

WORKING P A P E R S

CHINA'S WTO COMMITMENT ON INDEPENDENT JUDICIAL REVIEW

**An Opportunity
for Political
Reform**

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**Political and
Legal Reform Project**

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EXECUTIVE SUMMARY

China's accession to the World Trade Organization (WTO) thrusts formidable challenges on Chinese leadership to honor promises relating to the country's rule of law developments. One major challenge involves establishing an independent judicial review system in a country not known for judicial independence.

Judicial review of administrative actions in China is regulated by the *Administrative Litigation Law of the People's Republic of China* (ALL). In August 2002, China's Supreme People's Court promulgated a judicial interpretation to require, among other things, judicial review of WTO-related administrative actions to be based on the ALL. As China has entered into the WTO only about a year, it is too early to see any pattern of judicial practices emerging from WTO-related ALL cases. Nonetheless, empirical research on China's entire ALL system since 1998 reveals that the system lacks independence because the judiciary is plagued with interference, inter-court and intra-court influence, and bribery.

The major reasons for interference are the control of local governments and the Chinese Communist Party (CCP) over the courts' personnel and financial arrangements and the prevalence of CCP policies over law. Inadequate judicial competence, deficiencies in legislation, and the existence of a system under which judges can be punished for making erroneous decisions all contribute to the widespread practice of seeking instructions within the judiciary. This leads to serious inter-court and intra-court influence. Although judicial bribery may not be a serious problem in administrative litigation, it does exist.

To reduce the magnitude of these problems in WTO-related ALL cases, the Chinese government has taken some remedial measures. It has bolstered judicial competence by providing more training to existing judges and reforming the selection system. Legislation and judicial interpretations have been repealed, revised, or enacted in accordance with WTO rules to provide a basis for judges' accurate application of law. To combat judicial corruption, the government set up a nationwide inspection mechanism and launched a plan for reducing the number of judges to create more room for raising the salaries of judges. China's efforts to bring its administrative litigation system in line with the WTO's "independent judicial review" standard are quite impressive. But as mentioned above the fundamental problem lies in local government and CCP control over key aspects of the courts and CCP policies taking precedence over law. To resolve these problems, political reform is needed to redefine the current relationships among courts, the CCP, and local governments.

In July 2002, the Supreme People's Court made unusually strong statements about interference and announced its plan to deal with the problem. Xiao Yang, President of the Supreme People's Court, said, "courts have often been taken as branches of the government, and judges viewed as civil servants who have to follow orders from superiors, which prevents them from exercising mandated legal duties like other members of the judiciary." He clearly pointed out that judges should be "immune from local interference." The court announced that a mechanism would be established "to ensure that judges are free from interventions from local and departmental protectionism." All these actions signal the emergence of political reform initiatives to redefine the relationship between courts and local governments. These initiatives, if pursued cautiously, could lead to reform of the CCP's role in China's political structure.

To respond to this unprecedented opportunity for reforming the relationships among courts, local governments, and the CCP, the international community should direct more resources to support programs on this front. Yet the international community should be realistic about how far the reform can go. The CCP is unlikely to give up the current entrenched status of party policies. It may, however, be willing to allow courts to be more independent of government and party organs at lower levels, to strip these organs' power, and to authorize courts to review more rigorously actions taken by these organs.

Therefore, the international community should assist China in restructuring the court system to make it more independent of local governments and party organs. Chinese scholars propose establishing a court system that exemplifies vertical leadership. Under this system a lower court would be responsible to upper courts only, not to the local government. Personnel and financial arrangements for the entire court system would then be made by the central government. This model is not feasible unless and until China has a sound fiscal system so that the central government does not have to rely excessively on local governments' financial support and has enough resources to allow central fund allocations. For this reason, the international community should help advise China on fiscal reform. In the interim, they should assist China in exploring the possibility of establishing a circuit appeal court system akin to the one in the United States or a separate administrative court system similar to that in France, as proposed by Chinese scholars.

The international community should also offer assistance in drafting laws that would strip administrative organs' power and authorize courts to review more rigorously actions taken by these organs. Several pieces of legislation that the Chinese government is drafting, including a licensing law and an administrative procedure law, would have this effect. The international community should ensure that these laws meet their objectives and should monitor their enforcement once they are enacted.

In the near future, the international community's assistance in these areas will likely be confined to financial support, sharing of foreign countries' relevant experiences, and advising on the applicability of these experiences to China. These steps, though small, could culminate in a larger scale of reform if the Chinese leaders do not find them threatening.

CHINA'S ACCESSION TO THE WORLD TRADE ORGANIZATION (WTO) thrusts formidable challenges on Chinese leadership to honor promises relating to the country's rule of law developments. One major challenge involves establishing an independent judicial review system in a country not known for judicial independence.¹

Under Article 2(D) of the *Protocol on the Accession of the People's Republic of China*, China agrees to establish, among other things, tribunals for the prompt review of certain WTO-related administrative actions. Such tribunals "shall be impartial and independent of the agency entrusted with administrative enforcement." These "review procedures shall include the opportunity for appeal" and "if the initial right of appeal is to an administrative body, there shall in all cases be the opportunity to choose to appeal the decision to a judicial body." In short, China agrees that there shall in all cases be an opportunity for an impartial and independent judicial body to review specified administrative actions.²

Judicial review of administrative actions in China is regulated by the *Administrative Litigation Law of the People's Republic of China* (ALL).³ The legislation stipulates that citizens, legal persons, or other organizations whose legitimate interests are infringed upon by certain types of administrative acts have rights to bring lawsuits to courts.⁴ The aim is to ensure that administrative organs exercise their authorities in accordance with laws.⁵ Most ALL cases are tried by basic courts as the court of first instance unless the complexity of the case requires courts at upper levels—intermediate courts, higher courts, or even the Supreme People's Court—to do so.⁶ In August 2002, China's Supreme People's Court promulgated a judicial interpretation that requires judicial review of WTO-related administrative actions to be based on the ALL and handled at least by intermediate courts as the court of first instance.⁷

China has entered into the WTO for about a year, and it is too early to see any pattern of judicial practices emerging from WTO-related ALL cases. Nonetheless, my study of judicial practices in

The author is grateful to the Asia Foundation for supporting her research in Chongqing, China.

¹ See, for example, Peerenboom (2001); Cohen (1997); Clarke (1996); and Woo (1991).

² *The Protocol on the Accession of the People's Republic of China* (WT/L/432, Nov. 23, 2001), art. 2(D) [*Protocol*].

³ *Administrative Litigation Law of the People's Republic of China*, promulgated on April 4, 1989 and effective on October 1, 1990 [*ALL*].

⁴ *ALL*, art. 2.

⁵ *ALL*, art. 1.

⁶ *ALL*, arts. 13–16. Intermediate courts also have jurisdiction over: (1) "cases relating to ascertaining of patent right of invention and cases handled by the Customs" and (2) "cases brought against specific administrative acts undertaken by any department of the State Council or government in any province, autonomous region or municipality directly under the Central People's Government." *ALL*, art. 14.

⁷ *Supreme People's Court's Rules Concerning Several Questions About Adjudication of Administrative Cases Relating to International Trade*, promulgated on August 27, 2002, and effective on October 1, 2002, arts. 3 and 5.

China's entire ALL system—a mechanism by which WTO-related ALL cases are handled—reveals that the system is not independent. The first section of this paper analyzes how interference, inter-court and intra-court influence, and bribery weaken judges' independence in administrative litigation. The analysis draws on empirical research conducted in Beijing, Shanghai, Chongqing, Wuhan, and Guangdong province since 1998.⁸ Although much of the evidence is anecdotal, it sheds light on a topic about which existing literature is scanty and official statistics alone cannot depict a complete picture.

The second section outlines measures taken by the Chinese government to reduce the magnitude of these problems in WTO-related ALL cases. These include steps taken to combat judicial corruption, bolster judicial competence, and make existing legislation and judicial interpretations consistent with WTO rules so as to provide a stronger basis for judges to accurately apply the law.

The final section of the paper points out that these efforts, though impressive, cannot remedy the fundamental causes of China's lack of an independent judicial review system. These causes are the control of local governments and the Chinese Communist Party (CCP) over the courts' personnel and financial arrangements and the primacy of CCP policies over law. To resolve these problems, political reform is needed to redefine the current relationships among courts, the CCP, and local governments.

An examination of recent statements made by the Supreme People's Court about interference and its plan to deal with the problem reveals that these unusually strong statements signal the emergence of political reform initiatives to redefine the relationship between courts and local governments. These initiatives, if pursued cautiously, could lead to reform of the CCP's role in China's political structure. This section concludes with some suggestions of how the international community can respond to this unprecedented opportunity for reforming the relationships among courts, local governments, and the CCP.

THREE MAJOR PROBLEMS

Interference

Two phenomena in China's administrative litigation best illustrate the interference problem. The first is that courts accept (*shouli*) a relatively small number of administrative cases. A court will accept an administrative case filed by an aggrieved party only if certain prescribed conditions are met.⁹ From 1990 to 2000, courts across the country accepted about 50 million first-instance criminal, economic, civil, and administrative cases. Administrative cases only account for slightly more than one percent of this caseload.¹⁰ Both a professor and a judge who were interviewed noted that approximately 75 percent of Chinese laws are administrative laws and regulations. They also noted that one would then expect that administrative cases would account for a higher percentage, but that is not the case.¹¹ The

⁸ The author interviewed approximately two hundred judges, officials, professors, lawyers, and litigants, observed eight cases, and obtained the judgments for analysis.

⁹ *ALL*, art. 41.

¹⁰ *China Law Yearbook* (1991–2001).

¹¹ Author's interviews with a judge in Zhuhai, Guangdong, June 9, 1999; a professor in Guangzhou, Guangdong, January 14, 1999. Both respondents referred to the figure of 75 percent, which may be pure coincidence or that the figure was publicized in China.

second phenomenon is that a significant portion of accepted administrative cases is subsequently withdrawn from courts. From 1990 to 2000, approximately 47 percent of all administrative cases were withdrawn.¹²

The majority of the people interviewed in China for this study considered interference from administrative agencies and the CCP as the primary factor for the two phenomena and shared their observations about the forms and causes of interference. Other reasons, as discussed below, are only of subsidiary importance.

The small ALL caseload is often attributed to aggrieved parties' "three nots" (*San Bu*): dare *not* sue, *not* willing to sue, and do *not* know how to sue. Parties dare not sue because they are afraid of reprisals resulting from direct confrontation with administrative organs, especially those that have wielded enormous power. Individuals fear public security organs most.¹³ Business people are afraid of suing organs responsible for regulating commercial activities, such as departments of taxation as well as industry and commerce, because confrontations with these organs put their businesses at risk.

Some of the aggrieved parties' unwillingness to sue is rooted in the Chinese legal culture of settling disputes informally to save time, energy, and money as well as to maintain harmony in society.¹⁴ But the greater cause for such unwillingness is that citizens do not believe that judges can rule against administrative agencies and let citizens win. Judges are generally perceived in China as incompetent, unfair, and controlled by administrative organs and the CCP. Some 40 percent of 5,673 respondents from eleven cities, including Beijing and Shanghai, offered these negative opinions about judges.¹⁵

The third "not" refers to aggrieved parties' insufficient knowledge about administrative litigation. Many people may have heard of the term *administrative litigation* but do not know how to sue. The limited availability of legal aid and the relatively high lawyer fees hinder aggrieved parties' access to legal advice. Even if citizens can afford to retain lawyers, most lawyers are not keen on handling administrative cases because they do not want to stand up to the government and risk losing their licenses.¹⁶

Like the "small number of administrative cases" phenomenon, the "high withdrawal rate" phenomenon is often explained by three reasons aside from interference. First, administrative organs come to realize that their acts are wrongful and alter their acts so that the plaintiffs stop pursuing their claims. Second, plaintiffs, owing to their insufficient knowledge about administrative litigation, wrongly sue administrative organs. When they realize that their suits are groundless, they withdraw their cases. Third, these cases are withdrawn because the parties settle outside the judicial process even though mediation of administrative litigation cases is prohibited by the ALL.¹⁷

Neither official statistics nor interviewees could point out which of the three reasons for high withdrawal rate prevails. The statistics distinguish two categories of withdrawn cases: those withdrawn after administrative organs altered their acts and those withdrawn on the initiative of

¹² *China Law Yearbook* (1991–2001).

¹³ For detailed discussion of individuals' fear of suing public security organs (that is, police) and the implications for China's reeducation through labor system, see Hung (forthcoming 2003).

¹⁴ See generally, Lubman (1999), at chs. 3, 8.

¹⁵ *China Daily* (1999).

¹⁶ Hung (2003).

¹⁷ ALL, art. 50.

the plaintiffs. Official sources usually explain that the former category refers to cases in which the administrative organs alter their acts upon realizing that the acts are wrongful; the latter category refers to cases in which the plaintiffs withdraw their cases upon learning that their claims are groundless. This explanation is not complete, however, because under either situation the withdrawal can simply be a result of negotiation and neither party truly believes what he did was wrong.

Although interviewees could not tell which reason carried more weight, all of them mentioned that *xietiao* (literally means “harmonization”) happened all the time. They admitted that *xietiao* is in effect mediation except that at the end of the formal mediation process, there is a “mediation document,” whereas there is none for *xietiao*. During *xietiao*, parties may “reconcile” and settle their dispute voluntarily. What is most worrying is that plaintiffs may be pressured by administrative organs or even judges to settle their cases. Such interference, as discussed below, is not uncommon.

Forms and Causes of Interference. Interference from administrative officials and party members occurs during the entire course of handling an administrative case but is especially common before the case is accepted. At subsequent stages, judges may be pressured to uphold the administrative act, or aggrieved parties are pressured to have the case withdrawn. Since most administrative officials are CCP members, it is very difficult—and unnecessary as some interviewees suggested—to distinguish one source of interference from another.

Interference from administrative organs and the CCP takes various forms. It is seldom in a form that blatantly violates laws. The more senior the officials are, the more carefully they balance their personal status and interests in the government and the consequences of violating laws.

Administrative organs and party members may hinder a case from being transferred away from the jurisdiction where they have more control. Most ALL cases are handled by basic courts as the court of first instance.¹⁸ Compared with higher and intermediate courts, a basic court has jurisdiction over a much smaller community. Within that community, the court is so closely related to local administrative organs and party groups that it is susceptible to their interference. To guard against this, upper courts sometimes, out of their initiative or at lower courts' request, exercise their power to hear as courts of first instance cases over which the lower courts have jurisdiction.¹⁹ Yet administrative agencies and party members often step in to stop the transfer.

Interference usually takes the form of administrative officials and CCP members approaching judges to “inquire” about a case and to “exchange” their views about the case, including the interpretation of any law involved, to ensure that the case will be decided in favor of the defendant agency. Interference also takes the form of pressuring plaintiffs to have the case withdrawn from courts. This problem is not uncommon. A judge disclosed an “internal” investigation in Guangdong. A hundred cases randomly selected from all withdrawn cases in Guangdong during 1997 and 1998 were investigated. On the record, these cases were withdrawn voluntarily by the plaintiffs. But the investigation revealed that most plaintiffs were pressured by administrative organs to withdraw their cases.²⁰

¹⁸ ALL; see also discussion in note 6.

¹⁹ ALL, art. 23.

²⁰ Author's interview with a judge in Guangzhou, Guangdong, January 1999.

There are generally four causes of interference from administrative organs and the CCP. First, administrative officials and CCP members do not have enough legal knowledge and respect for law. Although administrative officials and party members in China have shown improvement in this respect, the improvements have not been great enough to eradicate interference. Second, the problem of *guanxi* (connections) is pervasive in China. Solutions to problems including legal disputes lie not in rules but in whether one knows an influential person to bend the rules. Third, local administrative organs and party officials practice local protectionism (*difang baohuzhuyi*). They influence judges to decide in favor of the party that contributes significantly to the local economy. Fourth, administrative organs practice departmental protectionism (*bumen baohuzhuyi*). Most departments in the Chinese government are run under tight budgets. Revenues from fines and other fees go to the central government. But the more the department contributes to the central government, the bigger the budget it will receive from the central government the following year. Interference is common in cases where plaintiffs request defendant agencies to compensate for their losses.

Judges' Susceptibility to Interference. Judges are susceptible to pressure from administrative organs and the CCP because the latter control courts' financial and personnel arrangements.²¹ Courts' budgets, judges' salaries, and other benefits are determined by people's governments at corresponding levels, which are ultimately controlled by the local party committees called political-legal committees (*zhenfa weiyuanhui*). The courts' heavy reliance on local funds creates tremendous pressure on judges.

Personnel arrangements in courts also weaken judges' impartiality. In China, judges include court adjudicators (*shenpan yuan*) and assistant court adjudicators (*zhuli shenpan yuan*). Senior court adjudicators usually have administrative positions such as presidents or vice presidents of the court or chief judges or deputy chief judges of the court's different divisions.²² The National People's Congress (NPC) appoints the president of the Supreme People's Court, and the Standing Committee of the NPC appoints vice presidents and other court adjudicators of the Supreme People's Court.²³ People's congresses appoint presidents of people's courts at corresponding levels. The standing committees of people's congresses appoint other court adjudicators upon the nomination given by the president of the relevant court. Presidents of the people's courts appoint the assistant court adjudicators.²⁴ Before any of these appointments are made, there is "democratic examination or appraisal" to collect extensively the mass's opinion about a candidate.²⁵

This personnel system may appear democratic, but in reality it is not. Although judges are responsible only to people's congresses, the government's power to decide courts' budgets renders judges susceptible to its pressure.²⁶ A few interviewees called the appointment of presidents by people's congresses sheer formality because they were actually appointed by local governments and party committees.

²¹ For discussion of constraints on judicial autonomy, see He (1995).

²² *Law on Judges of the People's Republic of China*, adopted on February 28, 1995, and revised on June 30, 2001, art. 2, [Judges Law].

²³ *Constitution of the People's Republic of China*, adopted on December 4, 1982, and amended on April 12, 1988, March 29, 1993, and March 15, 1999, arts. 62(7) and 67(11) [Constitution].

²⁴ *Judges Law*, art. 11.

²⁵ D. Chen (1999).

²⁶ See, for example, Cohen (1997), pp. 797–98; and Clarke (1996), pp. 49–52, 84–5.

Another reason for judges' susceptibility to pressure from the CCP is that if there is any conflict between party policies and law, judges are expected to handle a case in accordance with party policies.

China's political structure is not premised on the separation of powers. Under the principle of democratic centralism, legislative, executive, and judicial organs are under the unified guidance of the people's congresses, which, apart from being the country's legislative organs, are also "organs of state power." This political structure is ultimately led by the CCP. Leadership of the CCP is stated in the preamble of the constitution, which is proclaimed to be the fundamental law of the state and to possess supreme legal authority.²⁷ In theory, the CCP cannot lead the country by holding its policies above the law. The constitution stipulates that all state organs, political parties, the armed forces, and other organizations shall abide by the constitution and the law.²⁸ In reality, judges have to consider party policies such as those concerning economic development and social stability.

A judge in Guangdong shared his experience of handling a difficult case. The case concerned an investment project between a Chinese company and a foreign investor. The Chinese company provided land for development while the foreign investor was supposed to contribute RMB100 million. A joint enterprise was established to carry out this project. Two years passed but the foreign investor only invested between RMB20 and 30 million. The Chinese company applied to an administrative bureau in charge of foreign investment to seek approval for dissolving the enterprise. The bureau allowed the application. The foreign investor challenged this decision by administrative litigation. The senior judge said that according to law, the bureau was correct. Nevertheless, he emphasized that when he handled this case, he had to consider two questions: "Should I simply follow the law to uphold the bureau's act? Will this ruling affect investment here?"²⁹

A similar dilemma happens in cases that involve a large number of plaintiffs. In handling these cases, judges consider if their decisions may provoke protests and thus disrupt social stability. A professor in Chongqing cited the example of a case in Hubei province in which 4,600 farmers sued the county government for levying illegal fees. The judges concerned had to consider that if they ruled in favor of the farmers, the government had to bear a huge financial burden to compensate RMB7 million. If the farmers lost the suit, they would likely wage a series of protests that would eventually destabilize the society.³⁰

Intra-Court and Inter-Court Influence

Chinese judges' lack of independence is also reflected in the widespread practice of *qingshi*—that is, junior judges or judges at lower courts frequently reporting to and seeking advice from senior judges or those at upper courts. This practice is claimed to be necessary to ensure that cases are properly handled and that judges are responsible to the parties.³¹ It is doubtful whether the practice has produced these results. But a major problem has certainly emerged: Court decisions have been made

²⁷ *Constitution*, art. 5(2). This provision states that no laws, administrative regulations, or local rules shall contravene the Constitution.

²⁸ *Constitution*, art. 5(3).

²⁹ Author's interview with a judge in Guangzhou, Guangdong, January 13, 1999.

³⁰ Author's interview with a professor in Chongqing, January 7, 2000.

³¹ See He (1999).

collectively. Judges can hardly develop their independence amid this strong inter-court and intra-court influence.

The common practice of *qingshi* is due to judges' inadequate, though improved, competence to handle administrative cases, deficiencies in Chinese legislation, and the existence of a system under which judges can be disciplined if their judgments are considered erroneous.

Judges' Inadequate Competence. In early 1989, only 30 percent of 210,000 "court cadres" in China attained the level of college diploma (*dazhuan*) or above.³² By the end of 1997, there were 280,000 cadres in courts, 170,000 of them were judges and over 80 percent of these judges attained the level of college diploma or above.³³ In spite of these improvements, judicial competence has not been raised to a level that sufficiently meets practical needs.

The problem is most acute among judges from basic courts who admit that they have difficulty in grasping legal concepts. They do not have enough opportunities and time to receive administrative law training. Some courts lack resources to support these activities, whereas others can only send judges away to attend sporadic programs for a couple of days.

Judges from intermediate courts or above have fewer problems. Most of them suggest that they only have difficulty in trying new types of cases, especially those involving high-tech knowledge. Seldom do they refer to any difficulty in understanding legal concepts. This difference in the nature of difficulties encountered by judges from basic courts and those from upper courts mainly lies in the fact that more judges from the latter group have bachelor of law (LL.B.) degrees. Although Chinese university law programs are generally criticized for placing too much emphasis on civil and economic law courses and offering administrative law courses that are too theoretical, these judges at least acquired some concepts about administrative litigation that most of their counterparts in basic courts lack. Judges from upper courts also have more opportunities for training than do the lower court judges.

Deficiencies in Legislation. The common practice of *qingshi* also stems from deficiencies in Chinese legislation. Whenever a judge has difficulty interpreting any legal provision, he or she readily seeks advice from his or her colleagues or from senior judges in the same court or courts at higher levels. As the law does not confer any interpretative power on courts below the Supreme People's Court, junior judges find senior judges' advice essential and readily adopt their views.³⁴ If this interaction between senior and junior judges involves genuine exchange of views, it may be argued that this is conducive to careful handling of cases. But the practice has been abused to the extent that many judges simply rely on senior judges' instructions even though the law authorizes them, not their senior judges, to handle the cases. They cannot risk making mistakes that will affect their annual performance appraisal, or they can, as explained in the next section, be punished for making erroneous decisions.

³² See *China Law Yearbook* (1990), pp. 133–34.

³³ See *China Law Yearbook* (1998), p. 71.

³⁴ The Supreme People's Court has the power to interpret "any problems of the concrete application of laws or regulations in the course of litigation." See *Resolution of the National People's Congress Standing Committee on Strengthening Legal Interpretation Work*, adopted on June 10, 1981.

This problem is exacerbated by numerous ambiguous and conflicting legal rules in China. Ambiguity in legislation is partly due to poor draftsmanship. China's formalistic legal education does not equip law students with drafting skills or skills for investigating the social facts that shape legal developments.³⁵ It also stems from what a scholar called the "politicization of law" problem.³⁶ The contents of most Chinese legislation are couched in "broad, indeterminate language" to declare policies rather than in precise and concise terms to enumerate the regulated activities and the legal consequences of any violations.³⁷

Conflicting concepts in legislation are caused by poor draftsmanship, as described above, legislating organs' lax attitude toward maintaining consistency in content, and local protectionism (that is, local legislation is promulgated to protect or further the interests of the locality even though it contravenes national legislation).³⁸ The uncertain legal status of rules promulgated by multiple entities in China's political structure also contributes to this problem.³⁹ The Law-Making Law, which came into effect on July 1, 2000, helps remedy some but not all the problems.⁴⁰

Accountability for Erroneous Cases. Since 1997, more than twenty high people's courts have established the "accountability for erroneous cases" system. Under this system, judges are held responsible for cases wrongly decided by them.⁴¹ To standardize the system and provide centralized guidance for its implementation, the Supreme People's Court issued the *Tentative Methods for Pursuing the Liabilities of Judicial Adjudicators of People's Courts for Violating Laws during Adjudication* in September 1998. The purpose of this system is to ensure that judges exercise their powers in accordance with laws, facilitate the establishment of a clean court system, and safeguard judicial fairness.⁴² But the side effect is an increase in *qingshi* because judges are afraid of being punished for their mistakes.

Bribery

Judicial corruption in the Chinese court system is serious. Xiao Yang, President of the Supreme People's Court, condemned some judges for "lack[ing] the knowledge needed to do their jobs" and others for being "involved in authorizing torture, forging documents and *using trials to make money*"⁴³ (emphasis added). The pervasiveness of bribery in China's judiciary easily leads one to speculate that the same problem exists in administrative litigation. However, most interviewees found bribery rarely occurred in administrative litigation. According to them, plaintiffs—the aggrieved parties—dare

³⁵ Seidman and Seidman (1996).

³⁶ Wang (1999).

³⁷ Keller (1994), p. 734; and Wang (1999).

³⁸ Corne (1996), pp. 56-59, 90, 147-86. For more on protectionism, see ChinaOnline (1999).

³⁹ For details, see J. Chen (1999), pp. 100-6, 115-8. Murray Tanner characterizes China's law-making system as "chaotic." See Tanner (1994), p. 59.

⁴⁰ *The Law-Making Law of the People's Republic of China, promulgated on March 15, 2000, and effective on July 1, 2000.*

⁴¹ Xinhua News Agency (2000).

⁴² *Tentative Methods for Pursuing the Liabilities of Judicial Adjudicators of People's Courts for Violating Laws during Adjudication*, promulgated and effective on September 4, 1998, art. 1.

⁴³ Pomfret (2000).

not bribe judges into ruling against administrative organs; whereas defendants—the administrative organs—need not bribe judges into declining administrative cases or ruling in favor of them because they may attain this goal by interference.

This explanation sounds reasonable, but my personal experience in Chongqing shows that one should not lose sight of bribery committed by third parties. After a basic court finished a trial that I observed, the judges and I had dinner. On the way out of the restaurant, the third party of that trial greeted us and gave each of us cigarettes and RMB10 (for taxi fare). He included me in his generosity, although I had been introduced to all parties as engaged in field research. The judges readily declined the offer but looked very embarrassed. This episode clearly shows that a third party, who has interests in the case, does have motives to bribe. The third party's interests can be preserved if the challenged administrative act is upheld. This particular third party was not afraid of bribing judges in front of me. Is it because he did not know what he did was wrong? Or is it because he knew that it was wrong but did not care since bribery was so common?

The experience of a Mainland Chinese immigrant in Hong Kong indicates that most ordinary citizens in China do not consider giving gifts to judges wrong. Upon winning a divorce and custody suit in Hong Kong, the immigrant offered the Hong Kong judge cash, brandy, and cigarettes to thank him. "The judge did a very good job. The court helped me a lot and I decided to sponsor them." She continued, "[in China] if the judge is good, we will sponsor him. . . . People there always tell you to offer sponsorship to judges. It is seen as a good thing to do." She was convicted of offering an advantage to an official and was sentenced to a three-month suspended imprisonment.⁴⁴

REMEDIAL MEASURES

To reduce the magnitude of these problems in WTO-related ALL cases, the Chinese government has taken or announced some remedial measures. A number of initiatives that have been introduced since the promulgation of the Supreme People's Court's *Five-Year Court Reform Plan* in 1999 help tackle the problems.⁴⁵ After China's accession to the WTO, the government's reform efforts have intensified. Among these efforts is the promulgation of a judicial interpretation, in which the Supreme People's Court requires the first-instance trials of all WTO-related administrative cases to be handled by intermediate courts or courts at upper levels.⁴⁶ As analyzed in the first section of this paper, basic court judges generally experience much interference and are least competent, whereas judges from upper level courts are freer and more competent.

Overall, China has bolstered judges' competence by providing more training to existing judges and reforming the selection system. Legislation and judicial interpretations have been repealed, revised, or enacted in accordance with WTO rules. This is hoped to provide a stronger basis for judges' accurate application of law and thus reduces the occurrence of inter- and intra-court influence. To combat judicial corruption, the government set up nationwide inspection mechanism and launched a plan for reducing the number of judges to create more room for raising judges' salary.

⁴⁴ Deutsche Presse-Agentur (2000).

⁴⁵ See Xinhua News Agency (1999a). See also, *The People's Court Five-Year Reform Plan*, promulgated by the Supreme People's Court, October 20, 1999 [*Court Reform Plan*].

⁴⁶ See discussion in notes 6 and 7.

Bolster Judges' Overall Competence

Judicial Training. To prepare judges for the demanding work after China's entry into the WTO, the government has, over these years, organized training programs on foreign law and legal systems. Some programs are run in China. For example, in August 1999, Temple University in the United States and the Chinese University of Politics and Law launched a two-year LL.M. program in Beijing to train Chinese lawyers, judges, and government officials on U.S. law.⁴⁷ Six of the thirty-five students were judges, including two Supreme People's Court judges.⁴⁸

Other programs are conducted overseas. The Supreme People's Court has reportedly sent more than two hundred outstanding young and middle-aged judges to study law in developed jurisdictions.⁴⁹ Two examples are illustrative. From 1999-2001, twenty-nine higher and intermediate court judges were sponsored by a \$4.1 million Canada-China Senior Judges Training Project to study Canadian law and legal system for ten months at two universities in Canada and to work for ten weeks as interns at law firms and courts.⁵⁰ More recently, during the summer of 2002, the University of Wisconsin sent a professor and a judge to conduct a week of seminars on the U.S. legal system for judges in Shanghai. These judges then visited Madison for two weeks to observe court trials, meet their American counterparts, and study different courses including evidence law, trial procedures, and judicial ethics.⁵¹

Programs focusing on WTO rules have also been organized. Chinese officials and experts who were involved in the negotiation process have been invited to lecture on the topic across the country. The National Judges College, China's primary training center of senior Chinese judges, has held many WTO courses aimed at senior judges and judges who are responsible for handling cases involving foreign parties.⁵²

To further improve judicial training, the Supreme People's Court also pledges in its *Court Reform Plan* that every three years, all judges must be temporarily released from their duties to receive training at the National Judges College or other judicial training institutes.⁵³

Selection. Another way for improving judges' competence proposed by the *Court Reform Plan* is to change the selection system. Gradually, judges of upper courts should only be selected from excellent judges at lower courts and from lawyers and other legal talents in society. New law school graduates should have to work at intermediate courts or below before they can be promoted to courts at upper levels. In August 2002, the Supreme People's Court issued a circular to formally request all lower courts to adopt these practices.⁵⁴

The idea of recruiting judges from legal talents in society is welcome, but positive results have yet to be seen. In March 1999, the Supreme People's Court launched a pilot project to recruit ten senior

⁴⁷ Cohen (1999).

⁴⁸ Lin (1999).

⁴⁹ Xinhua News Agency (2002a).

⁵⁰ Frere (2001).

⁵¹ Treleven (2002).

⁵² Xinhua News Agency (2002a).

⁵³ *Court Reform Plan*, para. 36.

⁵⁴ Xinhua News Agency (2002b).

judges from distinguished lawyers, law professors, legal researchers, and legal workers in legislatures and law enforcement departments. Candidates had to be between thirty-five and fifty years old, registered Beijing residents, and holders of at least a master of law degree. They also had to pass written tests and interviews.⁵⁵ In the end, very few high-level lawyers and professors applied for the posts because they did not have registered households in Beijing. Even if they did, judges' low salaries and the unclear rank of these ten "senior" judges made the posts unattractive to eminent lawyers and professors.

Higher standards have been set for newly appointed judges. They must pass the national unified judicial examination and a test administered by the provincial people's courts.⁵⁶ The unified judicial examination replaced the separate tests for future judges, prosecutors, and lawyers. Candidates seeking jobs in these professions must satisfy the academic and professional requirements prescribed by the Judges Law, the Procurators Law, or the Lawyers Law.⁵⁷ According to the Judges Law, candidates must have a LL.B. degree (or other bachelor degrees but possess professional legal knowledge) and must have practiced law for at least two years. Holders of master and doctoral law degrees or holders of other master and doctoral degrees who possess professional legal knowledge must have practiced law for at least one year.⁵⁸ Candidates are tested on legal theories, existing legal provisions, professional ethics, and their ability to apply law to facts. More than 360,000 people took China's first national uniform judicial examination in March 2002.⁵⁹

Tidy Up Legislation and Judicial Interpretations

To provide a basis for judges' accurate application of law in handling WTO-related cases, China has been reviewing its legislation and judicial interpretations to ensure that they are consistent with WTO rules. At the end of 2001, China identified approximately 1,150 laws, regulations, rules, policies, and measures that needed to be promulgated, revised, or abolished. The NPC and its Standing Committee enacted or amended nine laws including the Patent Law, the Trademark Law, and the Copyright Law. The State Council promulgated, revised, and abolished thirty-seven rules and regulations and stopped executing thirty-four other policies and measures. Relevant departments under the State Council also have been undergoing similar process. For example, the Ministry of Foreign Trade and Economic Cooperation abolished at least 350 rules and regulations.⁶⁰ In June 2002, Qiao Xiaoyang, Deputy Director of the Legal Committee of the Standing Committee of the NPC, claimed that promulgation and revision of relevant laws, regulations, and rules were almost completed.⁶¹

The Supreme People's Court examined all of its 2,600 judicial interpretations and related documents and repealed 177 of them. The court also formulated new judicial interpretations to

⁵⁵ Xinhua News Agency (1999b).

⁵⁶ *Judges Law*, art. 12. See also, Xinhua News Agency (2002b).

⁵⁷ *Measures for Holding a National Judicial Examination (For Trial Implementation)*, promulgated on December 31, 2001, and effective on January 1, 2002, art. 13(4).

⁵⁸ *Judges Law*, art. 9(6).

⁵⁹ *Legal Daily* (2002).

⁶⁰ Xinhua News Agency (2001).

⁶¹ ChinaOnline (2002).

assist judges in handling WTO-related ALL cases.⁶² As discussed above, the court issued a judicial interpretation to require the first-instance trials of all WTO-related administrative cases to be handled at least by intermediate courts.⁶³ This judicial interpretation also provides that Chinese courts must apply domestic law. This puts to rest different speculations about whether WTO agreements are directly applicable in China or whether they must be applied through Chinese law.⁶⁴ Another judicial interpretation was issued in July 2002. It prescribes rules of evidence for administrative litigation.⁶⁵ Like other trials in China, ALL trials have been weakened by inadequate guidance on admissibility of evidence and parties' responsibilities of adducing evidence in court.

These efforts are admirable and remedy some deficiencies in Chinese law. New problems may emerge, however, because most of these new rules were prepared in haste.

Combat Bribery

In the *Court Reform Plan*, the Supreme People's Court pledges to strengthen the honesty of judicial personnel. In October 2002, Li Yucheng, head of the CCP's Central Commission for Discipline Inspection stationed in the Supreme People's Court, announced a new mechanism to check judges' illegal and inappropriate conduct. Higher people's courts at provincial or autonomous regional levels will be responsible for monitoring lower level courts by different methods including snap inspections. The Supreme People's Court will also send five inspection teams to ten provinces and autonomous regions.⁶⁶

In July 2002, without referring to judicial corruption, Supreme People's Court President Xiao Yang openly said that he wanted judges to be "well-paid so that they can lead a better life."⁶⁷ On the same occasion, he announced different measures for raising judges' overall competence including trimming the scale of the judge contingent. At present, China has about 210,000 judges. In August, the Supreme People's Court issued a circular to formally request each court to determine, in accordance with its caseload and the population and economic growth of its jurisdiction, a reasonable number of judges it needs.⁶⁸ Apparently, all of these efforts pave way for increasing judges' salaries to discourage judges from accepting bribes.

UNPRECEDENTED OPPORTUNITY

China's efforts to make its administrative litigation system conform to the WTO independent judicial review standard are quite impressive. But the fundamental problem of China's lack of an independent

⁶² Xinhua News Agency (2002c).

⁶³ See discussion in notes 6 and 7.

⁶⁴ *Supreme People's Court's Rules Concerning Several Questions About Adjudication of Administrative Cases Relating to International Trade*, arts. 7–9.

⁶⁵ *Supreme People's Court's Rule Concerning Several Questions Relating to Evidence in Administrative Litigation*, promulgated on July 24, 2002, and effective on October 1, 2002.

⁶⁶ Xinhua News Agency (2002d).

⁶⁷ Xinhua News Agency (2002e).

⁶⁸ Xinhua News Agency (2002b).

judicial review system lies in CCP and local government control over courts. To resolve this problem, political reform is needed to change the current relationships among courts, local governments, and the CCP.⁶⁹

The *Court Reform Plan* does touch on the courts' personnel and financial arrangements even though there is no clear reference to CCP and local government control. It provides that the Supreme People's Court will, from 1999 to 2003, "carry out positive exploration concerning the reform of various systems including the courts' organizational system, its cadre management system, and its budgetary management system." However, the suggested initiatives are quite vague. The plan states that the court will seek revision of the *Organic Law of the People's Courts* to gradually construct an organizational system that is consistent with China's political system and enables courts to exercise adjudication powers independently, fairly, and in accordance with the law. It further provides that the courts' cadre management system will be actively explored to better realize the CCP's leadership and the NPC's supervision. The establishment of a court appropriations safeguard system will also be explored to ensure that courts have necessary appropriations to perform their adjudicative duties.⁷⁰

That these initiatives are mostly confined to "explorations" shows the court's political constraints. Any meaningful institutional change involves reallocation of power within the existing political structure. This type of political reform is beyond the court's capacity. The court can only introduce less effective measures to alleviate the interference problem. For example, court leaders are required to rotate their posts regularly to ensure that they cannot stay in a locality for too long to develop strong connections.⁷¹ Intermediate courts are authorized to try all first-instance administrative cases in which "the defendant is the people's government at the county or higher level, and the cases are not appropriate for a basic court to adjudicate."⁷²

Against this backdrop, the statements made by the Supreme People's Court in July 2002 about interference and its plan to deal with the problem appear to be unusually strong. Xiao Yang said, "courts have often been taken as branches of the government, and judges viewed as civil servants who have to follow orders from superiors, which prevents them from exercising mandated legal duties like other members of the judiciary." Xiao clearly pointed out that judges should be "immune from local interference."⁷³ The court announced that a mechanism would be established "to ensure that judges are free from interventions from local and departmental protectionism."⁷⁴

Details about this mechanism remain unclear. But this topic is not new, and Chinese scholars have proposed various models.⁷⁵ According to them, the most desirable model is to replace the current system of horizontal leadership with one that exemplifies vertical leadership (that is, a lower court would be responsible to the court at the next higher level but not to the local government). At the top of this hierarchy would be the Supreme People's Court, which, together with the legislative

⁶⁹ See, for example, Pi and Deng (1998), p. 98; and Guo (1999a).

⁷⁰ *Court Reform Plan*, paras. 6, 43–45.

⁷¹ *Court Reform Plan*, para. 35.

⁷² *Supreme People's Court's Explanation of Several Questions Concerning the Implementation of the Administrative Litigation Law of the People's Republic of China*, adopted on November 24, 1999, and effective on March 10, 2000, art. 8. See also, *ALL*, art. 14(3).

⁷³ AFX-ASIA (2002).

⁷⁴ Xinhua News Agency (2002e).

⁷⁵ Wang (2000), pp. 117–27, 163–77; Ma and Nie (1999), pp. 19–20; Zhang (1999).

and executive branches of the Central People's Government, would make personnel and financial arrangements for the entire court system. Judges of a lower court would be appointed by the court at the next upper level, but the lower court's financial resources would be allocated by the Central People's Government.

This model is unlikely to be adopted in the near future. It would overburden the Central People's Government with too many responsibilities, and the structural change involved is too drastic. Above all, the central government's scanty resources and the country's fragile fiscal system disallow any optimism about central fund allocations. The central government collects only about 16 percent of GDP, compared to the 40 percent in developed countries.⁷⁶ The fiscal system is susceptible to abuse because approximately 80 percent of the central government's revenues are collected from local governments, which have been implicated in major cases of organized smuggling and financial fraud. Corruption and extensive fraud and theft in the banking system further drain funds from the state treasury.⁷⁷ As long as the central government depends on financial support from local governments, local protectionism will continue to exist.⁷⁸

Less drastic models have been proposed. One model would redesign courts' jurisdictions so that they transcend the borders of administrative regions and thus help reduce the impact of local protectionism. For instance, provincial high courts would be replaced with a "circuit appeal court" system that is akin to the one in the United States. Each circuit appeal court has jurisdiction over several provinces. In the context of administrative litigation, the establishment of a separate "administrative court" system similar to that in France has been suggested.⁷⁹

Some China observers perceive the Supreme People's Court's unusually strong statements about interference as "a radical break from the practice of recent decades in which judges were seen as tools of the ruling Communist Party and appointed for political reasons rather than for their knowledge of the law."⁸⁰ This interpretation is too optimistic. The court carefully referred to "interventions from local and departmental protectionism" only.⁸¹ There was neither reference to the central government nor the CCP leadership.

Nevertheless, the court's statements do signal emergence of some political reform initiatives to redefine the relationships between courts and local governments. If pursued cautiously, these initiatives may serve as an opening to bring about reform efforts that address the role of the CCP in China's political structure. The current circumstances inside and outside China create a favorable environment for such pursuit.

Externally, China's WTO membership puts the inner workings of its economic and legal—and by extension, political—systems under greater scrutiny. The WTO established a transitional review mechanism to monitor China's compliance. Under this mechanism, the WTO's general council and subsidiary bodies review for eight years China's implementation of various WTO commitments.⁸²

⁷⁶ Leow (2002).

⁷⁷ Kwang (2000); and Xinhua News Agency (2002f).

⁷⁸ For discussion of central government's financial reliance on regional governments, see Wang (1995).

⁷⁹ Ma and Jie (2000), pp. 65–9.

⁸⁰ *Straits Times* (2002).

⁸¹ Xinhua News Agency (2002e).

⁸² *Protocol*, art. 18.

The fact that aggrieved foreign parties can always, through their countries, resort to WTO's Dispute Settlement Body (DSB) for legal redress pressures China to implement meaningful reform to establish an independent judicial review system. Although the process involved in the DSB is cumbersome and time-consuming, this alternative may still be more appealing to foreign investors than a domestic judicial review mechanism that cannot independently decide cases in accordance with laws.⁸³

Internally, the CCP seeks to survive a mounting governance crisis resulting from, among other things, high-level corruption and rising worker and farmer protests.⁸⁴ Recent developments show CCP leaders' desire to change. There has been more robust discussion about political reform at party meetings and in party publications. Foreign political scientists, including harsh critics, have been invited to China to lecture and give advice on the country's future. Chinese researchers have been sent overseas to study social democratic parties and the transitions experienced by former communist parties in Europe.⁸⁵ Above all, the CCP has been campaigning for President Jiang Zemin's "Three Represents" theory—the CCP should represent, among other things, "advanced production forces." This is an attempt to justify the extension of CCP membership to the country's wealthy entrepreneurs, while the CCP is losing support from workers and farmers. The campaign manifests the CCP's pragmatic and creative survival instincts.

These favorable circumstances for reforming the relationships among courts, local governments, and the CCP are unlikely to change under the new Chinese leadership. At the time of writing, Hu Jintao is still expected to take over all three posts currently held by Jiang Zemin: state president, Communist Party General Secretary, and chairman of the Central Military Commission. Hu appears to be interested in political reform. Since he became head of the Central Party School, a training center for senior party cadres, the school has studied various sensitive topics such as political reform, direct elections, and Europe's "bourgeois" social-democratic parties. When Jiang Zemin's Three Represents theory drew vehement attacks from communist stalwarts, the Central Party School's newspaper, *Study Times*, ran an article to defend the theory.⁸⁶ In September 2002, Hu openly adopted the theory in his speech delivered at the school.

To respond to this unprecedented opportunity for reform, the international community should direct more resources to support programs on this front. Yet the international community should be realistic about how far the reform can go. The most desirable reform is to eradicate the CCP's control over courts by strictly separating laws from party policies. The CCP would only formulate policies, which the state would transform into laws. Laws would be supreme regardless of any subsequent changes in CCP policies.⁸⁷ Given the party's utmost concern about its unstable governance, it is unlikely to give up the current entrenched status of party policies. It may, however, be willing to allow courts to be more independent of government and party organs at lower levels, to strip these organs' power, and to authorize courts to review more rigorously actions taken by these organs.

Therefore, at this stage, the international community should assist China in exploring the possibility of establishing a "circuit appeal court" system or a separate "administrative court" system, as proposed by Chinese scholars. They should also study how China can reform its fiscal system so

⁸³ Clifford reports that the DSB is already overloaded. See Clifford (2002).

⁸⁴ See, for example, Pei (2002).

⁸⁵ Rosenthal (2002).

⁸⁶ Liu, Hesse, and Mooney (2002).

⁸⁷ Guo (1999b), pp. 9–10; Guo and Liu (1999).

that the central government does not excessively rely on local governments for financial support. The central government will then have enough resources to allow central fund allocations to support a court system that exemplifies vertical leadership, a model regarded by Chinese scholars as the most desirable. On fiscal reform, the Chinese government has already made a small step. It is reportedly planning to enact a new law by the end of 2003 to require businesses and individuals to pay fees directly to the central authorities instead of to those in provinces.⁸⁸

With respect to curbing administrative organs' power and strengthening courts' role in reviewing administrative actions, the Chinese government has been planning to enact a few pieces of administrative legislation including a licensing law and an administrative procedure law. The licensing law aims at restricting administrative organs' power to grant franchises, permits, or certificates to businesses and individuals. Such power has been abused to the extent that some citizens who want to start a business have to spend years before they get more than a hundred required official stamps.⁸⁹ The administrative procedure law aims at, among other things, fixing one major shortcoming of the ALL by stipulating clearly what procedures administrative organs must follow in taking administrative actions.⁹⁰ These steps taken by the Chinese government are welcome. The international community should offer assistance in the drafting process to ensure that these laws meet their objectives and should monitor their enforcement once they are enacted.

In the near future, most of the international community's response to this unprecedented opportunity for reforming the relationships among courts, local governments, and the CCP will be limited. Its response will likely be confined to financial support, sharing of foreign countries' relevant experiences, and advising on the applicability of these experiences to China in the reform areas discussed above. These steps, though small, could culminate in a larger scale of reform if the Chinese leaders do not find them threatening.

⁸⁸ Leow (2002).

⁸⁹ Xinhua News Agency (2002g).

⁹⁰ Author's interview with Xixin Wang, Professor of Law, Peking University, Washington D.C., October 8, 2002. Professor Wang is one of the five leading experts who advise the government on the drafting of the administrative procedure law.

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