

Chapter 4

Judicial Policies at the 16th National Congress of CPC: Steps toward Constructing a Country under the Rule of Law

Introduction

The 16th National Congress of the CPC has not made any significant change in the judicial policy of China but basically followed the line adopted at the 15th Congress in 1997. The ten principles achieved from the experience that must be followed, acquired from thirteen years of practice, to construct socialism with Chinese characteristic stipulates "We should promote political restructuring, develop democracy, improve the legal system, rule the country by law (*yi fa zhi guo*), build a socialist state under the rule of law and ensure that the people exercise their rights as the masters of the country." These words are almost the same as those adopted at the last Congress. There is, however, some advance in that one of the objectives in the "construction of a well-off society in an all-round way" established at this Congress was not another economic index to be achieved, but stipulated that "Socialist democracy and the legal system will be further improved. The basic principle of ruling the country by law will be implemented completely. The political, economic and cultural rights and interests of the people will be respected and guaranteed in real earnest."¹ This Congress has spared a full sub-section of the document for the judicial reform under the title of "Political Construction and Political Structure Reform," while the last Congress only mentioned it in one sentence. On the other hand, this Congress has also declared the policy of "combining the ruling of the country by law with the ruling of the country by virtue (*yi de zhi guo*)" in a paragraph mentioning material civilization and spiritual civilization. There is a criticism in the academic community of jurisprudence that placing ruling by virtue parallel to ruling by law is a backward step from the es-

tablishment of the country under the rule of law. This chapter discusses the new idea of governing the country by combining the ruling by law and ruling by virtue adopted at the 16th National Congress of the CPC, and the promotion of the judicial reform, and gives a concise description of the reform on the Judges, which is the most important issue of the judicial reform.

4.1 Ruling by Law and Ruling by Virtue

4.1.1 Proposal for "Ruling the Country by Law"

The idea of "ruling the country by law" was presented by Jiang Zemin at the 15th Congress in 1997, and it declared that in order to promote the economic structure reform and the Socialist modernization construction, it is necessary to "continue the political structure reform, improve the socialist legal system, rule the country by law and construct a socialist country under the rule of law."² "Ruling the country by law" presented in that Congress is defined as, under the direction of the mass of people and the Communist Party, manage the national business, and economic and cultural businesses according to the provisions of the constitution and other laws, materializing socialist democracy in a legal system and laws by assuring that all the activities of the country be executed according to the laws; and ensuring that the system and laws are not arbitrarily changed according to the leaders' views or interests. It was also stated as a basic policy under which the Communist Party leads the people and manages the country and that is objectively necessary for the development of socialist market economy. The basic policy of "ruling the country by law and construct a so-

cialist country under the rule of law" (Article 5) was also adopted in the constitution, which was revised in 1999 corresponding to the report at the 15th Congress, and thus promoted in the content of the highest law.

At the 16th Congress, "ruling the country by law" was included in the ten principles achieved from the experience that must be followed. It is also reflected in the phrases under the title "Political Construction and Political Structure Reform." It stipulated, "Adhering to the Four Cardinal Principles (i.e., (1) to keep to the socialist road, (2) to uphold the people's democratic dictatorship, (3) leadership by the Communist Party, and (4) Marxism-Leninism and Mao Zedong Thought), we must go on steadily and surely with political restructuring, extend socialist democracy and improve the socialist legal system in order to build a socialist country under the rule of law and consolidate and develop the political situation characterized by democracy, solidarity, liveliness, stability and harmony;" and "The key to developing socialist democracy is to combine the need to uphold the Party's leadership and to ensure that the people are the masters of the country with the need to rule the country by law. Leadership by the Party is the fundamental guarantee that the people are the masters of the country and that the country is ruled by law. The people being the masters of the country constitutes the essential requirement of socialist democracy. Ruling the country by law is the basic principle the Party pursues while it leads the people in running the country."

4.1.2 Combination of "Ruling the Country by Law" and "Ruling the Country by Virtue"

There was already a latent sign of "ruling the country by virtue" in the resolution of the Sixth Plenary Session of the 14th Central Committee of CPC in 1996. The resolution declared that "the construction of socialist virtue requires the implementation of education

for social public moral, occupational ethics, and family virtue with the basic requirement of the love of the country, the people, labor, science, and socialism with the service to the people set in the center and collectivism as the principle to form the human relationship among people throughout the society for solidarity and mutual aid, equality and fraternity, and collaboration and advancement." Part of it was incorporated in the constitution revised in 1999.

Jiang Zemin began to advocate "ruling the country by virtue" in the early 2000, and emphasized that the construction of the socialism with Chinese characteristic require forming the system of socialist ideology and virtue in society that corresponds to it, as well as constructing the socialist legal system. At the Central Meeting on Ideological and Political Work in June 2000, he pointed out that "law and virtue are important means of maintaining social order and ensuring that the people's ideology and behavior comply with the norms as constituents of the superstructure, and cooperate with and complement each other. Ruling by law ensures that members of society follow the norms by authoritative and forcible means, and ruling by virtue raises the recognition of the ideology and awareness of the virtue of members of society by influence and advice. The moral and legal norms must be combined and integrated to function." Furthermore, at the National Meeting of Directors of the Publicity Departments of January 2001, he proposed a new governing policy that "we should persevere in the construction of the socialist legal system and rule the country by law, and also persevere in the establishment of the socialist virtue and rule the country by virtue, in the process of development of socialist market economy in the construction of the socialism with Chinese characteristic. In the management of a country, ruling by law and ruling by virtue have usually complemented and promoted each other. Either of them is indispensable, and should not be neglected" and that "we should

always pay regard to combining the construction of the legal system and the establishment of virtue, and closely combine ruling by law with ruling by virtue."

Although there were opinions both for and against the idea of combining "ruling the country by law" and "ruling the country by virtue," the 16th National Congress of the CPC declared it as one of the ten principles achieved from the experience that must be followed. It is also mentioned in the section "Cultural Construction and Cultural Structure Reform." Under the policy of firmly reinforcing the establishment of the ideology and virtue, it states "Ruling the country by law and ruling the country by virtue complement each other. It is necessary to establish a socialist ideological and ethical system compatible with the socialist market economy and the socialist legal standard and consistent with the traditional virtues of the Chinese nation."

4.1.3 Opinions for and against Ruling the Country by Virtue

The academic community of jurisprudence is basically against the idea of ruling the country by virtue. It is only at the 15th National Congress that the construction of a country under the rule of law was first declared as a national policy, and the country is still in a struggle to realize such concept and establish administration ruled by the law. Under these circumstances, it is a large backward step to mention ruling by virtue as parallel with ruling by law. What are the standards for virtue? How are they decided? How is the country ruled by means of them? Considering those questions, they concern that the country may return to the traditional rule of men after all, in other words, what the leaders call "virtue" being followed. If it does not return to the rule of men, there may occur a tendency of emphasizing virtue but not following law, in other words, neglecting laws against the establishment of administration according to the law. They point out that ruling by

law and ruling by virtue are not complementary but contradictory.

On the other hand, there are opinions for "ruling the country by virtue" as follows.³ China is a county that values virtue. In the history of China, the Confucians emphasized "ruling by virtue" and formed a system of ideology of ruling by virtue. Although it is certain that the idea of ruling by virtue met the needs of the feudal society of China and had the color of the rule of men historically, the ruling by virtue that was presented at the 16th Congress does not rely on the virtue of the individual rulers, but represents the people's will as the central norm to serve the people, so that it will not turn to the rule of men. Virtue has a special effect that law cannot substitute. Virtue and law are complementary. Law relies upon the forcing power of the national authorities, but the legal norms can function in society only on the condition that the society is conscious about their moral obligations. The moral norms do not involve force but appeal to social manners and customs, public opinions, and inner beliefs. The root cause of cases where laws are put aside or are not strictly enforced is a moral matter, and so the legal norms need the support of virtue.

4.1.4 Sub-conclusion

According to the report by Jiang Zemin, the 16th National Congress adopted a resolution to revise the constitution of the Communist Party. The revised constitution of CPC added mentions of important results from the practice of socialism with Chinese characteristic, i.e., the ideas of promoting the development of both socialist material and political civilization and spiritual civilization in a harmonious way, ruling the country by law and constructing a socialist country under the rule of law, and combining ruling the country by law and ruling the country by virtue, in addition to the important ideology of the "three representatives" and the construction of a well-off society in an all-round way

as an objective of a struggle. Accordingly, the idea presented by Jiang Zemin was more formalized into the constitution of CPC, so it may be possible that it will be incorporated into the National Constitution together with the important ideology of "the three representatives" on a future occasion of Constitutional revision.

4.2 Judicial Reform

4.2.1 Promotion of the Judicial Reform

The judicial reform has been implemented on a step-by-step basis at the people's court, but it is at the 15th National Congress that it was first mentioned in the National Congress of the CPC. But, at the 15th Congress, it only stated that "the judicial reform shall be promoted; it shall be institutionally assured that the judicial organization exercise the power of jurisdiction and prosecution according to the laws independently and fairly; and a system to charges responsibility against false and misjudged cases shall be established." The 16th Congress expanded it in a full independent sub-section titled "Promotion of Judicial Reform" under the section of "Political Construction and Political Structure Reform." It stipulated that "A socialist judicial system must guarantee fairness and justice in the whole society. In accordance with the requirements of judicial justice and strict law enforcement, we should improve the setups of judicial organs, the delimitation of their functions and powers and their management systems so as to form a sound judicial system featuring clearly specified powers and responsibilities, mutual coordination and restraint and highly efficient operation. We should institutionally ensure that the judicial and procuratorial organs are in a position to exercise adjudicative and procuratorial powers independently and impartially according to law. We should improve judicial proceedings and protect the legitimate rights and interests of

citizens and legal persons. We should solve the problem of difficult enforcement of judgments. We should reform the working mechanisms of judicial organs and the management system of their human, financial and material resources and gradually separate their judicial adjudication and procuratorial work from their administrative affairs. We will tighten supervision over the judicial work and punish corruption in this field. We will build up a contingent of judicial personnel who are politically steadfast and professionally competent, have a fine style of work and enforce laws impartially."

4.2.2 Necessity of Judicial Reform

The Supreme People's Court has placed the reform of the people's courts as the most important component of the judicial reform, and promulgated the Outline of the Five Year Reform Plan of the People's Court (hereinafter referred to as "Outline") on October 20, 1999. The Outline states that there have occurred changes in the socio-economic relations and adjustments in the structure of interests in the process of transition from the planned economy system to the market economy system, and that, as a result, the number of cases brought to the people's courts has sharply increased, with new types of case. However, the management and trial mechanism of people's courts have not accommodated to such changes, so that there are difficulties in the judicial system's dealing with a large number of cases on a timely and fairly basis. Consequently, the Outline points out these serious problems: (1) spreading local protectionism is seriously undermining the uniformity and authority of the socialist legal system; some local courts tend to give partial decisions to protect their local interests, but it is difficult for the current management system to deal with it because the local government manages the personnel and finance of the people's courts in its area; (2) corruption and unfairness in the legal process due to

money worship is injuring the prestige of the Communist Party and the country; it is difficult to raise the quality of Judges in total to the level required as legal professionals in the current administration system of Judges; (3) case management in an administrative like way are not suitable for the nature of such work, so that they have had serious adverse effects on the functions of people's courts that should be fair and effective; and (4) financial difficulties and old facilities have given restrictions to court activities. Under these circumstances, the Outline asserts that only the decisive implementation of the reform of the people's courts and the establishment of the mechanism to endure independent and fair trials according to the laws can meet requirements for the development of socialist market economy and the establishment of a democratic legal system.

4.2.3 Overall Objectives of Judicial Reform

The overall objectives of the judicial reform are: (1) establishing an organizational system of the people's courts according to the requirements of the development of socialist market economy and the establishment of a socialist country under the rule of law; (2) improving independency, fairness, openness, efficiency, and integrity in the system, and operate an outstanding trial mechanism; (3) creating the force of Judges with high quality by a scientific system of administration over Judges; (4) establishing a cost-management system to ensure the implementation of the functions of the people's courts; and (5) establishing the judicial system with Chinese characteristic. With these objectives, the Outline sets the principal tasks and specific goals for the current five years, but they are short-term goals. It only mentions the more important reform of the deeper structure in stating that it will be dealt with piece by piece with theoretical studies being made. It suggests these as issues of such reform: (1) the organi-

zational reform of the system of the people's courts; (2) the reform of the high officials of the people's courts and the administration system over Judges; and (3) the reform of the cost-management system of the people's courts. Each of them relates to the fundamental matter of the independence of justice.

4.2.4 Sub-conclusion

The 16th National Congress has shown two developments in the judicial reform under way. The first is that the achievement of fairness and justice in society is set as an objective of the judicial system, so that a role that it is supposed to play has been expressly indicated. In the past, only the establishment of a fair judicial system has been emphasized, but now the direction of the judicial reform has been specified. The second is the policy that the people's courts be gradually separated from the administrative judicial business. In the present system, the local government controls the personnel and financial businesses of the people's courts. Accordingly the judicial independence has hardly been achieved and local protectionism in the judicial field has been encouraged. The separation policy declared in the Congress may facilitate the reform of the deep structure, such as the cost management system, which has been left over.

4.3 Reform of the System on Judges

4.3.1 Current Situation on Judges

In China, Judges have long been selected from within the people's courts. Court clerks may be promoted to the position of assistant Judge after they have worked as clerk for a certain number of years, and assistant Judges may be promoted to the position of Judge after they have worked as assistant for some years. Furthermore, there have been many cases where local government officials, retired military people, or laborers who did not learn law nor are trained in law

were appointed as Judges. Accordingly it has been possible that persons without knowledge of law became chief Judges (Wang Liming, 2000, 35).⁴ Particularly, there have been cases where officials of the Communist Party or the Government were transferred to the judicial branch and assigned to high positions such as president of the court, for a solution of an issue of personnel arrangement (Cui Min, 1999, 502). Approximately a half of the Judges of the basic people's courts are now retired military people, followed by those transferred from other government branches in the percentage. The Judges who have graduated from law colleges account for only less than 10%.⁵ As for the educational background of the Judges, more than 90% of the Judges are already graduates of "dazhuan" (corresponding to junior college) or higher; however, only less than 10% are graduates of the law departments of ordinary colleges/universities. It is assumed that most of those "dazhuan" graduates obtained their diploma in Spare-time Law College after they became Judges.⁶

All the problems in judiciary, e.g., partiality, unfairness, low efficiency, and corruption, are directly or indirectly related to the quality of Judges.⁷ The establishment of an independent and fair court system, and the realization of impartiality and justice in society, are dependent upon the quality of Judges (Udagawa, 2001, 39). Accordingly, reforms on Judges who carry out trials are a key to the successful judicial reform, so the successful achievement of the latter reform depends upon the former reforms (Udagawa, 2001, 49). The people's courts have taken measures such as reforms on the recruitment of Judges, stricter qualification requirements for Judges, and training and education for Judges. The following sub-sections discuss the stricter qualification requirement for Judges and the Unified National Bar Examination.

4.3.2 Qualifications for Judges

The qualifications for Judges were ini-

tially provided for in the Organic Law of the People's Court of 1979 only as (1) a citizen age of 23 or more who has the right to vote and is eligible for election but (2) who has not been deprived of the political rights; and another qualification requirement of (3) having the knowledge of law was not added until 1983 (Article 34).

The Judge Law of 1995 established for important reforms on Judges, clarifies the qualifications for Judges, and has the provisions of appointment, punishment, resignation, and dismissal of Judges. This law is intended to change the existing personnel system that calls all the high-rank members of the Communists and Government including Judges the nation's Cadre and manages all of them similarly, and to divide the personnel management of Judges from that of other national servants (Zhou Daoluan, 1996, 37). Article 9 of the present Judge Law provides for the qualifications for Judges. It stipulates, (1) being of Chinese nationality, (2) being age of 23 or more, (3) supporting the Constitution of China, (4) having good political and business ability, and being good in behavior, (5) being in good health, and (6) being a "benke" graduate majoring in law of an university or special college (corresponding to a four-year-college or a university), or a graduate of other "benke" besides law who has special knowledge of law and has an experience of two-year legal work. It also provides that those who has an experience of three-year legal work, in addition to the qualifications listed above, may be appointed as Judges of the Higher People's Courts and the Supreme People's Court. It also provides that those who have a master's or doctor's degree of law or who have a master's or doctor's degree of another major, a knowledge of law, and an experience of one-year legal work may be Judges; and that they may be appointed as Judges of the Higher People's Courts and the Supreme People's Court if they have an experience of two-year legal work. The Judge Law, however, sets a relaxation on full implementation

of these requirements for some regions that have difficulties in clearing those educational qualifications for a certain period.⁸ The law also provides that new recruited Judges will be selected from the excellent persons among those who have passed the Unified National Bar Examination, and is qualified for Judges, based on the standard of having both talent and virtue (Article 12).

The educational qualification requirements mentioned above were actually modified to be stricter in the revision of the Judge Law in 2001, which was a preparation for the first implementation of the Unified National Bar Examination. The previous Article 9 of the law provided for qualifications for Judges as a person who "has graduated from a university or a special college majoring in law, or who has an experience of two-year legal work in the case that he or she has graduated from another major of a university or a special college, and has a special knowledge of law;" and a person who "has an experience of one-year legal work if he or she has a bachelor's degree of law; however, no experience of legal work is required if he or she has a master's or doctor's degree of law." The provision was modified to require graduation from "*benke*" (corresponding to a four-year college or a university) rather than that from "*dazhuan*" (corresponding to junior college) as a qualification for Judges.

4.3.3 National Bar Examination

The separate examinations for Judges Prosecutors, and Attorneys were unified into the National Bar Examination, which was first implemented in March 2002. According to the Proposed Implementation Provisions on National Bar Examination, this examination is organized on a unified basis by the country and qualifies those who engage in the specified legal professions. Those who would like to be new recruit Judges and Prosecutors, or Attorneys are required to pass this examination (Article 2). The educational requirement

to take this examination is graduation from a "*benke*" (corresponding to a four-year college or a university) of a university/college majoring in law, or graduation from another major of "*benke*" of a university/college together with a special knowledge of law (Article 13 (4)), based on the relevant provisions of the revised Judge Law, the Prosecutor Law, and the Attorney Law. However, for the regions that the Ministry of Justice recognizes are certainly difficult to apply the above-mentioned requirements, the educational requirement is reduced to graduation from a special college (corresponding to a junior college) majoring in law for a certain period, according to the rules for the reduced educational conditions for the qualifications for Judges, Prosecutors, and Attorneys that the Supreme People's Court, the Supreme People's Prosecution, and the Ministry of Justice have separately established. The number of those who are to pass in the examination and the standard points for passing it are made public by the Ministry of Justice after consultation with the Supreme People's Court and the Supreme People's Prosecution (Article 15).

The National Bar Examination comprises judicial theories, applied law, provisions of the existing laws, law practices, and legal professional ethics; and the four questions are asked: (1) general knowledge: theories of law, constitution, economic laws, international laws, private international laws, international economic laws, and legal professional ethics and responsibility, (2) criminal and administrative law systems: criminal law, criminal procedure law, administrative law, and administrative procedure law, (3) civil and commercial law system: civil law, commercial law, and civil procedure law (including the arbitration system), and (4) case analysis. The questions (1) to (3) are choice questions, and the question (4) asks to write an essay. 360,751 people applied for the first National Bar Examination implemented in March 2002. Of all the applicants, those age of 40 or less were more than 340,000, or 95.1%; and those age of 25

or less accounted for 40%. The graduates from universities/colleges or special colleges majoring in law were more than 290,000, or 81.4%, a half of which were graduates from "dazhuan" (corresponding to a junior college). 6,346 applicants had a doctor's or master's degree. The applicants who work in legal businesses in people's courts, prosecution offices, or government agencies were approximately 160,000, or 44%. The examination was implemented at 12,860 places throughout the country, and more than 310,000 actually took it. After the examination, it was disclosed that the points for passing were generally 240 and those for the regions with the reduced conditions were 235. The rate of those who passed was approximately 7%, and more than 24,000 applicants passed.

4.3.4 Sub-conclusion

The introduction of the Unified National Bar Examination is evaluated to be one of the most important achievements of the judicial reforms that have so far been implemented. Setting higher conditions for selection at the entrance to the judicial community is expected to help improve the quality of Judges who will be appointed. It is also expected that the levels of Judges, prosecutors, and attorneys will come to a certain level, which could raise the reliability of the judicial system. However, an issue is left untouched, i.e., how the existing Judges who do not satisfy the educational requirements of the Judge Law nor pass the national bar examination should be treated. The Supreme People's Court has stated that it will dismiss those Judges; however, they have not significantly reduced them because of lack of human resources and inertia of the system. Particularly, there are many court officials who have been transferred from other government branches and do not have sufficient knowledge of law. If such officials continue to have an administrative way of thinking and acting, the introduction of the national bar examination will not have an

expected effect.

Conclusion

The 16th National Congress of the CPC confirmed the judicial policy of "ruling the country by law and constructing a socialist country under the rule of law" declared in the 15th Congress, and mentioned the judicial reform in a full sub-section spared for it that clarifies judicial issues. However, at the same time, it referred to "ruling by virtue" as parallel with "ruling by law," which raise doubt that they still lack legal consciousness. The main reason that those words were inserted into the document was because Jiang Zemin wanted to leave his footprints as much as possible at his retirement, but, more basically, because only few members in the Central Party are of legal background. China committed to make its legal system more transparent, and to make its judicial reviews stricter when joining WTO, so the construction of a country under the rule of law and the judicial reform is literally an urgent issue for China more than before. The key to the successful reform is to improve the quality of Judges, which is partially expected by the introduction of the Unified National Bar Examination. However, to obtain the desired results, a definite commitment for judicial reform from the Central Party is necessary, not mentioning years that the reform will require.

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Notes:

1. "Shehui zhuyi minzhu zhengzhi bi jiang bu ru yi ge xin tiandi: bufen zhengfajie shiliuda daibiao changtan minzhu fazhi" (Socialist democratic politics must enter a new world: some representative of the 16th National Congress of the CPC from the political and judicial circle speaks without reserve on democratic legal system), *Fazhi ribao* (Legal Daily), November 11, 2002.
2. Jiang Zemin, "Gaoju Deng Xiaoping lilun weida qizhi, ba jianshe you Zhongguo tese shehui zhuyi shiye quanmian tui xiang ershiyi shiji" (Hoist high the great flag of Deng Xiaoping theory, and totally push the work for constructing socialism with Chinese characteristic toward the 21st century) (The Report of the 15th National Congress of the CPC, September

- 12, 1997).
3. See, "Renzhen guanche shishi 'yi de zhi guo' fanglüe, da li jiaqiang sixiang daode jianshe" (Seriously attain enforcement of the policy of "ruling the country by virtue," and strengthen stronger the construction of ideology and virtue), at <http://njdj.longhoo.net/dj80/ca524450.htm>, accessed November 19, 2002; "Ruhe ba 'yi de zhi guo' de sixiang luo dao shi chu" (How to realize the ideology of "ruling the country by virtue"), at <http://njdj.longhoo.net/dj80/ca54905.htm>, accessed November 19, 2002; "Falü guifan yu daode guifan" (Legal norms and moral norms), reprinted from *Guangming ribao*, at <http://njdj.longhoo.net/dj80/ca52441.htm>, accessed November 19, 2002, etc.
 4. The reasons for this was because the people's courts' main function was to deal with criminal cases that control crimes, so the Judges were only required to be politically right, not required to be a specialist in law; and because of the lack of sufficient legal system, Judges did not need legal skills (Udagawa, 2001, 40).
 5. "Faguan zaizao: sifa kaoshi dazao zhiye menkan" (Regeneration of Judges: the bar examination creates a professional threshold), at CAIJING MAGAZINE on China Online, <http://www.caijing.com.cn/mag/preview.aspx?ArtID=1023>, accessed October 4, 2002.
 6. Falü yeyu daxue (Spare-time Law College) have been established to allow Judges who have had no legal education to acquire a basic knowledge on law and obtain a *dazhuan* graduation certificate (corresponding to a junior college). This certificate only meets the statutory requirement for educational qualification for Judges, and is considered to be lowest in value (Su Li, 2000, 328).
 7. Xin Chunying, "Guojia sifa kaoshi xuyao xiangying zhidu zhichi" (The national bar examination needs support of a suitable system), at http://www.legaldaily.com.cn/gb/content/2002-02/16/content_32028.htm, accessed November 19, 2002.
 8. The regions to which the reduced educational requirements apply are: (1) the autonomous counties under the provinces, autonomous regions, or municipalities directly under the Central Government; the counties under the autonomous regions; and the counties under the autonomous prefectures; (2) the priority counties that the State Council has approved under the development projects to overcome poverty; and (3) the cities, districts, and county-level cities under the Tibet autonomous region. It will be effective provisionally for the period of January 1, 2002 to December 31, 2002.

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