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Human Rights in China in the Context of the Rule of Law: Hearing Before the Congressional-Executive Commission on China, 107th Cong., Feb. 7, 2002 (Statement of James V. Feinerman, Prof of Law, Geo. U. L. Center)

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**HUMAN RIGHTS IN CHINA IN THE CONTEXT OF
THE RULE OF LAW**

HEARING
BEFORE THE
**CONGRESSIONAL-EXECUTIVE
COMMISSION ON CHINA**
ONE HUNDRED SEVENTH CONGRESS
SECOND SESSION
FEBRUARY 7, 2002

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Second, to encourage China to invite the ILO to send a direct contact mission, as they have offered, to look specifically at the issues of the rights of free association and ways of amending Chinese labor law and practices to bring them into conformity with ILO standards.

Thank you.

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

Chairman BAUCUS. Thank you very much. That was very helpful. I particularly urge members of this Commission to look at the suggestion to join the President on his trip to China.

All of us have been to China many times and in various capacities. I know that the one time I accompanied President Clinton, I learned a lot. It was very, very helpful. I particularly appreciate that, and your other recommendations.

I must leave now. There is a vote. But I will come back. Chairman Bereuter will continue. However, I have to give my apology to Mr. Xiao. Unfortunately, your little sign up there says Mr. Qiang, it does not say Mr. Xiao, and I very much apologize.

Mr. XIAO. I am used to that.

Chairman BAUCUS. I am sure you are.

Representative BEREUTER [presiding]. Professor Feinerman, we would like to hear from you. Professor Feinerman is from Georgetown University Law Center. You may proceed as you wish.

**STATEMENT OF JAMES V. FEINERMAN, JAMES M. MORITA
PROFESSOR OF ASIAN LEGAL STUDIES; ASSOCIATE DEAN,
INTERNATIONAL AND GRADUATE PROGRAMS; DIRECTOR,
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LAW CENTER**

Mr. FEINERMAN. Thank you, Mr. Chairman. I want to thank you and members of the Commission for holding these timely hearings and for providing an opportunity to present our views to you and share the information that we have gathered in our respective professional capacities.

I would also like to say that I am summarizing remarks that I have made in a longer written statement, as have the other witnesses.

I was asked to particularly address some rule of law-related issues that deal with China's accession recently to the WTO. I will try to focus on that.

But, in considering that situation, I want to start by saying that with respect to the rule of law, at least up to the point of WTO accession, there are three major points that we need to keep in mind as we think about how we will proceed in the future.

First, is that there has been, and continues to be, considerable legalization of the People's Republic of China which has been under way now for two decades. It is incomplete, it is problematic in some respects, but it is worth noting that this process will go on whether or not the United States chooses to participate in the future development of the process. I hope we do, as I will say in a few moments.

Second, the PRC has already experienced some considerable law reforms which have made important contributions to the economy.

This is important in connection with the WTO accession. But there are other commitments which have political ramifications, and they are not necessarily connected to the WTO or economic matters more generally, and we need to keep them in mind as we think about comprehensive development of the legal system in China.

Third, despite this legalization and law reform that has now extended for over 20 years, there is still, unfortunately, a great deal that has not changed in China with respect to the rule of law, civil rights, political liberties, and the meaningful enjoyment of freedoms that we take for granted in this country and other developed nations.

But this patchy liberalization that has taken place has at least brought a modicum of political and legal change, and economic development, which I think lays an important groundwork.

I have said in previous testimony to other committees in Congress in earlier years, that I think it was the case 4 or 5 years ago—and I think it is even more the case now—that more people in China today enjoy more political and civil rights than they have at any time in China history.

It is still not enough, and there are important groups that are not enjoying these overall effects that reach to most members of Chinese society. But that is an important thing to know.

We may want to try to push for a faster pace, faster than the Communist Party leadership in China might enjoy, but nonetheless we need to see where things stand currently.

I mentioned in my testimony a couple of areas that I think will demonstrate the partial success and the remaining problems of China's long, slow march toward the rule of law.

Here, I would just mention them in order and refer you to my written testimony: In areas like enterprise reform, where there has been a partial privatization of the Chinese economy, but many problems, including some that have already been mentioned this afternoon with regard to issues such as labor rights, such as the treatment of redundant workers in the modernization of the Chinese economy.

With regard to national and local leadership, there have been major reforms in many areas that make institutions that were previously virtually useless and bypassed usually by Communist Party authority much more important as we look at the future development. Especially, here, I would note things in the State Council, the administrative organs of the Chinese Government.

Third, there have been important developments with respect to corruption. Now, this is a problem that is beginning to be investigated by the Chinese authorities themselves. They understand that their political legitimacy depends on a belief on the part of those that they rule that the government is generally honest and uncorrupt.

Still, there is a tendency to scapegoat a few high-profile cases and not address some of the root causes of corruption, but this is an area where our experience may prove to be somewhat instructive and helpful.

In the legal profession there has been an important development, especially in terms of the numbers. My colleague, Professor Alford,

has written extensively and insightfully about the problematic developments in this realm.

But China went from having fewer than 3,000 lawyers 20 years ago to having over 100,000 lawyers there today. Here in Washington we may not necessarily see that as a positive development in every respect, but I think it means that people who do want to assert legal rights, at least, have someone available to help them do it.

Finally, appropriately, here in Congress I would mention that the National People's Congress itself has been undergoing a process of reform and there are now individuals and organs, including committees, that are trying to learn from the experience of developed legislatures around the world how to be more serious in their legislative work. This is obviously important.

I just want to mention two points about WTO accession before I conclude. As part of the protocol of accession to the WTO, China has made many important commitments to both reform its laws and to make basic changes in its legal system.

At the first level, these mainly involve things like passing certain laws that are necessary to comply with specific WTO requirements. Some of those have already been passed, other legislative reforms are under way. But that is just the first step.

On a second, deeper level, they have promised to adopt basic principles of WTO jurisprudence that most member countries already have, things like transparency of the regulatory regime, creation of impartial tribunals to hear WTO-related complaints and trade disputes. That will, I think, develop apace.

But on the third, deepest level, there are still some important choices that have to be made and bridges that the Chinese leadership, I think, has not yet crossed with respect to not only the WTO commitments, but the kind of rule of law that would really make it possible to honor the notion that would require structural changes that would transform the most basic features of not only Chinese law and legal culture, but I think Chinese culture, more generally.

The experience of other, former developing countries in the Asian region, such as South Korea and Taiwan, shows that this can happen over a period of time, but it also shows that it may take time.

It may take several decades, as happened there. The good news is, it has been under way in China for at least a couple of decades, so maybe we only have one or two more to go.

The challenges with respect to implementation, though, are legion. I outlined some of them in my written testimony. The report of the Working Party on Accession runs to 70 single-spaced pages of rather dense, legalistic prose. I commend it to you, but it gives you some sense of the scope of what China has to do next.

I would just like to close by making a pitch for something. I was gratified to hear in Congressman Bereuter's remarks opening the session today that there may be a commitment to more involvement on the part of the United States with respect to legal and other kinds of educational and cultural exchanges.

It is actually the case that the State Department and other Federal agencies that are involved in this today provide less support

for bilateral exchanges with China than they did 10 years ago. That, I think, is a shocking fact.

We devote less than 1/40th of the amount that is targeted in the United States Federal budget for aid to Central and Eastern Europe and the former Soviet Union and the newly-independent states to academic and cultural exchange with China. That is overall, not just focused on law.

Given the equal strategic importance of China and its vastly larger population, I think that this is short-sided and parsimonious on our part. I would note that, in the developed world, the European Union and Canada, for example, have major initiatives with respect to rule of law and law reform, not simply focused on the WTO, but broader.

I think, in conclusion, the development of the rule of law in the future in China is going to prove to be checkered, as it has been in the past two decades. China has made enormous strides since the 1970's, but in many areas it obviously has quite a long way to go.

I think that China has tried to make a kind of devil's bargain with respect to modernization. It wants to have a modern rule of law while it retains what they call "Chinese socialist characteristics." The situation is likely to persist, at least for the foreseeable future.

WTO accession, however, provides a unique opportunity to push the envelope and maybe hasten the pace of incremental change with respect to China's participation in the international economy, but in other, more basic legal areas as well. I think, with our eyes fully open, we should seize the opportunities that this historic era provides us.

Thank you.

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

Representative BEREUTER. Thank you very much.

Next, we would like to hear from Professor William P. Alford, the director of the East Asian Legal Studies Program at Harvard Law School. You may proceed as you wish, Professor.

STATEMENT OF WILLIAM P. ALFORD, HENRY L. STIMSON PROFESSOR OF LAW AND DIRECTOR OF THE EAST ASIAN LEGAL STUDIES PROGRAM, HARVARD LAW SCHOOL

Mr. ALFORD. Thank you very much. It is truly a privilege to appear before this important commission.

I start from the proposition that the two principal areas that this Commission is charged with overseeing, human rights and rule of law, are inextricably interwoven.

China needs to continue to develop legally for its citizens to have the means to vindicate their rights, but legal development insufficiently attentive to human rights will not enjoy credibility with the people of China, or with us.

Over the last quarter century the PRC has engaged in the most extensive program of legal construction in the history of the world. Considering that a generation ago there essentially was no legal system in China, a fair amount has been accomplished.

Hall on January 1. That same month, Yili prefecture ordered a campaign against folk customs such as wedding, funeral, and house-moving rituals. Uighur cadres must have permission before attending such events and must report back to their superiors. A Party official said the aim of the order was to curb extravagance and eradicate superstition.

In violation of its once-a-month prison visit policy, Rebiya Kadeer, sentenced in March 2000 to an 8-year term for sending Xinjiang newspapers to her husband in the U.S., was limited to one family visit every 3 months. Glass separated her family members during the thirty- to fifty-minute visits, at least one guard recorded everything that was said, and topics for discussion were limited. Ms. Kadeer was required to wear a black tag signaling that her crime was serious and her behavior bad, in part because she was unable to complete her assignments in the prison cardigan factory. However, she was denied the glasses she needed to work efficiently. Ms. Kadeer's family was subject to surveillance and harassment. A fourth son, Ablikim Reyim, was released in February, some 6 months before his 2-year reeducation through labor term expired.

PREPARED STATEMENT OF JAMES V. FEINERMAN

THE ACCESSION TO THE WORLD TRADE ORGANIZATION OF THE PEOPLE'S REPUBLIC OF CHINA (PRC) AND RELATED RULE-OF-LAW ISSUES

FEBRUARY 7, 2002

Members of the Commission:

Thank you for holding these hearings and for providing an opportunity to present my views and to share information gathered from my study of Chinese law, visits to the People's Republic of China (PRC) and ongoing work in the field of academic exchanges between the United States and the PRC. Given China's population and size, strategic position, and growing economic importance, it remains necessary to focus upon a number of other significant considerations in formulating United States policy toward the PRC. In addition to recent problems relating to United States actions and responses to the international behavior of the PRC, recurrent questions surround the development of a law and the legal system in the PRC which remain difficult to answer. This statement is an attempt to address at least a few of them in the context of China's recent accession to the World Trade Organization (WTO) and attendant legal concerns.

In considering the current situation with respect to the Rule of Law in China at the time of PRC accession to the World Trade Organization, there are three major points, further developed below, that I would like to make today. First, there has been and continues to be a considerable legalization of the PRC which began in the late 1970's. This process will go on whether or not the United States participates in the future developments. Second, the PRC has already experienced law reforms which have made important contributions to the economy and polity of the PRC and continue apace partly, but not solely, due to commitments the PRC has made with regard to WTO accession. Third, despite this legalization and law reform now extending for more than two decades, there is still unfortunately a great deal that has not changed in China with respect to the Rule of Law, civil rights and political liberties and the meaningful enjoyment freedoms taken for granted in most developed nations.

Legal Development in China Since 1979—Background. When China opened the door a crack to private entrepreneurship in the late 1970's, individuals long under the thumb of China's Communist nomenklatura at long last began to have some ability to control their own fates. Today, China's dramatic economic growth is the result of the efforts of millions of privately owned enterprises and reforming, semi-privatized State and collective enterprises. The economic changes in China over the past two decades have enabled a significant part of the Chinese populace to achieve more than a modicum of economic liberty and resulting personal freedom. They can throw off the shackles of their state-assigned jobs, their controlling danweis (all-powerful work "units") and the petty martinets who previously ordered their lives. This, in turn, opens the door to greater political liberty and even activism. Indeed, the public display of anti-government sentiment in Beijing and elsewhere in China in the spring of 1989 was largely funded—and often initiated—by such individuals.

Similarly, the police-issued residence permit (hukou) no longer serves as an indispensable passport to everything from food rations to job placement, housing or employment. Market-oriented reforms have so undermined the hukou system that the Chinese government is unable to exercise the demographic, political and economic

control it enjoyed from 1949 until the late 1980's. In a dynamic economy, the leadership has little choice but to allow a freer flow of workers to stoke China's booming economy. This increase in labor market mobility comes at the expense of social control, as migrant laborers swarm into China's coastal cities and provincial centers. Evidence of the system's breakdown was already visible over a decade ago, when scores of "most-wanted" student activists and dissidents managed to slip through the yawning gaps of the hukou net to escape from China in the aftermath of the 1989 massacre. Former paramount leader Deng Xiaoping's 1992 trip to the south of China and contemporaneous call for unleashing economic growth proved merely the final nail in the coffin lid of a crumbling system. An army of anywhere from 100 million to 200 million migrant laborers now provides the lifeblood of China's economic boom.

The death of China's paramount leader, Deng Xiaoping, led to much reflection about the many changes wrought in China during Mr. Deng's leadership over almost two decades; however, curiously little attention was paid to Deng's efforts to bring law to the lawless China he inherited from Mao Zedong at the end of the so-called "Great Proletarian Cultural Revolution." Nevertheless, all of the economic reforms and opening to the outside world for which Deng Xiaoping was rightfully acclaimed would have been difficult—if not impossible—without the simultaneous embrace of a rudimentary legal order that has become increasingly embedded in Chinese society with each passing year. At the same time, it remains necessary to exercise caution in assessing post-Mao China's legalization; the extent and depth of law's penetration of Chinese society today is both problematic and erratic. Parallel to China's economic modernization without corresponding political reform, there has been a considerable amount of lawmaking activity since the late 1970's without the nationwide entrenchment of fundamental concepts of civil liberties and restraints upon Party and State leaders.

The reasons for these developments in the legal field are not difficult to understand. The contradiction, to borrow now-discarded Marxist terminology, arises from the desire to enjoy the benefits of predictability and regularity provided by law to economic transactions while at the same time eschewing the contentious pluralism in political life that might arise from the protection of individual rights under a more Western-style legal order. In the view of most of China's leaders, including the late Mr. Deng, the striking economic growth of China over most of the past two decades vindicates their predilection for economic reform without political liberalization, particularly when contrasted with the rather different path taken by their once fellow socialists in the former Soviet Union. In the Chinese view, political liberalization too far ahead of economic development seems to have produced the worst of both worlds: deadlocked reforms leaving inefficient economies mired in backwardness and explosive political resentment of the failed promises of the new order to produce prosperity. Despite tight political and legal controls, China's leaders feel that they can take pride in having "delivered the goods," with year-to-year double-digit growth rates and visible symbols of economic success in the rapidly changing skylines of major Chinese cities.

Yet the patchy legalization which has occurred in China since the late 1970's, along with other sporadic political reforms, illustrates both the inseparability of at least a modicum of political and legal change from accompanying economic development along capitalist market lines and the intractable difficulty of partial political reform which creates popular expectations of more change, at a faster pace than most cautiously reforming regimes—particularly one as hidebound as China's Communist Party—are willing to provide. The particular areas considered below demonstrate just a few of the partial successes and remaining problems in China's long, slow march toward the rule of law.

Legalization in Action. A few areas where legalization has led to significant social change will illustrate the new importance law has assumed in Chinese society over the past two decades:

- *Enterprise Reform.* Since the start of China's market-oriented reforms, China's state-owned enterprises (SOEs) have faced increasing difficulties and economic decline; by contrast, collectively and privately owned enterprises have expanded rapidly. In the late 1990's, China had more than 2 million collectively owned enterprises, employing over 30 million people. In the mid-1990's, there were already 25 million self-employed business units and 600,000 privately owned enterprises; these enterprises employed 56 million people. Non-state-owned enterprises produce over 50 percent of China's GDP, and the output value of non-state-owned industrial enterprises now accounts for the lion's share of gross industrial output value. All of this has depended upon new legal rules for enterprise, company law, bankruptcy reorganization and even constitutional reforms that guaranteed the protections for private enterprise.

- *National and Local Leadership.* Roles and responsibilities for China's national and local politicians are changing radically. By 2010, the Chinese Communist Party (CCP) will be pre-occupied with managing the state's (and the CCP's) relationship to an emergent "civil society." This trend has several implications for the future: national and local leadership will have to be both educated technocrats and skilled political operatives; the CCP will have to adapt to new roles in order to maintain its leadership; technocratic imperatives will marginalize traditional CCP political leadership; and the CCP will likely, as a result, become less politicized and more educated, at both national and local levels, reflecting its membership. Much depends upon the ability of the CCP to institutionalize its new roles and to incorporate new members and leaders who depart from the traditional mold, making use of new legislation to regularize these practices. For example, fixed terms for senior and lower-level leaders are now being observed, and retirement at increasingly younger upper age limits is becoming common. Although indications are that the CCP will adapt and maintain its control over the State and political institutions in China, resisting attempts to pluralize Chinese politics and suppressing dissident forces, its ability to influence all policies (especially in the economic realm) will recede as its membership and leadership come more to resemble the business, education and other technocratic elites in Chinese society.

- *Corruption.* Notwithstanding the considerable attention paid to law reform in other areas, a separate and long running debate has been underway in China for the past several years with respect to the extensive and seemingly ineradicable problem of corruption. While the Chinese economy enjoyed tremendous growth under Deng Xiaoping's policies, embezzlement, bribery, extortion, favoritism, nepotism and even smuggling have not only increased in extent and variety; moreover, there is virtually no area of China free from these influences. Even Chinese Communist Party leaders view corruption as a threat to social and political stability. It weakens the legitimacy of the Chinese state, the capacity of those in power to govern and the attempts to create a more extensive rule of law in Chinese society. Partly to address these concerns, the leadership has since 1989 initiated various anti-corruption campaigns of limited duration and geographic scope. A few cases have been widely publicized, particularly where economic malfeasance has resulted in severe penalties, including the death penalty.

- *Local protectionism.* Local protectionism is another, related difficulty with respect to the elimination not so much of corruption but of distorting favoritism which skews markets and cuts against economic efficiency. An unfortunate concomitant of China's market economic reforms, local protectionism has resulted from the obvious economic incentives created the reforms to favor local enterprises and industries and to eliminate, by fair means or foul, outside competition. Reportedly, in certain provinces this has even led to attempts to impose illegal "duties" and other disadvantageous charges on goods and services originating outside of that particular province. The ability of local governments under the new economic order to retain more of the revenue produced in that locality, along with a diminished authority on the part of a central government which no longer provides either central guidance or wealth-transferring subsidies, has exacerbated these trends. The central government's apparent powerlessness in the face of these developments only further erodes local willingness to abide by central government directives, including those ordering an end to local protectionism. The PRC's WTO accession commitments to national treatment create a great dilemma in this arena.

- *The Legal Profession.* Once the decision was made, as part of China's Four Modernizations program begun under Deng Xiaoping in late 1978, to resuscitate the legal profession and to educate much larger numbers of lawyers in Chinese universities, a remarkable growth of this long-neglected sector took place. In 1980, when China promulgated its Provisional Regulations on Lawyers, only a few thousand lawyers could be identified in the entire PRC, many of them trained either before 1949 or during the brief period of "socialist legality" along Soviet lines during the post-liberation honeymoon between China and the Soviet Union before 1958. During the early 1980's, dozens of new law faculties were added to the small handful which had previously existed (and all of which were re-established and strengthened). Changes in both the Chinese economic system and in the realities of legal practice over a decade and a half required a total reworking of China's laws regulating the legal profession, which finally occurred in May, 1996 (effective January 1, 1997). The new Chinese "Lawyers' Law" introduced certain far-reaching and long-overdue reforms, reflecting not only certain developments which had already taken place but also describing a course of future reforms desired by many in the practicing bar and at least grudgingly conceded by the senior leadership. The liberalization permitted under this new legislation, including the ability of lawyers to form firms as partnerships, responded more to the needs of China's continuing economic modernization

than to the calls of lawyers for greater autonomy in their practice. Nevertheless, the law recognizes that the former requires the latter; moreover, the expansion and extension of China's economic reforms are now understood to depend upon governing the country by law, particularly in its market economic sectors.

• *NPC Reform.* Under the leadership of Qiao Shi and its current head, Li Peng, China's National People's Congress (NPC) has begun to emerge from its longtime status as a "rubber-stamp" parliament. To be sure, it remains far from an independent, multiparty legislative institution enjoying actual powers of parliamentary supremacy described in great detail in the 1982 Chinese Constitution. It is probably fair to say, however, that the new, higher status of the NPC stems from a leadership determination to exercise "rule by law" rather than "rule of law." In the formulation "rule by law," law exists not so much as a limit on State power (a feature of the "rule of law" in the usual Western understanding) but rather serves as a mechanism for the exercise of State power—which can still also be exercised by other available means, such as Party discipline or leadership fiat. Thus, a more powerful NPC does not necessarily diminish the other organs of power in the PRC; in fact, their predominance—particularly in the case of the Communist Party of China—is very little challenged by enhancement of the NPC's strength. A number of foreign scholars have begun to credit the NPC with greater independence and initiative. Under Qiao Shi, who served as a Vice Premier and head of China's security apparatus, new stress was given to the NPC's role in both originating and passing legislation as well as providing oversight of the nation's legal work in the judicial, prosecutorial and administrative spheres, as well as in legislation. During the past several legislative sessions under the leadership of Li Peng, former Premier, there has been considerable controversy—as well as a sizable number of negative votes—in connection with various legislative initiatives; such open dissension would have been unthinkable even a decade ago.

Law Reform Activities. Over the past 20 years, various organizations in the United States have provided assistance and support for law reform in the PRC. The programs they created, in conjunction with a huge domestic law reform project undertaken by the Chinese themselves and parallel programs supported by other foreign governments and organizations, benefited the construction of new legal institutions and the development of a legal infrastructure which are still being perfected.

In the early phases, a few pioneers played a major role in working with Chinese counterparts to get things off the ground. Among them were the Ford Foundation, the United States Information Agency (as it was then named), the Henry R. Luce Foundation and the National Endowment for Democracy and its party grantees, particularly the International Republican Institute. More recently, new entrants arrived on the scene to continue and to expand the work, such as The Asia Foundation, the Lawyers' Committee for Human Rights, the Freedom Forum, and even the State Department. Two summits between Presidents Clinton and Jiang in the late 1990's promised even greater United States assistance in the following areas:

- Judicial and lawyer training—new avenues for law schools from both countries to collaborate, legal cooperation between the American Bar Association and Chinese counterparts, United States Information Agency support for preparation and translation of legal teaching materials;
- Legal protection of human rights—The US and China held a symposium on this topic;
- Administrative law—A broad-ranging exchange involving decisionmakers and academic experts on comparative administrative law was planned;
- Legal aid for the poor—At least one symposium in Beijing has been held to consider ways to expand programs already initiated by the Chinese side;
- Commercial Law and Arbitration—Exchanges on securities law, electronic commerce and judicial handling of commercial disputes were planned, along with a program of cooperative training for arbitrators. The Chinese government also promised steps to ensure prompt enforcement of arbitral awards in local Chinese courts.

In most cases, the promises of those heady days of "constructive engagement" and "strategic partnership" went unfulfilled, in part due to the fallout of the accidental bombing of China's Belgrade embassy, the change in Presidential administrations and the downing of the EP-3 in China last spring.

Committee on Legal Education Exchange with China (CLEEC). No treatment of the law reform era in China over the last two decades, or any consideration of future US-government supported activities in legal assistance to China, should ignore the experience of CLEEC, created and generously supported for a decade and a half by the Ford Foundation.

Over the past two decades, the volume of international legal exchange between the People's Republic of China (PRC) and the United States has grown remarkably. Much of the contact between Chinese and American legal circles has occurred in the academy, and no organization has been more instrumental in encouraging this development than the Ford Foundation-sponsored CLEEC. For 15 years (1982-1997), CLEEC was directly involved in the education of over 250 young Chinese legal academics—in the PRC and in the U.S.—and in the promotion of many other forms of scholarly exchange between lawyers, law professors and government legal specialists. During that time, in no small part due to CLEEC's efforts, the underdeveloped legal education profession in the PRC grew tremendously, both in size and expertise; law faculties expanded and became much more international in their outlook; and academic research by Chinese specialists developed greater sophistication.

From its inception, CLEEC endeavored in several ways to promote both Sino-U.S. understanding, at least as it related to law, and the development of Chinese university law faculties. First, CLEEC provided training at U.S. law schools—including degree programs—for a wide range of Chinese legal educators. Chinese participants were given placements at the best American law schools, with supervision (for visiting scholars) or instruction (for degree candidates) by eminent faculty; such placements were arranged carefully to match the needs and backgrounds of Chinese scholars to the schools best able to meet those needs. In certain cases, these placements have resulted in longstanding exchange relationships, often beyond CLEEC's auspices. American host law schools generally shared part of the costs of the program. Virtually all the other costs of this activity were supported by a series of grants from the Ford Foundation, totaling over \$4 million. Among China's leading law faculties today, at least half a dozen are headed by alumni of CLEEC.

Second, CLEEC, beginning in the mid-1980's, offered an in-country short course in American law for candidates selected to visit American law schools as well as other individuals. This program brought some of the finest legal academics from the U.S. to China to teach law faculty, students and government lawyers and officials the rudiments of the U.S. legal system and, after 1990, specialized legal topics as well. The U.S. law teachers served as unsalaried instructors in a challenging three-to-four-week course that involved a great deal of contact beyond lectures in the classroom and proved both stimulating and inspiring to every cohort of Chinese students that has experienced the program. The largest number of direct beneficiaries of CLEEC are alumni of this program. This activity was generously funded by what was at the time known as the United States Information Agency (USIA), now part of the State Department.

A third major activity, organized by a subcommittee of CLEEC comprising law librarians and supported largely by separate funding from the Henry R. Luce Foundation, was involved in the provision of legal information in print and electronic forms to the leading law faculties of the PRC, the Institute of Law of the Chinese Academy of Social Sciences and other institutions in China. Originally charged with making "stock" law libraries of U.S. legal materials for Chinese law faculties, this subcommittee kept abreast of technological developments during the period of CLEEC's existence to move from print materials—largely law school textbooks and treatises—toward more modern media, including CD-ROMs, on-line legal data bases and the Internet and World Wide Web. Although technological limitations on the Chinese side during the period of CLEEC's operation limited the ability of the subcommittee to do as much as it had hoped, important inroads were made.

Finally, CLEEC and its individual members proved a valuable conduit for other types of scholarly exchange in law between China and the U.S. Aside from the direct funding of a handful of American researchers to carry out projects in China, CLEEC also helped to arrange bilateral conferences, to provide attendees for international meetings in China and to offer information and other assistance to any person or institution seeking to establish links with the legal academic community in the PRC. Many of CLEEC's members were themselves leading academic specialists and experts on China's modern legal system. At the same time, no attempt was made to funnel Chinese participants to those U.S. law schools which had Chinese law specialists; to the contrary, every effort was made to place each Chinese student and scholar at the American law faculty with the best resources for his or her individual program. In the end, over 40 U.S. law schools hosted CLEEC visitors. Today, it remains the case that no single school or group of institutions can hope to satisfy, by itself, the multifarious needs of China's evolving legal order or even its legal education system. CLEEC's successes demonstrate that a broad-based program that harnesses all the available talent in the United States is vastly to be preferred. In the light of the far more generous support that has recently been promised by the European Union, Canada and other foreign governments and foundations, it is high time for the United States officially to step up to the plate, make good on the prom-

ises of several years' standing and build upon the broad and strong foundation of earlier efforts.

WTO Accession. As part of its protocol of accession to the WTO, China has made many commitments to reform its laws and legal system. At the first level, these commitments mainly involve undertaking to pass certain new legislation and to revise some existing legislation to make China's foreign trade regime and related institutions compatible with the requirements of the WTO. On a second, deeper level, the PRC has also promised to adopt basic practices of WTO jurisprudence, such as transparency in its regulatory regime and the creation of impartial tribunals for the adjudication of trade-related disputes. Yet, at a third, deepest level, the commitments that the PRC has made in joining the WTO presage structural changes which promise to transform the most basic features of Chinese law and legal culture. Indeed, the experience of other former developing countries in the Asian region, such as South Korea and Taiwan, is that the adoption of modern legal mechanisms and their subsequent practice over a long term inevitably creates pressures for reform across the board, including political liberalization in line with economic modernization and development.

Among the reasons the PRC has been seeking membership in the WTO, enjoyment of unconditional Most Favored Nation (MFN) status pursuant to WTO rules is clearly the most significant. Under the WTO, trade among member nations is subject only to minimal tariff restraints and requires that all Contracting Parties treat each other "equally." Once the PRC becomes a WTO member nation, China would be able to eliminate its need for bilateral trade arrangements; although these provide benefits, including MFN, similar to those promised by the GATT, such arrangements must be periodically renegotiated and may be unilaterally terminated.

Membership in WTO would promise other benefits for the PRC's international trade in addition to MFN. The WTO provides an important forum for coordination of international economic policy and resolution of trade disputes. Useful, detailed information about the economies of member nations, as well as economic policies and activities, is compiled by its Secretariat; such material will assist China's formulation of its foreign economic and trade policy. Moreover, from the perspective of China's leadership and economic reformers, the WTO's requirements and market orientation are conducive to continuing reform in China's domestic economy, including price reform, tariff reduction and elimination of economically inefficient subsidies and other market distortions.

Notwithstanding these commitments and the substantial benefits to China of WTO accession, as the Report of the Working Party on the Accession of China documents, there are a number of challenges in effective implementation of China's WTO commitments. Some of these relate to China's basic economic policies and the framework for making and enforcing them; others relate to specific policy areas—trade in goods, intellectual property, trade in services, etc. The report itself runs to over 70 pages of dense prose, single-spaced in tiny type. Although less than four of those pages are devoted to framework issues related to economic policies, that brief section deals with such important and intractable issues as the authority of sub-national governments (often the source of local protectionism); the uniform administration of the trade regime (threatened by both local variation in enforcement and the lack of understanding of China's WTO commitments at the lower levels of government in China); and judicial review of administrative actions relating to WTO requirements as implemented in Chinese law (which may be hampered by lack of infrastructure and training, corruption and local protectionism).

A careful examination and historical overview of China's WTO accession process would reveal the WTO's impact on China. Necessary legislative and statutory changes in Chinese legislation are being made pursuant to WTO accession. The need for compliance with WTO rules imposes new constraints on Chinese policies and the uneconomic operations of state-owned enterprises. The role of China in WTO diplomacy, decisionmaking, and the dispute settlement system as a result of the Chinese accession (e.g. role of civil society, amicus curiae briefs, etc.) should also provide impetus for developments in the legal realm. Despite consideration given to special WTO rules designed for China and China's weight in the WTO diplomatic/decision process, China will still have to interact with other WTO member nations in this important international legal arena.

Processes and problems for China in implementing WTO rules include questions about whether the PRC maintains the political will to implement the WTO obligations and the challenges the PRC leadership faces in maintaining Chinese commitments over time. At the same time, there will be considerable economic impact of Chinese WTO membership on world trade and vice versa, in particular the tensions resulting from increased competition in Chinese main export markets, such as textiles, microchips, etc.

The rise and development of procedural rules in the WTO is part of a larger movement in the general WTO jurisprudence and structures. This movement is sometimes criticized as a move toward excessive legalism in the regulation of the global economy, an unfortunate move from diplomacy to a rule-based trade regulatory framework, characterized as a process of "judicialization." Yet, efforts to develop procedural review at the WTO level were taken mainly as a response to the concerns over misuse and abuse of domestic legal systems for protectionist purpose. The particular sensitivity of issues such as antidumping and political legitimacy concerns about national legal systems provided both an internal dynamic and discipline for the WTO dispute settlement. China's accession will require that WTO panels dealing with challenges to Chinese practices must demonstrate that often too rare combination of willingness to enter into the arena of conflict on the one hand, and the wisdom to know when to intervene on the other.

The Practical Implications for China. Procedural review and transparency in WTO jurisprudence is a recent phenomenon in the area of international regulation of world economy. Some have characterized the WTO rules and adjudication as a code of international administrative law; compared with earlier eras of "international administration" it is intrusive to an unprecedented degree. Yet, at the same time, PRC accession to the WTO offers some legal safeguards for China's rights and legitimate interests. Moreover, China can take advantage of the procedural review in Geneva, for example, to curb abuse of antidumping actions by its trading partners.

Bureaucratic culture and legal procedures in China will have to change, however, for the PRC to take full advantage of WTO accession. While there have been considerable efforts to improve administrative procedure in China in recent years, judicial supervision in China in general tends to be weak, at least by common law standards. Chinese authorities will probably face a much more searching review in Geneva than in their domestic courts. Given the need to provide a domestic forum in China before proceeding to WTO review in Geneva, it will take time and effort for the individual officials in Chinese investigating authorities to become familiar with WTO procedures, to improve their own procedures, and to follow those procedures.

What Is To Be Done? The needs that China obviously has in so many areas also present opportunities not only for United States assistance but also, in the process of providing such support, to inculcate American institutional preferences and legal cultural values. More to the point, the assistance that is being offered (and generously underwritten) by others insures that their institutions and values will displace those which we might prefer if the United States does not provide similar sorts of Rule of Law assistance in connection with WTO accession.

Moreover, the challenge now facing the U.S. is to emphasize China's obligations under all those international agreement it has signed (such as the Convention against Torture, International Human Rights Covenants and the Convention on the Elimination of All Forms of Discrimination against Women). Furthermore, China's domestic laws—beginning with China's 1982 Constitution—express in domestic Chinese legislation those universal values which are elsewhere enshrined in both in international treaties and other nation's domestic laws. We need to increase the level and frequency—at the same time lowering the volume—of dialog with China, bilaterally and multilaterally, over a range of legal issues, not only WTO-related but extending to civil and political rights. Expanding current exchange relationships focused on economic law can provide both an avenue for such dialog and a base on which to build relationships with sympathetic audiences in China.

The evolution of democracy in China will be a long, painful process. It depends primarily on economic growth, including greatly increased domestic investments in infrastructure, education and science and technology. The rise of a middle class in China—as in Hong Kong, Singapore, Taiwan and South Korea previously—along with exposure to the outside world and moral support from the West will inevitably press for a more open political system.

Most significantly, China's dissidents—within China and abroad—are virtually unanimous in their support of China's accession to the WTO. They understand the crucial linkages between China's enjoyment of MFN status, along with access to U.S. export markets, and the increase in personal liberty that results from concomitant economic growth. With virtually one voice, these individuals—many of whom have suffered grievously at the hands of the Chinese State and the Communist Party—urge a more nuanced policy, building on existing relationships, promising true "comprehensive engagement."

The economic and trade relationship between the U.S. and China reaches many more lives on both sides of the Pacific than does any other aspect of our bilateral relationship. Yet I would be remiss in representing my organization and my own experiences as a scholar researching Chinese law and the former director of a national U.S.-China educational exchange organization if I did not also describe for

you the remarkable opening of China to educational exchange and the greatly increased access for foreign researchers. More than two decades' hard work on the U.S. side has, particularly in the last several years, yielded new opportunities for study and research in China. For Chinese host institutions, the prospect of economic gain—and the promise that those gains can be enjoyed and controlled by the people most responsible for their realization—has resulted in a previously unimaginable opening. While there are still some problems to be resolved, especially in the light of recent arrests and show trials of Chinese-American scholars and researchers on trumped-up charges, remarkable progress since 1990 has led to unprecedented access to libraries, laboratories, archives and educational institutions.

Yet, despite these gains, the State Department and other Federal Government agencies now provide less than half the support for bilateral exchanges between the U.S. and China that they gave in 1988! Shockingly, we devote 1/40 of the amount targeted in the U.S. Federal budget for such aid to Central and Eastern Europe and the former Soviet Union to academic and cultural exchange with China. Given the at least equal strategic importance of China and its vastly larger population, such parsimony is inexplicably short-sighted.

Conclusion. The future development of the rule of law in the PRC is likely to prove as checkered as has the process of the past almost two decades. Since the late 1970's, China has made enormous strides in passing laws, rebuilding shattered institutions such as the bench, bar and legal education, and in using law and legal mechanisms to lend some greater predictability to the overall conduct of Chinese society and—in particular—the economy. Nonetheless, significant gaps remain with respect to enforcement of enacted laws, serious attacks on official corruption and elimination (or at least the gradual reduction) of the number of highly placed individuals who remain outside of the reach of the law, usually due to their status as Communist Party leaders. Although it is certainly no longer fair nor accurate to describe the PRC as a Nation without law, it would also be difficult to characterize it as a Nation where the rule of law enjoys quite the same prominence as it does in most developed Western nations or even Japan. As the Chinese like to say in describing their hybrid market economy, which possesses certain elements of the free market along with some remnants of the Communist planned economy, China's legal system is an attempt to create a more modern rule of law while still retaining "Chinese socialist characteristics." This situation is likely to persist for the foreseeable future. WTO accession provides a unique opportunity, however, to hasten the pace of incremental change at a time when the very structure of China's participation in the international economy is being perhaps permanently transformed. With our eyes fully open, we should seize the opportunities such historic changes may provide.

PREPARED STATEMENT OF WILLIAM P. ALFORD

FEBRUARY 7, 2002

To the Chairmen and Members of the Commission:

I am honored to have been invited to testify at this, the first public hearing of the Congressional-Executive Commission on the People's Republic of China, given your charge to monitor compliance with human rights and the development of the rule of law in the PRC at this critical time in our bilateral relationship.

My fields of specialization are Chinese law and legal history, international trade (including the World Trade Organization), and the legal profession. I have been involved with legal development in the PRC from the early 1980's onward when, together with Professors Randle Edwards of Columbia University and Dr. Stanley Lubman, among others, I established the first regular program of instruction in American law in the PRC and the first sustained program bringing Chinese legal professionals to this country for advanced training. In addition, I have taught in China; provided advice to our government, non-governmental organizations, foundations, and others about Chinese affairs; and had extensive occasion to observe Chinese legal development.

In this statement I first offer a brief overview of my understanding of Chinese legal development—which I see as necessary for the realization in China of internationally recognized standards of human rights, but not a substitute for that vital end. I then turn my attention to American and other foreign efforts to assist legal development before concluding by suggesting directions in which attention might be focused. As time and space are short, this statement is performed a summary for which elaboration may be found in the materials cited in my endnotes.