce official to China every month for the foreseeable future to check up on our implementation and trade promotion efforts. I am leading that effort with help from the Assistant and Deputy Assistant Secretaries at the Department. The commitment of those senior resources further reflects the priority we place on China's implementation of its commitments.

#### TECHNICAL ASSISTANCE

Compliance, of course, is not just the threat of retaliation for the failure to implement trade agreements. In many instances, compliance has as much to do with encouraging a greater understanding of the WTO rules and their purpose. Dr. Supachai, who will begin serving as the Director General for the WTO in September, has said that he is concerned that "the WTO doesn't have the resources to provide all the know-how that China requires." To help fill that gap, we are working with the WTO as well as with other countries and the private sector to monitor compliance and to provide technical assistance to China.

By joining the WTO, a rules-based international trading system, China has agreed to implement systemic reforms designed to establish a more transparent and predictable regime for business dealings. Though China's phased-in implementation of its WTO commitments will make the market more conducive for U.S. companies, the process will be challenging. China has begun the process of creating, revising and eliminating thousands of laws, regulations, and rules at the central, provincial and local levels.

During my recent visit to China, I heard repeated requests from Chinese officials for joint cooperation on technical assistance and training programs. Effective technical assistance programs can help China better understand what a particular WTO commitment means in practice, so that compliant legislation and practices are put in place, not just in Beijing, but throughout China. This will help China comply with WTO commitments in a timely manner, which should reduce the number of problems we will have to handle in the future.

Toward that end, in addition to tracking capacity-building programs, we are, with help from a variety of other agencies, conducting a series of WTO compliance seminars in China. This technical training is designed to disseminate as much information as possible regarding the practical implications of the WTO agreements to Chinese officials both in the central government and in the provinces. The seminars to date have focused on those areas, such as intellectual property and standards, in which we have had particular problems in the China market in the past.

Even before China became a WTO member, our training team traveled to Beijing and Shanghai to review China's WTO obligations with Chinese officials and the resident U.S. business community in important areas including standards, intellectual property rights and anti-dumping requirements. In early 2001, a half-dozen sessions were held in Washington for Chinese officials, on topics ranging from e-commerce regulation to corporate mergers and acquisitions, to WTO anti-dumping rules. These sessions have continued through this year.



Last year, our China Team officers traveled to China with the American National Standards Institute for seminars in Beijing and Xian, organized IPR Enforcement Training sessions in Shenyang, Hangzhou, and Xiamen, and conducted seminars on information technology and telecommunications equipment standards and testing issues in Beijing. A medical equipment standards program was held jointly with the medical device Global Harmonization Task Force in Kunming in September.

Now that China has joined the WTO, ITA is sponsoring a series of more than half-a-dozen technical assistance programs in fiscal year 2002, including training in sector-specific areas, as well as more general rule of law issues. This year we've already conducted a program on the Rule of Law for Distribution and Franchising in Beijing, Shanghai and Guangzhou, an IPR Enforcement Training session in two Chinese cities to follow up on last year's successful IPR seminar and program on the impact of WTO on the telecommunications sector in Xian.

In April, Secretary Evans and Minister Shi agreed to enhance our cooperative training efforts. At the plenary session of the U.S.-China Joint Commission on Commerce and Trade, the two sides announced plans for future training programs on the impact of WTO on the semiconductor industry, pharmaceutical standards and intellectual property protection, environmental technologies, antidumping procedures and trade facilitation through logistics improvements. The co-chairs also announced plans for a potential TDA grant to fund a WTO e-learning program that will provide guidance to both Chinese government officials and citizens on WTO implementation. We are also exploring a website in China for Chinese officials and U.S. businesses, which will provide WTO implementation and compliance guidance.

Our commercial officers who work in ITA's Foreign and Commercial Service unit at the U.S. Embassy and our consulates also have a strong outreach program in place, including a general WTO introduction seminar, which they have conducted in 12 provinces, and an IPR seminar, which they have conducted in every province. FCS officers are also organizing digital video conferences on WTO issues between the Shanghai WTO Affairs Consultation Center and U.S. experts in different fields.

Many of the IPR programs have been joint efforts between ITA and the U.S. Patent and Trademark Office (USPTO). Jim Rogan, the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, and I have worked closely together these past months on various IP initiatives. For example, last month USPTO in conjunction with the U.S. Consulate/Hong Kong, hosted a digital video conference with a group of judges from Jiangsu Province attending a WTO training program in Hong Kong. USPTO and ITA also are planning another IPR enforcement training program for September; a program on technology transfer and intellectual property protection in the fall, and a program on judicial enforcement of IPR in the fall. Jim advises me that USPTO has also undertaken a number of other initiatives in support of U.S. efforts—including hosting a number of digital video conferences with various U.S. consulates and Chinese counterparts on timely intellectual property matters, and a planned detail of a USPTO attorney advisor to the U.S. Embassy in Beijing to advise on intellectual property matters during July and August 2002. USPTO also is working closely with other foreign IPR offices, such as the European Patent Office and Japan Patent Office, in areas where mutual assistance can make their efforts more effective.

My recent trip helped me assess what more we could be doing and where we need to focus our training efforts in the future. There is much more we could do to help China reform its commercial legal system and to help China implement its WTO commitments. The China PNTR legislation contained an authorization for the Department of Commerce to establish a program to conduct rule of law training and technical assistance related to commercial activities in China, and we are evaluating how best to employ our resources to satisfy that.

The Commerce Department has demonstrated expertise in assisting other countries to develop their commercial legal systems. Through our Commercial Law Development Program (CLDP), we have trained lawyers, judges, and government officials throughout Eastern Europe, the former Soviet Union, in Africa and elsewhere in Asia to promote commercial law. And we would like to do the same in China.

Effective programs can help China efficiently implement its market opening concessions which means greater market access for U.S. firms. Other nations—Japan, the EU member states, Canada—all have substantial programs in place. At this Commission's staff roundtable on May 24, the Asia Foundation's Vice President and Washington Director Nancy Yuan testified that it is non-governmental organizations (NGO's), rather than the U.S. Government, that have taken the lead in conducting on-the-ground rule of law programs in China. She also noted that the assistance provided by U.S. NGO's, is "nowhere on the scale of assistance provided by European and other donors." As a practical matter, the Chinese are faced with choices: do they adopt a U.S., an EU, a Japanese, or another approach to regulation and

the rule of law? Though all these systems may be WTO-compliant, China's utilization of the U.S. approach to matters like standards will benefit U.S. firms.

Just as I regard the CLDP program as one of our "best practices," I would like to call your attention to another. The International Trade Administration hosts an AID-funded program called the Business Information Service for the Newly Independent States (BISNIS), which serves as a resource for U.S. companies which want to do business in the countries which comprised the former Soviet Union. BISNIS could serve as a successful model replicated to provide the same services for China—a larger market with even greater potential for U.S. businesses. The time to undertake this initiative is now—to "fill in behind" our agreement in order to help U.S. companies gain from our negotiators' hard work on China's accession to the WTO.

#### CONCLUSION

China joined the WTO with an awareness that it would be difficult to fulfill its commitments but with a resolve to do so. The Chinese leadership pragmatically recognized that WTO membership would be important for continued economic growth. Let us not forget that China's economic progress in the last 20 years has been nothing short of remarkable, and that the World Bank lauds China for accomplishing in poverty reduction in two decades what has taken other countries two centuries. Between 100 to 200 million people have been lifted out of poverty; a country that knew scarcity now has an economy that boasts surpluses.

Economists at the IMF estimate that, by the time China will have been in the WTO for 5 years, its economy will have grown to be \$26 billion larger than it would have if China had not joined the WTO. And the IMF was only looking at the effects from tariff cuts. The impact of new foreign capital flows will be even greater. China's annual average of \$40 billion in foreign direct investment is second only to that of the United States. This has been one of the most important factors in the transformation of the Chinese economy. To fully benefit from these capital flows, China's financial and legal system must continue on the path of reform. My counterpart at MOFTEC seems to fully understand this. The WTO's requirements for legal consistency and fairness will help further develop the rule of law in China—which will benefit our companies as well as the growing private sector in China.

As President Bush said when he was in Beijing in February, "China is on a rising path, and America welcomes the emergence of a strong and peaceful and prosperous China." In a global economy that is just beginning to improve, we need China to serve as an engine of growth. Beyond that, China's reforms can create a "virtuous circle" of competitive liberalization in the region—after all, success breeds success. This will encourage China's neighbors to undertake the hard steps needed to improve transparency, corporate governance, and their legal systems. At the end of the day, the rule of law—and the economic freedoms that it brings—may be our most important export.

Mr. Chairman, Mr. Co-Chairman, to answer your question: Yes, I believe that China can and will seek to keep its promises, and we should do whatever we can to help. I thank you for devoting this hearing to this important issue, and I welcome your questions now or at any time. It is an honor to serve on this Commission.

PREPARED STATEMENT OF SUSAN S. WESTIN

JUNE 6, 2002

Mr. Chairman and Members of the Commission:

I am glad to have the opportunity today to discuss aspects of China's development of rule of law<sup>1</sup> practices that are related to the commitments China made to the World Trade Organization (WTO), which it joined on December 11, 2001. My observations address three areas: (1) How elements in China's WTO accession agreement<sup>2</sup> seek to improve the rule of law; (2) What Chinese officials told us about their

<sup>1</sup>Definitions of "rule of law" are varied. For purposes of this testimony, we generally use it to describe a society in which law, for the most part, guides people and the government in the conduct of their affairs and constitutes the supreme legal authority, in contrast to the authority of an individual ruler or a political party.

<sup>2</sup>China's WTO commitments are documented in its (1) Protocol on the Accession of the People's Republic of China, which contains the terms of membership that China negotiated and affirms China's adherence to the WTO agreements; (2) the Report of the Working Party on the Accession of China, which contains additional commitments as well as provides a narrative on the results of China's negotiations; and (3) annexes containing market access commitments, which primarily cover individual tariff lines for goods and schedules for various service sectors.

reform efforts; and (3) What the U.S. business community has told us about the importance of these efforts and their views on rule of law implementation in China to date.

My statement today is based on our ongoing work; therefore, my observations are preliminary in nature. As you know, both the Senate Finance and House Ways and Means committees have asked GAO to conduct a 4-year body of work relating to China's implementation of its WTO commitments. This includes analyzing China's final WTO commitments, performing annual business surveys, evaluating China's implementation of its commitments, and assessing executive branch monitoring and enforcement activities. Our work to date has included two trips to China; one trip to Geneva, Switzerland; numerous meetings with U.S. and Chinese government officials; and an assessment of preliminary results from a mail survey and structured interviews of U.S. companies doing business in China. We are finishing our analysis and verifying our work, and we plan to report the final results of our work in various products by mid-October.

#### SUMMARY

Many elements in China's WTO accession agreement seek to improve the rule of law. When China joined the WTO, China agreed to ensure that its legal measures would be consistent with its WTO obligations. In our analysis of China's WTO commitments, we found at least 60 commitments that specifically obligate China to enact, repeal, or modify trade-related laws or regulations. In addition, China has made a substantial number of other WTO commitments related to the rule of law areas of transparency, judicial review, uniform enforcement of laws, and nondiscriminatory treatment.

Chinese government officials have emphasized their commitment to make WTO-related reforms that will strengthen the rule of law. They described how their efforts for reform go beyond China's WTO commitments and include broad reforms of laws and regulations at the national and provincial levels, as well as reforms of judicial and administrative procedures. However, Chinese officials acknowledged the challenges they face in completing the necessary reforms, including the capacity of the government to carry out new functions in a timely manner. In addition, despite an extensive training program about WTO-related reforms throughout the country, officials identified the need for outside assistance, because they lacked the expertise and capacity to meet all their training needs themselves.

According to the preliminary results of our survey, U.S. businesses in China consider rule of law-related WTO commitments to be important to them, especially the consistent application of laws, regulations, and practices in China, and enforcement of intellectual property rights. However, a majority of businesses answering our survey anticipated that these rule of law commitments would be difficult for the Chinese to implement, and they identified some concerns over specific implementation issues. U.S. businesses told us in interviews that they expected WTO reforms, including those related to the rule of law, to be part of a long-term process. Nevertheless, they believe the Chinese leadership is dedicated to living up to their WTO commitments.

#### BACKGROUND

Rule of law reform must take place within China's legal and political system, and any assessment of rule of law development should be judged in the context of Chinese institutions. China's current legal system is relatively new and is based, to a great extent, on the civil law codes of Germany as adopted by Japan, and, to some extent on the legal institutions of the former Soviet Union and China's traditional legal system. Two important characteristics of Chinese legal development since 1949 have been the subordination of law to Communist Party policy and the lack of independence of the courts. Another characteristic is the large number of legal measures used to implement a law, including administrative regulations, rules, circulars, guidance, Supreme People's Court interpretations, and similar local government<sup>3</sup> legal measures. China's central government laws, regulations, and other measures generally apply throughout China. Although local governments enact laws and regulations, these must be consistent with central government measures. In 1996, a number of China's top leaders emphasized the principle of administering the country in accordance with law. Several years later, China amended its constitution to incorporate this principle.

<sup>3</sup>Local governments include provinces, autonomous regions, municipalities directly under the central government, other municipalities, special economic areas, and counties.

MANY ELEMENTS IN CHINA'S WTO ACCESSION AGREEMENT SEEK TO IMPROVE THE RULE  
OF LAW

A substantial number of the many commitments that China has made to the WTO can be characterized as related to developing rule of law practices. In a broad sense, China's WTO commitments suggest that in its commercial relations China is on the way to becoming a more rules-based society, contingent on the faithful implementation of its WTO accession agreement. This agreement is highly detailed and complicated, running to over 800 pages including annexes and schedules. It is the most comprehensive accession package for any WTO member. As part of this package, China agreed to ensure that its legal measures would be consistent with its WTO obligations. About 10 percent of the more than 600<sup>4</sup> commitments that we identified in China's accession package specifically obligate China to enact, repeal, or modify trade-related laws and regulations. These commitments cover such trade policy areas as agricultural tariff-rate quotas, export and import regulation, technical barriers to trade, intellectual property rights, and nondiscrimination. In addition, by becoming a WTO member, China has agreed to abide by the underlying WTO agreements, such as the General Agreement on Tariffs and Trade, the General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the Understanding on the Rules and Procedures Governing the Settlement of Disputes.

China also has made a substantial number of important, specific commitments in the rule of law-related areas of transparency, judicial review, uniform enforcement of legal measures, and nondiscrimination in its commercial policy. In the area of transparency, China has agreed to designate an official journal for publishing trade-related laws and regulations and to provide a reasonable period for public comment before implementing them. China has also agreed to designate an enquiry point where individuals, business enterprises, and WTO members can request information relating to these published laws and regulations. Transparency requirements and commitments to report information to the WTO together represent about a quarter of the commitments we identified in China's accession package. In the area of judicial review, China has agreed to establish or designate tribunals to promptly review trade-related actions of administrative agencies. These tribunals are required to be impartial and independent of the administrative agencies taking these actions. In the area of uniform enforcement, China has agreed that all trade-related laws and regulations shall be applied uniformly throughout China and that China will establish a mechanism by which individuals and enterprises can bring complaints to China's national authorities about cases of nonuniform application of the trade regime. Finally, in the area of nondiscrimination, China agreed that it would provide the same treatment to foreign enterprises and individuals in China as is provided to Chinese enterprises. China also agreed to eliminate dual pricing practices as well as differences in treatment provided to goods produced for sale in China and those produced for export. (See the appendix for examples of rule of law-related commitments included in China's WTO accession agreement.)

CHINESE OFFICIALS CITE EARLY REFORM EFFORTS BUT RECOGNIZE CHALLENGES TO  
IMPLEMENTATION

Chinese government officials have stated their commitment to make WTO-related reforms that would strengthen the rule of law. Furthermore, China's plans for reform go beyond conforming its laws and regulations to China's WTO commitments and include a broad legal review, as well as reforms of judicial and administrative procedures. Chinese officials with whom we spoke discussed the numerous challenges they face in these areas and said that these reforms will take time to implement. They also stated their need for outside assistance to help them with their reform efforts.

*Early reform efforts in three areas*

First, Chinese government officials are in the midst of a comprehensive, nationwide review of laws, regulations, and practices at both the central and provincial levels. This review is to lead to repeals, changes, or new laws. According to one report, Chinese officials have identified more than 170 national laws and regulations and more than 2,500 ministry regulations as being WTO related.

Officials whom we interviewed from the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) contend that generally China has done a good job of implementing its WTO obligations to date. MOFTEC officials said that complete imple-

<sup>4</sup>This number excludes market access commitments contained in China's tariff and services schedules.

mentation will take time and that part of their role is to teach other ministries how to achieve reform according to WTO commitments. They noted the importance of their efforts to coordinate WTO-related reforms with other ministries because Chinese laws tend not to be very detailed and, as a result, it is difficult to incorporate the language of specific WTO commitments into Chinese laws. Officials said that, consequently, Chinese laws will sometimes use general, open-ended phrases that refer to WTO commitments, such as the services annexes, while the detail is set forth in the implementing regulations.

Provincial authorities are still reviewing their laws and regulations to see if they are consistent with national laws. Provincial-level officials told us that in some cases they were still waiting for the national government to finish its legislative and regulatory processes. This process will guide their own review of laws and regulations at their level. Prior to their enforcement, provincial-level laws, regulations, and other regulatory measures that implement the central government's legal measures are submitted to the central government for review. Chinese officials told us that they have found many provincial regulations that did not conform to national laws and regulations. MOFTEC officials estimated that it would take a year or two to complete this entire reform process, while some provincial officials estimated 2–3 years.

Second, China is undertaking reform of its judicial processes to ensure that they are compatible with its WTO commitments. The Supreme People's Court informed us that since China's accession it has been revising hundreds of judicial interpretations about laws that do not conform to WTO rules. It has also instructed the judiciary throughout the country to follow the revised interpretations and to undertake similar work at their respective levels. Officials told us that the court is also involved in reforms related to the WTO areas of judicial independence and uniform application of legal measures. For example, with regard to judicial independence, in February of this year the court issued new regulations to improve the adjudication of civil and commercial cases involving foreign parties. Under these regulations, mid-level and high-level courts, in contrast to the basic-level courts, will directly adjudicate cases involving, among other subjects, international trade, commercial contracts, letters of credit, and enforcement of international arbitration awards and foreign judgments. Furthermore, China recently amended its Judges Law to require that new judges pass a qualifying exam before being appointed to a judicial position.

Third, China is reforming its administrative procedures and incorporating the rule of law into decisionmaking. About one third of the commitments we identified in China's WTO accession agreement relate to guidance about how a particular commitment should be carried out. Officials told us that they are attempting to reduce the number of layers necessary to approve commercial activities and to make these processes more transparent. These actions can help implement rule of law practices at the day-to-day level. These reforms are also still underway at the central and provincial levels. For example, State Economic and Trade Commission (SETC) officials told us that they have identified 122 administrative procedures that must be changed to conform to WTO rules but that 40 percent of these must still be changed. In Shanghai, officials said that they have eliminated 40 percent of government approvals under their jurisdiction and that they are working to make the remaining 60 percent more efficient.

#### *Chinese officials acknowledge challenges*

Some Chinese officials with whom we spoke acknowledged challenges in completing all these reforms in a timely manner. These challenges include insufficient resources, limited knowledge of WTO requirements, and concerns about the effects on the economy of carrying out particular WTO commitments. For example, Chinese officials said that the effects of the changes needed to conform their tariff-rate quota administration process to WTO requirements were so difficult that they were unable to allocate the quota and issue certificates in time to meet the deadlines set forth in China's WTO commitments. A number of Chinese officials also indicated that it has been very difficult to fulfill a WTO transparency commitment that requires China to translate all its trade laws, regulations, and other measures into an official WTO language—English, French, or Spanish. This difficulty is due in part to the abundance of the materials to be translated and the highly technical quality of many legal measures.

#### *Chinese officials identified the need for more technical assistance*

Many Chinese officials we interviewed emphasized the importance of the steps they had taken at both the national and subnational levels to increase the training of government officials about WTO rules. For example, the State Economic and Trade Commission and the General Administration of Customs said they have been

holding training sessions for over a year at the national, provincial, and municipal levels on general WTO rules and China's WTO obligations. In addition, the National Judges College plans to train 1,000 judges from local courts across the country and send others for training abroad. Furthermore, governments in Shanghai, Guangzhou, and Shenzhen have established WTO affairs consultation centers that organize training and international exchange programs for midlevel Chinese officials on implementing WTO reforms.

Despite these efforts, Chinese officials acknowledged that their understanding of WTO rules remains limited and that more training is needed. According to several Chinese government officials we interviewed, China continues to lack the expertise and the capacity to provide all the training necessary to implement WTO rules and, therefore, it has asked for technical assistance both multilaterally and bilaterally from outside China. As a result, the WTO secretariat, the European Union, the United States, and other WTO member countries have either given or plan to give training assistance to China in numerous areas, including rule of law-related programs. For its part, the U.S. Government has provided limited training on a range of WTO-related topics, including standards, services, antidumping requirements, and intellectual property rights. The U.S. private sector also has provided technical assistance. In our interviews of U.S. businesses in China, almost one third of respondents said that they had given some assistance to China that related to implementation of China's WTO commitments.

RULE OF LAW-RELATED REFORMS ARE IMPORTANT FOR U.S. BUSINESS, BUT  
DIFFICULTIES ANTICIPATED

Preliminary data from our written survey indicate that China's WTO commitments related to rule of law reforms are some of the most important for U.S. businesses with a presence in China.<sup>5</sup> For example, more than 90 percent of businesses that have responded to date indicated that the following reform commitments were important or somewhat important to their companies:

- Consistent application of laws, regulations, and practices (within and among national, provincial & local levels);
- transparency of laws, regulations, and practices;
- enforcement of contracts and judgments/settlement of disputes; and
- enforcement of intellectual property rights.

When asked to identify the three commitments that were most important to their companies, two WTO rule of law-related areas received the greatest number of responses in our written survey—consistent application of laws, regulations, and practices; and enforcement of intellectual property rights. We will include a more complete analysis of these and other issues considered in our business survey in a report to be released this fall.

A majority of businesses answering our survey expected these rule of law commitments to be difficult for China to implement relative to its other WTO commitments. Businesses cited a number of reasons for this relative difficulty, including (1) the cultural "sea change" required to increase transparency; (2) a reluctance to crack down on intellectual property right violations stemming from a fear of destabilizing the labor force; and (3) the challenge of implementing laws, rules, and regulations consistently among provinces and within and among ministries.

Similarly, in our interviews, company officials noted the magnitude of WTO-related reforms, including those that would strengthen the rule of law.<sup>6</sup> They said that successful implementation would require long-term effort. Commensurate with the expected difficulty in carrying out reforms, we heard numerous specific individual complaints from U.S. companies, including concerns about:

- Vague laws and regulations that create uncertainty for foreign businesses;
- lack of transparency, which denied foreign companies the ability to comment on particular draft laws or regulations or to respond to administrative decisions;
- conflicting and inconsistent interpretations of existing laws and regulations from Chinese officials;
- unfair treatment by, and conflicts of interest, of Chinese regulators; and
- uneven or ineffective enforcement of court judgments.

Nevertheless, U.S. businesses in China believe that the Chinese leadership is strongly committed to reform and that the leadership has communicated this com-

<sup>5</sup> We have surveyed more than 500 U.S. companies with a presence in China and have received more than 175 usable responses as of the date of this testimony.

<sup>6</sup> We interviewed representatives from more than 50 companies in China as well as representatives from U.S. industry associations.

mitment publicly. Several private sector officials noted a more open, receptive, and helpful attitude on the part of the government officials with whom they had contact. Other private sector officials noted more specific positive actions. For example, officials noted improvements in intellectual property right protections including crackdowns against counterfeiters in Shanghai, and a case where a U.S. company won a judgment against a counterfeiter in a Chinese court that included an order to cease the operations of the copycat company.

#### CONCLUDING OBSERVATIONS

First, it is very clear that China has shown considerable determination in enacting the numerous laws, regulations, and other measures to ensure that its legal system and institutions, on paper, are WTO compatible. Nevertheless, the real test of China's movement toward a more rule of law-based commercial system is how China actually implements its laws and regulations in fulfilling its WTO commitments. At this point, it is still too early for us to make any definitive judgments about China's actual implementation. Second, as you know, it has been the hope of U.S. Government officials and others that China's accession to the WTO would constitute a significant step forward in China's development toward becoming a more rule of law-oriented society. It is worth noting that China's reform efforts, which have been ongoing for more than 20 years, have included substantial legal developments that could be described as rule of law related. These include the enactment of numerous laws, regulations, and other measures that apply to many aspects of Chinese society beyond the WTO, the recent proliferation of law schools and legal training, and the recognition of the need for judicial reform. It is still too early to know where this process will lead, but there is hope that the many rules-based commitments that China made to become a WTO member will influence legal developments in other areas.

Mr. Chairman, this completes my prepared statement. I would be happy to respond to any questions you or other Members of the Commission may have at this time.

#### CONTACTS AND ACKNOWLEDGMENTS

For future contacts regarding this testimony, please call Susan Westin at (202) 512-4128. Adam Cowles, Richard Seldin, Michelle Sager, Matthew Helm, Simin Ho, Rona Mendelsohn also made key contributions to this testimony.

**Appendix—Examples of Rule of Law-Related Commitments Included in China's  
World Trade Organization (WTO) Accession Agreement**

|  |
|--|
| <b>Transparency</b>  |
| <ul style="list-style-type: none"> <li>• Trade Framework: China shall make available to WTO members, upon request, all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange, before such measures are implemented or enforced. (Protocol paragraph 2.C.1)</li> <li>• Services: China would publish in the official journal, by appropriate classification and by service where relevant, a list of all organizations that were responsible for authorizing, approving or regulating services activities whether through grant of license or other approval, including organizations delegated such authority from the national authorities. (Working Party report paragraph 332)</li> </ul>  |
| <b>Judicial Review</b>   |
| <ul style="list-style-type: none"> <li>• Trade Framework: China shall establish or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, Article VI of the GATS and relevant TRIPS provisions. (Protocol paragraph 2.D.1)</li> <li>• Intellectual Property Rights: Appropriate cases, including those involving repeat offenders and willful piracy and counterfeiting, would be referred to relevant authorities for prosecution under the criminal law provisions. (Working Party report paragraph 299)</li> </ul>   |
| <b>Uniform Enforcement</b>   |
| <ul style="list-style-type: none"> <li>• Trade Framework: China shall apply and administer in a uniform, impartial and reasonable manner all central government laws, regulations and other measures and local regulations, rules and other measures issued or applied at the sub-national level. The laws, regulations and other measures covered are those that pertain to or affect (1) trade in goods, (2) services, (3) trade-related aspects of intellectual property rights (TRIPS), and (4) the control of foreign exchange. (Protocol paragraph 2.A.2)</li> <li>• Trade Framework: China would strengthen the uniform enforcement of taxes, tariffs and non-tariff measures on trade between its special economic areas and the other parts of China's customs territory. (Working Party report paragraph 225)</li> </ul> |
| <b>Nondiscrimination</b>   |
| <ul style="list-style-type: none"> <li>• Import Regulation: China would adopt and apply tariff reductions and exemptions so as to ensure MFN treatment for imported goods. (Working Party report paragraph 111)</li> <li>• Import/Export Regulation: Except as otherwise provided for in this Protocol, foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favorable than that accorded to other individuals and enterprises in respect of the distribution of import and export licenses and quotas. (Protocol paragraph 8.2)</li> </ul>  |

Source: Protocol on the Accession of the People's Republic of China and Report of the Working Party on the Accession of China, World Trade Organization.



## PREPARED STATEMENT OF CHRISTIAN MURCK

JUNE 6, 2002

Mr. Chairman and Members of the Commission:

Thank you for the opportunity to testify today before this distinguished body on the rule of law in China. I am here today representing the American Chamber of Commerce in China, an organization in Beijing of over seven hundred fifty companies and approximately 1,500 individuals formed to represent the commercial interests of the American business community in China. There are few subjects of greater interest to our members than the development, current state, and future prospects of the Chinese legal system. My personal interest in China began in 1965 as a teacher at the Chinese University of Hong Kong, continued through a Ph.D. in Chinese history at Princeton, and intensified during a business career beginning in 1980. I lived in Taipei, Taiwan from 1991 to 1996. In 1996 I moved to Beijing, where I am Managing Director for China of APCO Worldwide.

In my testimony today, which focuses on the rule of law as it affects business conditions, I will define rule of law in terms of transparency and consistency. By transparency, I mean the promulgation of laws and regulations that have been developed with the participation by affected parties and which are easily accessible, objective, and clearly understandable. By consistency, I refer to the fair, reliable, and non-discriminatory application and enforcement of laws, regulations and contracts. China is proof that economic growth and social progress can occur despite a legal system that is manifestly neither transparent nor consistent. But AmCham China has been an outspoken advocate of the proposition that economic growth and social progress can only be sustained and maximized over the medium and long term by establishing and enhancing the rule of law. A transparent, consistent legal system is required to treat participants in the economic system fairly and is one of the foundations of a just society; its absence is a deterrent to investment and encourages socially damaging recourse to non-legal means of redress and protection.

The concept of the rule of law outlined above is relatively narrow. A broader definition might include references to economic systems such as a market economy, to political institutions such as free and fair elections, to the balance between liberty and responsibility within society, and to conceptions of universal human rights. Defined in this fashion, the rule of law takes many forms. Many would agree, for example, that the rule of law exists in Canada, the United Kingdom, Germany, Japan, Taiwan, and Singapore, but it takes quite different institutional and substantive forms in each. The advantages of a narrow definition of the rule of law for my purposes today are: there is broad consensus as to its elements; it is at the core of all legal systems commonly recognized as embodying rule of law in its broader sense; and it provides a framework sufficient to encompass most commercial issues, such as property rights and contractual rights.

In thinking about China, it is always useful to consider trends, as well as conditions at a particular point in time. When China began its reform process in 1979, it did so essentially without a legal system. The legal profession did not exist, there were few published laws, the courts were political instruments intended to administer substantive "justice" defined ideologically and morally rather than legally, and the National People's Congress functioned as a consultative and advisory rubber stamp rather than as a legislature. The only constraint on the power of the government bureaucracy was the overlaid bureaucracy of the Party, and the only restraint on the Party was the PLA. There was also the theoretical possibility of popular revolt, but that had been exhausted in the excesses of the Cultural Revolution and other mass movements in the thirty years after 1949.

Since 1979, China has made extraordinary progress in drafting laws and administrative regulations, establishing law schools, training lawyers, and improving courts. The basic elements of a comprehensive system of economic and commercial law have now largely been put in place. Moreover, they are fundamentally consistent with international practice, though not always US practice. It is a stated goal of China, enshrined in its constitution, to establish the rule of law, though the government and Party do not necessarily share our conceptions of the rule of law. There is an intense public discussion in the press and on television on this concept and explicating the legal rights of citizens. But the standards of transparency and consistency are much more difficult than simply passing adequate laws and regulations with the expressed intent of establishing rule of law. Just as a financial center is not simply a group of tall buildings labeled "Financial Center", so too the rule of law depends on the professionalism and values of many players, on what might be called "legal system software" throughout the society. In particular, the rulemaking process and the enforcement process are both crucial.

An important corollary of establishing a transparent, consistent legal system in China is the acceptance by the government and Party of limits on its authority and a reduction in its administrative discretion. The Party as an institution and senior leaders as individuals have assumed the right to act arbitrarily and to enjoy special privileges in order to achieve goals justified in Marxist terms. In the reform process since 1979, the National People's Congress has typically written broad legislation stating general principles to be later amplified by implementing regulations issued by the relevant Ministry or other agency. The implementing regulations often contained not objective standards, but rather subjective standards that could only be applied to specific facts by recourse to government personnel on a case-by-case basis. To some extent this was necessary given a hectic pace of legislation in areas with few precedents in Chinese practice or law since 1949. It was also deliberately intended to preserve wide latitude for officials to manage many aspects of the economy as they wished. In the shift toward a market economy, it has become widely accepted in China that the Party and government must reduce their roles as owner and investor in the economy, largely withdraw from their roles as manager of the economy, and focus primarily on their functions as a regulator. The rule of law will facilitate this difficult transition. Establishment of the rule of law, even in the narrow sense used here, is therefore not trivial, nor is it irrelevant to broader political and social issues. To the extent it is successful, it will protect companies and individuals from the exercise of arbitrary power.

Moreover, the rule of law is not easily compartmentalized or confined to a single sector, such as commercial transactions of foreign companies. If, for example, the government wished to encourage development of the privately owned residential housing market by allowing foreign banks to issue home mortgages to Chinese individuals, it must also establish the ability of the foreign bank to take a clear lien, and in the event of default, seize the home and sell it on the open market. It will then be obvious that the same rights must be available to local bank competitors. Perhaps not so obviously though, the individual homeowner must have clear title to his property in order to mortgage it. This in turn implies a much greater degree of certainty in owning such property and may lead as well to a degree of protection against the arbitrary exercise of eminent domain or failure to pay legally required compensation by local governments and developers.

To summarize these points, I do not believe that the rule of law will necessarily or inevitably lead to a particular outcome with respect to economic system, political institutions or human rights regime, but I do believe that it will strengthen the accountability of institutions and generally improve the protection of the rights of individuals.

In our 2001 White Paper issued almost 18 months ago, AmCham China noted past progress in legal reform but expressed the view that it had stalled in recent years. We cited vague, poorly drafted laws and regulations that depend on subjective interpretations from government officials; continued reliance on internal regulations formally considered State secrets but used to regulate the economy; inconsistent, selective enforcement; lack of independence of the judiciary; and local protectionism.

Local protectionism is not simply a matter of favoritism. It is exacerbated by the fact that most judges are not university graduates, much less lawyers; by the widespread practice of *ex parte* communications; by corruption; and by the willingness of local courts to uphold local regulations inconsistent with higher level government laws. Lack of independence is often cited as the fundamental weakness of the Chinese judiciary, a view that AmCham China shares, but given these other problems, it is not clear that truly independent local courts would immediately improve the legal system. It will be necessary to improve the courts and the legal system generally on many fronts over a long period of time. We have called for independence of the courts from political direction, trials open to the public, improved evidentiary rules and procedures, appointment of judges based on professional merit, and salaries sufficient to discourage corruption.

We were cautiously optimistic in the 2001 White Paper on business conditions in general, but with respect to rule of law suggested that lack of progress was outweighing positive developments.

On December 11, 2001, China became a member of the World Trade Organization. Regarding the rule of law, as in other areas, WTO accession resulted in new energy, greater political will, and a clearer sense of direction. China has committed to:

- Administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central and local governments governing its trade and foreign investment regime;
- To conform central government laws, as well as all administrative and sub-national government regulations, rules, and measures to WTO obligations;

- To establish a mechanism under which both individuals and enterprises can bring to the attention of the national government cases of non-uniform application of the trade and foreign investment regime;
- To enforce only published laws and regulations (thus eliminating the legal force of internal documents) and to make them available before they are implemented or enforced;
- To designate an official journal dedicated to the publication of all laws, regulations and other measures affecting the trade regime, and to establish a single enquiry point where information on all such laws can be obtained;
- To establish impartial and independent tribunals for the prompt review of administrative actions, and to provide contact points with respect to administrative actions.

These commitments are extremely important with respect to establishing the rule of law in trade and foreign investment and to encouraging it generally.

Literally thousands of laws, regulations and rules have been reviewed for consistency with WTO rules and China's commitments and the process of revising or abolishing those with inconsistencies is basically complete. It will be some time before the legal and business communities are able to draw conclusions as to how well this task was done, but there is no doubt the effort was massive and in good faith. The promised enquiry points have been established, laws are increasingly being made available prior to their effective date and in some cases in draft form for comment, and a study is underway to establish a publication similar to the Federal Register to bring together information now published in many separate places.

It is to be hoped the central government will also be able to use WTO accession to strengthen its control over the provinces. All provincial Governors have been called to Beijing for WTO training seminars and told in blunt terms that lack of compliance at provincial or local level with the WTO framework will be damaging for their careers. Whether such measures will be sufficient to meet the commitment to administer laws and regulations in a uniform, impartial and reasonable manner locally as well as centrally remains to be seen. Two years ago, a Law on Legislation was passed by the National People's Congress attempting to rationalize the legislative process and establish the principle that sub-national jurisdictions may not pass laws and regulations inconsistent with those of the central government. This has reportedly had little practical effect and the issue will undoubtedly be revisited.

The statement of principle provided by the new WTO commitment is important, but uniformity, impartiality and reasonableness are subjective criteria difficult to evaluate. Moreover, meeting this commitment will require significant changes in behavior that will be perceived as damaging various special or local interests. Our argument, of course, is that the interests of all stakeholders in the society, not simply foreign investors and businessmen, will be served by making this effort.

Reflecting WTO accession, the AmCham China 2002 White Paper released last month emphasized the great, but uncertain opportunity we now face. WTO accession has given the reform process new energy, but we are also aware of the difficulties and constraints. As to the rule of law specifically, we cite a number of areas of modest progress, while reiterating the same basic problems with respect to transparency and consistency (now further distinguished as uniformity and enforcement).

A concrete example of the countervailing pressures at work on the ground is the vexed area of intellectual property rights.

Intellectual property rights were not recognized in Chinese law in 1979, and a pattern of rampant violations of copyrights, trademarks and patents soon became a problem for foreign investors. Pressure from the United States, the European Union and others had some effect in changing Chinese policy statements, but these were somewhat grudging and were not reflected in changes on the ground. In the last 3 years, however, the policy debate on this question has been won. A study by the Ministry of Information Industry identified copyright violations as the single biggest obstacle to the development of a Chinese software industry. This was followed by State Council regulations in 1999 requiring all government offices to use legal software and again in 2000 requiring all entities, including enterprises, to do the same and demanding enhanced, coordinated enforcement of the law. The Development Research Center, the leading think tank under the State Council, in early 2000 issued a report quantifying the economic losses of counterfeiting to the State in the form of lost revenue, to enterprises in the form of lost sales and damage to their reputation, and to consumers in the form of poor quality, even dangerous goods. Counterfeiting was identified as one of the major targets of the market rectification campaign launched last year, along with smuggling, fraud, and other violations of commercial law. Leaders such as Premier Zhu Rongji and State Councilor Wu Yi provided strong, focused attention to these problems.

Substantial revisions have been made in copyright, trademark and patent laws. While further improvements could be suggested, in general the legal framework is close to international standards and capacity building continues, often with foreign assistance. The European Union, for example, has funded a program to develop IPR laws that trains judges and law professors. Our member companies participate in such seminars to present case studies, and have also assisted with additional funding. Foreign companies also regularly hold training programs for local prosecutors, customs officials and other relevant authorities. The U.N. Development Program is sponsoring a program to train local economic planning officials in sustainable development that includes a substantial focus on how to transition away from specializing in counterfeiting, as some localities do. Foreign companies have supported the UNDP with funding as well as direct participation.

Our member companies have actively fought to protect their intellectual property. One large consumer products company routinely gathers evidence and presents it to the authorities, which conduct raids observed by company personnel, confiscate counterfeit goods and bring prosecutions. Last year that one company was involved in over three hundred such raids. In one case, a factory that was about to be closed because of dropping sales was rescued by putting counterfeiters out of business. The company invited the police and prosecutors who worked on the case to tour the factory, where the grateful work force greeted them with applause. In another case, a company making batteries saw its sales increase by 135 percent in 1 year by closing down a single counterfeiter. There have been recent court victories in copyright cases as well, such as a case involving an internet domain name squatter where the rights of the foreign company were firmly upheld.

Unfortunately, however, these positive examples do not reflect the general situation. China is not a single economy; it is a group of large, disparate regional economies. Although the central government can be described as authoritarian, its ability to control what happens in local areas is limited. Many factors such as those outlined above weigh against successful litigation for those attempting to protect their rights. Our members continue to report continued, large economic losses due to IPR violations. For those selling brand products in the Chinese market, the general estimate is that 15–20 percent of revenue is lost due to counterfeiting.

In response, our member companies are shifting their focus from the content of the laws to problems of enforcement. In many cases, the dollar value of confiscated goods is low, so violators are dealt with in administrative procedures and assessed low fines, often never paid. There are also administrative bottlenecks in effectively transferring cases from civil to criminal authorities. Foreign companies are thus emphasizing criminal proceedings with modest success in the last year.

One of the unanticipated consequences of WTO accession is likely to be an increase in the export of counterfeit goods manufactured in China to the rest of the world. China committed in the WTO protocol to give trading rights, presently restricted, to all legal entities in China. This means it will be much easier to import and export goods, and is a major improvement for US exporters and their customers in China. WTO will bring increased trade and the Customs will improve its efficiency in order to move a larger volume of goods across the borders of China in both directions. This is also a good thing, but unfortunately these developments will also make it easier for counterfeiters to export and increased enforcement in China will lead them to do so. If the fakes are sold in Latin America, Eastern Europe or the United States, it is more difficult to gather evidence and prosecute in China.

We thus see a mixed picture: progress with respect to IPR law and policy, but continued failure to make enforcement effective. AmCham China is convinced that this problem will eventually be brought under control, because there are strong local interests in doing so. Chinese companies are damaged more than foreign companies by IPR violations and they know it. The Chinese government finds its economic ambitions hindered by its IPR environment and it is trying to change it. Our members will continue to defend their legal rights and assist further development of the legal system.

The IPR case can stand as representative of the status of commercial aspects of rule of law in China. Given this situation, what approach should we take to encourage further progress toward transparency and consistency in the legal system generally?

First, we should recognize that despite a rapid pace of social change since 1979, likely to be accelerated by WTO accession and a new generation of leaders, capacity building is a long-term enterprise dependent on institutional and cultural change in many sectors. In my opinion, it is a reasonable goal to strive for the rule of law as defined above with respect to property rights and contractual rights during the anticipated 10 years in power of the next generation of leaders, that is, roughly 2003–2013. Full establishment of the rule of law will probably take longer.

Second, given the complexity of the process, we should encourage a multiplicity of players to pursue diverse avenues of institutional change, preferably in partnership with Chinese counterparts. The most active and important supporters of development of rule of law have been the European Union through the EU-China Legal and Judicial Cooperative Program, the Ford Foundation, the Canadian International Development Agency, the German government through the German Technical and Cooperation Corporation (GTZ) program to train MOFTEC lawyers.

The Asia Foundation and The US-China Legal Cooperation Fund, a program of the education and research arm of the US-China Business Council also have small, but effective grant programs. The Fund has attracted support from approximately forty corporate donors. To quote the Fund, "Contributors . . . share the belief that the people and the economies of the United States and China will benefit from further development of strong, transparent, impartial and equitable legal institutions. . . ." Grants are made in such areas as training of judges and lawyers, legal protection of human rights, administrative law, commercial law and arbitration, and legal aid for the poor and special focus is on projects that demonstrate support from both US and Chinese sources. We strongly encourage member companies with sufficient resources to consider support for this Fund as part of their corporate social responsibility programs in China.

Academic cooperation between American universities such as Columbia, Harvard, Stanford, and Yale and various Chinese universities in research and legal education is well established and productive.

The American government, though it takes an active public role of advocating improvements in the rule of law in China, has been conspicuous by its absence. Recently a three million dollar appropriation was made, primarily to support a legal education program of Temple University Law School. Though a welcome beginning, this is a meager record compared with that of the European Union, individual European countries and American private sector donors such as the Ford Foundation. Furthermore, while we welcome the sustained effort of the EU to improve the rule of law in China, I should parenthetically note that the adoption of European legal concepts and practices tends to favor the commercial interests of European companies familiar with them. AmCham member companies would welcome a material effort by the United States to balance this influence.

Another way in which the US government can assist the development of rule of law in China and at the same time assist American economic interests is to support the efforts of US law firms to be permitted to hire PRC qualified lawyers to practice PRC law. If permitted to hire PRC lawyers to practice PRC law, the US firms can have a significant positive impact on the sophistication and professionalism of the PRC lawyers and judges through their internal training programs, the impact of their corporate cultures, and the increased competition they will foster in the legal arena. They will also be able to provide better service to their clients, including many of our members. China made no WTO commitments on this point, highlighting the need for continued bilateral discussion on the economic reform process beyond the WTO framework.

Third, we should not assume that we can know the outcome or that there is only one satisfactory result. Forces such as economic development, modernization, and globalization have not led to convergence among nations in the past, and will probably not do so in the future. The Chinese are a very large nation, with a well-honed sensitivity to foreign pressure. As has been the case with smaller nations, the Chinese legal system will reflect the interplay of its own social, cultural and institutional forces much more than standards suggested from abroad.

We should recognize, but not be discouraged by the fact that our goals for Chinese legal reform are not those of the current leadership. China has stated it is attempting to build a socialist market economy governed by rule of law. Whatever the term "socialist" may mean, it does suggest a greater degree of State ownership of major enterprises than in the United States. Moreover, the Chinese government has articulated a conception of human rights placing more emphasis on responsibility to the community than individual rights, in which the right to subsistence is more important than personal liberty. Finally, the Communist Party intends to continue its rule. But if one reviews the history of such stated goals since 1949, and particularly since 1979, it is apparent that they have changed frequently and dramatically. If the past is any guide, China's stated goals today will not necessarily be her goals in the future.

If a legal system is established that protects property and contractual rights by promulgating accessible, objective and understandable laws with participation by affected parties, and enforcing them in a fair, reliable, and nondiscriminatory manner, the continued existence of the special, extra-legal privileges of the apparatus of the Party and government and of senior cadres and their families personally will be

more and more anomalous. I personally do believe that establishment of the rule of law in the narrow sense defined here will inevitably and positively impact broader social and political trends. It is therefore to be desired that the rule of law be expanded as rapidly as possible.

Considering actions that this Commission might recommend to the Congress and the Executive branch in support of this process, I would like to call to your attention the Commercial Law Development Program (CLDP) of the Office of the General Counsel in the Department of Commerce. CLDP provides training and consultative services seeking help in guiding the evolution of legal systems. It specifically focuses on "international economic agreements, foreign investment laws, project and trade finance, export controls, intellectual property rights, and government ethics". All of these areas are currently under development in China, important to implementation of its WTO accession commitments, and key building blocks of commercial rule of law. CLDP has not been able to work in China, despite our strong national interest in having it do so, because it is partially funded by the Agency for International Development (AID). As you know, the Congress has barred AID from China since 1989 in reaction to the Tiananmen Square incident. In order to bring the CLDP to China, where it is badly needed and could make a contribution in the interest of both countries, AmChina China supports either removing the ban on AID funds in China, or finding another acceptable way to fund the program.

We also encourage the Congress to appropriate a material level of funding for the Department of Labor and the Department of State to develop their own programs to assist development of the rule of law in China.

Thank you very much. I look forward to your questions.

PREPARED STATEMENT OF DONALD C. CLARKE

JUNE 6, 2002

Mr. Chairman, Mr. Co-Chairman, and Members of the Commission:

I am very pleased to have the opportunity to address the Commission today on issues of the commercial rule of law and WTO implementation in China. I have been involved in Chinese studies in one way or another since the early 1970's and have been interested in Chinese law for over 20 years. I have taught Chinese law since 1985, first at the University of London and now at the University of Washington, and have also spent time in practice advising companies doing business in China.

BACKGROUND

It is well understood both inside and outside of China that the task of making China's laws and regulations conform to WTO requirements is a huge one. But a key feature of China's accession to the WTO that sets it apart from most other countries is not the size of the task, but the fact that accession is part of a larger strategy of massive and fundamental economic reform.

China's economic reform era is now over 20 years old. The scope of the planned economy has been steadily shrinking, and few state-owned enterprises can afford to ignore market principles. Tariffs and non-tariff trade barriers had been steadily dropping prior to WTO entry, while rules on foreign investment were gradually liberalized. The Chinese government has embarked on this strategy for its own sake, not to fulfill treaty commitments to foreigners, and Chinese leaders have sought WTO membership not simply because they believe that it will open more markets to Chinese products, but because they see membership as giving them extra leverage to force through difficult changes in the domestic economic system. Many in the leadership understand that China's WTO commitments, while labeled "concessions" in the language of international trade negotiations, are not really "concessions" to be reluctantly yielded at all, but rather sound policies that China would be wise to adopt even without WTO membership.<sup>1</sup> Reforms simply imposed from outside are

<sup>1</sup> See, for example, the remarks of Kong Xiangjun, a judge in the administrative tribunal of the Supreme People's Court:

[W]e should not . . . conclude that [China's commitments regarding judicial review] are some kind of price or sacrifice that had to be made for China to enter the WTO. This kind of provision reflects the serious attitude and commitment of China to promoting the advancement of the rule of law . . . It is completely in accord with China's strategy of governing the country according to law and will advance China's progress in establishing the rule of law. The beneficiary in the end will be China.

Kong Xiangjun, "Jianli yu WTO yaoqiu xiang shiyong de sifa shencha zhidu" (Establish a System of Judicial Review that Meets the Requirements of the WTO), *Zhongguo Faxue* (Chinese Jurisprudence), no. 6, 2001, p. 8.

unlikely to go beyond surface compliance—if they get even that far—and truly take root. But many of the reforms required by China's WTO accession, from market opening to greater transparency in administrative procedures, have a strong domestic constituency as well as a foreign one. The influential "Legal System Daily," for example, last November published no fewer than three commentaries by prominent law professors welcoming the pressures that WTO membership would impose in the direction of limited government and increased transparency.<sup>2</sup> Thus, although China's trading partners may encounter rules and practices inconsistent with China's commitments and delays in curing these inconsistencies, it is not necessarily due to bad faith and foot-dragging by the central government (although of course that is a possibility). In many cases it will be due simply to the normal and well-documented difficulty the central government faces in getting many things done.

This is by no means a counsel of inaction and infinite patience in the face of a failure by China to live up to its commitments in certain areas. As I have noted, part of the whole point of joining the WTO—a central government decision essentially imposed on local governments—was to add foreign pressure to existing domestic pressures for reform. It does nobody any favors to pretend that specific and binding obligations do not exist. But it is necessary to bear in mind that not all violations will be deliberate, and that not all delay is obstruction.

#### DOMESTIC APPLICABILITY WITHIN CHINA OF WTO NORMS

One issue that has been the subject of some debate both inside and outside of China is that of the effect within the Chinese legal system of China's WTO obligations. In my view, as a practical matter, China's WTO obligations will not become part of its domestic law, binding on courts and government bodies, until appropriate domestic legislation and regulations incorporating those obligations are promulgated.

China became a WTO member through its internal procedures for the signing and ratification of treaties.<sup>3</sup> There are three ways in which China's treaty obligations might become part of its domestic law. First, they can be embodied in domestic legislation—a term I use here to include all authoritative sources of State norms in China, including "interpretations" and other documents issued by the Supreme People's Court and other bodies. This approach is known as "transformation," and it is one that China has adopted on many occasions.<sup>4</sup> Second, they can be incorporated through specific reference in domestic legislation. This approach, which I shall call "mediated incorporation," can be seen in Article 142 of the General Principles of Civil Law and Article 238 of the Law on Civil Procedure, each of which directs courts, in cases involving foreigners, to apply the provisions of international treaties to which China is a signatory when such provisions conflict with relevant provisions

<sup>2</sup>See Yuan Chengben, "Ru Shi wei sifa gaige tian dongli" (Joining the WTO Pushes Forward Judicial Reform), *Fazhi Ribao* (Legal System Daily), Internet edition, Nov. 30, 2001 (interviewing Professor Li Shuguang); Ma Huaide, "WTO yu zhengfu zhizheng linian" (The WTO and the Guiding Concept of Government), *Fazhi Ribao* (Legal System Daily), Internet edition, Nov. 26, 2001; Wang Feng "Ru Shi' yaoqiu zhengfu juese zhuanbian" (Entry into the WTO Requires a Change in the Role of Government), *Fazhi Ribao* (Legal System Daily), Internet edition, Nov. 12, 2001; see also Nan Xianghong, "WTO: fa de chongxin goujia" (WTO: The Restructuring of Law), *Nanfang Zhoumo* (Southern Weekend), Internet edition, Oct. 25, 2001 and Guo Guosong, "Wei sifa gongzheng jianli zhidu bingzhang" (Establish Institutional Protections for Judicial Justice), *Nanfang Zhoumo* (Southern Weekend), Internet edition, Oct. 25, 2001 (addressing the need for better court procedures, from improving the quality of judges to achieving greater transparency). For Chinese language sources, I have placed the author's surname before the given name in accordance with Chinese usage.

<sup>3</sup>Prof. Bing Ling of the City University of Hong Kong makes a persuasive argument that the ratification procedure was defective in that the National People's Congress Standing Committee granted a before-the-fact authorization (on August 25, 2000, long before the accession protocol had taken its final form and been signed by the Chinese government's representative), not an after-the-fact ratification. Prof. Ling's argument is available in full at <http://personal.cityu.edu.hk/~lwbing/Research/WTO.pdf>, last visited June 3, 2002; see also James Kyngge, "Academics hit at procedure to join WTO," *Financial Times*, Nov. 20, 2001, p. 14. As Prof. Ling points out, the validity of China's accession in spite of any procedural defects seems unquestionable as a matter of international law under Articles 45 and 46 of the Vienna Convention on the Law of Treaties. I would argue further that as a practical matter it is unquestionable—or at least, will not be questioned—as a matter of Chinese domestic law as well.

<sup>4</sup>In 1986, for example, the Standing Committee of the National People's Congress adopted the Regulations of the People's Republic of China on Diplomatic Privileges and Immunities, thereby transforming into domestic law China's obligations under the Vienna Convention on Diplomatic Relations.

of the law in question.<sup>5</sup> This approach has also been taken in directives issued to lower courts by the Supreme People's Court. In 1987, for example, the court issued a notice to lower courts instructing them to give priority to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in cases where the Convention applied and domestic law contained contrary provisions.<sup>6</sup> While the mediated incorporation approach requires Chinese courts and government bodies ultimately to look directly to treaty texts instead of the texts of domestic law, it is domestic law that tells them to do so.

While the above two methods of making treaty obligations part of domestic law are not controversial, real debate revolves around the issue of whether bare treaty obligations, without more, can or should be considered a source of binding norms by legal decisionmakers. While academic views on this question are divided, the views of government officials are fairly consistently in the negative: specific transformation or mediated incorporation is necessary. This was certainly the view China presented in the meetings of the WTO Working Party. In Para. 67 of the Working Party Report, for example, China undertakes to meet its WTO commitments "through revising its existing laws and enacting new ones fully in compliance with the WTO Agreement."

Whether treaty obligations can become part of domestic law without further mediation (a theory I shall call "unmediated incorporation") is a subject for debate because both the constitution and China's legislation are silent on the issue. Many years ago Prof. Wang Tieya, a noted international law scholar, laid down the view that China had a system in which its international law obligations automatically became part of domestic law, and this view has carried considerable weight in Chinese academic circles. This view was formed, however, in an era when China's international law obligations were all State obligations, and private rights were not implicated. Thus, China had essentially no international law obligations about which court enforcement in private litigation might be an issue. Its obligations were obligations of the government to do or not to do things with respect to other governments and their officials. Hence, it was possible for Wang and others to hold that there was and could be no conflict between international law and China's domestic law, because the government would always do what international law required of it.

Once one begins talking about private rights being recognized, however, the argument becomes more difficult to support. Wang and others support their argument by noting the existence of some statutes providing that where the provisions of the statute conflict with China's international treaty obligations, China's international treaty obligations shall override the provisions of the statute.<sup>7</sup> But surely this shows precisely that a specific rule in a domestic statute is necessary to give domestic legal effect to a treaty obligation; the very fact that the rule needs to be stated in a domestic statute or other official norm contradicts their position.

The key proof of the theory of unmediated incorporation would be a case where a court, in the absence of an authoritative instruction to refer to treaty provisions, nevertheless applied such provisions although the rules of domestic law dictated a different result. I know of no such cases.<sup>8</sup>

<sup>5</sup> Similar provisions can be found in Article 72 of the Administrative Litigation Law (applying to foreign-related administrative litigation), Article 24 of the Frontier Health and Quarantine Law, Article 42 of the Postal Law, Article 51 of the Water Law, Article 28 of the Law on Taxation of Foreign Enterprises and Enterprises with Foreign Investment, Article 59 of the Tax Administration Law, Article 268 of the Maritime Commerce Law (applying to foreign-related matters), and Article 96 of the Negotiable Instruments Law (applying to foreign-related matters).

<sup>6</sup> See Supreme People's Court, "Guanyu zhixing woguo jiaru de 'Chengren ji zhixing waiguo zhongcai caijue gongyue' de tongzhi" (Notice on the Implementation of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" of Which China Is a Member), April 10, 1987, Art. 1.

<sup>7</sup> See, e.g., the examples cited above in footnote 5 and the accompanying text. This argument is made in Tieya Wang, "The Status of Treaties in the Chinese Legal System," *Journal of Chinese and Comparative Law*, vol. 1, no. 1 (July 1995), pp. 1-18, and Meng Xianggang, "Woguo shiyong WTO guoji guize de liang wenti" (Two Issues in the Application in China of the International Rules of the WTO), *Renmin Fayuan Bao* (People's Court News), Internet edition, March 29, 2001. It appears in many other sources as well. The strongest argument I have seen from a court or government official appears in Sun Nanshen, "Cong Zhongguo ru Shi kan WTO xieyi zai Zhongguo fayuan de shiyong" (Viewing the Application of the WTO Agreements in Chinese Courts from China's Accession to the WTO), *Falu Shiyong* (Application of Law), no. 9, 2000, pp. 2-5, 20 (the author is a vice president of the Jiangsu Province Higher Level People's Court, only one level below the Supreme People's Court). In addition to the argument from incorporation favored by Wang Tieya, Sun argues (as do others) that the similarity in procedure for national legislation and treaty ratification means that they should have equal legal validity.

<sup>8</sup> Qingjiang Kong, a professor at the Hangzhou Institute of Commerce, cites two cases that he believes demonstrate the direct and unmediated application of treaty provisions by Chinese



Whatever academic views might be,<sup>9</sup> I believe the views that count, from the standpoint of China's trading partners and those doing business in China, are those of government officials, and in particular court officials. As noted above, I believe the statement of China's representative to the WTO Working Party constitutes a denial of the doctrine of unmediated incorporation. Equally important, however, are statements from senior officials of the Supreme People's Court (which has authority over the court system) and academics published in official or semi-official sources. Prof. Jiang Guoqing, for example, states in a lecture posted on a website administered by the Office of the National People's Congress Standing Committee that treaty norms do not apply in domestic law unless there is a specific domestic law norm making them apply.<sup>10</sup> Similar views are voiced by Kong Xiangjun of the Administrative Chamber of the Supreme People's Court<sup>11</sup> and Cao Shouye, also a judge in the Supreme People's Court.<sup>12</sup> Finally, the President of the Supreme People's Court recently declared:

In the course of adjudication, People's Courts must be knowledgeable about both domestic law and WTO rules; they must both grasp the technique of application of international treaty through transformation into domestic law, and do a good job in making judicial interpretations in accordance with the provisions of domestic law; they must both ensure the correct implementation of international treaties in China, and pay attention to upholding State judicial sovereignty and the dignity of law.<sup>13</sup>

While this statement is not as resolutely unambiguous as one might wish, it seems, with its constant references to domestic law and State sovereignty, to put the Supreme People's Court in the camp of the anti-unmediated incorporation school. Certainly this is consistent with what we know of the operation of Chinese courts already. As I have discussed elsewhere,<sup>14</sup> the hierarchy of rules Chinese courts follow tends to be the opposite of the putative hierarchy set forth in the constitution: while National People's Congress legislation should take priority over conflicting State Council regulations, for example, in reality it is usually the other way around. It is hard, therefore, to imagine that Chinese courts, which would uphold a State Council rule against a contrary, and theoretically higher, National People's Congress statute, and a National People's Congress statute against a contrary, and

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courts. See Qingjiang Kong, "Enforcement of WTO Agreements in China: Illusion or Reality?," *Journal of World Trade*, vol. 35, no. 6 (Dec. 2001), p. 1208. In both cases, Chinese courts purported to apply the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the "Hague Rules"). A reading of the cases reveals that they did so, however, because the parties had agreed contractually to apply the Hague Rules to their disputes. Indeed, China is not even a signatory to the Hague Rules, and thus there was no treaty obligation in the first place. The cases in question are *China Material Supply Corp. of Xiamen Special Economic Zone of Fujian Province v. Europe-Overseas Steamship Lines NV Belgium*, in Priscilla Leung Mei-fun (ed.), *China Law Reports*, 1991, vol. 3 (Singapore: Butterworths Asia, 1995), pp. 740-744, and *Japan (Taisho) Sea Fire Insurance Co. Ltd. v. Tianjin Branch of China General Foreign Trade Transportation Company*, in *ibid.*, pp. 745-748.

<sup>9</sup>A good statement in English of the position against unmediated incorporation is Zhaojie Li, "The Effect of Treaties in the Municipal Law of the People's Republic of China: Practice and Problems," *Asian Yearbook of International Law*, vol. 4 (London: Kluwer Law International, 1994).

<sup>10</sup>Jiang Guoqing, "Guoji fa yu guoji tiaoyue de jige wenti" (Some Issues of International Law and International Treaties), *Quanguo Renda Changweihui Fazhi Jiangzuo Jianggao Zhi Shisi* (National People's Congress Standing Committee Lectures on the Legal System, No. 14), July 4, 2001, available at <<http://www.npcnews.com.cn>> (website administered by the Office of the National People's Congress Standing Committee, News Bureau, Information Center).

<sup>11</sup>See Kong Xiangjun, "Tongyi jieshi yuanze yu WTO falü de sifa shiyong" (The Doctrine of Consistent Interpretation and the Use in Adjudication of WTO Law), *Fazhi Ribao* (Legal System Daily), Oct. 14, 2001, p. 3; Kong Xiangjun, "WTO falü de guonei shiyong" (The Domestic Application of WTO Law), *Fazhi Ribao* (Legal System Daily), Internet edition, Dec. 16, 2001; Kong Xiangjun, "Jianli yu WTO yaoqiu xiang shiyong de sifa shencha zhidu" (Establish a System of Judicial Review that Meets the Requirements of the WTO), *Zhongguo Faxue* (Chinese Jurisprudence), no. 6, 2001, pp. 3-14.

<sup>12</sup>See Cao Shouye & Wang Fei, "Zhongguo fayuan shiyong WTO guize" (The Application of WTO Rules by Chinese Courts), *Renmin Fayuan Bao* (People's Court Daily), Internet edition, October 15, 2001 and Cao Shouye, "Zhongguo ru shi dui renmin fayuan de yingxiang" (The Effect Upon People's Courts of China's Entry Into the WTO), *Renmin Fayuan Bao* (People's Court Daily), Internet edition, October 15, 2001.

<sup>13</sup>Quoted in Xu Lai, "Xiao Yang zai renmin fayuan 'ru shi' hou shenpan gongzuo zuotanhui shang tichu zhuanbian sifa guannian tigong sifa baozhang" (Xiao Yang Suggests Transforming Judicial Concepts and Providing Judicial Protections at Roundtable Discussion on People's Court Adjudication Work After Accession to the WTO), *Fazhi Ribao* (Legal System Daily), Nov. 21, 2001, p. 1.

<sup>14</sup>Donald C. Clarke, "State Council Notice Nullifies Statutory Rights of Creditors," *East Asian Executive Reports*, vol. 19, no. 4 (April 15, 1997), pp. 9-15.

theoretically higher, provision in the constitution, would override a very clear provision in an authoritative Chinese regulation in favor of a claim based solely on a right allegedly granted in one of the WTO agreements.

The practical import of this discussion is twofold. First, the fact that such an important issue—whether or not courts can or should directly apply the provisions of China’s treaty obligations without further domestic legal authority—could go unresolved for so long shows the limited role traditionally played by courts and the legal system in the Chinese polity. This question has not been answered because it has never been a very important question before. Second, assuming that the dominant official view is the one that will actually be adopted by courts and government institutions, this need not be a source of great alarm to foreign governments and traders. It is no more than the position taken by the United States respecting its own WTO obligations, and in any case the number of private lawsuits before Chinese courts potentially implicating private rights granted under the WTO agreements is likely to be small.<sup>15</sup>

#### CHINA’S ABILITY TO COMPLY WITH WTO COMMITMENTS AND PROCEDURES

This section will look at China’s ability to comply with WTO commitments and procedures with respect to its legal system in general, my particular area of expertise. I will not be attempting to predict whether China will indeed fulfill its commitments regarding, say, customs valuation procedures (see Para. 143 of the Working Party Report).

In assessing China’s ability to fulfill its commitments and to comply with WTO procedures in such matters as the Transitional Review Mechanism and dispute resolution, we need both to look backward and to look forward. Looking back, one cannot fail to be impressed by the amount of work that has been done so far in identifying, and revising or abolishing where necessary, laws and regulations inconsistent with China’s WTO obligations.<sup>16</sup> This work began, of course, long before China’s formal accession last November. The scope of the effort can be appreciated by seeing what the Ministry of Foreign Trade and Economic Cooperation is reported to have achieved by the end of 2000 in anticipation of WTO membership: the review of over 1400 laws, regulations, and similar documents, including six statutes (of which five were revised), 164 State Council regulations (of which 114 were to be repealed and 25 amended), 887 of its own ministry regulations (of which 459 were to be repealed and 95 amended), 191 bilateral trade agreements, 72 bilateral investment treaties, and 93 tax treaties.<sup>17</sup> In the first 2 months of the year 2001, the various ministries and commissions of the State Council are reported to have reviewed some 2300 laws and regulations, of which 830 were identified as in need of repeal and 325 as in need of revision.<sup>18</sup>

Needless to say, the process of trying to identify inconsistent regulations in the abstract is bound to miss many problem areas. Identifying inconsistency is sometimes easy, but at other times takes a high level of expertise and a full hearing by a dispute settlement panel in the context of a particular set of facts. Thus, we should not be surprised if many inconsistencies remain despite the government’s efforts. Nevertheless, I believe that the government has so far shown a great deal of energy in addressing problems of legislative inconsistency.

Outside of the field of legislative revision there has also been a great deal of activity. The last several months have seen a flood of new regulations designed to implement China’s commitments. There have also been countless training sessions for Chinese officials, many with foreign financial support.<sup>19</sup> The government has begun

<sup>15</sup>The main areas where rights under WTO agreements might be directly asserted are (1) administrative litigation against Chinese government departments for (for example) failure to grant permits on a most-favored-nation basis, to reduce tariffs, or to take other actions promised in China’s accession protocol, and (2) proceedings to enforce intellectual property rights, in which the substantive and especially the procedural protections of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”) could be attractive to plaintiffs.

<sup>16</sup>As this statement is intended to be largely forward-looking, it is not the place to canvass in detail what China has already accomplished in terms of WTO implementation. The United States-China Business Council has compiled useful summaries that can be found at <<http://www.uschina.org/prcwto.compliance.pdf>> (dated June 2001) and on page 14 of the January-February 2002 issue of the China Business Review (dated September 2001).

<sup>17</sup>Nan Xianghong, “WTO: fa de chongxin goujia” (WTO: The Restructuring of Law), Nanfang Zhoumo (Southern Weekend), Oct. 25, 2001.

<sup>18</sup>Ibid.

<sup>19</sup>A partial, but nevertheless very long, list of such programs can be found in Brian L. Goldstein & Stephen J. Anderson, “Foreign Contributions to China’s WTO Capacity Building,” China Business Review, vol. 29, no. 1 (Jan.-Feb. 2002), pp. 10–11.

restructuring to facilitate the meeting of WTO requirements. For example, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) has established a Department of WTO Affairs to handle implementation and litigation, and a “China WTO Notification and Enquiry Center” in order to help implement its transparency commitments.<sup>20</sup> It has also established a Fair Trade Bureau for Import and Export to handle issues relating to unfair trade practices.<sup>21</sup> The courts, for their part, have also undertaken training and other activities, such as review for WTO-compatibility of existing Supreme People’s Court interpretations and other directives, designed to meet the requirements of WTO accession.<sup>22</sup>

While much work remains to be done, then, there can be little doubt of the energy and commitment shown so far by the government. And this is to say nothing of the enthusiasm for knowledge about the WTO displayed outside of government. Almost any lecture or presentation with the word “WTO” in it is guaranteed to draw a large audience, and indeed among urban Chinese the English abbreviation is probably as common as, if not more common than, the original (and shorter) Chinese abbreviation (shi mao).

Looking forward, I am generally sanguine about the prospect of China’s compliance with its commitments and its willingness and ability to modify its rules if it loses a WTO dispute settlement proceeding. But there will be disappointments, and it is necessary to understand and anticipate them in order to put them in proper perspective and distinguish real and pressing problems from temporary and minor ones.

As noted earlier, China undertook in Para. 67 of the Working Party Report to meet its WTO commitments “through revising its existing laws and enacting new ones fully in compliance with the WTO Agreement.” The extent to which China revises its existing laws and promulgates new ones is something that can be monitored with relative ease. But clearly it is not enough simply to promulgate new regulations. They must be applied and enforced. Here, there are at least two major issues worthy of discussion.

The first is the extent to which local governments will engage in WTO-inconsistent practices that the central government is unable or unwilling to stop. We should be clear about one thing: there is no question that, as a legal matter under China’s constitutional system, local governments may not do what the central government forbids them to do, and must do what the central government requires them to do. Because the central government has the legal capacity to require local governments to conform to WTO obligations, it has the obligation to do so.

Some members of the WTO Working Party on China’s accession were reported to have expressed concern that subnational governments in China might take measures inconsistent with China’s WTO obligations, and that the central government would not or could not remove such measures. The representative of China assured them (see Para. 70 of the Working Party Report) that local governments had no autonomous authority over trade-related matters, and that the central government would “ensure” (not merely take the “reasonable measures” called for by Art. XXIV:12 of the General Agreement on Tariffs and Trade (the “GATT”) 1994) that local government regulations conformed to China’s WTO obligations. This assurance is one of China’s formal commitments. Art. XXIV:12 of the GATT 1994, which presupposes a degree of independence on the part of local governments, simply does not apply.

Obviously, however, the real question is not quite so simple as the legal question. Subnational governments in China can enjoy considerable *de facto* autonomy from Beijing; this is a fact, not simply a convenient excuse for inaction cooked up by the Chinese central government. China suffers from numerous internal trade barriers that the central government is continually struggling, often unsuccessfully, to remove. We should not be surprised if, with the best will in the world, it has at least as much difficulty removing barriers to foreign goods and services.

<sup>20</sup> See Ministry of Foreign Trade and Economic Cooperation, “Guanyu Zhongguo zhengfu WTO zixun dian zixun banfa (zanxing)” (Measures Regarding the Making of Inquiries at the Government of China’s WTO Inquiry Point (Temporary)), issued Jan. 1, 2002, effective Jan. 14, 2002. This document provides the inquiry point with the official English name of “China WTO Notification and Enquiry Center.” A report dated April 11, 2002 stated that as of that time the Center had received over 300 inquiries. See Xinhua Wang (New China Net), “Jiangqiu chengxin! Woguo qieshi luxing jiaru shimao zuzhi de gexiang chengnuo” (Stress Sincerity! China Conscientiously Implements Each Commitment Made Upon WTO Entry), April 11, 2002, available at <<http://www.exin.net/economic/itemview1.jsp?id=334638>>, last visited June 3, 2002.

<sup>21</sup> See Xianwu Zeng, “Trading Rights After China’s WTO Entry,” *China Business Review*, vol. 29, no. 1 (Jan.-Feb. 2002), p. 19.

<sup>22</sup> For a general account of activities within the court system, see Guoguang Li, “To WTO Accession, Chinese Courts Think Ahead,” *China Law*, February 2002, pp. 58–59.

The phenomenon of local protectionism is one that has attracted the attention and concern of academics and policymakers in China for some time. Internal trade barriers are just one aspect of it; favoritism to local parties in courts is another. But it is important to understand that it is not just foreigners who want to get rid of it. It is generally in the interest of the central government to expand its own sphere of actual authority and to reduce such local protectionism, and it is practical considerations more than ideological ones that have stood in the way of progress in this area. It has been proposed for years, for example, that judges in local courts should be appointed and salaried by the central government instead of the local government. So far, however, the central government has not been willing to expend the political and financial resources necessary to put this reform into practice. But pressure for such reform is building, as shown by the recent appearance in *Jingji Yaocan*, the internal (non-public) journal of the State Council's think tank on development issues, of an article advocating precisely such a reform.<sup>23</sup>

The main factor behind local economic protectionism is the dependence of local government upon local enterprises for revenues. To the extent a government takes revenues, whether in the form of taxes or profits, from an enterprise, it is of course not unlike an owner and has the same interest in protecting those revenues. When the owner of an enterprise can control the conditions under which that enterprise competes, the results are utterly predictable. With the further progress of economic reform in China, one might expect to see a widening of the tax base and a reduction of the dependence of local governments upon specific enterprises for revenues. Needless to say, however, the influence of powerful local businesses seeking protection will not disappear in China any more than it has disappeared in China's trading partners.

The second issue I wish to raise here is that of the capacity of China's courts to handle a substantial workload of reasonably complex cases. Here the news is neither especially good nor especially news, since it has been widely known for some time that China's courts are weak and its judges, on the whole, poorly qualified. China's courts will continue to present difficulties in the years ahead. On the other hand, as in many other areas of Chinese legal and political life, we can expect the most reform in areas where there is a solid domestic constituency for it, and court reform is undoubtedly one of those areas. The key issues in court reform from the standpoint of China's fellow WTO members are the qualifications of judges, the willingness and capacity of courts to render fair judgments free of corruption and pressure from local government, and the ability of courts to execute those judgments once rendered.

The low qualifications of China's judges are no secret, and indeed are a regular subject of discussion by high government officials, including the President of the Supreme People's Court.<sup>24</sup> As of 1995, for example, only 5 percent of China's judges nationwide had a 4-year college degree in any subject (let alone in law),<sup>25</sup> and it is currently estimated that about 10 percent of judges have 4-year college degrees in law.<sup>26</sup> A 1998 study of nine basic-level courts (the lowest level) in a major provincial city revealed that only 3 percent of the judges had a bachelor's degree in law and that the "great majority" had had other types of jobs in the court administration such as bailiff, clerk, or driver before being promoted to the rank of judge.<sup>27</sup>

The frequency with which situations such as this are reported suggests strongly that there is no political difficulty with advocating reform and that such advocacy is supported in important sectors of the central government. China has in fact recently taken solid steps toward improving the qualifications of judges. Last March, for example, saw the first administration of a new unified judicial examination for lawyers, prosecutors, and judges. Although sitting judges will not be required to

<sup>23</sup> See Wang Xu, "Tuijin sifa tizhi gaige, ezhi sifaquan difanghua qingxiang" (Push Forward Reform of the Judicial System, Block the Trend Toward Localization of Judicial Power), *Jingji Yaocan* (Economic Reference), no. 74, 2001 (Nov. 31), pp. 11–22.

<sup>24</sup> See the remarks of Xiao Yang reported in "Xiao Yang zai renmin fayuan 'ru shi' hou shenpan gongzuo huiyi shang tichu zhuanbian sifa guannian tigong sifa baozhang" (Xiao Yang Proposes to Change Judicial Concepts, Supply Judicial Guarantees at Conference on Adjudication Work of People's Courts Following WTO Accession), *Fazhi Ribao* (Legal System Daily), Internet edition, Nov. 21, 2001. Two other senior Supreme People's Court officials comment to the same effect in Guoguang Li, *supra* note 22, pp. 55–60, and Cao Shouye, *supra* note 12. However accurate the comments, one must wonder about morale among lower court officials constantly held up for contempt by their superiors.

<sup>25</sup> See Deng Ke, "Sifa gaige: xianshi yu keneng" (Judicial Reform: Reality and Possibilities), *Nanfang Zhoumo* (Southern Weekend), Internet edition, Oct. 25, 2001.

<sup>26</sup> Author's interview with members of Beijing University Faculty of Law, March 2001.

<sup>27</sup> See Li Xiaobin, "Shenpan xiaolu ruhe neng you da fudu tigao" (How Can There Be a Large Increase in the Efficiency of Adjudication?), *Faxue* (Jurisprudence), no. 10, 1998, pp. 52–54.

take or pass the examination, to require this of judges going forward is already a very far-reaching (indeed, surprisingly so) reform at this stage of China's legal development—so far-reaching, indeed, that one wonders whether the pool of those who pass and are willing to serve as judges will be big enough to serve the needs of the court system. In any case, however, this reform—and the political difficulties that must have been overcome to effect it—is solid evidence of the potential for significant reform to occur where there is a domestic constituency for it. Fortunately, there is a domestic constituency for significant further reforms in the judicial system.

In addition to the problem of the quality of judges, China's courts are at present not fully reliable as enforcers of statutorily guaranteed rights. This is true for a number of reasons. First, while statutes are superior to regulations issued by government ministries in China's formal constitutional structure, a ministry regulation that is directly on point will generally be considered in fact to be directly applicable rule by both government officials and court officials. This is simply a matter of what might be called customary legal culture; it has been both noted and criticized in China as well as abroad,<sup>28</sup> and among many critics WTO accession was viewed as a helpful spur to change. Nevertheless, change will not come quickly. Second, there is the well known problem of corruption in the judiciary. This problem is not of course unique to China. Third, Chinese courts often have difficulty enforcing their judgments. As this problem is also well known and has been the subject of considerable commentary elsewhere by myself and others,<sup>29</sup> I will not go further into it here.

Fourth, and less well known, is the tendency of Chinese courts not to aggressively seek jurisdiction over cases, but on the contrary to fear it and often go to great lengths to avoid taking difficult or sensitive cases. Courts in China have the choice of accepting or not accepting a case. This is somewhat akin to the institution of summary judgment in its gatekeeping function, but very much unlike it in that it is not governed by any consistent set of principles other than the court's general sense of whether the case seems meritorious and deserving of further proceedings. Courts can use this power simply to decline to hear, and thus avoid ruling on the merits of, cases that look troublesome and likely to cause serious offense to powerful interests no matter how the court decides.

Most recently, the Supreme People's Court of China stirred up a major controversy when it instructed lower courts simply to stop accepting shareholder suits for damages based on certain violations of China's Securities Law.<sup>30</sup> This instruction, it is important to note, was not based upon a theory that the shareholders had no legal right of action under the Securities Law. It was explicitly based on the grounds that adequate procedures had not yet been worked out for hearing such suits, and that they would therefore have to wait.<sup>31</sup> The real reason was simply that the courts were terrified of a number of looming actions in which shareholders were bringing, or about to bring, suit in several courts around the country, and the specter of overloaded judicial resources and inconsistent decisions on similar facts was too much to contemplate.

Just a few months ago, on January 15, the Supreme People's Court finally announced that investors would be allowed to proceed with actions based on claims of false disclosures in securities trading, but only where China's Securities Regulatory Commission had established the existence of such false disclosures.<sup>32</sup> While this is no doubt welcome news to investors, it underscores the casual attitude toward statutorily granted rights taken not only by government agencies, but by the courts themselves. The Court apparently agrees with the plaintiffs that they State a valid claim under the Securities Law, but has interposed, without any statutory foundation whatsoever, the CSRC as a gatekeeper in order to ensure that claims

<sup>28</sup> See, for example, Donald C. Clarke, "State Council Notice Nullifies Statutory Rights of Creditors," *East Asian Executive Reports*, vol. 19, no. 4 (April 15, 1997), pp. 9–15.

<sup>29</sup> See Randall Peerenboom, "Seek Truth from Facts: An Empirical Study of the Enforcement of Arbitral Awards in the People's Republic of China," *American Journal of Comparative Law*, vol. 49, no. 2 (2001), pp. 249–327, and Donald C. Clarke, "Power and Politics in the Chinese Court System: The Execution of Civil Judgments," *Columbia Journal of Asian Law*, vol. 10, no. 1 (Spring 1996), pp. 1–125.

<sup>30</sup> See Supreme People's Court, "Guanyu she zhengquan minshi peichang anjian zan bu should de tongzhi" (Notice on Temporarily Not Accepting Securities Cases Involving Civil Suits for Damages), Sept. 21, 2001.

<sup>31</sup> See "Gao yuan biaooshi shenli zhengquan jiu fen an jiang zhubu tuikai" (Supreme Court Indicates that the Hearing of Cases Involving Securities Disputes Will Gradually Be Increased), *Zhongguo Zhengquan Wang* (China Securities Net), Oct. 11, 2001, available at <<http://www.cnstock.com>> (reporting remarks of Supreme People's Court official Cao Shouye).

<sup>32</sup> See Richard McGregor, "China to Allow Investors to Sue Listed Companies," *Financial Times*, Internet edition, Jan. 15, 2002.

not approved by the government will not come before the courts. (And all other claims remain barred for at least the time being.)

WHAT KIND OF LEGAL SYSTEM DOES THE WTO REQUIRE?

Despite the problems discussed above, it must be recalled that the WTO does not mandate a perfect legal system, or even a basically fair one, outside of a few specific areas. At times, according to some of the more ambitious claims, it seems that China must utterly revamp its legal and political system—in short, stop being China—or risk being found in violation of its WTO commitments. One analyst goes so far as to state that the national treatment and transparency requirements of the GATT require China to amend its constitution to eliminate any special position for the Communist Party and to delete or amend the word “socialism” to the extent that it implies or authorizes Party control over the operation of the legal system.<sup>33</sup>

This is going too far. First, the requirements of the WTO agreements for fairness and transparency are in fact surprisingly limited. The only WTO agreement that comes close to a general requirement of fairness in the operation of the legal system is the TRIPS Agreement. This agreement does indeed set forth in Part III (“Enforcement of Intellectual Property Rights”) a number of requirements for fair judicial proceedings for the protection of intellectual property rights.<sup>34</sup> However, it is worth noting that Article 41.5 specifically states that this Part [III] does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in the Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

Once this disclaimer of obligation is taken into account, there is not much left of the Part III obligations beyond the obligation to pass appropriate legislation. It is hard to see a strong mandate here for institutional reforms.

Moreover, the very fact that the requirements of Part III are specifically listed in the TRIPS Agreement suggests that those requirements do not apply to the other WTO agreements and do not attach to WTO membership generally; they could almost be read as a list of things a country’s judicial system does not need to have outside the realm of intellectual property. Finally, of course, the TRIPS Agreement’s obligations apply only to proceedings for the protection of intellectual property rights. These are a small part of the legal system’s activity.

Other WTO agreements such as the GATT and the General Agreement on Trade in Services (the “GATS”) also have provisions spelling out transparency requirements, but once again the obligation is more limited than generally assumed. Article X of the GATT contains requirements respecting transparency and the impartial administration of law, but these apply only to a limited subset of China’s laws: those affecting trade in goods. Similarly, the corresponding provision of the GATS applies only to scheduled sectors—those that China has agreed to open up at least partially.

In short, there is no general obligation under the WTO agreements to have a fair and well functioning legal system. That obligation applies only to specific actions in specific sectors. Of course, it is unlikely that a State could produce a fair and well functioning legal system in those sectors and be unable or unwilling to produce it in others. Thus, a good legal system is likely to be an all-or-nothing proposition. Nevertheless, it is important to bear in mind that the undoubted problems of China’s legal system cannot uniformly be condemned as violations of its WTO commitments. Many members of the WTO have or have had legal systems of questionable fairness, and nobody has ever suggested that that disqualified them from WTO membership. The fact that China happens to be a major actor in the world trading system, whereas these members may not have been, does not change the argument.

A second answer to the claims that accession requires major revisions to China’s entire legal system is to note that the WTO system cares much less about what you say than about what you do. The constitutions of the WTO member states contain any number of vague provisions susceptible of various interpretations, many of which might be WTO-unfriendly. But the issue for China’s trading partners is not whether its constitution gives primacy to the Communist Party in judicial proceedings. It is not even whether the Communist Party in practice controls judicial proceedings. It is whether those proceedings as actually conducted meet the GATT, GATS, and TRIPS Agreement tests of fairness and transparency.

<sup>33</sup> Pitman Potter, “The Legal Implications of China’s Accession to the WTO,” *China Quarterly*, no. 167 (Sept. 2001), p. 603.

<sup>34</sup> See generally Part III of the TRIPS Agreement, Articles 41 to 50.

The area of the Chinese legal system that will probably cause the most difficulty is its present inability to provide, at least on a consistent basis, truly independent review of administrative actions. The financial dependence of courts on local government is compounded first by the lower political status of judges relative to many of the officials whose actions they will be called upon to judge, and second simply by the tradition of judicial deference to administration. This tradition is reinforced in a very concrete way by the structure of courts, which are at every level part of the so-called "political-legal" system at the same level, a vehicle of Party control that coordinates the activities of courts, police, and prosecutors. Parties may be justly dubious of receiving an impartial hearing in an environment where *ex parte* contacts are common, corruption is widespread, and courts are allowed and even encouraged to contact superior courts (without notice to the parties) for their advice on specific cases before rendering a judgment.

Future reform is not, of course, out of the question. As I have noted earlier, the problems were diagnosed in China long ago and the solutions to at least some of them are there on the table: among them, for example, putting power over staffing and financing of courts to the central government, raising judicial salaries in order to attract a higher calibre of personnel, and ending the use of courts as a dumping ground for demobilized army officers.

Bearing in mind the problems outlined above, I shall now turn to a few specific commitments relating to China's legal system (I am not addressing here any of China's commitments respecting specific trade matters such as tariff levels, quotas, etc.) where I see potential difficulties in compliance. Three relate to transparency. In Para. 334 of the Working Party Report, China promised to make available in one or more of the official WTO languages all laws, regulations, and other measures pertaining to or affecting trade in goods or services, TRIPS, or foreign exchange control not less than 90 days following their implementation. Considering the vast array of potential sources of relevant measures, including central ministries, local governments and people's congresses, and even the court system, this is an astonishingly ambitious commitment. It is worth noting that despite the great thirst in the private sector for such translations, not a single service, commercial or otherwise, exists today that can truly say that it provides translations of all such laws and regulations. The universe is simply too vast.

China has undertaken a similarly vast commitment in Para. 336 of the Working Party Report. It has promised to designate one or more enquiry points where information about all laws, regulations, and other measures pertaining to or affecting trade in goods or services, TRIPS, or foreign exchange control, as well as texts, can be obtained. To fulfill this promise completely, the enquiry point will have to be fully informed as to all relevant provincial and local regulations from all parts of China. One wonders whether any country could carry this out successfully.

Finally, in Para. I.2.C.3 of the Accession Protocol, China has promised that any individual, enterprise, or WTO member can get information about any measure required to be published under the Accession Protocol at a designated enquiry point, and that a response must be forthcoming within 30 or at most 45 days. Although China has promised an "authoritative" reply only to fellow WTO members, it has nevertheless promised an "accurate and reliable" reply to individuals and enterprises. Even this standard could prove difficult to meet if the enquiry point is flooded with questions. In short, these three provisions all seem to promise to make available a kind of knowledge that does not currently exist, and which it will be very burdensome to provide.

Similar problems are likely to afflict the Transitional Review Mechanism, which on China's part consists primarily of the obligation to supply information. It seems inevitable that China will interpret the requirements for information narrowly, given the vast range of information called for. While procuring the statistical information called for is merely a question of requiring the relevant authorities to collect it, it will be more difficult to provide the complete lists of relevant regulations and administrative measures that are called for, since it will not always be obvious that a particular regulation may have an impact on, for example, trade in goods or services.

In addition to the specific problems indicated above, the Working Party Report and the Accession Protocol also pose somewhat contradictory demands both at the conceptual level and at the concrete level. They generally promote the strengthening of legal institutions in China, but in some places seem to promote the opposite and to encourage China to continue its tradition of administrative omnipotence. More generally, China's government is paradoxically being asked to exercise central power to further decentralization, and to exercise administrative power to strengthen judicial power.

Consider, for example, Para. 68 of the Working Party Report: China promised that administrative regulations, departmental rules and other central government measures would be implemented in a timely manner, and that if they were not changed in time, the government would still honor China's WTO commitments. Presumably China made this promise at the behest of the members of the Working Party, but it is tantamount to saying that the government may decide at any time simply to ignore its own duly promulgated regulations and to operate according to some other set of standards. Fortunately for the rule of law in China, the Chinese government was apparently not asked to promise to ignore "laws," i.e., legal requirements issued by a constitutionally superior body, the National People's Congress or its Standing Committee.

Perhaps more troublesome is the fact that apparently not only is the government to ignore its own regulations if they cannot be changed in time, but so also are the courts. Here, the issue is how courts are to be notified, other than through the normal process of formal repeal and replacement, that duly promulgated State Council regulations they would normally be bound to implement have lost their effectiveness. The only method would seem to be one that China's trading partners are in other arenas encouraging her to move away from: the unofficial note or telephone call from a senior official instructing courts how to operate in a way that is both arbitrary and opaque.

Similarly, Para. 203 of the Working Party Report contains a promise not to enforce the terms of contracts containing foreign exchange balancing, local content, or export requirements. The demise of such obligations will cause few tears among foreign investors. If the government is saying that as a regulator, it will decline to exercise its discretionary authority to seek sanctions against those who do not fulfill those terms of their joint venture contracts, that is one thing. But if it is claiming the power to order courts not to enforce, between parties, contract rights arising under laws passed by the National People's Congress or its Standing Committee (both constitutionally superior bodies), that is quite another. It may indeed have such power as a matter of fact, but whether China's trading partners should be encouraging its exercise is questionable.

#### CONCLUSION

China is a large country in which the central government has a serious problem in making its writ run in a number of sectors of activity. Moreover, it is just emerging from a period of extensive, and perhaps WTO-inconsistent, government control over economic activity. Even assuming the utmost good faith on the part of the central government, therefore, there are bound to be WTO-inconsistent measures and practices—quite possibly a good number of them—that persist after China's accession. Those who predict problems are not wrong to point this out. What is unlikely, however, is that these problems will amount to more than routine frictions, and will bring either China or the world trading system crashing down, or will require major changes in the way China is governed, such as removal of the Communist Party from its traditional spheres of influence.

First of all, any dispute settlement proceedings that are undertaken will take time. This is insufficiently realized by many Chinese commentators, who are afflicted perhaps by too strong a sense of urgency. It is commonly said, for example, that the need to identify and revise inconsistent regulations is pressing because if inconsistencies are found once China is in the WTO, its trading partners can impose trade sanctions. In fact, of course, the process is not nearly so fast. The complaining State would first have to notify China of its complaint and enter into discussions with it; only if it were dissatisfied with the results might it bring a proceeding under the WTO's dispute settlement procedures, and if China ultimately lost it would then still have a reasonable time (Article 21.1(c) of the Dispute Settlement Understanding suggests 15 months as a general guideline) within which to modify the offending regulations.

Second, it has become clear even in the very short time since China's accession that its trading partners have no intention of flooding the Dispute Settlement Body with complaints. Individual companies cannot bring complaints in this forum against WTO members; only other member governments can. The trade authorities of those member governments have limited resources and must pick and choose the cases they want to bring. Moreover, they are limited by diplomatic considerations. Thus, there is no evidence of a hurry on anyone's part to bring large numbers of complaints.<sup>35</sup>

<sup>35</sup>See, e.g., Reuters, "US Business Says [sic] Patient on China WTO Commitments," Feb. 8, 2002.



I would like to end with a few words on potential United States assistance with compliance and capacity-building. Because of China's relative lack of experience with a market economy, it is inevitable that despite the government's efforts to identify and weed out WTO-inconsistent legislation, some inconsistent rules and practices will remain, and new ones will crop up. It is in fact likely that many such inconsistent rules will be discovered over time. As I have discussed, the government has already devoted considerable energy to making Chinese laws and regulations consistent with its WTO obligations. As in any country, there may be rules the government wishes to retain that its trading partners view as questionable under WTO principles, like the E.U.'s rules on bananas or the U.S. rules on Foreign Sales Corporations. And there may be rules that displease China's trading partners that do not in fact run afoul of the WTO agreements. But there is no reason to doubt that the government is in principle genuinely committed to getting rid of many of the old rules that shackled the economy and has seized WTO accession as an opportune moment to do it. There is no reason to think that the Chinese government is committed to defending every WTO-inconsistent rule to the bitter end.

The United States is now very much involved, both at the governmental and the non-governmental level, in activities aimed at promoting compliance and building capacity. These activities should continue. Considering the volume of trade at stake, the required expenditure is probably quite modest.

The United States should work with China to develop formal mechanisms—some of which are already in existence—that can identify questionable rules and practices, hear arguments from affected parties, and deliver advice to the appropriate governmental body on the WTO-consistency of the rule. This would give the Chinese government the opportunity to continue, in a structured and unified way, its review of its own regulations, and could serve to obviate the need for formal WTO dispute resolution procedures in many cases.

In particular, compliance and capacity-building efforts should be directed at local governments. The degree of local government commitment to reform and receptivity to WTO standards and principles varies. But almost all local governments have one thing in common: they are drastically less informed than the central government about the WTO in general and about China's specific commitments in particular. Only recently have the WTO accession documents been available in Chinese (they can now be downloaded from MOFTEC's web site), and even so it is no more realistic to expect Chinese local officials to understand their details than to expect American local officials to understand the WTO. There is a great need at the local level for seminars and workshops that will explain the basic principles of non-discrimination and transparency. Local governments need to be encouraged to set up their own offices for hearing and resolving complaints about WTO-inconsistent measures so that recourse need not be had to Beijing or, failing that, the WTO Dispute Settlement Body.

It is important, however, to pay some attention to the target audience. It may make a great deal of sense to train judicial officials in the principles of transparency and due process, for example, but they have very little need to be acquainted with China's substantive commitments under the WTO. Those commitments mean little to courts until they have been translated into domestic law. On the other hand, it is probably a good idea to train local government officials in the principles of non-discrimination and national treatment, since the granting of special breaks and favors on an ad hoc basis is a deeply rooted government practice as natural and unremarkable as breathing.<sup>36</sup>

I sometimes think of the Chinese legal system as an aircraft carrier, and of foreign assistance projects as rowboats attempting to change its course. To a very large extent, the path of that aircraft carrier will be determined by what goes on in the engine room and on the bridge. This is a counsel not of despair but of humility, patience, and thoughtfulness. Effective compliance and capacity-building programs must be designed to work over the long term and to build relationships with specific institutions. They must strike the balance between asking too much and asking too

<sup>36</sup>In its 2002 National Trade Estimate Report on Foreign Trade Barriers—China (March 29, 2002), p. 48, the Office of the United States Trade Representative reflected concerns that local officials "do not understand China's WTO commitments." These concerns seem well founded. See, for example, the (barely) post-accession Zhejiang Province Regulations on Protecting the Investment of Taiwanese Compatriots (Zhejiang sheng Taiwan tongbao touzi baozhang tiaoli) passed by the Zhejiang Provincial People's Congress Standing Committee on Dec. 28, 2001 and effective January 11, 2002. These regulations promise special benefits for Taiwanese investors, thus apparently violating most-favored-nation principles to the extent that the investment is in a sector covered by, for example, the GATS, and further specifically encourage investment in projects that will produce for export. To the extent that the "encouragement" constitutes an export subsidy, it will of course violate the GATT.

little, either of which will lead to nothing being done. And the U.S. must be willing to work with and through non-governmental organizations, other WTO members, and multilateral organizations in order first to demonstrate that WTO compliance is not simply a narrow American political interest, and second to avoid having discussions about Chinese compliance with multilateral standards turn into possibly contentious, and certainly fruitless, discussions about U.S. trade practices vis-a-vis China.

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PREPARED STATEMENT OF JEFFREY L. FIEDLER

JUNE 6, 2002

Thank you Mr. Chairman for this opportunity to appear before the Commission. I would like to offer some thoughts on the commercial rule of law and the WTO and raise what I believe is a policy question that must be addressed by the United States government in its dealing with the PRC over the next few years.

There is widespread and legitimate concern within the Congress, the executive branch and the business community about whether China will fully comply with WTO rules and the agreements it made when it gained entrance. This concern has roots in three concerns: one, Chinese government officials and business executives do not understand the complex maze of rules and agreements; two, China has a dismal record of compliance with bilateral and international agreements; and three, the concern that domestic unrest will cause the Chinese government to ignore or, at a minimum, postpone compliance with its agreements. These concerns are further complicated by the prospect that compliance is expected under the tutelage of a new group of little known and untested national leaders about to assume power.

Permit me, as a non-lawyer, to make a few comments on the rule of law generally and commercial law specifically. All discussion of the law in China must be had with the understanding that there is no rule of law as we know it in China. Legal concepts of any variety or derivation do not guide government officials, business executives or ordinary citizens in their daily lives. It is power, specifically the power of the Communist Party, which guides most decisions of consequence in China. That is not to say that everything is simple, it is not. The complex web of power relationships is ever changing. There are various dynamics of power at work, but none of them are rooted in the participants' desire to comply with one law or another.

During the various debates in the Congress over the past decade we have heard much about the power of free trade and capitalism to bring about change in China. Now that the principal debate is over, we are hearing less about it. But, what we are now hearing more about is the rule of law, and the how commercial law can help change China. I hope we don't have to hear too much about this for just as capitalism doesn't bring democracy, commercial law does not give birth to the rule of law. Commercial law was pretty well developed in Mississippi and elsewhere in the 1960's, but respect for the rule of law left much to be desired.

If the US government and the business community want to experiment with developing a system of functioning commercial law within the context of authoritarian political rule so that American corporations can do business in China with some measure of what they perceive to be equity and predictability, so be it. But, we should be spared the rationalizations about how much this contributes to the development of civil society.

If the US government wants to spend taxpayer money training Chinese "judges" so they can better understand contract law, so be it. Just do it without pretending that this somehow advances the development of civil society. The problem with the Chinese legal system is not untrained judges. The problem is that it is not a legal system. It is a system designed primarily to maintain the power of the Communist Party, and only secondarily to govern the conduct of individuals within society. It certainly has no significant function in governing the relationship between the government and its citizens.

Training lawyers and judges absent systematic change is analogous to training the officials of the All Chinese Confederation of Labor (ACFTU) to be better labor leaders. Certainly safety and health training for staff at all levels of this phony union structure is intrinsically a good thing. It might even save a few people their arms and legs. But in the end, the ACFTU will still be a phony union, albeit with some staff who now know better what they are not doing.

The central concern of the Chinese government and the ruling Communist Party is so-called "social stability." It is also the primary concern of the United States government, and of US corporations. The US government expresses its concern slightly differently. At various times, mostly during political debates, the specter of "chaos"

has been held up for all to consider—a billion something people running amok. The net result has been a conscious decision among Members of Congress and various Administrations, both Democratic and Republican, to support efforts of the so-called “reformers” within the Communist Party. It has helped everyone rationalize this action knowing that few if any members of the Communist Party actually believe in communism any more.

The leaders of the Party believe in their own power. They believe that they can cobble together a new foundation of power based on economic growth. Foreign investment and trade is crucial to generating this growth. To the extent that it is necessary and in its interests, the Party is willing to share the fruits of this growth with foreign corporations. Both the Party and the US government viewed China’s entrance into the WTO as lubricant for this continuing economic relationship. Furthermore, both view it as a catalyst for continued change. The US views it as getting the Chinese used to complying with international rules, and the ruling Party views it as a convenient justification for such moves as dismantling its State enterprise system.

The question of continued “social stability” remains wide open. The critical issue is not whether China develops a deeply rooted system of commercial law, or even whether its various actors understand WTO rules and regulations. The real issue is what will the Party do when WTO implementation clashes with its own view of what is in its interests, i.e. threatens its continuing ability to rule.

It is in dismantling the State enterprises system that all of the many conflicts in China come together. No one outside China disputes the necessity of this. In the first instance, the Chinese financial system depends upon it. In any other country, the banking system would have already collapsed under the weight of the bad loans made to the State enterprises.

Despite foreign investment and various “economic reform” policies, the State enterprise sector still employs a majority of the industrialized work force in China. That it does so unproductively is beside the point. The destruction of this economic and social system creates a political reality. This political reality is further complicated by a pervasive corruption at all levels of politics and society. The corruption has produced a deep seated and widespread resentment among ordinary people, especially workers.

They do not trust their factory managers. Many of the managers have looted the enterprises. They do not trust their Party-controlled “unions”, the local leader of which is usually the deputy plant manager. No real labor leader, or lawyer for that matter, needs further training to know that workers expect to be paid for their labor. And yet, one of the most common reasons for worker unrest is the owing of back wages.

The Party’s greatest fear is that workers will revolt on scale. They believe that allowing the existence of independent trade unions is tantamount to giving up power. A number of US government officials I have spoken to over the years agree with them.

The Chinese government without the slightest hint of embarrassment entered a “reservation” on the clause concerning independent trade unions when it signed in 1998 the International Covenant on Economic, Social and Cultural Rights. The US business community, also without a hint of embarrassment, remained silent. I did not notice any noteworthy comment from proponents within the United States for the rule of law in China.

As a matter of policy both the United States and the ruling Party in China have bet worker unrest can be managed successfully. To be sure it has been “managed” successfully thus far. Workers are allowed to protest about legitimate grievances such as back pay so long as these protests are largely confined to the workplace, and so long as the workers don’t ask why the government let it happen. They are even allowed to engage in some disruption such as blocking traffic. The government moves relatively quickly to settle the dispute, usually by paying the workers a portion of what they are due. During the dispute, the security services usually determine who the leaders are. Afterwards, they are arrested, threatened, fired, or punished in some other way. These leaders are particularly dangerous in the minds of security officials. They have risen naturally out of the circumstances, and they have organized their peers. Rarely are they arrested in the workplace. Usually it happens at home and at night. It is a time-tested way of dealing with workers who display their entrepreneurial talent for organizing.

When the government believes a protest is getting out of hand or must be stopped it uses the People’s Armed Police. This is a force of some 1.4 million, whose growth from 300,000 in the early 1980’s mirrors remarkably the Party’s increasing concern with the impact of economic change. These troops are used primarily to deal with worker and farmer protests.

The key question for US policymakers is what will the United States government do if the increased pace of State enterprise “restructuring” results in the violent repression of workers on a mass scale? The Chinese government, in my view, is prepared to use force to suppress workers. One of the key determinants of the decision to use force in 1989 was the increased activity of workers in support of the students. It fears them.

It is somewhat ironic that compliance with WTO requirements is the justification most likely to be used by the Chinese government for repressing workers. The reality is that workers are faced with no choice but to take to the streets in order to secure a modicum of what they deserve. Should they instead be allowed to organize independent unions to give strength to their aspirations, there would be many alternatives. All of these certainly would involve real power sharing, a concept that is found in most countries respecting the rule of law. It is not that Chinese government and Party officials are stupid and do not understand the meaning of power sharing. It is simply still true that the Party is uninterested in sharing power with anyone. Its leaders think they can “manage” repression and maintain “social stability”. As far I can tell, the US government and business community think they are right, and have, at the very least, tacitly endorsed the Party’s policies. I think this is a grave mistake.

Thank you.

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PREPARED STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM MONTANA,  
CHAIRMAN, CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA

JUNE 6, 2002

Last December, we ushered in a new era with China’s formal entry into the World Trade Organization. Our task now is two-fold. First, to ensure that the Chinese government complies with the terms of accession and with the global standards of action embedded in the WTO. Second, to encourage continued progress in the development of commercial rule of law in China, both as a means to ensure WTO disciplines are being met, and as a means to a broader development of the rule of law in that country.

As China’s economy grew through the 1990’s, and its role as a major trading Nation became more significant, the need for China to be subject to WTO disciplines became increasingly urgent. Bilateral and multilateral negotiations took over a decade. We spent a year in the Congress on passage of PNTR. Now we turn to Chinese implementation of the commitments they undertook. The monitoring of China’s performance is a major task—for the United States, for China’s other trading partners, for the WTO, and for the Chinese themselves.

Chinese compliance is critical—to the United States, to the global economy, and to China’s own economic development. Compliance is one of America’s top trade priorities. We are talking about changes that will impact us now, not at some indefinite time in the future. It must be on the top of our agenda.

Why is this so important to the United States? First, total trade between the U.S. and China increased from \$5 billion in 1980 to \$122 billion in 2001, and China is now our fourth largest trading partner. Likewise, U.S. investment in China has grown astronomically. The United States is China’s largest source of foreign investment outside of Hong Kong, with \$34.4 billion invested in China between 1979 and 2001, and \$4.4 billion in 2001 alone. China is also the country with which the U.S. has the largest trade deficit. In 2001, our merchandise trade deficit with China was almost \$83 billion. We must have clear and understandable rules governing these relationships, along with far greater access to China’s markets.

China’s accession to the WTO should provide greater opportunities and predictability for American businesses operating there. Some of the changes China must make were to be implemented immediately upon accession; others are to be phased in over time under special transition rules. These were the terms of China’s accession, and they were the terms under which we granted China PNTR status.

The second reason WTO accession is so important to the United States involves the potential broader impact of the reforms China must undergo. Development of commercial rule of law will likely accelerate change in governance inside China. For example, one WTO requirement is the prompt publication of all laws, regulations, judicial decisions and administrative rulings relating to trade. WTO members must agree not to enforce those measures before they are officially published. And once those measures are published, they must be applied in a uniform, impartial and reasonable manner. This is a process far different than exists at present.

Another example is that WTO members must establish and maintain judicial, arbitral, or administrative mechanisms to review trade-related actions by government agencies. These must be able to operate independently of the agencies that carried out the actions in question. If implemented, this should contribute to the development of a more open, market-oriented society in which not only are the people bound by the laws and regulations, but so will be the government. China's membership in the WTO can be an important force driving the development of the rule of law. That is a priority goal of this Commission, and of the United States.

We are at an early stage in China's process of WTO adherence and commercial law transformation. Clearly, senior Chinese leaders are committed. National bodies have begun to reform and adjust thousands of laws, regulations, and judicial decisions that are not WTO-compliant. The Chinese government has welcomed assistance from foreign governments, as well as non-governmental and private organizations in conducting extensive training sessions on WTO requirements, administrative law, judicial reform, and a myriad of other topics. Chinese government officials, at all levels, have been eager to learn about the steps needed to ensure that it is complying with its commitments.

Yet, there have been mixed signals as to whether the Chinese government is willing, or able, to adhere to all of the commitments it has made. For example, while tariffs have been reduced and quotas have been eliminated in some industries, there are reports that equally protective non-tariff barriers have been erected in their place. Sanitary and phyto-sanitary standards have still been used in some areas with no scientific basis. Regulations that were supposed to be in effect at accession have not been promulgated.

There are also questions about the capacity of the Chinese government to implement the vast changes needed in so many areas. We need to explore this closely and see if there are ways that our government can assist more in capacity-building. Finally, although I have confidence in the commitment and determination of the senior leadership in Beijing to effect the required changes, questions exist about Beijing's ability to force provincial and local levels of government to change policies and practices. This will require continuing and close scrutiny.

We have embarked on a long and ongoing process. That is why the Senate Finance Committee tasked the General Accounting Office with a long-term investigation into China's WTO compliance. This study includes an examination of the legal and regulatory changes China is making, the actual effects in the marketplace on American business, and the activities of executive branch agencies in monitoring Chinese actions. We will hear more about this from our first panel of witnesses. Let me just note now that this GAO study can only proceed with full cooperation from the executive branch, and I expect all agencies to be cooperative and forthcoming with information, documents, and other assistance.

The task of the Congressional-Executive Commission on China will be to monitor the process, to watch how China implements its commitments, to gain an understand of how developments in the commercial rule of law are unfolding, and to assess the implications for broader rule of law developments, public participation, transparency in rulemaking, and administrative and legal accountability in China.

As we scrutinize China's WTO implementation closely, we must also remind ourselves that this is one step, albeit a major one, in a process of economic reform that began over two decades ago. We must evaluate the WTO process by looking both at a snapshot of the current reality and at the full video that incorporates trends over a 20-year period.

Today's hearing is the third held this year by the Congressional-Executive Commission on China. We have two distinguished panels to help us examine China's accession to the WTO, the commercial impact on American firms, and implications for legal reform and the rule of law in China. I look forward to their remarks.

PREPARED STATEMENT OF HON. JOSEPH R. PITTS, A U.S. REPRESENTATIVE IN  
CONGRESS FROM PENNSYLVANIA

JUNE 6, 2002

Mr. Chairman, thank you for holding this important hearing on WTO: Will China Keep its Promises? Can It?

Some might believe that China's entry into WTO will help resolve many of the problems in China's economy and society, particularly as member nations must comply with WTO regulations. WTO entry should help raise the standard of living for the Chinese people. However, Chinese leadership does not have a history of following international norms if those norms do not fit with the aim of the Chinese leadership: keeping control over the Chinese people.

In October 1998, China became a signatory to the International Covenant on Civil and Political Rights. However, China still has not ratified this Covenant. Unfortunately, contrary to the Covenant's clear statements about protection of freedom of religion, freedom of speech, freedom of assembly, freedom of worship, violations of those fundamental rights and others abound.

China's lack of compliance with the International Covenant on Civil and Political Rights does not bode well for compliance with WTO norms. However, unlike the Covenants, the WTO does have accountability measures that can be imposed if member nations fail to comply with WTO standards. That, and that alone, may force the Chinese government to keep its promises.

I look forward to hearing from our distinguished witnesses.

PREPARED STATEMENT OF HON. MARCY KAPTUR, A U.S. REPRESENTATIVE IN  
CONGRESS FROM OHIO

JUNE 6, 2002

I would like to thank Congressman Bereuter and Senator Baucus for convening a third hearing for Commission Members. I understand that the staff-led roundtable discussions have been continuing and the future schedule holds some potential.

Today's hearing on World Trade Organization (WTO) regulation implementation is an interesting choice for a hearing topic. As we all know, our Commission was charged with examining and monitoring human rights and the rule of law in China. It is my sincere wish that China will live up to its commitments on implementation. To say that I am skeptical, however, may be an understatement.

Nevertheless, for the purposes of this hearing, I will grant China great leeway. Let us suppose that China diligently works to come into compliance with WTO obligations. Will this lead to a new world of rights and freedoms for the Chinese people? I am doubtful.

Many proponents of Permanent Normal Trade Relations (PNTR) for China purported that China's entry into the WTO would lead to great reforms within Chinese society, creating a near utopia. I did not support unconditional PNTR and I don't support this naive, if not misleading, future-look. Let's be frank: rarely does commercial law lead to an expansion of human, labor and environmental rights.

I think it is safe to say that we all agree that any improvement in China's rule of law is a step in the right direction. Chinese officials must realize that rule of law means that all—including government officials—are held accountable and that the law can be used to protect, not just punish. Until now, the Chinese have been less than willing to keep their promises when it come to commercial trade agreements. If that Nation truly wants to be a world player, I encourage them to prove us wrong, to live well beyond the pessimistic predictions.

Commercial transactions may have logic, but they have no ethic. Most importantly, the people of China deserve a sincere effort by their leaders to uphold internationally recognized human rights—not as a condition of a trade agreement, but as a moral right.

QUESTIONS AND ANSWERS

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RESPONSE OF JON M. HUNTSMAN, JR. TO A QUESTION FROM REPRESENTATIVE WOLF

*Question.* [W]e had a briefing by our security people saying there is a major espionage program by the Chinese government against our private sector . . . . Have you had that briefing? . . . [If you have not had that briefing,] can you . . . get the briefings and then just drop a note to the [Commission] that you had the briefing?

Answer. I have contacted USTR's security personnel and have asked them to provide me with the briefing to which you refer.

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RESPONSE OF JON M. HUNTSMAN, JR. TO A QUESTION FROM REPRESENTATIVE LEVIN

*Question.* I think it would be helpful, even before the annual report, if you could give us in writing to this Commission an analysis of what you are doing, how the inter-agency mechanism works, where you are with the hiring of additional people to make sure that this annual review is truly meaningful, so that GAO undertakes its first review, it does not give you an E, or even a D.

Answer. Given China's importance as a major trading power and the breadth and complexity of China's WTO commitments, the Administration has set up a comprehensive inter-agency monitoring effort to determine the extent to which China is complying with those commitments. USTR's China Office is coordinating this initiative, which is being formally overseen by a newly created Trade Policy Staff Committee (TPSC) subcommittee whose mandate is devoted exclusively to China and the extent to which it is complying with its WTO commitments.

All TPSC agencies have been invited to participate in this newly created subcommittee. The subcommittee held its inaugural meeting on December 4, 2001, and, since then, has met on a monthly basis as it evaluates and prioritizes the monitoring activities being undertaken, reviews the steps that China has taken to implement its commitments and decides on appropriate responses.

The activities being overseen by the subcommittee are taking place on several fronts, with continual private sector involvement. In China, State Department economic officers, Foreign Commercial Service officers, Foreign Agricultural Service officers and Customs attaches are very active, gathering and analyzing information, maintaining regular contacts with U.S. industries operating in China, maintaining a regular dialog with Chinese government officials at key ministries and agencies, and working with personnel from like-minded Embassies of other WTO members. In Washington, an inter-agency team of experts, coordinated by USTR and including principally the Departments of Commerce, State, Agriculture and Treasury and the U.S. Patent and Trademark Office, is working closely with personnel from the U.S. Embassy and Consulates General in China as well as with U.S.-based trade associations and companies. Finally, at the WTO in Geneva, USTR has been active in voicing concerns about, and working with other WTO members to address, problems with China's implementation efforts as they arise.

At USTR, we currently have 4 persons in the China Office and 2 persons in the General Counsel's Office who devote most of their time to China WTO compliance matters. In addition, we will soon be adding one other person (in the China Office), who will assist in these efforts.

Many others at USTR also participate in monitoring China compliance matters as the need arises. They include USTR policy and legal experts on issues such as intellectual property rights, services, investment, technical barriers to trade, customs administration, import licensing, rules of origin, information technology, tariffs, subsidies, agriculture, and sanitary and phytosanitary measures. In addition, USTR's representatives in Geneva participate in various WTO meetings and reviews addressing China's compliance efforts.

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RESPONSES OF JON M. HUNTSMAN, JR. TO QUESTIONS FROM REPRESENTATIVE  
KAPTUR

*Question 1.* I would just appreciate, Mr. Ambassador, if you could provide to our record the list of firms that you have visited and what the wage level is of the people working therein, and whether they are Western investment in China or whether they are Chinese-owned companies, State-owned or otherwise.

Answer 1. I have visited numerous firms in China over the years.

Here is an illustrative list of the foreign-owned enterprises and foreign-Chinese joint ventures that I have visited:

Continental Grain Corporation—A joint venture with a Ministry of Agriculture state-owned enterprise, this venture is a grain and poultry processing facility in Tianjin, where Western management and free market principles positively impacted the culture of local employees.

Owens Corning Corporation—An insulation manufacturing facility in Shanghai, this venture is an example of a U.S. firm promoting Western management standards, practices and training to the local workforce.

ICI—The Imperial Chemical Company of England is a specialty chemical manufacturing facility in Shanghai which trained many qualified local employees in the practices of international marketing and management.

Foxborough—One of the pioneering U.S.-China joint ventures in Shanghai, which specialized in process control technology and equipment, this venture is famous for its early contribution to the U.S.-China commercial relationship and the creation of high-tech jobs.

These examples are in stark contrast to the State-run plants which I have visited, such as Number One Shanghai Television Factory, Gaochao Petrochemical Complex in Shanghai and Ningbo Chemical Works in Zhejiang, which typically had factories that were ineffective, antiquated and completely uncompetitive. In addition, based on my conversations with officials at the various firms that I visited, it is my understanding that the wages at the State-run firms were lower than those at the Western firms since there was no concept of incentive or competitive pay scales introduced by private industry.

*Question 2.* I would like to know if any of you could provide for the record information as to whether the United States is the major recipient of Chinese exported goods, or are other regions of the world equally graced?

Answer 2. Yes. The United States is China's largest export market. For calendar year 2001, the United States imported \$102.3 billion of goods from China.

#### RESPONSES OF GRANT D. ALDONAS TO QUESTIONS FROM SENATOR BAUCUS

*Question 1.* At one of the roundtables the Commission staff held recently, several witnesses noted that the United States was at a disadvantage in China because others, especially the European Union, were putting many more financial resources into training programs in the area of commercial law and training than the United States was. The concern was that legal developments and standards would then be more in tune with European ways of doing things, and that European companies would benefit at the expense of American business. Do you have any thoughts about this? Also, there are Commerce Department programs in other countries to promote commercial legal reform. What is the situation in China?

Answer 1. Other countries have invested significant amounts of money in WTO implementation programs for China. The European Union, Australia, Japan, and Canada all have aggressive WTO technical assistance programs, with substantially more funding than the United States. One estimate holds that the EU has spent over \$100 million on these kinds of programs in the last few years.

To the extent that other countries' technical assistance improves the transparency and predictability of China's trading regime, these programs are in everyone's interest. The Commerce Department is seeking joint opportunities with other countries to cosponsor training sessions with China. For example, our standards training in medical devices last August included a speaker from the EU. However, as you suggested in your question, should China adopt standards that are more compatible with those of other countries, for example European or Japanese standards, as a result of technical assistance sponsored by those countries, U.S. companies could be at a competitive disadvantage.

Regarding commercial legal reform, the Department has a long history of cooperation in the area of commercial law with our Chinese counterparts under the U.S.-China Joint Commission on Commerce and Trade Commercial Law Working Group. This cooperation is continuing under our recently announced legal exchange program. However, there is much more we could do to help China reform its commercial legal system and to help China implement its WTO commitments.

As you mentioned in your written question, the Commerce Department has demonstrated expertise in assisting other countries to develop their commercial legal systems. Through our Commercial Law Development Program (CLDP), we have used funding from the Agency for International Development to train lawyers,



judges, and government officials throughout Eastern Europe, the former Soviet Union, in Africa and elsewhere in Asia to promote commercial law. And we would like to do the same in China, as we believe this type of assistance would be welcomed by the Chinese and would provide benefits both to U.S. companies doing business in China and to the Chinese people, but we have not done so to date due to funding concerns.

*Question 2.* Much of our interest in trade with China seems to be focused on large multinational American corporations. Could you talk about the opportunities for small and medium size enterprises in the China market and how the U.S. Government assists them?

*Answer 2.* China has been and will continue to be an important and growing market for U.S. small- and medium-sized enterprises (SMEs). China's large consumer market and recent developments such as its accession to the WTO make China a promising market for SMEs. The Department has actively sought to promote the interests of small business in China. We have a number of activities planned or underway including:

- A medical device trade mission to China is scheduled for September 15–24, 2002. The recruitment process for this mission includes a strong outreach effort to SMEs. The mission will focus on identifying opportunities for sales of medical and dental devices, clinical laboratory products and related supplies.
- We organized a Franchising Trade Mission to Beijing, Shanghai and Hong Kong in June 2002. China offers tremendous business opportunities for U.S. franchisors which are keen to expand their businesses into this market.
- A Department team recently visited Shanghai, Beijing, Chengdu, Guangzhou, and Hong Kong to gather information for an ExportIT report on China which should be published in the next few months. This study will cover the telecommunications, IT, Internet, and electronic commerce industries and is aimed at helping SMEs expand into overseas markets.
- As a result of current and past Market Development Cooperator Program (MDCP) grants, numerous trade associations have established offices in China to assist SMEs. These offices help SMEs establish themselves in the China market, provide trade leads, and conduct market research.
- Through our China Virtual Trade Mission to China's Computerworld Expo we enabled 15 small- and medium-sized U.S. information technology companies to introduce their products to Chinese end-users. We also recruited SME representatives for Secretary Evans's trade mission to China in April of this year.

Additionally, ITA's Advocacy Center has assisted several small and medium-sized companies as they sought to secure contracts in China. Currently, the Advocacy Center is working with three small business companies on projects totaling \$245 million. These projects cover a broad range of sectors that include aerospace, coal liquefaction and aluminum products.

A California-based SME has, for example, signed a \$5 million contract to provide China with air monitoring and related services. This firm faced strong international competition but won the contract with extensive assistance provided by the Department of Commerce. During June 2002, a SME signed a contract to provide China with process design and other services that pave the way to the world's first direct coal-to-liquid fuel plant. The USG provided extensive support for this firm through the Trade Promotion Coordinating Committee.

Our Foreign Commercial Service in China, with offices in Beijing, Shanghai, Chengdu, Shenyang, and Guangzhou, has provided export assistance to approximately 225 small and 90 medium-sized U.S. companies since mid-2000. Extensive trade-related information on China is also available through websites, including the Trade Information Center site ([www.export.gov](http://www.export.gov)) and the China Gateway site ([www.mac.doc.gov/china](http://www.mac.doc.gov/china)) which contains a statistical profile of SME exports to China.

In 1999 (the most recent year for which detailed numbers are available), 10,086 SMEs exported merchandise to China—which is 83 percent of the total number of U.S. firms exporting goods to China—and accounted for \$3.3 billion in exports to China. The number of small and medium-sized firms participating in the Chinese market has grown at a rapid rate: between 1992 and 1999, the number of SMEs exporting merchandise to China rose by 221 percent. Over the same period, SME exports to China increased 85 percent, making China the seventh-ranking growth market for SMEs among the major U.S. markets.

China's recent accession to the WTO will provide many benefits for SMEs. China's accession to the WTO has improved the environment for trade, making it a more transparent and predictable place to conduct business. China's agreement to lower tariffs includes products of interest to SMEs like medical devices and building prod-

ucts. China has also agreed to open access to its telecommunications market by increasing foreign participation and investment. In addition, China has made commitments in the areas of pollution control. ITA has produced over 40 specific industrial goods and services sector reports that summarize China's WTO commitments.

In closing, I would like to reaffirm my commitment to working with both you and with the Commission to encourage respect for human rights in China, particularly as regards the practice of one's religious beliefs. I look forward to working with you toward that end. If there is anything else I can provide you in the way of information in the meantime, please do not hesitate to let me know directly.

RESPONSES OF GRANT D. ALDONAS TO QUESTIONS FROM REPRESENTATIVE WOLF

*Question 1.* Have you received U.S. intelligence briefings on China's espionage against U.S. companies that is occurring both in the U.S. and in China?

Answer 1. I have received briefings regarding commercial espionage. I intend to continue to follow the issue closely.

*Question 2.* Do any American companies speak out on behalf of human rights? Do you have any record?

Answer 2. The Department of Commerce maintains close contact with U.S. companies doing business in China and with U.S. associations involved in U.S.-China trade issues, but does not keep a formal record of companies that have spoken out on human rights. As a general rule, American ethical and managerial practices help shape the way U.S. firms run their factories, relate to their employees, and contribute to local community activities. Through these practices, U.S. companies set a positive example of corporate citizenship and contribute to the evolution of norms within China and a more open Chinese society.

Most U.S. companies conducting business in China make positive contributions to the country's social, labor, and environmental conditions by exporting to China not only products and services, but also their operating standards, best business practices, values, and principles. For example, the Beijing AmCham has recently established its Corporate Responsibility Committee and since 1998 the U.S.-China Business Council has been doing important work through its U.S.-China Legal Cooperation Fund. Other specific examples of how U.S. companies promote worker rights and worker well-being in China can be found in the 57-page report, "Corporate Social Responsibility in China" from The Business Roundtable, which is also available online at [www.brt.org](http://www.brt.org).

RESPONSE OF GRANT D. ALDONAS TO A QUESTION FROM REPRESENTATIVES WOLF AND KAPTUR

*Question 2.* Is the United States the major recipient of Chinese exported goods? What is the trade deficit today with China, and what was it over the last 20 years?

Answer 2. The United States is China's largest export market. For calendar year 2001, the United States imported \$102.3 billion of goods from China and had a bilateral deficit of roughly \$83 billion. Both U.S. exports to and imports from China have grown over the last 20 years as the Chinese opened their economy. The Chinese trade surplus has grown significantly during that period. I have attached the requested data (please see Attachment A).

ATTACHMENT A.—Trade Balance with China 1983–2001

(In US dollars)

|      | Trade Balance    | Exports Total<br>Fas Value | General Imports<br>CUSTOMS Value |
|------|------------------|----------------------------|----------------------------------|
| 1983 | (72,021,915)     | 2,172,071,017              | 2,244,092,932                    |
| 1984 | (60,776,999)     | 3,004,029,667              | 3,064,806,666                    |
| 1985 | (9,927,450)      | 3,851,738,104              | 3,861,665,554                    |
| 1986 | (1,665,517,101)  | 3,105,402,963              | 4,770,920,064                    |
| 1987 | (2,805,103,905)  | 3,488,357,323              | 6,293,461,228                    |
| 1988 | (3,479,280,774)  | 5,032,945,267              | 8,512,226,041                    |
| 1989 | (6,181,164,282)  | 5,807,371,217              | 11,988,535,499                   |
| 1990 | (10,416,554,934) | 4,807,332,470              | 15,223,887,404                   |
| 1991 | (12,688,964,907) | 6,286,832,744              | 18,975,797,651                   |
| 1992 | (18,205,935,594) | 7,469,573,056              | 25,675,508,650                   |
| 1993 | (22,767,730,198) | 8,767,103,939              | 31,534,834,137                   |

## ATTACHMENT A.—Trade Balance with China 1983–2001—Continued

(In US dollars)

|      | Trade Balance    | Exports Total<br>Fas Value | General Imports<br>CUSTOMS Value |
|------|------------------|----------------------------|----------------------------------|
| 1994 | (29,494,383,467) | 9,286,759,231              | 38,781,142,698                   |
| 1995 | (33,806,985,282) | 11,748,446,559             | 45,555,431,841                   |
| 1996 | (39,517,355,520) | 11,977,920,628             | 51,495,276,148                   |
| 1997 | (49,746,517,782) | 12,805,416,498             | 62,551,934,280                   |
| 1998 | (56,897,907,649) | 14,257,952,774             | 71,155,860,423                   |
| 1999 | (68,668,252,218) | 13,117,677,381             | 81,785,929,599                   |
| 2000 | (83,809,928,735) | 16,253,029,349             | 100,062,958,084                  |
| 2001 | (83,045,656,308) | 19,234,827,272             | 102,280,483,580                  |

Source: US Trade Statistics

According to the official Chinese statistics, the United States was the largest recipient of goods shipped from China in 2001. Hong Kong was second, and Japan was third.

## RESPONSES OF GRANT D. ALDONAS TO QUESTIONS FROM REPRESENTATIVE KAPTUR

*Question 1.* Provide examples of how China exports capital to the United States. What is China doing with its dollar reserves?

Answer 1. China has the world's second largest foreign exchange reserves (after Japan), totaling \$228 billion at the end of March 2002, according to official reports, and China's foreign currency reserves have more than doubled in the past 5 years, according to China's State Administration for Foreign Exchange. These foreign reserves help China to maintain a stable currency, which benefits both the U.S. and global economy.

While the exact amount of China's reserves denominated in dollars is not known, it is estimated that U.S. dollar reserves make up anywhere from 40 to 60 percent of the \$228 billion total. The bulk (approximately \$92 billion) of China's surplus foreign currency liquidity is believed to have been invested in U.S. securities, in the form of U.S. Treasury bonds and U.S. agency debt, according to Treasury and Federal Reserve statistics (March 2000). This benefits the United States as these kinds of foreign holdings keep the cost of borrowing low for the U.S. Government, and at the same time make more capital available, at lower interest rates, for U.S. companies to finance their operations and thus create wealth here.

Direct investment from China in the U.S. has been much smaller than its portfolio investment. At the end of 2001, China had \$306 million in direct investment in the United States, according to statistics from the Department of Commerce's Bureau of Economic Analysis. More information on foreign portfolio and direct investment in the U.S. can be found in the following reports: <http://www.ustreas.gov/tic/mfh.txt>, <http://www.ustreas.gov/fpis/shl2000r.pdf>, and <http://www.bea.gov/beat/di1.htm>.

By way of context, Japan is the largest holder of U.S. Treasury and agency securities, and China ranks fourth after Japan, the United Kingdom and Germany. If China's and Hong Kong's holdings were counted together, they would rank third, accounting for about 10 percent of the total Treasury securities held by foreign governments. By comparison, Japan has 27 percent of the total.

## Top Five Foreign Holders of Treasury Securities

(In billions of dollars)

| Country              | 2002 Mar | 2001 Dec | 2000 Dec | 1999 Dec | 1998 Dec |
|----------------------|----------|----------|----------|----------|----------|
| Japan .....          | 333.0    | 337.8    | 335.9    | 320.0    | 276.1    |
| UK .....             | 210.8    | 202.3    | 207.3    | 242.9    | 264.0    |
| Germany .....        | 85.0     | 87.4     | 88.6     | 96.8     | 95.1     |
| Mainland China ..... | 72.5     | 66.6     | 48.3     | 51.8     | 46.4     |
| Hong Kong .....      | 52.1     | 53.8     | 44.7     | 46.7     | 44.2     |
| Total .....          | 1227.7   | 1231.0   | 1203.6   | 1283.8   | 1273.8   |

Source: Department of the Treasury/Federal Reserve Board

## Value of Foreign Holdings of U.S. Long-term Securities By Major Country and Type

(As of March 31, 2000 in billions of dollars)

| Rank  | Country           | Total | Common stock | Other equities | US Treasury securities | USG agency debt | Corporate/municipal debt |
|-------|-------------------|-------|--------------|----------------|------------------------|-----------------|--------------------------|
| 1     | UK .....          | 534   | 288          | 34             | 73                     | 30              | 109                      |
| 2     | Japan .....       | 431   | 128          | 16             | 221                    | 43              | 22                       |
| 3     | Canada .....      | 209   | 151          | 22             | 14                     | 9               | 13                       |
| 4     | Germany .....     | 207   | 94           | 15             | 55                     | 8               | 35                       |
| 5     | Switzerland ..... | 187   | 131          | 17             | 18                     | 5               | 17                       |
| 10    | PR China .....    | 92    | 1            | 0              | 71                     | 20              | 0                        |
| Total | .....             | 3,558 | 1,474        | 235            | 884                    | 261             | 703                      |

\* Greater than zero but less than 0.5.

Source: Department of the Treasury/Federal Reserves Board

## RESPONSE OF GRANT D. ALDONAS TO A QUESTION FROM REPRESENTATIVE BROWN

*Question.* In private, non-state enterprises, is the right to collectively bargain markedly enhanced compared to state-owned enterprises? Are the wages significantly different?

*Answer.* Collective bargaining does not exist in China in the sense that we know it in this country since labor unions in China must be affiliated with the All-China Federation of Trade Unions (ACFTU), which is a state-controlled entity, and independent unions are banned. U.S. companies have been, on the whole, more supportive of worker participation than many other foreign investors, and some labor activists see activities of this sort as a positive step in the right direction. For example, an open union election in a Reebok factory in Shenzhen has resulted in a union committee that proportionally represents the factory's line workers, supervisors, and office workers. This union, while nominally associated with ACFTU (so that may legally operate), has been able to maintain functional autonomy. Reebok and Kong Tai Shoes Ltd. (Reebok's Hong Kong contract company), in coordination with Hong Kong non-governmental organizations, have actively supported both the election process and the subsequent training of the new union committee. Labor activists have praised this election, in which factory workers freely chose their union representatives using internationally accepted standards of candidate nomination, election campaigning and voting procedure.

There is a difference in wages. According to China's Ministry of Labor and Social Security and the State Statistics Bureau, the national average yearly urban employee wage in China is 10,870 yuan or about \$1,310. This can be subdivided into:

- State units average wage: 11,178 yuan (\$1,350)
- Urban collective units average wage: 6,867 yuan (\$830)
- Average wage of other urban employees (includes self-employed and privately employed workers in foreign and domestic companies): 12,140 yuan (\$1,470)

I believe that this will be aided by a trend that is going in the right direction—namely, the size of China's State sector has fallen in the past couple of decades and private ownership has grown.

## RESPONSE OF SUSAN S. WESTIN TO A QUESTION FROM REPRESENTATIVE WOLF

*Question.* We had a briefing by our security people saying there is a major espionage program by the Chinese government against our private sector. Are you aware of that? Have you had that briefing? Do you raise that when you are in China? Can all three get the briefings and then just drop a note to the committee that you had the briefing?

*Answer.* We are generally aware of the problem, based on our discussions with various U.S. officials before and during our travel to China, as well as our own security program. However, we have not had the specific briefing(s) you mention, and we are in the process of arranging to receive them, after which we will notify you through the Commission.

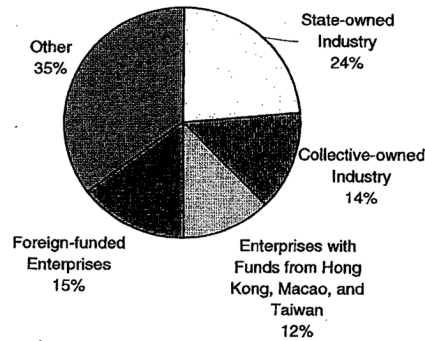
## RESPONSES OF SUSAN S. WESTIN TO QUESTIONS FROM REPRESENTATIVE KAPTUR

*Question 1.* Could any of the witnesses provide kind of a textural feel as to the ownership of these enterprises, as I have asked?

Answer 1. Chinese state-owned enterprises provide employment for almost 4 out of 10 urban workers (81 million employees out of 213 million total) in 2000. About 10 percent (21 million) of urban workers were self-employed. The rest were employed by entities with other forms of ownership, including private enterprises, foreign-funded enterprises, and cooperative units.

In terms of production, figure 1 shows that the share of state-owned enterprises was about a quarter of gross industrial output in 2000.

Figure 1: Shares of Gross Industrial Output by Status of Registration, 2000



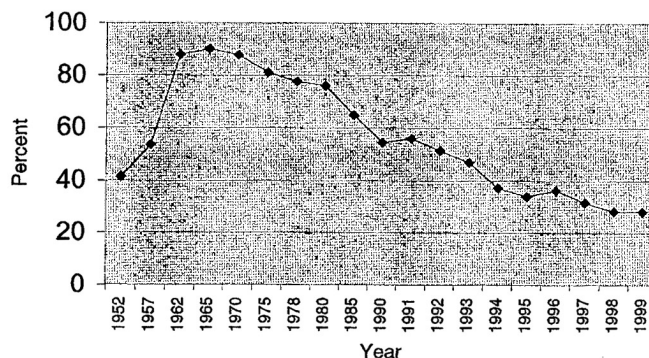
Note 1: Data on gross industrial output used to make this pie chart excludes non-state-owned enterprises with annual sales income less than 5 million Yuan (approximately \$600,000). Information on these excluded enterprises is not reported. Inclusion of these firms, if available, could change the distribution of these enterprise groups.

Note 2: Other types of registration status include cooperative, joint ownership (state joint, collective joint, joint state-collective), limited liability, share holding, and private.

Source: China Statistical Yearbook, 2001

Figure 2 shows that the share of state-owned and state-holding enterprises in gross industrial output has been falling over time. By 1999, the industrial output share of state-owned and state-holding enterprises was only around 28 percent, and the remaining 72 percent was accounted for by enterprises of other types of ownership.

Figure 2: Share of Gross Industrial Output of State-owned and State-holding Enterprises, 1952-99 (in percent)



Note 1: The share reported here includes both "state-owned" and "state-holding" enterprises. The China Statistical Yearbook, 2001, does not provide the exact share of the state-holding enterprises that the state owns.

Note 2: Data on gross industrial output used to make this pie chart excludes non-state-owned enterprises with annual sales income less than 5 million Yuan (approximately \$600,000). Information on these excluded enterprises is not reported. Inclusion of these firms, if available, could change the distribution of these enterprise groups.

Source: China Statistical Yearbook, 2001

*Question 2.* I would like to know if any of you could provide for the record information as to whether the United States is the major recipient of Chinese exported goods, or are other regions of the world equally graced?

*Answer 2.* The United States was the largest destination for Chinese exports in 2001, according to Chinese trade data. Table 1 shows the top five destinations for Chinese exports. It is important to note that U.S. and Chinese trade data differ significantly.<sup>1</sup> For 2001, Chinese trade statistics reported that \$54 billion (20 percent) of China's exports went to the United States. However, U.S. Customs statistics reported that China exported \$102 billion (38 percent of China's total U.S. imports) to the United States in 2001. In either case, the United States was the primary destination for Chinese exports.

China was the fifth largest supplier of imports to the U.S. market in 2001 at \$102 billion (9 percent of total U.S. imports), according to U.S. trade data. The European Union, Canada, Mexico, and Japan were larger suppliers than China. China was the seventh largest export destination for U.S. goods in 2001 at \$18 billion (3 percent of total U.S. exports). (See the Congressional Research Report, China's Economic Conditions, May 29, 2002, by Wayne Morrison (Issue Brief: IB98014) for a more detailed description of U.S.-China trade patterns.)

<sup>1</sup> China's trade data often differ significantly from those of China's major trading partners. One factor affecting this discrepancy is that a large share of China's trade passes through Hong Kong. China treats a large share of its exports that go through Hong Kong as Chinese exports to Hong Kong for statistical purposes, while many countries that import Chinese products through Hong Kong generally attribute their origin to China (instead of Hong Kong) for statistical purposes.

Table 1.—Top Five Trading Partners to Which China Exported, 1999–2001

| Rank | Country              | Exports<br>(US\$ in billions) |       |       | Percent of total Chinese<br>exports |      |      |
|------|----------------------|-------------------------------|-------|-------|-------------------------------------|------|------|
|      |                      | 1999                          | 2000  | 2001  | 1999                                | 2000 | 2001 |
| 0    | World .....          | \$195                         | \$249 | \$267 | 100                                 | 100  | 100  |
| 1    | United States .....  | 42                            | 52    | 54    | 22                                  | 21   | 20   |
| 2    | Hong Kong .....      | 37                            | 45    | 47    | 19                                  | 18   | 17   |
| 3    | Japan .....          | 32                            | 42    | 45    | 17                                  | 17   | 17   |
| 4    | European Union ..... | 30                            | 38    | 41    | 16                                  | 15   | 15   |
| 5    | Korea, South .....   | 78                            | 11    | 13    | 4                                   | 5    | 5    |

Note: China's trade data often differ significantly from those of its major trading partners (see footnote 1). For example, the U.S. Customs Bureau valued Chinese imports in 2001 at \$102 billion.  
Source: China's General Administration of Customs.

