

Testimony of Jeffrey L. Fiedler
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Commercial Rule of Law and the WTO
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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 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.