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PRESENTS

THE FUTURE OF POLITICAL REFORM IN CHINA

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CHINA'S LEGAL REFORM

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PROFESSOR BENJAMIN LIEBMAN,
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"RECENT TRENDS IN LEGAL REFORM"

DR. VERON HUNG,
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"THE IMPACT OF WTO ENTRY ON CHINA'S LEGAL REFORM"

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"PROPERTY RIGHTS REFORM IN CHINA"

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JAMES FEINERMAN: Well, I am confident that there will be academic and scholarly rewards for those of you who have lasted – (laughter) -- to this final panel. And I am very glad that we have this excellent group here together to share their wisdom with you. Before they do I just want to make a preparatory comment and then briefly introduce each of the speakers. I will do that all at once at the beginning. You have extensive bios of them in the materials that are handed out today.

Our topic for this final panel is the rule of law in China and I am always moved to quip as Gandhi did about another topic when he asked what he thought of Western civilization, to say that probably everyone in the room that agrees that the rule of law in China would be a good idea. As with western civilization, which Gandhi was very careful to put prospectively, I think that we are looking at something that is also a developing prospect in China. China has, for at least the last 25 years, moved towards the socialist rule of law, or the rule of law with Chinese socialist characteristics.

When I was a student of Jerry Cohen's over a quarter of a century ago – (laughter) – there was a joke among people who studied socialist law – there were more countries that practiced it back then – that socialist legality bore the same relation to legality as an electric chair bore to a chair. (Laughter.) And at least in China's case that has developed in a positive direction but we will see from the remarks of our speakers today just how much or how little.

And I am also gratified that if Jerry was among the first generations – and we talked about fourth generation Chinese leadership today – Jerry, who is here with us, the first generation of Chinese legal scholars in the United States. I am one of a large group, mostly that he trained in a second generation, but the three scholars we have with us today up here on the panel are stalwarts of the third generation of Chinese legal scholars, each one of them more highly trained than any of the previous generations could have been. And I am sure it will show in their remarks.

We just passed last month, actually, the 25th anniversary of the famous third plenum of the eleventh party congress, which was a landmark for many reasons. It is where the whole reform process was really put into play by Deng Xiaoping, but there was a famous 16 character formulation that came out in December 1978 that was the kick off for the rule of law in modern China. And it very briefly said that there should be law, where there was law it should be followed, where there was law in place it should be strictly enforced and that violations of the law should be punished. Fairly unexceptional for any rule of law system but a remarkable confirmation of the importance of the rule of law at the tail end of the cultural revolution in China.

And the task is more daunting for the speakers who will speak this afternoon because, unlike my time as Jerry's student and even in the early days when I was starting

out as a young scholar of the next generation where we had to make scholarly mountains out of informational molehills, the problem today is precisely the reverse. Not that we are trying to make scholarly molehills – (laughter) – but that we do confront informational mountains which need to be mined for those nuggets of wisdom that will produce a coherent picture.

Fortunately for this final panel we have up here Ben Liebman, Veron Hung, and Jacques deLisle, each of them will talk about a very important area of the rule of law. Ben Liebman, who is the associate professor of Law at Columbia Law School and director of their Center for Chinese Legal Studies, a graduate of Yale, Oxford and the Harvard Law School and a former law clerk for Justice Souter, is going to generally about trends and recent developments in the rule of law in China.

Veron Hung, who is one of the rare doctorates in law with a research doctorate from Stanford Law School, I believe, but also a legal academic, a practicing lawyer with experience in both the U.K. and the United States and an associate here at the Carnegie Endowment where she is part of the very vibrant China program, is going to talk about the important issues relating to China's WTO accession and how the rule of law will be effected and will effect that.

And finally Jacques deLisle, who is a professor at the University of Pennsylvania in both the law school and the east Asian studies program and director of china studies at the Foreign Policy Research Institute located in Philadelphia, a Ph.D. in government as well as a J.D. in law, will talk about the – what may be the most important unresolved question that goes back to the very beginning of legal reforms in China, the question of property rights without which many of the economic reforms that started a quarter of century ago cannot finally be completed.

But I will stop myself here and turn the microphones over to each of our speakers in series.

BENJAMIN LIEBMAN: Thank you, Jim, and let me join the chorus of people thanking Minxin for the outstanding job he has done putting this event together, and thank all of you for sticking around to hear four lawyers speak in the late afternoon.

Summarizing recent trends in China's legal reforms in 12 minutes is somewhat of an ambitious task, so I am not going to actually try and attempt to do it. Instead, I am going to try and highlight three trends in the Chinese legal system that I think are important to watch – that have been important to watch in the last few years and will be important to watch over the coming years. Those three are the role of the media in the Chinese legal system, the growing use of litigation by individuals, and the growing debate regarding institutional reforms to the court system.

First, on the media, Susan mentioned some of the interesting recent developments in the media, and I want to piggyback a little bit on some of the trends she talked about earlier and talk about how they apply to the legal system. She mentioned the tension

between commercialization of the media and continued party control of the media. In the legal area, over the last five or six years, commercialization of and increased competition in the media, and in particular in the print media and the online media, have brought an explosion of media coverage of court proceedings and legal matters generally. Much of this is extremely sensational. It ranges from coverage of the plight of disadvantaged individuals seeking back wages, or who face courts controlled by corrupt local officials, to demands for harsh penalties for alleged criminals. As one headline in the famous case four years ago screamed out, "slicing her to a thousand pieces will not be sufficient punishment."

In the past nine months, we have seen three examples -- which Jerry mentioned in his question a few minutes ago – of print and internet media coverage stirring up national outrage. The Sun Zhigang case, which a number of people have mentioned today, where media coverage played a role both in the rapid resolution of the case and also contributed, in part, to the abolition of the custody and repatriation detention system. Second, the Liu Yong case up in the northeast, where media outrage at a decision by a provincial high court to reduce the sentence for a convicted gangster to life in prison led the Supreme People's Court to rehear the case, and, not surprisingly, to reinstate the death sentence. And then, as Jerry also indicated, the ongoing BMW case -- which has received widespread coverage in the West as well -- where media coverage highlighted a case in which a well-connected driver of a BMW in Harbin was not sentenced to jail after she killed someone, apparently intentionally after a traffic accident. The coverage has led authorities to intervene in the case and likely will lead to a much harsher sentence being imposed.

Media coverage does, in some cases, play a very positive role in redressing grievances. Indeed the influence of the media has given rise to the saying in the legal community, and in particular amongst those representing disadvantaged individuals, that "it is better to hire a journalist than to hire a lawyer." But in the criminal context, the media is often a force pushing for harsher treatment of alleged wrongdoers. Coverage literally can and does mean the difference between no punishment and death for alleged wrongdoers, in particular for officials.

To a degree, expanded media coverage of law can be understood as part of modest steps towards increasing transparency and the general expansion of legal knowledge in China. But the role of the media in the Chinese legal system is also arguably, at least in the short term, reinforcing party interference in the courts. If one looks at the mechanisms by which the media influences court decisions -- even in cases where the media is having a positive role in addressing popular grievances -- it is not so much the threat of public exposure that applies the pressure on the courts as it is the intervention of party officials, or at least the threat of intervention by party officials. The media appeals to popular conceptions of justice, but they also appeal to Party-state leaders who then often intervene in individual cases. And the party trusts the media more than the courts because of the media's traditional mouthpiece role.

Despite significant improvements in China's judiciary, courts remain ill-placed to resist such pressure. The reasons that the courts are so ill-placed to resist such pressure are widely known. One is that interference in individual cases continues to be a legitimate function of Party officials – done either via written instructions or informally. I should add that there are significant signs of improvement in this area, probably less frequent use of instructions, –and a greater effort by the courts to force those who want to intervene to actually intervene formally rather than informally -- that is to make superiors put their requests in writing. Nevertheless, as long as the threat of intervention is there, the ability of the media to appeal to Party officials, in particular by stirring up popular opinion, is significant.

In addition, judges continue to be evaluated in part based on whether or not their decisions are correct. In theory judges should only be punished if their decisions are egregiously wrong, clearly illegal or the result of corrupt behavior. In practice this practice means judges can have their pay docked, or even lose their jobs, if they get decisions wrong in the view of their superiors, even when their decisions may be correct on the facts or law. And the views of superiors, especially those in Party Political-Legal Committees, are likely to be influenced by views of the media, be they critical articles in traditional party mouthpiece papers or popular rage expressed in internet chatrooms.

So that is the first trend. The second general trend I want to highlight is that despite the well-documented problems in the Chinese court system, we are seeing a significant growth in litigation. Indeed the number of civil cases in China roughly doubled between 1992 and 2001. In 2001, there were more than 5 million civil cases, a very small number when compared to this country, but still a near doubling in a 10-year period.

Although some of this is the result of the growth of commercial and economic disputes, a significant part of the growth in litigation comes from increased use of the courts by ordinary people to address what we might think of as issues concerning individual rights. As both Yasheng and Liz mentioned in the earlier panels, increasingly people have expectations of law and how the legal system should work, despite the widely documented problems in the courts. Standards of popular complaints increasingly are law-based. More and more disputes that might once have been resolved by other institutions, or not brought at all, are being brought in courts. So we have seen a growth in labor disputes, in housing disputes in the courts, some environmental cases, a lot of basic tort cases. In fact some people are now saying that China is starting to have its own ambulance-chasing lawyers. That is good for those of us teach torts. (Laughter.)

There are also a small number of cases, which have been widely reported being brought directly under the Constitution. Most recently, two separate cases were brought by people with Hepatitis B, claiming that discrimination against them – denying them jobs because of their status in carrying Hepatitis B – violates provisions in the Constitution guaranteeing equality. Individuals are using the system in new and creative ways, in some cases in ways that maybe the center is having a hard time controlling. Indeed, the Hepatitis casesare quite interesting because these cases have been brought –

they were brought in the fall -- despite widely circulated reports last summer that the Supreme People's Court had actually told courts not to accept any more constitutional cases. But in fact in at least one of these cases, a local court has actually accepted the case, and a hearing was held a few months ago, although I do not think a decision has actually been reached yet.

The third trend I want to highlight is the renewed attention to structural reforms of the Chinese legal system, and in particular to the courts. In the legal world in China, there is now widespread discussion of the need for institutional reform to strengthen the position of China's courts. There has been lots of progress in the Chinese legal system over the past decade. But in a sense, the problems that have been addressed to date – in the recent years of legal reform – have been largely technical in nature. We have seen significant effort in training – raising the qualifications requiredof judges -- so that judges are now required to meet the same basic standards as lawyers, at least new judges. We have seen efforts to create a legal framework for judges and others to apply; there has been enormous attention to the creation of new laws and regulatory frameworks. We have seen some reforms to trial practice and some attention to transparency via the WTO rules – the obligations that Veron is going to talk about in a few minutes.

We have seen, perhaps most significantly, enormous attention to legal training and education more generally. Indeed, the statistics regarding legal training are staggering and are probably, to some of you, actually somewhat terrifying – in 1999, 320 law schools or law departments in China, 42,000 law students -- and what is probably the most terrifying to many of you out there, more than 5,000 law teachers. Those numbers are almost certainly up over the last five years -- we have seen a lot of expansion in law faculties and in law schools in just the last five years. Many of these actually are just politics departments that have renamed themselves as law schools or departments. It is a lot easier to attract students to study law in China than is to attract students to study politics. But it does show the enormous attention to law and enormous progress for a country that in the late 1970s had two law schools and just a few thousand lawyers. Last year, some 197,000 people took the unified bar exam, 17,000 of whom passed. That includes lawyers, judges and procurators.

There is still much to be done in each of these areas. But also, there is recognition that there are limits to what can be done under the current institutional arrangements, where courts lack authority and are subject to a range of influences that reduce their ability to act independently. Now the focus is increasingly shifting, both in legal academia and, it appears, within the Party's Central Political-Legal Committee – which last year convened a special team to address broader institutional issues – to broader questions of how to reform the system.

What can be done structurally to address the range of problems that undermine the authority and effectiveness of courts? In particular, how should China address local protectionism, administrative interference, lack of confidence, and lack of finality? We are now seeing proposals, widely reported in the Chinese media, regarding the future of legal reform. Proposals, for example, to create regional district courts to address local

protectionism. Proposals to strip the procuratorates of some of their power to intervene in cases. Proposals to shift controls over court finances – to shift authority over court finances away from local governments to the courts themselves -- and to remove control over court appointments from local governments.

We have also seen some proposals to end the zaishen, the rehearing procedures, that undercut finality, and perhaps to institute some form of discretionary, third-tier of review. Currently the second-tier court review in China – that is, the first appeal -- is the final tier, although cases can later be reopened through the rehearing procedures. There are now some proposals to institute a third tier, and to abolish the rehearing procedures at the same time. And we have also seen a few times in the past six months proposals to require courts to review sentences for people sentenced to reeducation through labor, and we have seen proposals to set up some sort of a body within the Supreme People's Court to review death sentences. Right now, as many of you know, final determinations in most death cases are made by provincial high courts.

These steps might well help to improve the quality of the courts, even within the confines of overall leadership by the Party, although obviously there still will be limits to just how far reforms can go within the current setup. But they are extremely controversial and are going to be much more difficult to implement then the reforms we have seen over the past decade or two, mainly because these issues go much more directly to broader questions of political reform. Attention to these issues, however, I think demonstrates increased recognition that improving the courts is not simply something the courts can do on their own.

None of these proposals are actually new. Many of them have been talked about in legal academia for more than a decade, and many of them were actually first raised in the 1980s. But I think it is fair to say there is a growing sense that the time for them to be addressed more directly is closing in, and that further reforms are needed to meet the rising popular expectations for the legal system that we are seeing voiced, both on the internet and in courtrooms.

VERON HUNG: I am going to examine the impact of China's WTO entry on legislation and adjudication in the country. Wherever appropriate, I will discuss related reform issues.

First of all, on legislation – since China's accession to the World Trade Organization in December 2001, it has reviewed over 2,500 pieces of WTO-related legislation. As a result, 830 pieces were repealed, 325 pieces were amended, and then 118 new pieces of legislation were enacted.

In addition, to satisfy the transparency requirement under WTO agreements, China also requires all local governments to file their legislation with the State Council, China's highest executive organ. By the end of 2003, all 2,026 pieces of local legislation have been reportedly filed with the State Council. These reform efforts are very impressive but there is still a major problem.

After its WTO entry, China also passed a rule to allow its citizens, social organizations, enterprises, and government agencies to request the State Council to review any filed local rule if it is believed to be in conflict with a national law. This review mechanism has not been adequately used over the past two years, even though official sources acknowledge that some filed local rules are inconsistent with national laws, or were adopted in breach of legal procedures.

On adjudication. Has China's WTO entry helped improve the country's court system? Based on WTO-related cases in China, what observations can be made? China has only been a WTO member for slightly over two years. It is too early to see any clear pattern in judicial practices. But some recent developments about intellectual property cases should be noted.

You may ask me why I should confine myself to intellectual property cases. Well, the simple answer is that I don't have a choice because statistics about the total number of WTO-related cases and their outcomes are not available. China did report that the average annual increase of so-called foreign-related cases over the past five years is 4 percent. But foreign-related cases mean any cases involving foreign parties. Therefore, some cases could be unrelated to WTO issues.

So here is my first policy recommendation: ask China to provide these statistics. I know that many of you have the influence to do that. If this is done, it could save my life. (Laughter.)

Because we don't have these statistics, the alternative is to look at two types of cases that foreign investors and their governments are most concerned about: the anti-dumping cases and intellectual property cases.

First, anti-dumping court cases – there is none in China. Since China's accession to the World Trade Organization, its Ministry of Commerce has registered a total of 13 anti-dumping cases against overseas producers. In two of these 13 cases, the ministry finally terminated dumping investigations after it decided that no injury had been caused. How about the other 11 cases? The ministry has made preliminary rulings on seven of those cases and is still in the process of investigating the other four. Since only the ministry's final rulings – not preliminary rulings -- can be reviewed by courts, there are no anti-dumping court cases yet. It's still too early to talk about anti-dumping cases.

So, let's talk about intellectual property cases. According to the Supreme People's Court, courts in China have accepted more transnational intellectual property cases since China's accession to the World Trade Organization. But we don't know the exact number because existing statistics about intellectual property cases cover both foreign related and local intellectual property cases. However, we do know that the total number of intellectual property cases over the past five years is 40 percent more than the proceeding five years. Statistics from Beijing courts actually shed some light on this

issue. They reported that 20 percent of Beijing's 888 intellectual property cases handled in 2002 are foreign related.

We just talked about the number of cases, how about the outcome? How often do foreign parties win in an intellectual property case? Let's take a look at seven well-known foreign related intellectual property cases decided last year. The parties of these cases include Johnson & Johnson, Toyota, Twentieth Century Fox, Disney, Universal Studios, Honda, Lego, Nike. Of these seven cases, only two were ruled against the foreign party, and in fact parties of these two cases can still appeal.

Based on the above facts, two observations can be made. First, there have been more WTO-related intellectual property cases. Quite a few Chinese officials, Chinese lawyers, and foreign lawyers interpret this as a sign of foreign parties' growing confidence in the court system in handling WTO-related intellectual property cases. They have more confidence because the legislation in this area is more satisfactory and judges who handle these types of cases are more competent.

Second observation: most foreign parties in those seven cases won their lawsuits, but then the results could be misleading. Well, let's try to understand what happened in courts when they handled these seven cases. As you notice, all of these seven cases involve big foreign companies whose investment may contribute significantly to China's economy. Their importance also allows them to generate much publicity.

As a result, these cases were likely treated as "major and complex" cases by courts. What does that mean – "major and complex" cases? Courts in China are guided by some rules to decide whether a case is "major and complex". But these rules always have a catchall phrase to allow them to categorize a particular case as "major and complex" if they think that the judgment of the decision would have significant impact on society. This provision is quite ambiguous. Once a case is decided as "major and complex", it's going to be passed on to the adjudication committee of the court. An adjudication committee consists of president, vice-presidents of the court and also senior, the top judges of different divisions inside the same court.

But the adjudication committee itself is eventually controlled by the Chinese Communist Party's political and legal committee. This mechanism has been criticized for opening a door for interference from the party and administrative agencies. But then, in handling WTO-related cases, judges and party leaders know very well that the world is watching and they also know that if dissatisfied, foreign investors can always go to the WTO's dispute settlement body through their governments. That's why these judges and party leaders carefully apply the law.

Therefore, my conclusion is that these judges are not independent but it doesn't mean that those cases could not be handled carefully.

But we do need to worry about those cases that are not categorized as "major and complex" cases, that is, regular cases. We still need to worry about four problems: first,

judges' inadequate competence; second, China's unclear and conflicting laws and regulations. The shortcomings in the legislatioin make judges unsure about how to interpret and apply the law. Whenever they have any difficulty, they are quite ready to seek instructions from senior judges of the same court or judges of upper level courts. This actually opens a door for undue influence within the court system. The third problem is judicial corruption and the fourth is interference from local party organizations and administrative agencies.

There have been some improvements in these four areas. I planned to focus only on institutional reforms but Professor Liebman already covered that. So let me briefly talk about the other three aspects.

Judicial competence – overall there has been improvements in Chinese judges' competence. Let me give you some basic statistics for comparison. In early 1989, only 30 percent of 210,000 court employees and judges in China attained what they call college diploma level, which is below the bachelor level. Now, China has about 300,000 judges and other court employees. Over 3,000 judges have masters or doctorates. There are mainly two reasons: training, of course. Another reason is that they require candidates to have better qualifications before they can sit for the bar examination – what they call national unified judicial examination. At least, a candidate has to have a bachelor of laws degree before he or she can be qualified to take those examinations.

Second, on unclear and conflicting legislation. Over the past five years, the Supreme People's Court has formulated 170 judicial interpretations to clarify conflicting legislation. But there are still problems. Where there is any conflict between a local rule and a national law, judges can only choose not to apply the local rule but they cannot declare that local rule as invalid. In a recent case, a Chinese judge tried to do that. Although a lot of rule of law activists in China consider her to be very brave, she's likely to be punished for making a major mistake.

Third, judicial corruption – in the past five years, the number of court personnel who have violated laws and discipline across the country has decreased year after year from 6.7 per thousand in 1998 to two per thousand in 2002. This improvement is mainly because the Chinese government has raised judges' salary and also because it tried to organize judicial inspections to ensure the proper implementation of disciplinary rules applicable to judges.

I skip my discussion on interference and institutional reform. Here comes my conclusion. There have been a lot of changes to WTO related legislation in China. As regards WTO related adjudication, the picture is not as gloomy as most of us thought, especially in major and complex cases. In these cases, contrary to most critics' remarks, independence is not the key obstacle to justice. But when WTO-related cases increase, adjudication committees cannot handle most of them and the rulings are not scrutinized by the media, independence will become a key obstacle. So will other problems I just identified, namely, judges' inadequate competence, unclear and conflicting legislation, and judicial corruption. Thank you.

(Applause.)

JACQUES DELISLE: Thank you. As Confucius didn't say, even an attorney of 10,000 lee (ph) ends with a single step. I thank those of you who've been able to stick through all of this. It's gratifying to see so many people still in the room, that's a tribute to the panels that Minxin has been able to put together and the current commentator notwithstanding. And it's also gratifying to have to have Jim award me a degree, I never actually finished – (laughter) – but nonetheless, it is also quite gratifying to hear my political science colleagues talk about law. We are not the footnote or the afterthought but actually the climax of the day's activity. (Laughter.)

And I have a truly bizarre assignment of talking about property rights in China. As many of you know, a big part of the discussion of constitutional reform right now, is about the inclusion of planks relating to property rights. Now this sounds wacky in a system that remains officially socialist and a variety of other things, and where the translation of the proletariat – the core of the ruling classes -- was of course literally the propertyless classes. So now we're talking about property.

And if you look at the provisions that are being put in place, they are at some level, remarkable. The big two changes that get a lot of discussion are the protection in revised article 13 for lawfully owned private property – (foreign language) – private property – that that shall not be violated -- the right to hold that. And we also get an addition that says compensation shall be paid when it's taken for public interest. Article 11 is also to be changed where we used to have references to a couple of types of non-public, or non-collective economy -- the individual economy and the private economy – we now have more the generic reference to the non-public sector, the – (foreign language) – sector of the economy. And the state instead of guiding, supervising and managing them, now encourages, supports, and guides them – or will once these are ratified in March – and promotes their development according to law as opposed to simply overseeing their existence. We have elsewhere in article 10 another provision that adds a, and shall pay compensation, requirement where we are talking about real property – and again a public interest requirement for so acting and according to law.

But there are other elements scattered about the agenda of constitutional reform that also speak to the property question. Back in the preamble, there is a reference to the builders of socialism as a stratum that gets included among the good guys. This is taken to be, at least in part, a reference to the first group in the three represents – the entrepreneurial property owning classes. Also, in the preamble we get the three represents. Which, of course, again looks to those who have the biggest stake in property rights being protected -- the entrepreneurial classes. And we have other two provisions that I'll return to a bit later, a provision that the state shall protect human rights, which is on some rights – some life (?) people are reading as a potential, deeper entrenchment of property rights although that's unlikely to go anywhere. And a state pledge to create a system of social security appropriate to China's current level of development with

improvement as one goes along, which as we'll see, has some interesting intersections with private property rights.

Now in some respects this sounds remarkable and in other respects it's really fairly modest. There were provisions about property, indeed private property, in the constitution before, they just tended to be more interstitial and not so categorical. And there were, of course, a variety of laws on the books which have not been much supplemented during this period of discussion of property rights in the constitution. And there was a discussion of how broad constitutional reforms should be, and even getting these modest property rights provisions in was fairly contentious. There was a good deal of disappointment that the third plenum of the 16th central committee last fall didn't go further than it did in embracing property rights -- but it wasn't a bit more forthcoming – and there was a discussion of whether it should be a big constitutional reform or a small constitutional reform. And small constitutional reform won with arguments of gradualism and such.

There certainly were more radical ideas out there, there were conferences in Xiangdal (ph) and Beijing talking about more radical types of constitutional reform and there are certainly people who link an even more robust embrace of property rights to some pretty far-going constitutional reforms, including democratic elections, constitutional courts to review the conformity of laws to the constitution, and so on. Now you can get Tao Su Yen's (ph) latest book which goes into that in some detail, but he's one of many.

So we have this politically contentious move toward relatively modest changes in the text of the constitution on property rights. And it was cast largely in terms of economic justification, and not particularly populous ones. These are much more the Jiang Zemin era type argument that under market conditions private property rights are necessary for economic development and social progress. You need to guarantee the property rights, particularly of the entrepreneurial classes, to energize them and bring the builders of socialism fully into play. You need property rights to help build a prosperous economy and there were also some hints of the dark side. You need to do something to sort out property rights because of the discontent with official violation of property interests, even if one can't fully call them rights.

And one of the questions is that this was so politically difficult and so legally modest – was it even economically necessary? Were these economic arguments compelling? After all China's done pretty darn well economically -- it's hard to know what the counterfactual is -- but it's done pretty well economically despite a regime which, no matter how you describe it, was shall we say, rather soft, squishy or ambiguous in its protection of property rights. You have high growth rates, you have the transformation to a marketized economy which is all about buying and selling rights in some form or another, many of them property-based. You had massive investment by those foreigners who supposedly care about property rights more than the Chinese do if you buy the old stories. And you had a sectoral transformation from agriculture, where you could get away with vague rights, perhaps in theory, into industrial and service

sectors, intellectual property sectors – where maybe rights are thought typically to be more central.

And if you look at what happened sector by sector, the different kinds of property one can think of that are being discussed as in need of greater protection in Chinese law, you see a lot of things that sure as heck look like trading and property rights. In the rural sector: a broadening of contract based use rights for peasants, a secondary market in land use rights, the transfer of land use rights outside of the collective, the conversion of agricultural land on a massive scale to residential and industrial uses by people who thought they had a good enough claim to the land to invest in capital in it. In the urban sector anybody who's been to a Chinese city has seen the plowing under of the Hu Tong (ph) and the building of large skyscrapers, and then the tearing down of that skyscraper to put up another one. You have the fairly rapid transformation – (audio break – tape change) -- looks good enough, and this all has occurred despite, what did I say, I think our fairly described as not terribly strong or clear property rights protections in the law on the books, let alone the law as implemented. And there's been a process of all of this happening and the law has kind of followed along at the very end, kind of like it does in the conference. That is, the social or the economic practice gets going and then we back and fill and approve it with the law. So the secondary market in rural land use rights gets going in the early '80s, it gets constitutionalized in 1988. Private property as a economic phenomenon burgeons and it takes a long time before you get the laws recognizing China's myriad forms of ownership for enterprises now – private, partnership, small, medium, so on and so on.

And you see the merger and acquisition, or the privatization, or the foreign buyout of many former state-owned enterprises long before anybody was sure what you were buying, indeed we're still not sure when you accumulate those shares, or just how much of that kind of transfer of ownership would be permitted. Bankruptcy laws and other notorious area -- lots of enterprises go bankrupt, just ask the folks who are holding the claims against Giddick (ph) the Gwondon (ph) International Trade Investment Corporation. Yet the bankruptcy law on the books didn't have much teeth and applied nominally only to state-owned enterprises. Whereas most of the entities that go into something that sure looks like bankruptcy did it at best in the shadow of – or with reference -- to the formal bankruptcy law, which we are told every year is just around the corner, really we're going to have a new, revised, comprehensive bankruptcy law. I expect to live to see it but it's not going to happen in the next five minutes so that means at least I'll live to see the end of my speech and not a bankruptcy law. (Laughter.)

So what does one then do with this situation? Well, let me give you a quick sort of point, counterpoint debate. There is an argument out there that says, look, China has done pretty well, not in spite of the weaknesses of the legal protections for property rights but rather because of some of the ambiguity. And this is an argument that surfaced quite markedly in the middle to late 1990s to explain how things were going, really in the years preceding that. That is – the argument is you can satisfy with property rights -- good enough may do it and if you try to get too good, if you try to get too clean and crisp, it can backfire. This is the era of look at shock therapy, look at what Jeff Saxon (ph), his

prior incarnation did to eastern Europe on this view, right. If you privatize too quickly you wind up with an economic mess, you don't want to be the post-Soviet states in most cases.

And even short of that, somewhat mushy property rights are good enough. It's not a fine continuum, it's somewhat lumpy – if you do well enough, that's security enough, people will go forth and invest and have sufficient security of expectations. But beyond that, there was an argument that said ambiguous, uncertain property rights actually were economically functional – they were highly adaptive.

The argument was that in China's transitional economy, in the hay day of the township and village enterprise -- the collective enterprise of the new sort, the reform era sort – because the government was still so deeply entangled, because the ability to go out and make money was so bound up with government gatekeepers, government sources of finance, regulatory bottlenecks of one sort or another, indeed being increasingly used corruptly – that it made sense to invite the government in in some form as your partner. And we know all the studies of the different forms of TVs and such that cropped up. And so in that context, ambiguous property rights worked pretty well – they allowed the flexibility to bring the government in in a way that maybe clearer laws would have produced more obvious conflict.

It avoided the problem of the anti-commons (ph) – this is something that comes up on the literature on the post-Soviet system – where too many people held clear rights. Somebody could block the use of an asset because he is a government official, or some rights holder could block it. And perhaps there was a narrow legal argument as well that basically said, China was changing so fast that it needed to adapt on the fly. The rights on the ground, the functional economic realities were changing so quickly that the attempt to write them down in a statute was actually going to do more harm than good. Especially in a Chinese context where, as we know, getting a law through the NPC, or even the NPC's standing committee, can be a laborious process – once you get it there, it's hard to go back and change it. And you'd either wind up ignoring it, which was bad for the rule of law, or you'd wind up implementing it, which would be bad for the economy, and the lawyers bet that the rule of law would lose when that particular push came to that particular shove.

Also if you're constantly tinkering with the laws you're drawing on a resource that was extremely scarce in China – legal talent in the '90s to draft and to implement these things. And, of course, it's devilishly hard to get the proper sequence of law reforms going when you're changing pieces of the puzzle all the time.

There's also a political argument for not doing too much too soon – for going very gradually in increasing protection of property rights. Obviously property is a hard ideological nut to crack in a way that, say, freedom of contract was not. We saw Jiang Zemin working mightily to redefine for the state sector to be the leading sector, Susan Lawrence (ph), she's still here, did a wonderful riff on that at another conference, I don't have time to go into it. But you see the gradual hollowing out of what it means for the

state sector to be dominant. You see the concern about what happens – and this is sort of from China's new intellectual left, if you will – the concern about what happens if you were to protect property rights robustly first, before you get the social security positions in place, before you get the safety net in place, before you get redistribution in place. You essentially wind up privileging the rich at the expense of the losers with all the social tensions that that can reinforce.

And there's a sense that the basic decisions still haven't been worked out on how to strike some of those balances and that's some of the ambivalence, some of tensions you see in what's on the constitutional reform agenda right now. And out there, of course, is the standard, sort of old style, modernization theory kind of arguments, which you know, never quite die cause there is some persuasive power to them; that if you have property rights kicking around out there, a genuine middle-class, a genuine bourgeoisie, they may start pressing for political reform that the state doesn't quite want to accept; and maybe short of that, that property rights may fuel some of the unrest. That is, you've got people who are plenty angry about all sorts of things -- as we've heard about earlier today, Liz Perry (ph) and others, the countryside peasant problem, the urban workers and such – who may, given property rights, go even farther off the tracks.

That's one side. Let me just give you a quick form of the other side, which is that things are changing. There is an argument -- and I remain somewhat agnostic on this, I told you it was going to be point, counterpoint – that doing more and doing it more quickly is something that needs to be pursued now. That the counterfactual is how China could have done in the past, perhaps, but what China needs to do now. And here the point is there's some big changes going on in China's economy as a whole. You see the destateification (ph) of the economy, the notion of the government being entangled with enterprises is declining, as we've heard earlier. In that context the argument for ambiguous property rights, the old theoretical argument, starts to wane.

Globalization -- the doors are now open for foreigners to come into China and for China – for Chinese to get some of their money out of China. And in some sense, there's pressure to level the playing field. There's a WTO pressure now which says, level up the level-down advantages of protectionism, but at the same time there's an argument that means you have to level up the rights protections, the economic efficiencies that come with that, for Chinese enterprises, if they're going to survive. You have a more sophisticated economy – you've gone from agriculture, to industry, to real estate development, to mortgage-backed securities, to all these other things – where the rights equation may be a lot more complicated.

And it's these kinds of arguments that lie behind a lot of the attempts to draft lots of laws which look like they play on property rights, not just constitutional provisions, but rules on rural land use and transfer, rules on urban land use, owners associations, cooperative and condominium structures, the property rights of enterprises, the rights of shareholders within enterprises, intellectual property protection we've heard about, and so on and so on.

And part of the claim is that you need this, not just because of economic change, but you also need it, and with this I'll close, you also need it because there's an argument that in the Chinese context, you may have a special need for a legal clarity that transcends even the level of development issue. That is, so much is in flux legally in China that you got to fix something and property rights are a good place to get something fixed to work with and build the rest around that. Secondly, the system has shunned political reform, democratic political reform, and in lieu of it, has relied on law to impose some of the checks on the government going off the tracks that in other systems can be performed electorally. Hold up the constitution to object, try to sue; that's a better route then trying to elect. And that you need this also for, finally, political steam control; that is, you have peasants burning themselves, you have peasants burning down the local town hall, you have people marching all over the place, often about property rights.

So most of the discussion of property rights that I've covered up to this point, is really about goosing the economy, continuing to move it forward and getting it to perform. The other side of it is to deal with the losers. And there's a sense that the constant taking of land rights from peasants at under-market value, the seizing of urban real estate, to relocation – things that have prompted protests around Chinese cities – are in part a product of ambiguous rights. You may need to give something on that front to maintain stability. Putting it into law matters because of the strange alchemy of law in China; that is, the regime has said for long enough that we're serious about law, that if you put it down in the constitution, that's an important programmatic statement, and people seem to take law seriously enough, as many anecdotes have shown us today, that they can waive it around – not enforce it in courts as my colleagues have pointed out – but get it as a momentum behind invigorating statutes on the books and pushing forward for new statutes.

(Applause.)

MR. FEINERMAN: We're bumping up against the conclusion of the whole program but I hope we can have ten minutes for questions for people on this panel. And as usual please identify yourself and any institutional affiliation, and direct your question if you would like to a particular panelist.

Q: My name's Bill Root (ph), export control consultant, and the question is for Veron Hung. Many years ago I was involved in an organization involving 16 countries that agreed on international text for export control, and each country was to translate these texts, put them into their national laws and regulations. Subsequently, American exporters were complaining that the playing field was not level that these other countries were exporting thing which they could not tell – study was instituted to translate from the other countries legislation and regulations back into English to see if they in fact had a better set of regulations from their exporters point of view. This double translation resulted in something that – often you could barely recognize what the original English was after translating into Japanese for instance, and then Japanese back into English. This was not intended ambiguity as we've heard about property rights, quite the opposite, and often it was not the fault of the translators it was the fault of the original English

which was not sufficiently precise. I wondered whether in the WTO area – with respect, I suppose you'd start with English and go into Chinese – whether it's proceeded to the point where perhaps we've learned that the original English should be improved upon?

VERON HUNG: Thanks for the question. I always feel lucky that I – well, Chinese is my first language – and so that's why it's very easy for me to find all the loopholes in the Chinese legislation. In fact, there's one – I can give you one example to illustrate why it's so important to pay attention, to compare the two versions. About two years ago, right after the country acceded to the organization, I was invited to participate in one training program for the state council's officials. And then they raised one issue – one question – about judicial review, China's WTO commitment on judicial review. Because they're very concerned about, well, under Chinese law only specific administrative acts -- that means an administrative action targeting a specific individual -- only that type of actions can be reviewed by courts. Whereas they are worried that under the WTO agreement they have to open up and then allow review – allow what they call administrative acts to be reviewed by courts – that means legislation, well, rules, regulations, national laws.

So we actually had a long debate about how to interpret. That puts a – (inaudible) – provision under the China protocol and it still, let me tell you, it is still ambiguous. It can be arguable. So I think – well, yes – a lot of time, especially because WTO treaty is a treaty provision is such a lot compromises when they negotiate the terms and conditions. So it is very difficult to understand sometimes, it is just because they subsequently make a lot of changes so it is not really well drafted in that sense.

MR. FEINERMAN: It may be worth noting, too, as we pass on to a next question if there is one, that the WTO only has three official languages, none of which is Chinese.

Q: Sorry, I'm abusing my privilege to ask a second question at the conference. When we talk about legal reform in China I think we can maybe group it in to broad categories. One category might be where there's a new social or political reality on the ground and you don't have rules that can adequately address it and you need to have some sort of new rule system to deal with it. And I think some of the examples that Professor DeLisle talked about on the property rights context might fit that general grouping. A second general grouping might be what we would term aspirational legislation, and I think this is primarily – you could see this in the administrative law context and in the case of proposals for general court systemic reform where you'd be talking about a change that would take a significantly further afield from where the current sociopolitical reality is.

In terms of that second category, it seems to me that the idea of that sort of reform is founded on three assumptions: one is that the new system is actually going to work in a way that isn't going to make people disillusioned; two, that it's actually going to have sort of beneficial effect on the sociopolitical reality – will lift up the political reality to the level of new legislation; and three, when you have a transition, it's going to be relevant to the new social political reality down the road. And I guess the question that I struggle

with is whether any of those assumptions are valid – whether there's any reason for us to think that that's going to work. And I'm just curious if you guys have any thoughts on that.

MR. DELISLE: That's the old law leaves or law lags question and I defer to Pei Minxin's judgment that we belong at the end not at the beginning of today's session suggesting that it usually lags. But to take the premise more seriously, there is a lot of aspirational law in China and I -- not to make an already complex question more complex, but there is a very delicate game being played here in a sense that, yes, law is aspirational. As Gary Cohen wrote many years ago, the Chinese constitution is a programmatic document. It has tried to get away from that and be more of a concretizing or codifying document but it still has this programmatic aspect. And so there is the tension of getting law out to there to lead, as it does to some degree, and yet also lagging. And it winds up doing both and that is why, one of the many, many reasons why, constitutional adjudication is such a nightmare to think about in China -- because the provisions aren't all equal. I mean, they do have these very different qualities, and it's hard to imagine what that would look like.

That said, though, there is the end-run quality to aspirational law, which I want to reinforce, we've touched upon a couple of times earlier today. That is, this isn't about top-down Leninist line implementation, whether it be by the bureaucracy or by the courts. It is signaling from sometimes fairly far up to sometimes to sometimes very far down, we're with you. And you complain about the guys in between. Though it's clearly the story of the '80s, it went away for a while, I think it's back with a vengeance now.

MR. LIEBMAN: Let me just say, I agree with Jacques and I sort of agree with the question that Neysun has raised as well, but I think it's also important to remember as these things go on, these reforms, these institutions, they take on meaning – different meanings to different people at different levels in the system. Obviously when you talk about judicial independence in China it means a very different thing to Hu Jintao than it does to some of the courts, or to the judge, for example, who Veron was talking about who has been innovative in trying to create precedent and strike down administrative regulations.

I think also you probably shouldn't look for a single meaning to come out of these steps because, as the prior panel has suggested, there's a lot that can be done from the bottom up that may actually shape how things – how these reforms -- actually play out.

VERON HUNG: Just one more note to add to – (inaudible). That may be the reason why the draftsmen actually pay a lot of attention to foreign experiences in other countries and try to see whether those provisions work in other jurisdictions. So I think, yes, a lot of assumptions there, but it's still – well, if you compare to other legal jurisdictions there still can be good for references in China.

MR. FEINERMAN: One last questions from Tee Kumar (ph) perhaps.

Q: Kumar (ph) from Amnesty International. My question is on criminal law reform. I just want to know whether there are any serious steps have been taken to improve criminal law and procedures, especially in terms of human rights. I can give you -- an example is the admission of evidence obtained through torture, especially to death penalty cases. Thanks.

MR. LIEBMAN: I think there's certainly this – I mean there are positive signs that there's a lot of discussion of this in Chinese academia, and to some degree in the media, although, it hasn't yet gotten that far. But we've seen pretty major papers, the Procuratoratorate Daily in November running a series of articles calling for – discussing at least the next step of criminal procedure reform. So, it may still be a ways away in terms of actually occurring, but I think it is at least being discussed and I think that one of the big measures for this will be, as I mentioned in my talk, what happens with reeducation through labor. There is now clear recognition by many people that it has to be changed and there are clearly people trying to change it, both I think, within the government and outside the government. It remains to be seen how soon that can actually happen.

MR. FEINERMAN: There also, I just add in closing, that a lot of discussion, most since the late 1980s, of reducing or possibly even eliminating the death penalty. It's the first time in 15 years that there's been serious widespread discussion, both in the popular press as well as in academic journals, about this. And it couldn't have happened without some sort of official approval to at least take the wraps off that discussion.

MR.DELISLE: And of course, the shelter in Rios (ph) – the Sheltern (ph) investigation reforms are –

(Cross talk.)

MR. DELISLE: -- a nice step in the right direction, yeah.

MR. FEINERMAN: Which have already happened.

I hope you all join me in thanking this panel, and of course – (applause) – Minxin and the staff here at Carnegie.

(Applause.)

MR. : I just have some very brief closing remarks. First of all, I would like to thank you on behalf of the Carnegie Endowment for your interest, your stamina and your support. And second, I would like to thank the speakers at today's conference. As a Chinese-American, I know the secret of doing a successful event, connections, weinshe (ph), and meritocracy. You get your best friends but they also have to be the best people in the fields. And today's experience shows that this is the right recipe for success. And third, I would really like to thank the almighty God – (laughter) – for giving us a day that Washington is not iced up. (Laughter.) Because I – for the last week, I've been nervous

as a wreck – (laughter) – checking weather reports literally every day. And it just so happens that the icing storm stopped Tuesday evening.

And of course I would like to thank the Smith Richardson Foundation for giving us the grant for conducting my own research on political reform in China, and also for supporting this conference. And lastly I would like to thank the staff of the Carnegie Endowment – Savina Rupani, John Fei, Gus, for being so helpful with the preparation for this conference.

Thank you very much.

(Applause.)

(End of event.)