

Statement Before the U.S. - China Security Review Commission

by Donald C. Clarke  
Professor of Law  
University of Washington  
Seattle, Washington

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Mr. Chairman and Members of the Commission:

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

I have been asked to address several aspects of China's membership in the WTO, in particular China's ability to comply with certain of its WTO commitments from the standpoint of its legal system. I have also been asked for recommendations on ways the United States might be able to work bilaterally with the Chinese to help facilitate their compliance with the WTO, including mechanisms to resolve problems short of the formal WTO dispute settlement process.

### Background

It is well understood both inside and outside of China that the task of making China's laws and regulations conform to WTO requirements is a huge one. But a key feature of China's accession to the WTO that sets it apart from most other countries is not the size of the task, but the fact that accession is part of a larger strategy of massive and fundamental economic reform. The Chinese government has embarked on this strategy for its own sake, not to fulfill treaty commitments to foreigners, and Chinese leaders have sought WTO membership not simply because they believe that it will open more markets to Chinese products, but because they see membership as giving them extra leverage to force through difficult changes in the domestic economic system. Many in the leadership understand that China's WTO commitments, while labeled "concessions" in the language of international trade negotiations, are not really "concessions" to be reluctantly yielded at all, but rather sound policies that China would be wise to adopt even without WTO membership. Reforms simply imposed from outside are unlikely to go beyond surface compliance -- if they get even that far -- and truly take root. But many of the reforms required by China's WTO accession, from market opening to greater transparency in administrative procedures, have a strong domestic constituency as well as a foreign one. The influential "Legal System Daily," for example, last November published no fewer than three commentaries by prominent law professors welcoming the pressures that WTO membership would impose in the direction of limited government and increased transparency.<sup>1</sup> Thus, although

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<sup>1</sup>See Yuan Chengben, "Ru Shi wei sifa gaige tian dongli" (Joining the WTO Pushes Forward Judicial Reform), *Fazhi Ribao* (Legal System Daily), Internet edition, Nov. 30, 2001 (interviewing Professor Li Shuguang); Ma Huaide, "WTO yu zhengfu zhizheng linian" (The WTO and the Guiding Concept of Government), *Fazhi Ribao* (Legal System Daily), Internet edition, Nov. 26, 2001; Wang Feng "Ru Shi' yaoqiu zhengfu jueise zhuanbian" (Entry into the WTO Requires a Change in the Role of Government), *Fazhi Ribao* (Legal System Daily), Internet edition, Nov. 12, 2001; see also Nan Xianghong, "WTO: fa de chongxin goujia" (WTO: The Restructuring of Law), *Nanfang Zhoumo* (Southern Weekend), Internet edition, Oct. 25, 2001; and Guo Guosong, "Wei sifa gongzheng jianli zhidu bingzhang" (Establish Institutional Protections for Judicial Justice), *Nanfang Zhoumo* (Southern Weekend), Internet edition, Oct. 25, 2001 (addressing the need for better court procedures, from improving the quality of judges to

China's trading partners may encounter rules and practices inconsistent with China's commitments and delays in curing these inconsistencies, it is not necessarily due to bad faith and foot-dragging by the central government (although of course that is a possibility). In many cases it will be due simply to the normal and well-documented difficulty the central government faces in getting many things done.

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

### China's Ability to Comply with WTO Commitments and Procedures

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

In assessing China's ability to fulfill its commitments and to comply with WTO procedures in such matters as the Transitional Review Mechanism and dispute resolution, we need both to look backward and to look forward. Looking back, one cannot fail to be impressed by the amount of work that has been done so far in identifying, and revising or abolishing where necessary, laws and regulations inconsistent with China's WTO obligations.<sup>2</sup> This work began, of course, long before China's formal accession last November. The scope of the effort can be appreciated by seeing what the Ministry of Foreign Trade and Economic Cooperation is reported to have achieved by the end of 2000, over a year ago, in anticipation of WTO membership: the review of over 1400 laws, regulations, and similar documents, including six statutes (of which five were revised), 164 State Council regulations (of which 114 were to be repealed and 25 amended), 887 of its own ministry regulations (of which 459 were to be repealed and 95 amended), 191 bilateral trade agreements, 72 bilateral investment treaties, and 93 tax treaties.<sup>3</sup> In the first two months of

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achieving greater transparency). For Chinese language sources, I have placed the author's surname before the given name in accordance with Chinese usage.

<sup>2</sup>As this statement is intended to be largely forward-looking, it is not the place to canvass in detail what China has already accomplished in terms of WTO implementation. The United States-China Business Council has compiled useful summaries that can be found at <[www.uschina.org/prcwto/compliance.pdf](http://www.uschina.org/prcwto/compliance.pdf)> (dated June 2001) and on page 14 of the January-February 2002 issue of the *China Business Review* (dated September 2001).

<sup>3</sup>Nan Xianghong, "WTO: fa de chongxin goujia" (WTO: The Restructuring of Law), *Nanfang Zhoumo* (Southern Weekend), Oct. 25, 2001.

the year 2001, the various ministries and commissions of the State Council are reported to have reviewed some 2300 laws and regulations, of which 830 were identified as in need of repeal and 325 as in need of revision.<sup>4</sup>

Indeed, one might almost say that the Chinese officials and commentators are afflicted by too strong a sense of urgency. It is commonly said, for example, that the need to identify and revise inconsistent regulations is pressing because if inconsistencies are found once China is in the WTO, its trading partners can impose trade sanctions. In fact, of course, the process is not nearly so fast. The complaining state would first have to notify China of its complaint and enter into discussions with it; only if it were dissatisfied with the results might it bring a proceeding under the WTO's dispute settlement procedures, and if China ultimately lost it would then still have a reasonable time (Article 21.1(c) of the Dispute Settlement Understanding suggests 15 months as a general guideline) within which to modify the offending regulations.

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

Outside of the field of legislative revision there has also been a great deal of activity. The last several months have seen a flood of new regulations designed to implement China's commitments. There have also been countless training sessions for Chinese officials, many with foreign financial support.<sup>5</sup> The government has begun restructuring to facilitate the meeting of WTO requirements. For example, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) has established a Department of WTO Affairs to handle implementation and litigation as well as to serve as the central place for bringing inquiries and responding to complaints. It has also established a body to handle WTO notifications and a Fair Trade Bureau for Import and Export to handle issues relating to unfair trade practices.<sup>6</sup>

While much work remains to be done, then, there can be little doubt of the energy and commitment shown so far by the government. And this is to say nothing of the enthusiasm for knowledge about the WTO displayed outside of government. Almost any lecture or presentation

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<sup>4</sup>*Id.*

<sup>5</sup>A partial, but nevertheless very long, list of such programs can be found in the Brian L. Goldstein & Stephen J. Anderson, "Foreign Contributions to China's WTO Capacity Building," *China Business Review*, vol. 29, no. 1 (Jan.-Feb. 2002), pp. 10-11.

<sup>6</sup>See Xianwu Zeng, "Trading Rights After China's WTO Entry," *China Business Review*, vol. 29, no. 1 (Jan.-Feb. 2002), p. 19.

with the word "WTO" in it is guaranteed to draw a large audience, and indeed among urban Chinese the English abbreviation is probably as common as, if not more common than, the original (and shorter) Chinese abbreviation (*shi mao*).

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

One issue that should be clarified at the outset is that of the direct applicability of China's WTO obligations within its domestic legal system. To summarize briefly, China's WTO obligations will not become part of its domestic law, binding on courts and government bodies, until appropriate domestic legislation and regulations incorporating those obligations are promulgated. Although there has been some commentary suggesting the contrary,<sup>7</sup> the dominant view -- and the view that counts for practical purposes -- is that specific incorporation into domestic legislation is necessary.<sup>8</sup> This view is certainly the one China presented in the meetings of the WTO Working Party. In Para. 67 of the Working Party Report, for example, China undertakes to meet its WTO commitments "through revising its existing laws and enacting new ones fully in compliance with the WTO Agreement."

The extent to which China revises its existing laws and promulgates new ones is something that can be monitored with relative ease. But clearly it is not enough simply to promulgate new regulations. They must be applied and enforced. Here, there are at least two major issues worthy of discussion.

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<sup>7</sup>See, for example, Tieya Wang, "The Status of Treaties in the Chinese Legal System," *Journal of Chinese and Comparative Law*, vol. 1, no. 1 (July 1995), pp. 1-18, and Meng Xianggang, "Woguo shiyong WTO guoji guize de liang wenti" (Two Issues in the Application in China of the International Rules of the WTO), *Renmin Fayuan Bao* (People's Court News), Internet edition, March 29, 2001. Both authors support their argument by noting the existence of some (by no means all) statutes providing that where the provisions of the statute conflict with China's international treaty obligations, China's international treaty obligations shall override the provisions of the statute. But surely this shows precisely that a specific rule in a domestic statute is necessary to give domestic legal effect to a treaty obligation; the very fact that the rule needs to be stated in a domestic statute contradicts their position.

<sup>8</sup>See, for example, Zhaojie Li, "The Effect of Treaties in the Municipal Law of the People's Republic of China: Practice and Problems," *Asian Yearbook of International Law*, vol. 4 (London: Kluwer Law International, 1994), and more recently (and perhaps more authoritatively, as the author is a member of the administrative law chamber of the Supreme People's Court), Kong Xiangjun, "WTO falü de guonei shiyong" (The Domestic Application of WTO Law), *Fazhi Ribao* (Legal System Daily), Internet edition, Dec. 16, 2001.

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

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

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

The phenomenon of local protectionism is one that has attracted the attention and concern of academics and policymakers in China for some time. Internal trade barriers are just one aspect of it; favoritism to local parties in courts is another. But it is important to understand that it is not just foreigners who want to get rid of it. It is generally in the interest of the central government to expand its own sphere of actual authority and to reduce such local protectionism, and it is more practical considerations than ideological ones that have stood in the way of progress in this area. It has been proposed for years, for example, that judges in local courts should be appointed and salaried by the central government instead of the local government. So far, however, the central government has not been willing to expend the political and financial resources necessary to put this reform into practice. But pressure for such reform is building, as shown by the recent appearance in *Jingji Yaocan*, the internal (non-public) journal of the State Council's think tank on development issues, of an article advocating precisely such a reform.<sup>9</sup>

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<sup>9</sup>See Wang Xu, "Tuijin sifa tizhi gaige, ezhi sifaquan difanghua qingxiang" (Push Forward Reform of the Judicial System, Block the Trend Toward Localization of Judicial Power), *Jingji Yaocan* (Economic Reference), no. 74, 2001 (Nov. 31), pp. 11-22.

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

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

The low qualifications of China's judges are no secret, and indeed are a regular subject of discussion by high government officials, including the President of the Supreme People's Court.<sup>10</sup> As of 1995, for example, only five percent of China's judges nationwide had a four-year college degree in any subject (let alone in law),<sup>11</sup> and it is currently estimated that about 10% of judges have four-year college degrees in law.<sup>12</sup> A 1998 study of nine basic-level courts (the lowest level) in a major provincial city revealed that only three percent of the judges had a bachelor's degree in law and that the "great majority" had had other types of jobs in the court administration such as bailiff, clerk, or driver before being promoted to the rank of judge.<sup>13</sup>

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<sup>10</sup>See the remarks of Xiao Yang reported in "Xiao Yang zai renmin fayuan 'ru shi' hou shenpan gongzuo huiyi shang tichu zhuanbian sifa guannian tigong sifa baozhang" (Xiao Yang Proposes to Change Judicial Concepts, Supply Judicial Guarantees at Conference on Adjudication Work of People's Courts Following WTO Accession), *Fazhi Ribao* (Legal System Daily), Internet edition, Nov. 21, 2001.

<sup>11</sup>See Deng Ke, "Sifa gaige: xianshi yu keneng" (Judicial Reform: Reality and Possibilities), *Nanfang Zhoumo* (Southern Weekend), Internet edition, Oct. 25, 2001.

<sup>12</sup>Author's interview with members of Beijing University Faculty of Law, March 2001.

<sup>13</sup>See Li Xiaobin, "Shenpan xiaolü ruhe neng you da fudu tigao" (How Can There Be a Large Increase in the Efficiency of Adjudication?), *Faxue* (Jurisprudence), no. 10, 1998, pp. 52-54.

The frequency with which situations such as this are reported suggests strongly that there is no political difficulty with advocating reform and that such advocacy is supported in important sectors of the central government. China has in fact recently taken solid steps toward improving the qualifications of judges. This March, for example, will see the first administration of a new unified judicial examination for lawyers, prosecutors, and judges. Although sitting judges will not be required to take or pass the examination, to require this of judges going forward is already a very far-reaching (indeed, surprisingly so) reform at this stage of China's legal development -- so far-reaching, indeed, that one wonders whether the pool of those who pass and are willing to serve as judges will be big enough to serve the needs of the court system. In any case, however, this reform -- and the political difficulties that must have been overcome to effect it -- is solid evidence of the potential for significant reform to occur where there is a domestic constituency for it. Fortunately, there *is* a domestic constituency for significant further reforms in the judicial system.

In addition to the problem of the quality of judges, China's courts are at present not fully reliable as enforcers of statutorily guaranteed rights. This is true for a number of reasons. First, while statutes are superior to regulations issued by government ministries in China's formal constitutional structure, a ministry regulation that is directly on point will generally be considered in fact to be directly applicable rule by both government officials and court officials. This is simply a matter of what might be called customary legal culture; it has been both noted and criticized in China as well as abroad,<sup>14</sup> and among many critics WTO accession was viewed as a helpful spur to change. Nevertheless, change will not come quickly. Second, there is the well known problem of corruption in the judiciary. This problem is not of course unique to China. Third, Chinese courts often have difficulty enforcing their judgments. As this problem is also well known and has been the subject of considerable commentary elsewhere by myself and others,<sup>15</sup> I will not go further into it here.

Fourth, and less well known, is the tendency of Chinese courts not to aggressively seek jurisdiction over cases, but on the contrary to fear it and often go to great lengths to avoid taking difficult or sensitive cases. Courts in China have the choice of accepting or not accepting a case. This is somewhat akin to summary judgment in its gatekeeping function, but very much unlike it in that it is not governed by any consistent set of principles other than the court's general sense of whether the case seems meritorious and deserving of further proceedings. Courts can use this power simply to decline to hear, and thus avoid ruling on the merits of, cases that look

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

<sup>15</sup>See Randall Peerenboom, "Seek Truth from Facts: An Empirical Study of the Enforcement of Arbitral Awards in the People's Republic of China," *American Journal of Comparative Law*, vol. 49, no. 2 (2001), pp. 249-327, and my "Power and Politics in the Chinese Court System: The Execution of Civil Judgments," *Columbia Journal of Asian Law*, vol. 10, no. 1 (Spring 1996), pp. 1-125.

troublesome and likely to cause serious offense to powerful interests no matter how the court decides.

Most recently, the Supreme People's Court of China stirred up a major controversy when it instructed lower courts simply to stop accepting shareholder suits for damages based on certain violations of China's Securities Law.<sup>16</sup> This instruction, it is important to note, was not based upon a theory that the shareholders had no legal right of action under the Securities Law. It was explicitly based on the grounds that adequate procedures had not yet been worked out for hearing such suits, and that they would therefore have to wait.<sup>17</sup> The real reason was simply that the courts were terrified of a number of looming actions in which shareholders were bringing, or about to bring, suit in several courts around the country, and the specter of overloaded judicial resources and inconsistent decisions on similar facts was too much to contemplate.

Just this week, on January 15, the Supreme People's Court finally announced that investors would be allowed to proceed with actions based on claims of false disclosures in securities trading, but only where China's Securities Regulatory Commission had established the existence of such false disclosures.<sup>18</sup> While this is no doubt welcome news to investors, it underscores the casual attitude toward statutorily granted rights taken not only by government agencies, but by the courts themselves. The Court apparently agrees with the plaintiffs that they state a valid claim under the Securities Law, but has interposed, without any statutory foundation whatsoever, the CSRC as a gatekeeper in order to ensure that claims not approved by the government will not come before the courts. (And all other claims remain barred for at least the time being.)

Despite these problems, it must be recalled that the WTO does not mandate a perfect legal system, or even a basically fair one, outside of a few specific areas. Such a system would be welcomed by many in China, and many hope that WTO membership will promote its achievement, but the WTO does not actually require it except with respect to intellectual property under TRIPS.

In TRIPS, there are a number of requirements set out for fair judicial proceedings for the protection of intellectual property rights, but even here there are also a number of clauses

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<sup>16</sup>See Supreme People's Court, "Guanyu she zhengquan minshi peichang anjian zan bu shouli de tongzhi" (Notice on Temporarily Not Accepting Securities Cases Involving Civil Suits for Damages), Sept. 21, 2001.

<sup>17</sup>See "Gao yuan biao shi shen li zhengquan jiu fen an jiang zhu bu tu kai" (Supreme Court Indicates that the Hearing of Cases Involving Securities Disputes Will Gradually Be Increased), *Zhongguo Zhengquan Wang* (China Securities Net), Internet edition (www.cnstock.com), Oct. 11, 2001 (reporting remarks of Supreme People's Court official Cao Shouye).

<sup>18</sup>See Richard McGregor, "China to Allow Investors to Sue Listed Companies," *Financial Times*, Internet edition, Jan. 15, 2002.

specifying that these commitments are not to be read as obligating members to make drastic changes to their judicial system. The list of requirements set forth in Article 41-50 of TRIPS could in fact be read as a list of things a country's judicial system does *not* need to have outside of this particular realm.

Both the GATT (Art. X) and the GATS (Art. VI) have requirements of their own regarding transparency and the impartial administration of law, but these apply only to a particular subset of laws: those regulating trade in goods and scheduled services. There is no requirement of a fair legal system and the uniform and impartial administration of laws in any other respect. Of course, it is unlikely that any country could or should maintain a legal system that was capable of delivering fairness in one sector and unable or unwilling to do so in others. Nevertheless, it is important to bear in mind that the undoubted problems of China's legal system cannot uniformly be condemned as violations of its WTO commitments.

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

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

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

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

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

Similar problems are likely to afflict the Transitional Review Mechanism, which on China's part consists primarily of the obligation to supply information. It seems inevitable that China will interpret the requirements for information narrowly, given the vast range of information called for. While procuring the statistical information called for is merely a question of requiring the relevant authorities to collect it, it will be more difficult to provide the complete lists of relevant regulations and administrative measures that are called for, since it will not always be obvious that a particular regulation may have an impact on, for example, trade in goods or services.

In addition to the specific problems indicated above, the Working Party Report and the Accession Protocol also pose somewhat contradictory demands both at the conceptual level and at the concrete level. They generally promote the strengthening of legal institutions in China, but in some places seem to promote the opposite and to encourage China to continue its tradition of administrative omnipotence. More generally, China's government is paradoxically being asked to exercise central power to further decentralization, and to exercise administrative power to strengthen judicial power.

Consider, for example, Para. 68 of the Working Party Report: China promised that administrative regulations, departmental rules and other central government measures would be implemented in a timely manner, and that if they were not changed in time, the government would still honor China's WTO commitments. Presumably China made this promise at the behest of the members of the Working Party, but it is tantamount to saying that the government may decide at any time simply to ignore its own duly promulgated regulations and to operate according to some other set of standards. Fortunately for the rule of law in China, the Chinese government was apparently not asked to promise to ignore "laws," *i.e.*, legal requirements issued by a constitutionally superior body, the National People's Congress or its Standing Committee.

Perhaps more troublesome is the fact that apparently not only is the government to ignore its own regulations if they cannot be changed in time, but so also are the courts. Here, the issue is how courts are to be notified, other than through the normal process of formal repeal and replacement, that duly promulgated State Council regulations they would normally be bound to implement have lost their effectiveness. The only method would seem to be one that China's trading partners are in other arenas encouraging her to move away from: the unofficial note or telephone call from a senior official instructing courts how to operate in a way that is both arbitrary and opaque.

Similarly, Para. 203 of the Working Party Report contains a promise not to enforce the terms of contracts containing foreign exchange balancing, local content, or export requirements. The demise of such obligations will cause few tears among foreign investors. If the government is saying that as a regulator, it will decline to exercise its discretionary authority to seek sanctions against those who do not fulfill those terms of their joint venture contracts, that is one thing. But if it is claiming the power to order courts not to enforce, between parties, contract rights arising under laws passed by the National People's Congress or its Standing Committee (both constitutionally superior bodies), that is quite another. It may indeed have such power as a matter of fact, but whether China's trading partners should be encouraging its exercise is questionable.

#### Potential U.S. Assistance with Compliance and Capacity-Building

I would like to end with a few words on potential United States assistance with compliance and capacity-building. Because of China's relative lack of experience with a market economy, it is inevitable that despite the government's efforts to identify and weed out WTO-inconsistent legislation, some inconsistent rules and practices will remain, and new ones will crop up. It is in fact likely that many such inconsistent rules will be discovered over time. As I have discussed, the government has already devoted considerable energy to making Chinese laws and regulations consistent with its WTO obligations. As in any country, there may be rules the government wishes to retain that its trading partners view as questionable under WTO principles, like the E.U.'s rules on bananas or the U.S. rules on Foreign Sales Corporations. And there may be rules that displease China's trading partners that do not in fact run afoul of the WTO agreements. But there is no reason to doubt that the government is in principle genuinely committed to getting rid of many of the old rules that shackled the economy and has seized WTO accession as an opportune moment to do it. There is no reason to think that the Chinese government is committed to defending every WTO-inconsistent rule to the bitter end.

As the Commission will probably be hearing from other witnesses, the U.S. is now very much involved, both at the governmental and the non-governmental level, in activities aimed at promoting compliance and building capacity. These activities should continue. Considering the volume of trade at stake, the required expenditure is probably quite modest.

The United States should work with China to develop formal mechanisms -- some of which are already in existence -- that can identify questionable rules and practices, hear arguments

from affected parties, and deliver advice to the appropriate governmental body on the WTO-consistency of the rule. This would give the Chinese government the opportunity to continue, in a structured and unified way, its review of its own regulations, and could serve to obviate the need for formal WTO dispute resolution procedures in many cases.

In particular, compliance and capacity-building efforts should be directed at local governments. The degree of local government commitment to reform and receptivity to WTO standards and principles varies. But almost all local governments have one thing in common: they are drastically less informed than the central government about the WTO in general and about China's specific commitments in particular. Only recently have the WTO accession documents been available in Chinese (they can now be downloaded from MOFTEC's web site), and even so it is no more realistic to expect Chinese local officials to understand their details than to expect American local officials to understand the WTO. There is a great need at the local level for seminars and workshops that will explain the basic principles of non-discrimination and transparency. Local governments need to be encouraged to set up their own offices for hearing and resolving complaints about WTO-inconsistent measures so that recourse need not be had to Beijing or, failing that, the WTO Dispute Settlement Body.

It is important, however, to pay some attention to the target audience. It may make a great deal of sense to train judicial officials in the principles of transparency and due process, for example, but they have very little need to be acquainted with China's substantive commitments under the WTO. Those commitments mean little to courts until they have been translated into domestic law. On the other hand, it is probably a good idea to train local government officials in the principles of non-discrimination and national treatment, since the granting of special breaks and favors on an *ad hoc* basis is a deeply rooted government practice as natural and unremarkable as breathing.

I sometimes think of the Chinese legal system as an aircraft carrier, and of foreign assistance projects as rowboats attempting to change its course. To a very large extent, the path of that aircraft carrier will be determined by what goes on in the engine room and on the bridge. This is a counsel not of despair but of humility, patience, and thoughtfulness. Effective compliance and capacity-building programs must be designed to work over the long term and to build relationships with specific institutions. They must strike the balance between asking too much and asking too little, either of which will lead to nothing being done. And the U.S. must be willing to work with and through NGOs, other WTO members, and multilateral organizations in order first to demonstrate that WTO compliance is not simply a narrow American political interest, and second to avoid having discussions about Chinese compliance with multilateral standards turn into possibly contentious, and certainly fruitless, discussions about U.S. trade practices vis-à-vis China.