

Letter to colleagues regarding UNDP actions in China

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Boston University

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To: Colleagues
From: R.B.Seidman

This constitutes two documents. (1) Before hiring us, UNDP (the United Nations Development Programme) had tentatively budgeted US\$2.2 million (with matching funds from the Chinese Government for local costs) to draft bills in 22 priority areas. (We summarize these bills in an appendix at the end of the document). They hired my wife, Ann, and myself as consultants to advise them about how to spend their money. The first document attached is an edited-down version of the proposal that this past June Ann and I produced for UNDP and CICET (the Chinese Committee on International Cooperation, Exchanges and Trade, the designated Chinese Government agency for dealing with UNDP). (The original ran to about 125 single spaced pages, mostly even duller than these, so don't complain). As you will see, we transformed the project from one for drafting these priority bills into one for strengthening drafting services, drafting the priority bills as part of the training process.

(2) The second document consists of most of a brief report that we wrote the UNDP to attach to the Proposal, describing what we did in our four weeks in Beijing.

We propose to talk to this document, with several objects in mind:

1. We think that the whole UNDP process of project formulation is extremely sensible and practical; we will try to describe that process.

2. In the course of the process, we learned a great deal about the Chinese drafting and law-making processes. We will try to describe these.

3. Since we left China, we have not really had a chance to reflect upon the experience. We hope to use the occasion of our presentation to you (as Virginia Woolf said about writing generally) to discover what we think about it all.

4. The project must receive final approval from the Bureau of legislative Affairs, CICET, the Beijing Regional Representative of UNDP, and the New York headquarters of UNDP. Before we left, the first three had informally signed off; we understand that for bureaucratic reasons that have nothing to do with the proposal, some delay has been encountered, but UNDP Beijing faxed us last week to say that everything was on track. If all these approvals come through (perhaps by Christmas), there are good possibilities that some of you might get involved in the project. If BU agrees (the authorities will not come to decision until all the UNDP approvals are in) we may have 10 to 13 Chinese drafters here for as many as three consecutive Fall

semesters as visiting scholars, to read in comparative law in one or another of the 22 priority areas. Any of you who have an interest might direct their reading. In addition, each of the 22 priority areas calls for a consultant to lecture in Beijing on a particular substantive area for three weeks, with a possibility of a return for a week to critique the bills drafted in the particular area. I have included a sample of the consultancy specifications (save for the subject matter, all have almost identical language). A strong possibility exists that, if you choose, some of you might serve as consultants. In our presentation we hope to acquaint you generally with that possibility.

REPORT ON CONSULTATION RE
DRAFTING
BILLS AND REGULATIONS IN 22 PRIORITY AREAS AND STRENGTHENING
BUREAU OF LEGISLATIVE AFFAIRS DRAFTING CAPACITY
CPR/91/ /A/01/99

This brief report deals with two aspects of the preparation of the proposed Project on Drafting Bill and Regulations in 22 priority Areas and Strengthening China's Drafting Capacity: first, the participatory methodology employed for designing the training features of the Project; and, secondly, the changes in the previously-proposed budget that we, as consultants to the project, believe necessary to attain the Project's goals within the constraints of the \$2.2 million allocated for its completion.

1. A participatory needs assessment:

Together with Mr. Zhou Qing Pei of the Bureau of Legislative Affairs (BLA), we conducted an extensive participatory needs assessment as the basis for developing both the drafting and the training features of the proposal. The assessment aimed to discover the reasons for two pervasive difficulties with China's drafting processes: The inordinate delay in drafting legislation related to the Reform and open policy and the fact that, once enacted, some laws and regulations remained unenforced, did not resolve the social problems at which aimed, or even had perverse consequences. On this basis, we sought to identify the ways the proposed project could best assist in overcoming the causes of these difficulties.

For this purpose, Mr. Zhao arranged for us to meet on ten different occasions, most for about seven hours each, with five to ten members of each of the ten task groups appointed by the BLA. We used these meetings to explore the drafters' backgrounds and both formal and in-house training; the drafting process in BLA/DLAs; the drafters' perceptions as to the causes of the difficulties they encountered in drafting priority legislation; the apparent capacity of the drafters to structure the drafting problems they faced and the research required to resolve them; and their ideas as to how the Project might best help them overcome those causes. We prepared, and Mr. Zhao circulated in advance of the meetings, the attached agenda. [on our disk under "Meetings"].

As a result, we came to understandings that led to three changes in the original proposal. First, we came to understand the present uneven state of formal and on-the-job training among the drafters in terms of preparing them to draft legislation of the complex nature required to facilitate China's Reforms and open policy. We also obtained an insight into two particular difficulties encountered in China but not generally elsewhere. First, in China, in drafting bills, drafters have the task of resolving policy issues that in most other countries, not drafters, but policy makers (typically legislatures) resolve. As a result, major bills not infrequently become bogged down because the relevant ministries and government agencies cannot agree on critical policy matters. Unable to resolve these issues, the

drafters not infrequently resort to one of three strategies: (1) arguing conditions have not "matured" enough to draft a law on the issues, they postpone making any decisions; (2) they turn to foreign law and practice for a solution, too often with inadequate analysis of the completely different country circumstances that make those solutions inapt for China, obviously hoping that someplace in the world there exists some off-the-rack solutions that, could they but find it, they could copy into Chinese law, or (3) under pressure to produce results, they papered over controversial issues with vague wording that renders effective implementation difficult if not impossible.

Second, a number of Chinese drafters expressed the belief that a law ought in a single bill dispose of all the issues that the general heading of the bill might possible subsume -- for example, a single consumer protection law covering such diverse topics as false advertising, deceptive packaging, product liability and passing off. As a result, legislation required to deal with fairly simple problems remained unpassed because the drafters struggled to incorporate it into broader legislation which became bogged down over other, only marginally related, unresolved policy issues.

More generally, we became convinced that while of course Chinese drafters must study foreign law and practice, they must first develop a legislative theory to guide their drafting practice. Without such a theory, it seems unlikely that they can learn from foreign law and practice anything very useful for Chinese drafters. In short, to make their studies of foreign law

fruitful, they must first study legislative theory relevant not only to the problems of foreign law, but more generally to guide the whole drafting enterprise.

We therefore amended the proposal for training with a greater focus on providing China's drafters with legislative theory and methodology. We anticipate that training will enable them to deepen their understanding of the limits as well as the possibilities of law as a tool for dealing with the fundamental issues of development, to sharpen their research skills, and to lay a foundation for the fruitful study of foreign law and practice. As a result, they, themselves, will acquire the capacity to formulate new strategies for overcoming the drafting problems they face in producing, in a timely and effective fashion, drafts for the economic legislation and regulations China requires.

Second, the task groups' detailed review of existing practices relating to the way drafters conduct research and draft legislation also helped us to identify additional issues of methodology and procedure with which the Project's training features should assist the drafters to deal more effectively. These, too, we have sought to incorporate into the Project in the proposals for involving the drafters themselves in formulating new Rules and Regulations to guide the drafting process.

In particular, we have urged that early in the project BLA provisionally institute procedures to require that drafters accompany their drafts by a Memorandum of Law with a fairly precisely-detailed content, and to ensure that each draft receive

an organized group critique. The adequacy of the justification of a draft, of course, constitutes the only measure of the quality of the draft. Thus the proposal contains two result criteria, as well as a number of input success criteria (e.g., training courses, fellowships, study tours): As to production, that BLA draft the specified bills and regulations according to the proposal's schedule, and, as to quality, that they come accompanied by Memoranda of Law that meet the project's stipulated criteria.

Finally, it appears that there exists in China no treatise concerning drafting techniques in the Chinese language. We have therefore included provisions for seeing to it that selected BLA staff members write that treatise and accompanying teaching materials, and institute specific training in Chinese legislative linguistics and techniques.

2. Budget revisions:

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Draft UNDP Proposal

TO DRAFT 22 PRIORITY LAWS AND REGULATIONS AND STRENGTHEN THE CAPACITY OF THE BUREAU OF LEGISLATIVE AFFAIRS IN THE 1990S

A. Context

1. Description of the subsector

In 1979, China's leaders embarked on a bold programme of reform, aimed at transforming China's economy from a centrally planned one to a planned commodity economy (the Reform), at the same time making a strong opening to the outside world. They early came to realize, not only must law help to articulate relations within the planned sector and between the planned and the market sector, but that even the market sector of a planned commodity economy must rest upon a legal framework.

That is so for three reasons. First, markets consist of sets of buyers and sellers. They do not, however, strictly speaking, buy and sell things; they buy and sell title to things. Until the legal system defines ownership, markets cannot exist. Second, markets consist of interactive institutions -- banks, factories, stores, sets of buyers and sellers, trade unions, and so forth. Because people in markets act in repetitive patterns of social behavior, they constitute institutions. Unless the those repetitive patterns of behavior have a high degree of predictability, market actors will not hazard their capital. Without investment, markets cannot perform. Unless the law, backed by the power of the state, provides normative rules to guide people's market behavior, markets fail to achieve predictability. Finally, law constitutes government's principal tool for changing social behaviors. To change institutions, governments the world around invoke the machinery of the law to induce changed institutions. To define the market, to assure predictability, and to make possible planned change, China's Reforms must rest upon an firm legal basis.

China entered the Reform period, however, with a legal order long since decayed. At Independence, most Third World countries continued in force the old colonial legal system, changing it one law at a time. China, almost uniquely, declared invalid the entire corpus of its received (Kuomintang) legal legacy. After 1949, for a long time its senior leaders showed a marked preference for governing through administrative decrees rather than through legislation or formally adopted regulations. Formal law-making

activity stopped altogether during the decade of the Cultural Revolution. China entered the Reforms and the opening to the outside world with inadequate formally enacted laws.

Since 1979, China has enacted a number of laws, but a vast number of laws basic to a planned commodity market economy remain absent from the law books: banking law, advertising law, planning law, corporation law, domestic investment law, foreign trade law, and so forth. In all these areas social practices exist, held together by normative instruments of various sorts. However, they lack the four characteristics that would ensure the legal system provided the necessary underpinning for a market-oriented economy: normative rules that: (1) the authorities have publicly promulgated, and therefore which the key market actors can discover; (2) have emerged from society's legitimate, deliberative law-making system, and (3) have an internal consistency, so that market actors can obey them; and (4) have as much precision as the nature of the case admits, both to advise market actors of the probable consequences of their behavior, and to limit the discretion of officials.

In most countries where a relatively complete legal code exists, law-making for development and change requires new laws, but only one at a time. That one usually makes changes along only one or two dimensions. Because of China's unusual legal history, however, Chinese law-makers must design whole legal codes to support the Reforms and open policy.

Law plays an underbearer role in society. Because of its symbiotic relationship with institutions, it constitutes government's principal tool for changing them. Development, by definition, means changing institutions. China's government cannot improve social practices in any area -- for example, rural economic development and production, energy, transport and communications, industrial productivity and profitability, economic and public administration and management, or even social development and the quality of life generally -- without invoking the legal order. It cannot solve its manifold problem of management and administrative performance without changing administrative law; it cannot solve its fearful environmental disasters without changing environmental law; it cannot increase the role of women in development without changing the law relating to women. Those constitute the foci of the UNDP country programme for China; law underpins them all.

China's weak legal sector does not persist because China's leaders lack the will to enact the necessary new legislation, but because China's system for drafting laws lacks the capacity to draft them promptly. From the time of its commissioning as a drafting project, the average length of time for a new, relatively minor regulation to appear on the books runs about a year; for legislation, two years. For ordinary, non-priority bills, the delay in drafting can run to considerably more than that. From conception

to enactment, large, important, or contentious bills run an extremely long course. It took from 1979 to 1991 to draft and enact a copyright law. The Bankruptcy Act took some eight years. Almost all the bills and regulations in the 22 areas upon which the proposal focusses have been in gestation for five years or more.

This Project proposes to achieve the drafting of bills and regulations in 22 priority areas central to China's reforms, using their drafting as opportunities for improving the capacity of two of the three central government drafting institutions -- the Bureau of Legislative Affairs of the State Council (BLA), and the Departments of Legal Affairs of the several Ministries (DLAs). Unless these units improve their capacity to draft laws, China's strategy for improving its legal structure and thus the entire Reform effort may stumble and even fall.

2. Host Country Strategies.

Since 1979, China has made some long strides towards a planned commodity economy. It has adopted an "open door" policy to attract foreign private investment, managerial skills, and "know how". It has largely de-collectivised agriculture, and has permitted market forces increasingly to guide investment decisions.

These changes required reform of China's administrative and legal systems. In 1982, the authorities promulgated a new constitution which established the supremacy of law. In order to tailor the legal order for a more market-oriented economy, the government adopted a number of laws and regulations appropriate to the new economic situation: a patent law, a copyright law, three foreign investment laws, a bankruptcy law, a state enterprise law, and others. It supported training efforts to upgrade legal expertise in specialized areas, both by providing opportunities for advanced study (frequently overseas) for high-level personnel, and by providing inputs from foreign experts in administrative law, banking law, foreign trade law, and others.

Faced by overwhelming demands for legislation and low law-making capacity, China's leaders initially adopted a number of policies to make do. First, they have steadily strengthened drafting capacity. In May 1980 and July, 1981, the State Council successively set up the Bureau of Law and Legal Institutions under the General Office of the State Council and the Economic legislation Research Centre. In 1986, it amalgamated these into the Bureau of Legislative Affairs (BLA). It has steadily increased the size of BLA until now it numbers 260 personnel. It has also steadily expanded ministerial drafting capacity by expanding the DLAs.

Secondly, the Government has streamlined law-making procedures to facilitate the enactment of economic legislation. In 1983, and again in 1984 and 1985, the National People's Congress delegated

to the State Council the power to enact draft regulations concerning taxes and interim regulations concerning all matters "concerning the reform of the economic structure and the open policy". In principle, in time, these measures will enable the NPC to enact basic economic laws with the confidence of experience.

The State Council has delegated to the BLA most of the tasks of formulating legislation and regulations, reviewing local regulations and rules, and monitoring their implementation. Even at the very crux of decision-making the State Council relies heavily upon advice from BLA. In short, the Government has therefore put into place machinery to create an adequate legal order.

Recently, the Government has again moved to accelerate the enactment of Reform-oriented legislation. In the current Eighth Five Year Plan period, the State Council has prioritized its need for legislation and BLA identified laws and regulations in 22 high priority economic areas that affect basic aspects of Chinese life. Over the next five years, it proposes to enact these as the core of this Project.

The BLA, the State Council's chosen instrument to chart a course on this bewilderingly unknown sea, has on its own initiative already made extensive initial preparations to ensure the success of this Project. Dismayed at the slowness of the production of laws required for the reform, to accelerate the drafting of priority economic legislation BLA recently established nine task groups, composed of both high- and lower-ranking officials and drafters from the relevant DLAs and BLA. Each task group focusses on the areas identified by the State Council as a priority: Macro-economic control; enterprise; market; agriculture; foreign trade; environment and resources; education; legislative techniques. The ninth group, the liason group, coordinates the efforts of the others with the overall activities of the BLA within the guidelines of the State Council. In preparation for this proposal, the consultants met separately for a full day with the members of each of these groups, all of whom showed the seriousness of purpose and attention to detail necessary to make this Project succeed. The Legislative Techniques Group has already begun to review the existing legislative drafting rules and procedures to facilitate the Project, including the drafting of the bills and regulations in the 22 priority areas. Each of the other task groups inherited a substantial body of research that various concerned units had undertaken earlier; each has already begun further research and in some cases has already proceeded to formulate a preliminary draft of the bills for which it has assumed responsibility. That research will furnish a useful foundation for the production of the bills and regulations included in this Project.

To facilitate and accelerate the research process, the BLA

has also laid the basis for establishing a computerized Documentary Center to organize and index the tens of thousands of existing laws, regulations, rules and background documents. It has appointed highly-qualified computer experts who have already formulated a workable plan for inserting this vast amount of material into a computerized data base as soon as they obtain the necessary hard and software.

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4. Institutional Framework for the Subsector

BLA, an agency of the State Council, has the principal responsibility for the drafting of laws, regulations of the People's Republic of China. A description of the institutional context facilitates understanding the importance of BLA's role in China's lawmaking processes.

The Constitution describes a system of descending power to make laws (See Annex 10). The National People's Congress (NPC) exercises the general legislative power. Article 67 of the Constitution, however, endows the Standing Committee of the NPC with certain law-making powers. The State Council constitutes the highest administrative structure, whose constituent agencies include the national government ministries and major departments. The Constitution (Article 89<1>) empowers the State Council to "enact administrative...regulations". Within their respective jurisdictions, as empowered by the statutes, the Ministries and Commissions may issue orders, directives and rules. (Article 90). The People's Congresses and Standing Committees of local provinces and cities directly under the Central Government "may adopt local regulations which must not contravene the Constitution, the statutes and the administrative rules and regulations...." (Article 100). Lower level congresses may "issue decisions and orders." (Article 107) The NPC's Standing Committee has the power (Article 67<7,8>) to annul regulations or laws adopted by lower organs that contravene the Constitution or applicable law.

As noted above, early in the Reforms, the NPC delegated significant law-making powers to the State Council which, in turn, delegated many of those powers to BLA. In particular,

the State Council vested the BLA with a number of functions relevant to this Project:

- + To draft the legislation program of the State Council;
- + To coordinate all the legislative work of the DLAs, that is, of the State Council's constituent agencies;
- + To review and clear draft laws, treaties, agreements and administrative regulations prepared and proposed by DLAs.

- + To draft important laws and regulations, especially those that involve the responsibility of a number of State Council units;
- + To interpret administrative regulations;
- + To codify promulgated regulations;
- + To oversee the application of economic and administrative laws and regulations;
- + To study the needs and issues that affect the legal base of China and advance recommendations on these matters to the State Council;
- + To continuously examine the validity and applicability of laws and regulations;
- + To compile all locally passed regulations and rules, to review them, and to codify and record them;
- + To conduct academic exchanges and consultations with both domestic and foreign legal entities and circles;
- + To familiarize itself with the legal systems and theories of other countries;

Annex 3 depicts the internal structure of the BLA. In exercising these powers, the BLA stands at the very nerve-centre of China's law-making processes.

B. Project Justification

1. The problem to be addressed: The present situation.

BLA and the DLAs face a complex situation, with drafters drawn catch-as-catch-can from a variety of backgrounds, with little specific training for the task, and procedures that have had only a short span of experience to develop.

a. BLA's and the DLAs' tasks. The terms of reference for BLA (as quoted in the preceding section) seem altogether daunting.

In a real sense, BLA has the task of ensuring that China develops a systematically coordinated legal order to facilitate the Reforms and open policy. In effect, it has in its charge the creating not only the necessary conditions for the Reforms and the opening to the outside world, but the necessary conditions for the Rule of Law.

The DLAs have more specialized tasks. Averaging about twenty

members, DLAs exist in all the major governmental departments and ministries. Each carries out three tasks related to drafting:

(1) to work out legislative plans for its ministry, including bills, regulations and rules;

(2) to review and where necessary rewrite layment's drafts prepared by other ministerial departments;

(3) to draft bills, regulations and rules for its ministry;

b. Performance

The performance of the BLA and DLAs leaves room for improvement. Serious delays exist in drafting urgently needed laws and regulation; their quantity falls well below the need. The corpus of the laws remain disorganized, unindexed, difficult or impossible to access.

i. **Quantity.** In China, the common practice, especially at beginning of the reforms, has been to enact laws based on administrative regulations previously enacted by the State Council and implemented for a period of time. At present, the National People's Congress and its Standing Committee enact only about 10 laws annually. In addition, the State Council has the capacity to draft only about 70 administrative regulations a year. Since the beginning of the reform era in 1979, the NPC and its Standing Committee have adopted 80 laws, 80% of them drafted by the State Council; the ratio of laws to administrative regulations enacted is 1.5. In addition, local governments drafted 90% of local regulations, and the ratio of local laws to regulation is 1:7. Yet this is hardly a drop in the bucket compared to the innumerable laws, regulations and rules required to facilitate economic development at the local, provincial and national level in a country the size of China, inhabited by almost a fourth of the world's total population.

The BLA's own assessment describes the inadequacy of China's pre-Project legislative drafting capability. In every area some laws exist, but for the most part, it remains uncharted by any more than administrative decrees. For example, consider agriculture. In this area, only a small number of laws and regulations exist. Policy directives, rather than formally enacted laws, address most agricultural issues. Twelve years after the introduction of the contract responsibility system in agriculture, BLA has now identified two laws concerning agriculture as having a high priority, one "Promoting Agricultural Technology," the other, "Regulation on Responsibility Contracts in Agricultural Production." This Project will complete final drafts of those laws.

ii. **Inducing prescribed behavior.** As in many other countries,

some of China's laws and regulations failed to induce the behavior prescribed. Two examples: The ordinary stroller in Beijing, one of the cities with the most air pollution in the world, might learn with some surprise that China has an air pollution control statute. In the 1980s, as a response to inflationary tendencies, year after year China's political leaders directed banks to reduce loans for capital expenditures; year after year those expenditures rose. Not infrequently, the laws fail adequately to provide for implementation.

iii. **Perverse consequences.** Laws may also fail because they induce the behavior anticipated, but that behavior leads to perverse consequences. For example, to induce enterprise vitality, both on farms and in industry, the Government introduced a two-tier pricing system, giving farms and enterprises the power to sell at higher market rates goods produced over the contract-defined minimum. Officials did not introduce sufficient measures to prevent this from becoming a primary engine for speculation and corruption. As a result, enterprise managers siphoned off inputs delivered at the low planned price and sold them at high market prices for their own account.

iv. **Coherence and Cognoscibility of the Laws.** For an economy that includes market and planned sectors, existing not as a mere "mixed" economy but carefully integrated -- i.e., a planned commodity market system -- the legal order cannot succeed unless it has the four characteristics of a true legal system, especially cognoscibility and coherence. ("Cognoscibility" means the ability of ordinary citizens to learn about the law's existence and contents in order to take the laws' provisions into account in shaping their own behaviors.) That calls for the codification, indexing and publication of the laws, regulations and rules.

Laws and regulations that find expression in vague terms lead neither to cognoscibility nor coherence. Some laws that China has enacted contain vague terms, giving the laws the appearance but not the substance of coherence and cognoscibility.

Insufficient output of draft bills and regulations; the failure of the drafts adequately to provide for implementation; perverse consequences; the lack of coherence and cognoscibility -- all these constitute difficulties this Proposal aims to solve. Confronting potentially serious obstacles to the Reforms because of the lack of an adequate legal framework, Government's first priority has become to get bills and regulations concerning 22 priority areas drafted as soon as possible. While this Project takes that as its first obligation, it would short change China if, in the process of drafting those priority bills and regulations, it did not undertake to strengthen BLA's drafting capacity.

To succeed, proposed solutions must address causes. Several factors combine to explain the difficulties confronting China's

law making system in formulating adequate legislation to implement the nation's reforms and open policy.

c. Explanations. A combination of factors, discussed in this section, explain these difficulties. Two conditions for delay lie beyond the reach of this proposal. Strengthening the research and drafting processes do, however, constitute one of its primary objectives. The explanation for the weaknesses in those processes lies in the training, procedures and technology of the BLA and the DLAs.

i. Two conditions of delay. Two constraints in the drafting environment will, in any event, cause considerable delay: The relatively small size of the drafting resources available, and the procedures for reaching consensus on draft legislation.

(a). Size. The Bureau of Legislative has 260 staff members. About 67 percent constitute professional staff -- drafters, researchers and administrators. The remaining 33 percent constitute support staff. The State Council has, at least for now, decided to limit any increase in the size of the Bureau, focusing instead on increasing its drafting capability.

In addition to the drafters in the BLA, more than 1000 drafters work in the departments of legal affairs of ministries, departments. Although Government has systematically increased the size of these units, at this time, Government shows no disposition to increase the number of posts. Until that decision changes, the number of drafters available to BLA and the DLAs constitutes a condition about which the proposed Project can do little. If that condition changes, however, the Project will have in place a training scheme that will facilitate a rapid increase in the size of staff.

(b). The many steps of the drafting process. Unlike the drafting process in most other parts of the world, in China the drafting process encompasses the political accommodation between various interests that elsewhere takes place in other institutions. In part, the delay in drafting legislation results from that procedure. Most drafts originate in a ministry, or a request from a senior leader. Most of these receive their initial form in a DLA. In the first instance, because of a bill or regulation's importance or for other reasons, BLA itself drafts it. The BLA will pull the leading oar on all 22 bills which, as its first objective, this Project will draft.

Existing provisional procedures require BLA to complete at least nine steps from the original proposal to draft a piece of legislation to its final submission to the State Council for decision:

Step 1. Preliminary meeting with ministry officials and others

with an important interest to work out the legislative programme.

Step 2. Identify all workers in the drafting group. In a bill originating in BLA, most of these will come from BLA, with some from the relevant DLA. The BLA task groups, already created, each containing BLA and DLA drafters, have assumed responsibility for drafting the 22 priority bills involved here.

Step 3. Formulate an outline for the draft.

Step 4. Draft the bill.

Step 5. Several meetings examine the initial draft. The drafting group has discretion as to whom to invite to these meetings. Usually, if the matter of the draft touches some organizational interest, the group will invite that organization to send a representative; if many government and non-government organizations have an interest, the drafting group decides whom to invite.

Step 6. After revision in light of the criticism by the affected organizations, the drafting group sends the draft back to the ministry for review and approval. The leader of the drafting group explains the bill at a meeting within the ministry.

Step 7. After ministerial approval, the ministry sends the draft and the statement of reasons to the State Council for review; the State Council forwards it to BLA, which carries out the review task for the State Council. BLA reviews the draft in light of national strategies and also technically, and sends copies to all interested people for their opinions. Through these opinions, BLA frequently discovers major problems that the draft has not adequately resolved. To invite comments, BLA, at its own discretion, may publish an important bill.

Step 8. The relevant BLA group revises the draft. If a disagreement persists, that is, no consensus can be reached, the drafting team defers decision.

Step 9. A group of senior BLA drafters reviews the revised draft. If it approves the draft, the group prepares a statement of reasons justifying the draft, and forwards it the State Council. If it disapproves, for example because it is ultra vires, it forwards the draft to the State Council with a recommendation that it reject the draft.

As in any complex organization, the capacity of BLA and the DLAs to accomplish their tasks depends upon the capacity of their members -- that is, their training -- and the adequacy of their organizational structure and procedures.

ii. Capacity of BLA/DLA drafters. For any drafter faced by

challenges as bold as those that China's drafters face, the first problem becomes to conceptualize the drafting problem, for without an adequate conceptualization, the drafter does not know where to begin the research. We discuss this issue generally, and then the existing state of training in BLA and the DLAs.

(a) **Conceptualizing the drafting task.** China's drafters face a task that stands unparalleled in the world. Chinese drafters have no previous corpus of organized legal norms to serve as a base line. Every one of the priority areas that concern this Project constitutes a major task: Banking law, the budget law, planning law, company law (this apparently will include all forms of business organization except state and some forms of cooperative enterprise), investment law, foreign trade law, education law.. In most of the world, no drafter ever has to start almost from scratch to draft bills like these. Always there exists some prior law to use as a baseline. China's drafters face a problem that everywhere would likely overwhelm most drafters.

Faced by these daunting tasks, on many of these bills China's drafters have experienced long delays. The drafters themselves give a variety of reasons. Many claim they cannot proceed because they do not know foreign practice. Some have undertaken to draft a single all-encompassing bill covering several disparate subjects. Some drafters say that because of the Reform's rapid pace of change, they cannot draft a bill because law can only "reflect" a stable situation. Some say that law deals only with rights and duties, seemingly denying that a law or regulation can influence the social behavior of relevant societal sectors.

All this suggests that many BLA and DLA drafters have difficulty in conceptualizing the drafting task. Many seem to lack a legislative theory and methodology to guide their research and decision-making. Faced by a socio-economic problem for which a legislative solution seems required, a competent drafter must first study the social behaviors which constitute that problem. That requires the drafter carefully to examine existing laws, regulations and other norms that purport to structure that social behavior, and then to search for explanations for the way the addressees of the law actually do behave. On this basis, the drafter may then devise new sets of laws or regulations designed to overcome the causes of the behavior at issue. Drafting, in short, rests upon research.

Research requires the search for data. The fields of data, however, stretch to the furthest horizon. Where to plough that immense field? Without either theory or methodology to tell the researcher what agenda of steps to take and what categories of data to look at, the researcher has difficulty in deciding where to begin the research. China's drafters churn out vast amounts of research, but sometimes still do not advance rapidly in formulating a draft. That suggests a lack of training specifically relevant to

the drafting task.

(b). **Training.** BLA/DLA drafters need training both broad and deep. Because of the extraordinary scope of BLA/DLA tasks, and the requirement that they draft laws of the most far-reaching character, their drafters need an unusually broad background, not only in the relatively narrow techniques of drafting per se, but in the substantive areas with which they must deal. To improve their drafting capability, they need knowledge of foreign law and practice, legislative theory and methodology; and language and techniques of drafting. Examination of the state of training of BLA and DLA staff members indicates that they have had only small opportunity to learn these subjects. Because many BLA and DLA drafters place great emphasis upon their relative ignorance of foreign practice, this proposal first discusses problems of learning from foreign law and practice and the risks involved in studying comparative law, and then the limits of the present training of BLA and DLA staff members for learning that subject.

(i) **Comparative law and practice.** The world around, there exists rich experience in attempts to use law to resolve social problems. Drafters must study these efforts, lest they repeat mistakes that a little study of comparative law and practice might have avoided. The study of foreign law and practice also may offer a smorgasbord of devices that others have attempted to resolve problems analogous to those facing China's drafters.

Without a solid understanding of legislative theory and methodology, however, drafters may too easily assume that the study of comparative law can reveal "successful" laws that they need only copy for instant success. Because China's circumstances remain unique, however, her drafters cannot copy other countries' laws and expect them to work the same way in China. They can, however, learn from the experience -- especially the mistakes -- of other countries, and acquire ideas about possible alternative solutions to similar problems. In other words BLA and DLA drafters need to comprehend the relationship between particular historically-shaped social circumstances in the foreign countries in which particular laws emerge, and how they may differ from those in China. To incorporate the lessons derived from study of foreign law and practice into legislation capable of implementing China's Reforms and open policy in ways that will work to the benefit of the Chinese people, they need to understand legislative theory and method.

(ii) **Academic Background.** The intake to the professional staff of the BLA and the DLAs consists mainly of university-trained personnel with relatively little specific training in any of the essential drafting disciplines. Of the approximately 164 professional staff now in BLA, about 40 have graduate degrees in various discipline. Others have upgraded their skills, sometimes impressively, through experience on the job.

Practically all drafters have bachelor's degrees, also in various disciplines. Staff members frequently majored in (typically compartmentalized) social sciences, many of them in economics or history, an increasing number of younger staff members in law. Chinese universities offer almost no courses on legislative drafting or subjects directly related to it.

(iii). **Training in legislative theory and methodology.** In conceptualizing the drafting problem and its associated research, without the guidance of legislative theory and methodology drafters inevitably proceed hit-or-miss. Moreover, without the understandings that these subjects give, drafters have no framework for understanding how to use foreign law as an aid in solving the drafting problem. That too often leads to either of two disastrous consequences: copying foreign law, or ignoring it altogether. For convenience, this Proposal includes under the rubric of "legislative theory and methodology", the subjects of law and development and research methods for legislative drafters.

(a). **Law and development.** Laws aim to channel behavior of citizens and officials along lines that their proponents believe will resolve the social problems they have defined. To draft effective laws, drafters need to understand how law affects social behavior. That problem takes on special dimensions when government attempts to use law to transform society from poverty to prosperity and modernity. The study of those kinds of socio-economic problems constitutes the subject-matter of Law and Development, not presently available in Chinese universities. Most of the lawyer-drafters have little training in economics -- an essential basis for drafting economic legislation.

(b) **Research methodology.** Especially given the laudable aim of using reason and experience -- the facts -- to shape a new legal order in China, her drafters need an agenda of steps to take which if followed will likely direct their attention towards data relevant to understanding the causes of social behavior that blocks development policies aimed to improve societal welfare. Drafters always must do research to discover what behavior embodies the difficulty, to explain it, and to make reasonable social cost-benefit estimates of implementing their proposed laws. For that they need to have skills in research methods carefully tailored to the task at hand and the (usually limited) research resources available. They must study methodology in order to understand what research agendas will serve that purpose, and how to obtain the evidence necessary to test the alternative explanatory hypotheses that underly the prolonged debates relating to proposed legislation. Although this kind of methodology seems especially necessary to formulate legislation rationally designed to implement to China's Reforms and open policy, for a variety of reason very few places either in China or the rest of the world, provide legislative drafters with the opportunity to learn it.

(c) **Legislative language and techniques.** Drafters must write clear, precise, elegant sentences, structured into well-organized drafts. Teaching legislative language has two aspects, theoretical and practical. In the English-speaking world, a dozen-odd treatises exist on the subject, offering a variety of rules which if followed make it likely that the result will meet the professional demands for clarity, elegance and precision. A body of rules also exists concerning the technical requirements of drafts -- preferable modes of amending laws, the nature and function of titles and subheads, the form for preparing bills for particular legislatures, and so forth. China still needs both a treatise on these subjects related to drafting in Chinese, and a textbook suitable for teaching them.

The fact remains, however, that the world around, most drafters learn most of their trade on the job. That of course happens also in the BLA and the DLAs. A subsequent section, on the organization of drafting in the BLA and the DLAs, discusses ways in which staff members could more efficiently in the process of drafting laws.

(iv) **Existing BLA In-house Training.** In cooperation with the University of Politics and Law in Beijing, the BLA has established a legislative drafting training program which provides full-time courses for two months in Legislative Affairs, Implementing Laws, Administrative Law, and Economic Law. Members of the BLA staff give most of the lectures, focusing on practical issues of "how to draft" in these fields. Especially for the Economic Law program, but also for the others, the BLA invites outside experts from other Chinese universities, ministerial DLAs, and occasionally foreign experts to lecture on specified topics. For example, the BLA has invited experts from the People's Bank of China to lecture on Economic Law. These lectures do not deal with legislative theory.

To maximize the benefits to China of the Project's proposed opportunities for BLA and DLA drafters to study foreign economic laws and practice, in short, requires a training programme that includes legislative theory and methodology, and the use of the Chinese language for drafting purposes.

In addition to well-trained drafters, competent drafting also requires adequate drafting procedures.

b. Drafting Procedures. As shown above, draft bills and regulations emerge from a complicated procedure both within and between the DLAs and BLA. Putting aside the inevitable delay arising from the many efforts to reach consensus on a draft, a review of existing procedures demonstrates: (a) lack of criteria for formulating the reasons (or justifications) in the reports that accompany successive drafts at every stage in the drafting process; (b) the absence of well-defined procedures to for critiquing

drafts, both to improve their quality, and as an in-house training device for staff members; and (c) the low technological level of word processing to produce drafts.

(i) Not until the BLA submits the final draft to the State Council for approval do the drafters write a full justification for it. An explicit statement of the reasons for each successive draft, however, constitutes the principal check upon its validity. Only if one can justify a draft by appropriate standards of what constitutes an adequate justification can one assert that a draft meets the criteria for an adequate bill or draft regulation. To wait until the very end of the drafting process to write the justification deprives drafters of the principal control over the quality of their product.

No consensus appears within BLA and the DLAs about the appropriate content of the justification. That reflects the absence of theory. An agenda telling drafters what belongs in a justification tells the drafter what data they must capture in order adequately to justify their drafts. The agenda for an adequate justification thus constitutes the functional equivalent of a theory of legislation. Without the one or the other, drafters cannot efficiently draft any legislation more far-reaching than the most simple amendment.

(ii). **The Drafting Process and On-the-Job Training.** BLA and DLAs have some relatively senior drafters. Among its junior drafters, some have higher skills level than others. The transfer of these skills to other drafters ought to take place in the groups formed to review drafting legislation. Unless the procedures for that group process becomes clearly defined, however, the extent of skills transfer remains at best serindipitous.

(iii). **Computerization.**

At present BLA/DLA drafters must write all their drafts by hand, an unnecessarily tedious and prolonged process. Giving every drafter access to personal computers could reduce by more than half the amount of time required simply to process drafts. However, at present neither the BLA nor the DLAs have the necessary computers, nor do their drafters have the necessary computer skills.

Furthermore, China's the existing laws and regulations have never been organized or indexed. Yet since 1949, nationally and at local levels, China's government has already promulgated tens of thousands of laws, regulations, and rules. The NPC, alone, has passed 3,364 laws and regulations. The Ministries under the State Council have enacted 21,000 additional pieces of legislation, and the local governments thousands more. On top of this, every level of government has accumulated mountains of potentially useful background documents and reports relating to past, present, and future legislation. This accumulation of unorganized materials

makes research as to the existing state of law and the background relating any particular socio-economic problem unnecessarily tedious. A computerized retrieval system would greatly facilitate and accelerate the research essential to good law-making. It would also make available to China at relatively little expense all the laws and regulations of countries which have already been computerized. The BLA has already established a Documentation Center and has employed several highly qualified computer experts who have formulated a plan for computerizing China's law data base. Unfortunately, however, neither the BLA nor the DLAs have the hardware or the software to install the planned system.

Given the relatively low numbers of DLA/BLA drafters, and special problems imposed by the intermingling of strictly drafting problems with the problems of reaching consensus, the slowness of drafting in China finds explanations in the drafters' insufficient knowledge of legislative theory and methodology, and of comparative law; lack of basic research and training in legislative language and techniques; the use of outmoded handwritten drafts; and the incoherent methods of organizing and indexing China's existing legal corpus.

2. Expected end of Project situation

When completed, the Project anticipates results in the following areas: (1) the completion of drafts of 22 pieces of urgently needed legislation (for a list and justifications of the specific laws, see Annex 5); (2) significantly increased capacity of individual drafters to meet their responsibilities (see Annex 7); (3) revised BLA procedures and rules in place to facilitate drafting quality legislation; and (4) improved software and hardware for drafting to ensure quality drafts (see Annex 8 for list of equipment and justification).

a. Drafting bills and regulations in 22 priority areas. In the process of developing BLA/DLA legislative drafting capability, the Project will complete drafts of major bills and regulations in the 22 priority areas identified by the State Council as critical to facilitate implementation of China's reforms. These areas consist of the following:

- (1) Planning Law
- (2) Budget Law
- (3) Banking Law
- (4) Domestic Investment Law
- (5) Enterprises Regulation Law
- (6) Company Law

- (7) Fair Competition Law
- (8) Consumers' Rights Protection Law
- (9) Commodities Trading Law
- (10) Promotion and Dissemination of Agricultural Technology Law
- (11) Agricultural Investment Law
- (12) Foreign Trade Law
- (13) Foreign Investment Law
- (14) International Arbitration Regulations
- (15) Nature Protection Zones Regulations
- (16) Environment Protection in Mining Areas Regulations
- (17) Groundwater Utilization and Protection Regulations
- (18) Wild Plants Protection Regulations
- (19) Regulations Relating to Foreign Mining Investment
- (20) Education Law
- (21) Revised Provisional Regulation on Procedures for Enactment of Administrative Regulations.
- (22) Rules for drafting and Enacting Laws and Regulations
(The content of these bills is summarized in Annex 5).

b. Increased capacity of drafters. The individual drafters in BLA and the DLAs will have increased capacity to draft legislation, regulations and rules. 40 Chinese trainers will have received intensive training in the three areas of instruction: comparative law in their specialized fields; legislative theory; and methodology. They in turn will help to train other drafters in China. In addition, foreign experts will have conducted seminars involving all the drafters working on those priority bills and regulations. About 95 drafters will have undertaken three week tours in several countries to study foreign law and practice in their specialized areas. BLA and the DLAs will have in place procedures to maximize on-the-job training. In the process, the BLA will have completed drafting the required bills and regulations in the 22 priority areas, and have significantly improved capability for drafting additional bills and regulations to serve more effectively to implement China's economic reforms and open door policy.

c. **Improved Procedures.** The BLA and DLAs will have in place drafting procedures that embody an methodology and theory adequate to enable drafters to conduct effective research into the causes of the problems their draft legislation aims to overcome. A deep understanding of the potential benefits of studying comparative international law will enable BLA/DLA staff members to avoid the mistakes other countries have experienced in attempting to use law to solve analogous problems. Furthermore, to avoid the dangers inherent in copying foreign laws, they will acquire the capacity critically to assess the consequences of foreign laws "in action" in the context of their own country-specific constraints and resources.

Careful analysis of factors in the Chinese circumstances likely to influence the probable behavioral outcomes of the legislation's primary addressees, as well as the relevant implementing agencies, will help to ensure that, when enacted, the bills and regulations attain their stated objectives. The BLA's revised procedures will help to ensure that the drafters adequately identify the socio-economic behavior at issue, examine its probable causes, and devise legislation that, when implemented, will achieve a cost-effective solution. The legislation will describe as precisely as possible the expected behavior of their addressees. The systematic employment of backward mapping will enable the drafters to prescribe the most cost-effective means of implementation in the Chinese circumstance.

In giving careful consideration to the costs and benefits of proposed legislation, the revised BLA/DLA drafting procedures will require all BLA/DLA drafters to give special consideration to its possible adverse consequences for vulnerable sectors of the population, especially women, the rural and urban poor, and national minorities). They will regularize requirements that drafters ensure that all those potentially affected by proposed laws or regulations have an opportunity to provide adequate inputs into policy-making decisions. Finally, BLA/DLA drafting procedures will require that every law or regulation includes adequate provision for evaluation, assessment, and, if required, revision.

d. **Computerization of the drafting and retrieval process**
All BLA and DLA drafters will have training in the use of personal computers, and access to one for drafting purposes. All China's laws, regulations, rules and background documents will have been codified and placed in a computerized data base. BLA will have access to computerized foreign data bases of legal materials.

4. Project Strategy and institutional arrangements.

The Project incorporates a three-pronged strategy to help overcome the legislative drafting problems faced by the Chinese government.

a. Drafting bills and regulations in 22 priority areas.

The Project proposes to ensure the drafting of bills and regulations in the 22 priority areas. It proposes to do this directly in two ways. First, the proposal puts forward a realistic timetable for the preliminary and final drafts of the bills and regulations in each priority area. Second, it provides foreign experts to critique the preliminary draft of each bill or regulation, and to participate in a critique session on the draft. consultative help in the drafting process. It also proposes to improve their capacity to draft, both by training and by improving drafting procedures.

b. Training. In the process of drafting the bills and regulations in the 22 priority areas, the Project also proposes to improve the quality and speed of drafting by strengthening the capability of the drafters. The Project will undertake to increase

the capability of drafters through both formal in-house courses, overseas courses and study trips, seminars by foreign experts, and highly-organized on-the-job training. At the same time, the project will contribute to revising the provisional rules and procedures of the BLA and DLAs to facilitate more efficient and effective drafting of quality legislation.

i. **Training drafters in comparative law and practice.** For a one month workshop in China, and a subsequent one semester study abroad, 40 trainers will study the comparative law of the areas of their concerns, followed by three week study tours to study foreign law and practice in several countries. Together with foreign consultants, they will conduct annual one month programmes of study for BLA and DLA drafters, focusing on the priority bills and regulations as case studies. In the area of each priority bill or regulation selected by the relevant task group as its focus for that year, a foreign expert will conduct a three-week seminar as an integral feature of the first three of these month-long programmes.

ii. **Procedures.** Two of the priority bills and regulations focus on improving the procedures and rules of the drafting process in the BLA and the DLAs. Because it will contribute to institutionalizing decision-making rules and procedures required to improve the quality of all draft legislation produced by the BLA and DLAs, this constitutes an important means of achieving the Project's first objective, that is, to draft bills and regulations in the 22 priority areas. In particular, in the process of drafting the priority bills and regulations, the Project will institutionalize a procedure that guarantees that each draft will come with an explanatory Memorandum of Law, and that both will receive careful editing, revision and critique.

(a) **Memorandum of Law:** The Project will stress the important role of the explanatory Memorandum of Law in the legislative drafting process. Self-evidently, no method exists by which to assess on the face of a draft bill or regulation its inherent worth. As a surrogate, however, one can estimate its likely impact by assessing the reasons lying behind it (its justification) in light of evidence.

The principal test for any normative proposition lies in the quality of its justification. Scientists assess the worth of a scientific theory propounded by other scientists, not by inspecting of the scientific theory itself, but by the adequacy of the experiments used to validate it. In the same way, assessments of the validity of a normative proposition must depend on the adequacy of its grounding in evidence. By requiring the drafters of each of the priority bills and regulations to support their proposal by an adequate justification -- the Memorandum of Law -- the Project will help to ensure drafts more likely to produce the desired results. That Memorandum will:

- + define the behavior that constitutes the social problem, and includes evidence that the behavior actually exists;
- + explain the behavior, supporting its explanatory propositions by evidence;
- + propose alternative solutions (including solutions drawn from comparative law);
- + based on evidence, explicitly consider --
 - o the probability that the prescribed behavior will occur and that it will resolve the problem;
 - o the social cost-benefit of the proposed solutions;
 - o their impact on the environment and on the most vulnerable elements in the society (women, children, urban and rural poor, and national minorities);
 - o the legislation's implementation; and
 - o procedures for monitoring, evaluation and feedback.

BLA and the DLAs will require that at every stage in the drafting process, a Memorandum of Law with these characteristics will accompany the proposed draft legislation.

(b) **Critique sessions:** BLA will institutionalize procedures so that in every case, relatively junior drafters will accomplish the basic research and writing. The draft and its accompanying memorandum will undergo editing by a senior drafter or a trainer. After revision, the draft and the memorandum will fall for formal critique by the drafting group. In the critique session, each member will have a formal assignment to critique the draft and memorandum along a particular dimension (for example, problem identification; explanations; comparative law; adequacy of analysis of existing law; social cost-benefit assessment; syntax; and so forth). Each critique group will contain at least one trainer, who will use the critique group session as an occasion to deepen drafters' understanding of basic legislative theory. In this way, the Project will use the occasion of the drafting of the bills and regulations in the 22 priority areas as the principal focus for on-the-job 'learning by doing'. Continual evaluation and development of this in-training program will contribute to

improving the quality of the training.

(c) **A Manual of Procedures and Legislative Drafting Techniques:** The Project will produce a Manual that will incorporate the revised rules and procedures for the drafting process in the BLA and DLAs. The BLA will publish and circulate the Manual to all drafters, not only in the BLA and DLAs, but among all local government units as well.

In addition, the Manual will include rules and procedures for improving the drafters' legislative language and techniques. The BLA will identify four drafters to write that part of the Manual dealing with improving legislative language and technique. Over the Project period, these four drafters will use the Manual to teach all BLA and DLA drafters legislative language and techniques in small, one-week workshops. In addition, the Manual will guide the BLA trainers in improving the critique sessions held on each of the draft priority bills and regulations.

c. **Computerization of the legislative drafting process and codification of laws.**

The BLA will work with UNDP consultants and Chinese computerization experts to provide a computerized drafting system at minimal cost with maximum efficiency to speed the actual drafting process. This will be accompanied by training in the utilization of computers for all BLA staff dealing with economic laws.

UNDP consultants will help BLA to identify experts to codify laws and regulations and establish a national legislative documentation center with a computerized search system. This will enable drafters more easily to research the existing state of legislation and regulations in the nation, ensuring greater coordination and integration of newly drafted laws and regulations in the context of the evolving national legal framework.

7. Special considerations

The Project proposes to ensure special protection for women,

the poor, and the environment by requiring that the Memorandum of Law consider the impact of the proposed laws on special areas of UNDP concern and by ensuring the participation in lawmaking of the especially vulnerable.

a. Special considerations concerning the impact of proposed laws:

i. Popular participation in the legislative process

The successful completion of this Project aims to benefit the entire population of China by contributing to creation of a stable, predictable legal order that facilitates economic development and an improved quality of life. Involvement of all segments of the Chinese population in the process of evolving the legal order by enabling them to provide inputs into the formulation and implementation of laws, regulations and rules will contribute to ensuring that all members do, in fact, benefit from the economic reforms.

Existing drafting procedures give drafters great discretion in deciding whom to consult. They generally invite inputs from relevant government ministries and agencies, and sometimes from non-official groups or the public at large. As one of the 22 priority draft bills and regulations, the Project will ensure the completion of the Rules for Receiving and Drafting Bills and Regulations. Those Rules will specify rules to structure the drafters' discretion to invite inputs and deal with such issues as open public hearings on drafts, publications, published reports, and so forth.

ii. Women, the poor, minorities.

The World Bank (1985) reported that, among low income countries, China probably had the most equitable distribution of incomes and services. Although the economic reforms have successfully contributed to increased overall production, some aspects have unintentionally aggravated unemployment and reduced the real incomes of some elements of the urban and rural population. To reduce the danger of these kinds of unintended side-effects of new economic legislation, the Project requires that BLA immediately institute provision procedures requiring that every draft be accompanied by a Memorandum of Law that will include a social cost-benefit assessment that explicitly considers the impact of the proposed bill, regulation or rule on women, the poor, and minorities.

iii. The environment, health and safety

China's efforts to attain rapid industrial and agricultural growth have been accompanied by growing environmental problems, including urban pollution and increased dangers to worker and

community health and safety, declining underground water tables, erosion of soils. The Project proposes to ensure consideration of these issues by requiring their explicit inclusion in the Memorandum of Law accompanying every draft bill or regulation. In addition, the Project includes five environmental protection regulations among the 22 priority drafting projects.

b. Participation in the law-making process.

The provisional drafting regulations will require BLA and DLAs to invite specially comments on proposed drafts from women's organizations, and where possible, women generally.

c. Special considerations relating to the Project's immediate recipients, that is, the BLA and DLAs:

The requirement that the legal order provide equal opportunities to women and minorities extends, of course, to the BLA and DLAs. In addition to the general imperative of equality¹, their participation as equals in the drafting process may help to ensure that the special problems of women and minorities in the larger society receive adequate consideration. At present, however, women comprise a relatively small percentage of the legislative drafters on the staff of these agencies. Minority drafters constitute 15 percent of the total.

To ensure adequate participation of women and minorities in this Project, both in selecting trainers and in selecting drafters for overseas study tours, the BLA and DLAs will take care to ensure that women drafters receive special consideration so that the gender composition of these two groups will at least reflect the gender composition of the BLA and DLAs.

ANNEX 5: THE 22 PRIORITY LAWS
PROPOSED BY THE STATE COUNCIL

The State Council identified these 21 laws and regulations as priorities in its legislative programme to facilitate China's economic reforms and open policy to overcome the following problems:

(1) Planning Law:

Given China's socialist perspective, consensus has long existed between the Government and grassroots units about the importance of planning. To date, however, although the State Council has promulgated regulations, no law of planning exists to guide China's economic reforms and open policy. Although debates persist on the specific form of the proposed planning law, the State Council agrees that it should constitute a basic economic law for China's planned commodity economy.

(2) Budget Law

The proposed budget would constitute the fundamental law relating to government finance and banking. Initial regulations promulgated in 1951 no longer serve China's changing situation. New regulations and rules passed after 1978 to solve urgent problems do not adequately define government's legal rights, interests, and obligations. The proposal for a new budget law would provide a strong budget law with Chinese characteristics. Because the budget law involves all aspects of social life, however, it remains difficult to draft.

(3) Banking Law

The 1979 reforms fundamentally altered China's unified state banking system to establish the People's Bank as the central bank, with only indirect controls over some 160,000 relatively autonomous commercial bank branches and credit cooperatives. Despite the banks' important role in China's socio-economic system, they remain governed only by regulations. The NPC has urgently requested a new national banking law appropriate to China's planned market economy. Although research began in 1988, to date the relevant ministries and government bodies have failed to agree upon a draft.

(4) Domestic Investment Law

To facilitate the accumulation and reinvestment of capital in China's planned commodity economy, the State

Council several years ago requested the BLA to draft a domestic investment law in the context of the NPC's legislative plan. In particular, the law should help overcome several problems including subjective investment decision-making; duplicative investments; lack of responsibility for financial returns on state investments and subsequent budget deficits. However, in because of several underlying debates, the relevant ministries and agencies have failed to agree upon a draft.

(5) Regulations of Enterprises Group

A new enterprise law that would facilitate mergers, enabling more successful firms to take over less successful ones would enable them to take advantage of economies of scale, achieve efficient internal management, and compete effectively in the world market. To date, since the reforms, some 1,600-2,000 informal mergers have occurred without legal sanction, but no formal law exists delineating their relationship to China's planned commodity economy. Many issues have arisen, however, including the relationship of conglomerates to labor, distribution of income between conglomerates and the state, etc., but since they have not been resolved, the bill remains uncompleted.

(6) Company Law

This law, first proposed in 1979, aims to clarify the existing state of uncertainty relating to various forms of ownership among the 260,000 industrial enterprises (about 10 percent of them foreign or jointly owned) now operating in China. To date, although regulations exist, the relevant ministries and government authorities have not reached a consensus on the appropriate form of draft companies bill.

(7) Fair Competition Law

Since China's reforms introduced a planned market economy, need legislation to govern the relations between buyers and sellers to ensure fair competition (as opposed to problem of monopoly which may, but need not be present). Since reforms, State Council has enacted regulations, but these may sometimes conflict, and do not adequately deal with the problems of unfair competition or implementation. The task is to resolve these problems and draft a law ensuring fair competition among buyers and sellers in China's planned market economy.

(8) Consumers' Rights Protection Law

In planned commodity economy, consumers will require protection against several practices, including false

advertising, passing off goods as those of a well-known manufacturer, false packaging and product liability. In drafting this law the drafters have encountered difficulties in defining the issues, reconciling existing regulations, and working out adequate implementation procedures. As yet these issues remain to be resolved.

(9) Commodities Trading Law

Whereas the proposed fair competition law and the consumers' protection law aim to prevent negative practices by buyers and sellers, the proposed commodities trading law would serve a complementary role of protecting the producers' interests. It would adjust market relations among and between commercial, agricultural and industrial enterprises; and provide adequate remedies for counterproductive business behavior like speculation.

(10) Promotion and Dissemination of Agricultural Technology Law

After experiments with various forms of agricultural extension, the NPC called for a law to regularize its role in assisting farmers to improve their use of agricultural technologies to increase productivity. In particular, the law should address the problems of inadequate staffing for the agricultural extension agency, lack of materials and funds for farmers, and inadequate protection of extension agents' welfare.

(11) Agricultural Investment Law

First requested in 1988 by NPC delegates from several province, then in 1989 by the NPC Committee, this proposed law aims to overcome the fluctuating and, in the late 1980s, declining percentage of the national (and provincial) product devoted to agricultural investment. In particular, it would seek to increase the share of government investment in agriculture as a percentage of GNP, and ensure coordination of investments by various government agencies

(12) Foreign Trade Law

After 1979, to facilitate its open policy, the Chinese government introduced a legislative program relating to foreign economic relations and trade, including laws and regulations relating to international investment, patents, and so forth. In the field of foreign trade, however, have administrative rules, but no comprehensive law. Many experts, businesses, and government organizations hold China needs a foreign trade law quickly to facilitate the expansion of foreign trade. Difficulties encountered in drafting, however,

include: the constantly changing international environment as well as in China; conflicting interests among various trade groups; and differences of opinion as to what kind of law would best suit China's needs.

(13) Foreign Investment Law

China seeks to improve the environment to attract further foreign investment. At present, three different laws govern three different forms of international investment, namely, joint ventures, cooperative joint ventures, and wholly foreign owned enterprises. Perhaps one law relating to the conditions, rights and obligations of foreign investments would improve the investment climate. This and other issues require study, including an understanding of international practice, in order to formulate an appropriate foreign investment law.

(14) International Arbitration Regulations

Since 1979, about 30,000 foreign companies have invested in China, and China has signed several conventions relating to international arbitration in the case of disputes. However, China has, as yet, no domestic regulations as to how to handle disputes with foreign investors under these conventions, and little experience on which to design them. Debates exist as to whether, when a dispute arises, the investor must first exhaust internal remedies before going to arbitration; or whether the investor may elect to invoke either Chinese judicial remedies or international arbitration. The Task group aims to examine foreign countries' experiences in this area to assess the costs and benefits of alternative approaches.

(15) Nature Protection Zones Regulations

China's 600 nature preserves of all kinds comprise only 3% of the national territory, well below the 5-10% of national territory preserved in most developed countries. Those that exist, consisting mainly of forest areas, do not adequately represent significant areas in the lowlands, the grasslands, and Tibet, and require improved management. The proposed regulations will aim to help determine locations, categories, and uses of additional preserves; and resolve issues of responsibility between various governments.

(16) Environment Protectional in Mining Areas Regulations

China is one of the world's leading minerals producers, with over 80,000 large and medium sized mining enterprises, and over 23,000 small collective, private, and individual mines. The 1986 Minerals Resources Law

asserted principles relating to mining, but left the implementation to further regulations. Existing regulations cover aspects of environmental protection and joint ventures, but leave uncontrolled serious problems, including destruction of extensive land areas, mining wastes, loss of arable land to such activities as brick making (10,000 hectares a year!), and the emission of carbon dioxide. Government authorities do not have enough information about the operations of small mines, but they constitute important contributors to these problems. Revised regulations should clarify the rights and obligations of the different types of mining management and their employment of different technologies in terms of China's long term national as well as local needs.

(17) Groundwater Utilization and Protection Regulations

One third of China's water resources consist of underground water reserves. Rapid agricultural and industrial growth have led to overuse and declining reserves and pollution, seriously endangering China's water supplies. The 1986 minerals law and the 1988 water law, together with many local regulations, have not proven sufficient to control this deteriorating situation. The proposed draft regulation would clarify responsibility for protecting underground water, strengthen its management, and improve the organization of prospecting and evaluating further possible sources.

(18) Wild Plants Protection Regulations

Among China's 30,000 species of wild plants, some 14,000 are available only in China some of which have significant value. Although regulations exist to protect wild animals, none exist to protect these plants. Yet rapid development threatens the existence of some of them. The proposed regulations would identify these plants; compile and coordinate existing scattered regulations now inserted in various laws and regulations relating to grasslands and forests; and detail the particular kinds of protection required for particular species. The Task group would like to learn from other countries some of the alternative ways of accomplishing these objectives.

(19) Regulations Relating to Foreign Mining Investment

Although China has attracted significant amounts of foreign investment remains limited in mining. This reflects, in part, the heavy expenditures and long time periods required for mines to begin operations. To

encourage increased foreign mining investment, the proposed new regulations will aim to resolve disagreements over compensation in case of nationalization, and take into consideration international practices on such issues as possible special preferences and the rights and obligations of both parties. For these purposes, the drafters seek to learn more about the practices of other countries, including developing countries.

(20) Education Law

Education must play a central role in China's economic reforms and open policy since, in the last analysis, their success depends on the quality of the human beings who must achieve them. China needs laws in the field of education that will contribute to people's awareness of the importance of education, especially at local levels; provide sufficient funds and stabilize the status of the nation's schools at all levels of government; and improve their management and administration. The proposed education law will serve as an umbrella covering several areas of laws and regulations, including existing ones like those relating to academic degrees and teachers' training, certification, employment, responsibilities and duties; and new ones on institutions of higher learning, vocational education, adult education, and the division of responsibility among various levels and branches of government.

(21) Revised Provisional Regulation on Procedures for Enactment of Administrative Regulations.

Established in 1986, the BLA, as well as the DLAs in each ministry, have grown rapidly. In 1987, the State Council passed provision regulations on procedures for enacting administrative regulations. In light of the China's needs for timely new legislation, the State Council now proposes to revise them. In less than a decade, the BLA and DLAs have brought in several hundred new staff members, instituted an internal training program, and drafted some 100 laws and 600 regulations. This experience has laid the basis for revising the existing draft regulations on procedures for enacting regulations for government administration. The State Council has decided that this should be completed during the 8th Five Year Plan.

(22) Rules for Drafting and Reviewing Proposed Laws and Regulations.

Over the last decade, the BLA and DLAs have developed

some rules guiding drafters in the process of drafting and reviewing proposed laws and regulations. In light of their experience and what they can learn about legislative theory and techniques from other countries, they would like to revise these rules to ensure the drafting of more effective legislation to facilitate China's economic reforms and open policy. In particular, the rules, which will be incorporated in a Manual of Legislative Theory and Technique, will provide more detailed rules. These may include the requirement that, at every stage in the drafting process, the drafters will write a Memorandum of Law explaining the reasons for the draft; and that all drafts will be assessed by carefully planned critique groups; and how to ensure the words used express the meanings of the draft bills and regulations.

developing countries.

Duration/involvement:

The consultant will initially be appointed for a period of approximately three weeks and carry out the tasks of the consultancy in China. Where BLA so elects, the consultant may be appointed to return to China for an additional one week consultancy to critique the final draft bill.

**CONSULTANCY NO. SIX
COMPARATIVE DOMESTIC INVESTMENT LAW**

Short term consultant, approximately three weeks, with one additional week optional if BLA so decides.

General job description:

One top-level non-resident consultant to the project who will conduct a seminar on comparative law and practice concerning the use of law to direct domestic investment; critique the preliminary and final drafts of the proposed domestic investment bill; participate in critique groups on the preliminary draft of that bill, and, where BLA so elects, in the final draft of that bill.

Specific tasks

1. In China, for members of the task group, conduct a three-week seminar on comparative law and practice concerning the use of law to direct domestic investment.
2. Critique in writing the preliminary first drafts of the proposed domestic investment bill and its accompanying Memorandum of Law.
3. In China, participate in a critique group on the preliminary first draft of that bill and its accompanying Memorandum of Law.
4. If BLA so elects, critique in writing the provisional final draft of that bill and its accompanying Memorandum of Law.
5. If BLA so elects, in China, participate in a critique group the provisional final draft of that bill and its accompanying Memorandum of Law.

Professional background.

Senior academic or practitioner concerned with the comparative law and practice of directing domestic investment. The consultant must have:

+ Postgraduate education (Ph.D or J.D. or equivalent) in economics or law; and

+ either: --

-- a distinguished record of at least ten years in research and teaching about the comparative law and practice of directing domestic investment, including the laws of developing countries, or

-- at least ten years' experience in international or governmental organizations doing work concerned with the

use of law to direct domestic investment, including developing countries.

Duration/involvement:

The consultant will initially be appointed for a period of approximately three weeks and carry out the tasks of the consultancy in China. Where BLA so elects, the consultant may be appointed to return to China for an additional one week consultancy to critique the final draft bill.