Human Rights and Most-Favored-Nation Tariff Rates for Products from the People's Republic of China

Randall Green*

I. INTRODUCTION

The issue of human rights in China has been in the news with increasing frequency the past few years. In May 1989, the Tiananmen Square prodemocracy demonstrations were vividly brought into our homes on television, and the unarmed demonstrators captured our hearts with their sincere yearning for liberty and democracy. The brutal crackdown by a unit of the ironically named People's Liberation Army outraged American viewers. The poignant smashing of the "Goddess of Democracy" and the fatal shooting or bayoneting of 500 to 1,000 of the demonstrators can never be forgotten nor forgiven. Most important, the hard-line government earned "the resentment of the people China needs most: the young, the intelligent, the energetic and innovative." This incident is but one example of China's poor record on human rights.

The human rights situation in China has been documented by many observers, including the U.S. State Department. The

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* Adjunct Professor, University of Puget Sound School of Law. Attorney, Seattle, Washington. B.S.B.A. 1977, University of Missouri-St. Louis; J.D. 1980, Harvard Law School (where he was a member of the Harvard Civil Rights-Civil Liberties Law Review). The Author wishes to express gratitude for the capable research assistance of Masaru Kibukawa, J.D Candidate 1994, University of Puget Sound School of Law.


2. One demonstrator, asked by a television interviewer at the time, replied he was not really sure what democracy meant to him but he wanted more of it. CNN News, (CNN television broadcast, June 2, 1989). An analysis of the virtues and problems of Western-style democracy and individual liberties is beyond the scope of this Article. See generally Kishore Mahbubani, The Dangers of Decadence, FOREIGN AFF., Sept./Oct. 1993 at 10, 14.


4. Id.

5. Id. at 29.


611
United States places primary importance on concerns such as the denial of a fair public trial, the harsh implementation of population control programs, strict restrictions on the freedoms of speech and press, the lack of ability for peaceful and legal change of government or government officials, the de facto discrimination against women despite legal equality, and the inability of workers to form a trade union independent of government control.

There are a few bright spots, however. For example, China released some prominent political prisoners on medical parole in 1993. Moreover, China continues to allow more citizens to emigrate than the United States allows to immigrate.

Despite recent improvements, most observers agree that the quality of human rights in China needs to be improved. The question is which course of action the U.S. government can take to help the situation improve. It is tempting for Americans to try to improve human rights in China by using the threat of trade sanctions, specifically the denial of Most-Favored-Nation (MFN) tariff rates. This course of action, however, may harm the very people we most want to help and may slow, rather than accelerate, the improvement of human rights in China.

Because there is an historical link between the economic power possessed by any group of people and the political rights enjoyed by that group, this Article argues that the best way for the United States to promote human rights in China is to assist China's economic development. This argument is supported by logic (e.g., demonstration of cause and effect) as well as by example (e.g., the recent histories of Korea and Taiwan).

Part II of this Article takes a detailed look at what MFN status really means and looks at the history of U.S. grants of

8. See id. at 7-11.
9. See id. at 12-13. Population control is implemented through a "one-child" policy, which is inconsistently administered. Abortion and sterilization are commonly used, although the government officially opposes forcing such measures. Id.
10. See id. at 13.
11. See id. at 21.
12. See id. at 23.
13. See id. at 26.
14. See id. at 1.
15. Richard H. Solomon, U.S. Dep't of State, China and MFN: Engagement, Not Isolation, Is Catalyst for Change 5 (Current Policy No. 1282, 1990). The right to emigrate is the original basis for the Jackson-Vanik Amendment and remains its sole criterion. See infra part II.B.
MFN status to China. Part II also analyzes the 1993 executive order conditionally renewing MFN status for China and explores some of the grounds for opposing MFN status renewal.

Part III explains the causal connection between economic development and the resulting development of human rights. Part III also examines the Chinese economy and suggests that the U.S. policy of using MFN status as a reward or punishment is misguided. Part IV lends further support to the relationship of economic development and human rights by reviewing the past and present shift of economic and political power from central governments to citizens. Finally, Part V warns of the effects of the perceived hypocrisy in U.S. foreign and domestic policy.

II. USE OF MFN STATUS TO PROMOTE HUMAN RIGHTS

A. Definition of MFN Status

Most-Favored-Nation status is a misnomer, as it is really the ordinary tariff level applicable to most of our trading partners.17 Products from some nations receive reduced or no tariffs under various free trade agreements or under the system of tariff preferences for certain goods from certain developing countries.18 A nation that does not have MFN status is subject to the punitively high tariffs under the protectionist Smoot-Hawley Act,19 which is widely regarded as having contributed to leading the United States into an economic depression into which the rest of the world followed.20

MFN status is not preferential treatment for products from a few countries. MFN status does not imply the granting of a favor, nor is it reserved to a few favorite trading partners. The United States currently denies MFN status to only ten countries.21 The primary effect of granting MFN status to a country

19. Id. § 1301.
is that merchandise produced there may enter the United States under normal (Column 1) rates of duty for each product, rather than under the discriminatory Smoot-Hawley (Column 2) rates.22

B. Methods for the United States To Extend MFN Status to Other Nations

Article I of the General Agreement on Tariffs and Trade (GATT)23 presumes MFN status among the over one hundred states (called "contracting parties") that have acceded to the terms of GATT: "With respect to customs duties . . . imposed on . . . importation . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in . . . any other country shall be accorded immediately and unconditionally to the like product originating in . . . the territories of all other contracting parties."24

Initially, nonmarket economies (NME)25 were denied inclusion in GATT.26 The basic reason for the exclusion was that the

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22. See HARMONIZED TARIFF SCHEDULE, supra note 21, at 2. To determine the rate of tariff for a product, one must find the appropriate classification number of that product in the Harmonized Tariff Schedule and then read across to the appropriate column—Column 1 "General" for most MFN goods, Column 1 "Special" for goods that receive lower tariffs or enter free (e.g., under the Canada-United States Free Trade Agreement of 1989, the Caribbean Basin Economic Recovery Act of 1983, or the Generalized System of Preferences legislation of the U.S.), or Column 2 for all other goods. See id.

23. GATT, supra note 17.

24. Id. at A12, 55 U.N.T.S. at 196, 198. Nonetheless, the United States may in its discretion withhold MFN status from a GATT member, as it has done in the case of Cuba. See HARMONIZED TARIFF SCHEDULE, supra note 21, at 2. Congress has authorized the President to maintain a total trade embargo with Cuba. 22 U.S.C. § 2370(a)(1) (1988).

25. The term "nonmarket economy" is commonly used to describe countries where goods and resources are allocated by government planning agencies rather than by prices freely set in a market. . . . In general, the Communist bloc countries are viewed as having nonmarket economies, while the developed Western countries are viewed as having market economies. This categorization is not as precise as might be desired. For example, some members of the Communist bloc, in particular Hungary and China, have recently instituted new economic rules that permit market forces to play a role in some sectors of their economies.


lower tariffs under MFN are designed to generate greater quantities of imports. This naturally occurs when private buyers in a market economy find imports relatively more attractive because lower tariff duties result in lower net purchase prices to those buyers. But where a NME is itself the purchaser and, in effect, pays any import tariffs to itself, lower tariff rates do not lower the net purchase price to that NME and therefore do not increase the quantity purchased by the NME.

The United States may choose to grant MFN status to a NME, as the United States intended to do with the U.S.S.R. after the May 1972 summit meeting in Moscow. Restrictive Soviet emigration policies at the time caused Senator Jackson and Representative Vanik to sponsor legislation restricting the authority of the President to extend MFN status to any NME that denied its citizens the right to emigrate or imposed more than a nominal fee on emigration. The so-called Jackson-Vanik Amendment was signed into law as Title IV of the Trade Act of 1974.

The Jackson-Vanik Amendment provides the President with discretionary authority to grant nondiscriminatory trade status by Executive Order for successive twelve-month periods to any NME that adheres to certain standards regarding freedom of emigration. Congress may, however, pass, within a prescribed time, a joint resolution denying the extension of MFN status. If the President vetoes such joint resolution, Congress must override the veto within a prescribed time or the Executive Order will remain effective.

Negotiations for the accession of the People's Republic of China to GATT are now underway. The timing, and even the ultimate success, of the GATT membership negotiations are not known. Whether or not China accedes to GATT as a NME,

27. Id. at 340.
28. Id.
30. Id. at 196.
32. Id. § 2432(c), (d)(1).
33. Id. § 2432(d)(1).
34. Id. § 2432(d)(1)-(2).
35. Overholt, supra note 20, at 388.
36. "In March 1993, the official in charge of such things in Washington, Donald Newkirk, said that he would be retiring in seven years and doubted that China would fulfill the requirements by then." Id.
any U.S. extension of MFN status to China must, at a minimum, comply with the terms of the Jackson-Vanik Amendment.37

Renewal or denial of MFN status to China has many more implications than what tariff rate will apply to imported goods from China. The following sections trace the history of MFN status in China before 1993 and discuss the 1993 Executive Order granting MFN status, opposition arguments against further renewal, China's view of this as meddling with internal affairs, and finally an alternative nonpolitical measure of human rights.

C. **MFN Status for China**

1. **History Before 1993**

The United States first extended MFN treatment to the People's Republic of China on February 1, 1980, under the provisions of the Jackson-Vanik Amendment.38 China has received an extension of MFN status each year since 1980, but not without significant congressional protests in several years.39

In both 1991 and 1992, Congress passed joint resolutions opposing extension, which former President Bush vetoed.40 The House overrode those vetoes but the Senate narrowly failed to do so.41 This set the stage upon which the new Clinton Administration entered.

2. **1993 Executive Order**

On May 28, 1993, President Clinton by Executive Order No. 12,850 renewed China's MFN status for the twelve-month period beginning July 3, 1993.42 The Executive Order described further renewal in 1994 as "subject to the conditions" set forth

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40. Id. at 2.
41. Id.

WHEREAS, the Congress and the American people have expressed deep concern about the appropriateness of unconditional most-favored-nation (MFN) trading status for the People's Republic of China (China);
President Clinton's attachment of specific conditions to his renewal was probably necessary to avoid a congressional veto.44

It is unclear from the text of the Executive Order whether all the conditions must be met prior to granting MFN status or if some are only advisory. The language of the Executive Order

WHEREAS, I share the concerns of the Congress and the American people regarding this important issue, particularly with respect to China's record on human rights, nuclear nonproliferation, and trade;

WHEREAS, I have carefully weighed the advisability of conditioning China's MFN status as a means of achieving progress in these areas;

WHEREAS, I have concluded that the public interest would be served by a continuation of the waiver of the application of sections 402 (a) and (b) of the Trade Act of 1974 (19 U.S.C. 2432(a) and 2432(b)) (Act) on China's MFN status for an additional 12 months with renewal thereafter subject to the conditions below;

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

SECTION 1. The Secretary of State (Secretary) shall make a recommendation to the President to extend or not to extend MFN status to China for the 12-month period beginning July 3, 1994.

(a) In making this recommendation the Secretary shall not recommend extension unless he determines that:

—extension will substantially promote the freedom of emigration objectives of section 402 of the Act; and

—China is complying with the 1992 bilateral agreement between the United States and China concerning prison labor.

(b) In making this recommendation the Secretary shall also determine whether China has made overall, significant progress with respect to the following:

—taking steps to begin adhering to the Universal Declaration of Human Rights;

—releasing and providing an acceptable accounting for Chinese citizens imprisoned or detained for the non-violent expression of their political and religious beliefs, including such expression of beliefs in connection with the Democracy Wall and Tiananmen Square movements;

—ensuring humane treatment of prisoners, such as by allowing access to prisons by international humanitarian and human rights organizations;

—protecting Tibet's distinctive religious and cultural heritage; and

—permitting international radio and television broadcasts into China.

SEC. 2. The Secretary shall submit his recommendation to the President before June 3, 1994.

SEC. 3. The Secretary, and other appropriate officials of the United States, shall pursue resolutely all legislative and executive actions to ensure that China abides by its commitments to follow fair, nondiscriminatory trade practices in dealing with U.S. businesses, and adheres to the Nuclear Non-Proliferation Treaty, the Missile Technology Control Regime guidelines and parameters, and other nonproliferation commitments.

SEC. 4. This order does not create any right or benefit, substantive or procedural, enforceable by any person or entity against the United States, its officers, or employees.

43. Id.

44. For descriptions of the several more restrictive legislative bills see PREGER, supra note 39, at 5.
suggests that compliance with the clauses listed in Section 1(a) (freedom of emigration and prison labor) is mandatory, but that the United States expects only "overall, significant progress" rather than full compliance with those clauses listed in Section 1(b) (taking steps to begin adhering to the Universal Declaration of Human Rights, releasing political and religious detainees, treating prisoners humanely, protecting Tibet's heritage, and permitting international broadcasts into China).

Section 3 of the Executive Order relates to fair trade and weapons nonproliferation commitments. The language of this section suggests that U.S. officials are directed to pursue compliance by China in those areas, but it is not clear from the language whether further renewal of MFN status is conditioned on such compliance. The placement of this Section after the discussion of the Secretary of State's recommendation to the President implies that these are not conditions but are independent directives to U.S. officials in charge of compliance. If this analysis is correct, the areas addressed in section 3 may technically remain outside the scope of MFN considerations.

The Executive Order can be described as a noble attempt to move China's leadership toward compliance with international standards of human rights. The carrot of further renewals of MFN status (or, conversely, the stick of MFN status withdrawal) provides, however, a clumsy tool for achieving that goal. The stated all-or-nothing character of renewal makes the Secretary's recommendation both more important and more difficult.

If MFN status renewal had not been granted in 1994, some leverage may have remained with respect to the possible extension at some later time. But if MFN had not been renewed there would almost certainly have been retaliation of some sort,

45. See Exec. Order No. 12,850, supra note 42.
47. Exec. Order No. 12,850, supra note 42.
48. "The Secretary, and other appropriate officials of the United States, shall pursue resolutely all legislative and executive actions to ensure that China abides by its commitments to follow fair, nondiscriminatory trade practices in dealing with U.S. businesses, and adheres to...nonproliferation commitments." Id. § 3.
49. Just as this Article was going to press, the President announced the extension of MFN status for China for the next 12 months, and announced a disconnection of trade status from human rights in connection with future extensions. Presumably, however, the emigration standards imposed by the Jackson-Vanik Amendment will remain in place. The extent of a congressional challenge, if any, to the President's extension was not yet known.
including higher tariffs or more restrictive quotas on the import of U.S. goods into China.\textsuperscript{50} Other countermeasures, such as the recall of China's overseas students and additional restrictions on emigration, may have been taken.\textsuperscript{51} The spiraling imposition of measures and countermeasures might have led to a deterioration of China-U.S. relations to the point where the possibility of a re-extension of MFN in 1995 would not seem likely enough to serve as further leverage for improving human rights in China.

Of all the conditions in the Executive Order, the requirement that China make overall, significant progress\textsuperscript{62} in taking steps to begin adhering to the Universal Declaration of Human Rights was the most difficult to monitor. The Declaration covers thirty articles including rights as diverse as those relating to torture or degrading punishment;\textsuperscript{53} arbitrary arrest, detention, or exile;\textsuperscript{54} fair and public hearings by an independent and impartial tribunal;\textsuperscript{55} freedom of movement and residence within the borders of each state;\textsuperscript{56} peaceful assembly;\textsuperscript{57} protection against unemployment;\textsuperscript{58} rest and leisure;\textsuperscript{59} and "a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."\textsuperscript{60} Such a wide range of rights may be difficult for any nation to guarantee its people.

Moreover, the legal status of the Declaration has not been clear. For example, contrast the remarks of the United States representative in the United Nations General Assembly at the time of the Declaration's adoption with the U.N. Secretary-General's remarks in 1971. According to the United States' Repre-

\textsuperscript{50} "If China is denied MFN status, it is expected to retaliate in the marketplace by closing its doors to many [U.S.] exports." Joe Haberstob, Biting into a Big Market: Apple Growers Aim for China, Seattle Times/Post-Intelligencer, Feb. 4, 1994, at A16. "PRC authorities would view the termination of MFN status as not just a trade sanction but as a hostile political act." Solomon, supra note 15, at 5. "Trade retaliation is almost a certainty if we deny China MFN status." Id. at 6. One author suggests "the collapse of U.S. exports to China would cost well over 100,000 American jobs." Overholt, supra note 20, at 394.

\textsuperscript{51} Solomon, supra note 15, at 5.

\textsuperscript{52} Exec. Order No. 12,850, supra note 42, § 1(b).

\textsuperscript{53} Universal Declaration of Human Rights, supra note 46, art. 5.

\textsuperscript{54} Id. art. 9.

\textsuperscript{55} Id. art. 10.

\textsuperscript{56} Id. art. 13.

\textsuperscript{57} Id. art. 20.

\textsuperscript{58} Id. art. 23.

\textsuperscript{59} Id. art. 24.

\textsuperscript{60} Id. art. 25.
sentative, the Declaration "is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation."^{61} In contrast, the U.N. Secretary-General claimed that "[d]uring the years since its adoption the declaration has come, through its influence in a variety of contexts, to acquire a status extending beyond that originally intended for it."^{62} Both these statements differ from the Restatement (Third) of the Foreign Relations Law of the United States, which provides that "[t]he United States has frequently reiterated its acceptance of the Universal Declaration, and whatever legal character it applies to the United States."^{63}

3. Grounds for Opposition to Further Renewal

There is a large and politically formidable coalition that shares an interest in reducing imports from China for reasons other than those relating to human rights.^{64} This coalition includes opponents to various Chinese policies, such as nuclear testing and arms sales to Pakistan, as well as U.S. businesses in competition with imported Chinese goods.^{65}

The fact that Chinese producers are major exporters to U.S. buyers does not please U.S. producers of similar goods.^{66} The merchandise-trade deficit with China increased to $18.2 billion in 1992, the second largest U.S. bilateral trade imbalance behind Japan's.^{67} The U.S.-China trade deficit grew to $23 billion in 1993, reflecting $27 billion in U.S. imports and $4 billion in exports.^{68}

The large amount of goods imported into the United States from China, which sell at lower prices, reflecting the lower cost of production in China, leads the U.S. producers of comparable goods to desire protection from competition. This group could cast an argument in terms of human rights to gain more sup-

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66. See Reynolds, supra note 64.
porters in excluding imports from China, even though the group's primary concern may not be human rights. It would be ironic if good-hearted Americans who wish more human rights for the Chinese are swayed to the side of some U.S. producers whose main interest may be protection from the competition posed by imported goods.

4. China's View as Meddling in Internal Affairs

China's leadership interprets America's conditional renewal of MFN as meddling in internal affairs. Such an interpretation may lead, in turn, to greater resistance from Chinese political leaders. As Deng Xiaoping told Richard Nixon in October 1989, "If you want China to beg, it cannot be arranged." It can be argued that because China has accepted international monitoring of human rights conditions under the Universal Declaration of Human Rights, and has even voted to monitor activities in South Africa, China cannot object to monitoring in its own country. Such an argument may be valid if China were objecting to a proposal by the U.N. or other international body to monitor human rights conditions in China. The argument carries less weight, however, when the outside monitoring and determination are made by only one other country, the United States.

China's accusation that the United States is meddling in its internal affairs is, for the Chinese, emotionally charged. The average Chinese is painfully aware that the Western powers carved eastern China into "concessions" and imposed Western laws on Chinese nationals in China who dealt with Westerners. At the same time, Westerners made settlements of their own in China in which they were immune to all Chinese law. That

71. Inauspiciously, the modern phase of relations between China and Western powers began when China attempted to restrict the importation of Indian-grown opium by the British East India Company. The British engaged in the Opium War of 1841 to keep open their market. The British and French combined to fight China 15 years later to force the receipt of their diplomats and traders. This second war more resembled a deliberate looting and burning of the emperor's extensive summer palace in Peking. The resulting treaties of Nanking (1842) and Tientsin (1857) ceded the island of Hong Kong outright and established Kowloon, Shanghai, Canton, and other areas as "treaty
state of affairs, lasting from the 1840s until the early part of this century, 72 may seem long ago and far away. Yet, in our own American political consciousness, events such as Paul Revere's ride or Patrick Henry's speech typically bring forth an immediate and emotional response of pride and patriotism, notwithstanding that the events took place even longer ago. We should therefore be able to understand China's even more immediate and emotional response to efforts by the United States to affect legal relationships on Chinese territory. 73

It is unlikely that China's leaders will be moved by an appeal to morality by the United States. The conditioning of MFN status renewal on progress in human rights in China is seen as an unwanted intrusion into local politics. Although MFN status renewal may have enough economic leverage to move China's leaders to some degree, political leverage works in the opposite direction and may more than offset the economic leverage.

ports." R.R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD 702 (4th ed. 1971). Further, the importation of opium was legalized, a low tariff was established for it, and China had to pay indemnities to the victor governments. 8 ENCYCLOPEDIA BRITANNICA Opium Wars 967 (1990). After the First World War, the first aim of Dr. Sun Yat-sen and others in China was to shake off the "treaty system." PALMER & COLTON, supra, at 835. These deep feelings continued, so that after 1949 the new Communist leaders "were articulate spokesmen for a universal hostility to Western imperialism that had all but carved their country to pieces in the nineteenth century . . . ." Id. at 948 (emphasis added) (citations omitted).

72. This period lasted even longer. By one definition, "critics of modern colonialism . . . considered China between 1900 and 1930 as a colony of the West because of the economic dominance of certain European and American countries and the impotence of the central Chinese government . . . ." 6 ENCYCLOPEDIA BRITANNICA Colony 85 (1973).

73. There has even been resistance within the United States to our being held to international standards of human rights. See, e.g., LOUIS HENKIN, THE AGE OF RIGHTS 74, 77 (1990).

From the beginning, the international human rights movement was conceived by the United States as designed to improve the condition of human rights in countries other than the United States (and a very few like-minded liberal states). . . . It did not strongly favor but it also did not resist the move to develop international agreements and international law, but, again, it saw them as designed for other states. But the resistance in the United States is deeper. There is resistance to imposing national standards on some matters that have long been deemed "local"; even more, there is resistance to accepting international standards, and international scrutiny, on matters that have been for the United States to decide. A deep isolationism continues to motivate many Americans, even some who are eager to judge others as by interceding on behalf of human rights in other countries.

Id.
5. Nonpolitical Measures of Human Rights

There are different perspectives on the meaning of human rights and on the ideal role of a government toward its citizens. These different perspectives exist even within the United States. For example, many Americans firmly believe that federal and state governments owe a duty to provide their citizens with freedom from want by providing subsidized food, education, and health care. Others equally believe those governments owe a greater duty to provide maximum freedom of action and opportunity by minimizing regulation and taxation of private activity.

The same tension and differing perspectives exist within China. For example, a poor farmer in an inland province may view the desire to vote for one's political leaders or to speak publicly on political matters as less pressing than the desire to increase the number of meals per day from two to three. Thus, the official government program of heavily regulating private activity so as to maximize economic benefits for all may seem justified and desirable to many Chinese.

Even within the area of economic development there are irresolvable internal conflicts. For example, it is clear that China's overpopulation has contributed to famine, but the government's program to reduce overpopulation by limiting families to one child has been quite unpopular both with citizens of China and with human rights observers outside China.

The U.S. government seems primarily concerned with China's suppression of individual civil liberties and political rights. The State Department believes that

experience demonstrates that it is individual freedom that sets the stage for economic and social development; it is repression that stifles it. . . . Those who try to justify subordinating political and civil rights on the ground that they are

74. See Patrick Tyler, Crossroads for China, N.Y. TIMES, Jan. 29, 1994, at A1. In general, China has retained the traditional notion that the rights of individuals are subordinate to collective rights. Rights in China must stem from some positive law and are usually coupled with a corresponding duty to the state. This is in contrast to rights in liberal states, which stem from some metaphysical source, for example, the "inalienable rights" referred to in the U.S. Declaration of Independence. See, e.g., R. RANDLE EDWARDS ET AL., HUMAN RIGHTS IN CONTEMPORARY CHINA 21 (1986).


concentrating on economic aspirations invariably deliver neither. That is why we consider it imperative to focus urgent attention on violations of basic political and civil rights.\textsuperscript{77}

In contrast, the Chinese government view is that developing the economy, at least so as to avoid starvation and homelessness, is more important than assuring political freedoms.\textsuperscript{78}

Abraham Maslow's famous "hierarchy of needs" argues that people first desire freedom from hunger, cold, and the elements, and then seek higher-order needs such as self-actualization.\textsuperscript{79} Former President Carter agrees:

[The Chinese] (and leaders in other socialist countries) point out, correctly, that there is a wide range of human rights, some of which are respected in their countries and neglected in the United States. These include the right to have a home, a job and health care. It is self-satisfying for us Americans to emphasize freedom of speech, the press, religion and assembly as the only important human rights.\textsuperscript{80}

III. THE LINK BETWEEN ECONOMIC DEVELOPMENT AND HUMAN RIGHTS IN CHINA

There is a direct link between China's economic development and the human rights enjoyed by its people. This relationship can be made clearer by examining the Chinese economy, and the misguided "reward-versus-punishment" view held by the United States with regard to MFN status.

A. Chinese Economy

The issue of whether to extend MFN status to China is hotly debated in the American press and conscience. During the Asia-Pacific Economic Cooperation (APEC) meetings in Seattle last November, some commentators argued that we should not put business negotiations before human rights.\textsuperscript{81} This view (popular in America) assumes that an emphasis on

\textsuperscript{77} Id. at 627 (quoting U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990 XI (1991)).

\textsuperscript{78} Id. at 628.

\textsuperscript{79} See generally ABRAHAM MASLOW, MOTIVATION AND PERSONALITY (1954); ABRAHAM MASLOW, TOWARD A PSYCHOLOGY OF BEING (1962).


\textsuperscript{81} See, e.g., Mike Jendrzeczyk, But Human Rights Can't Be Bartered, SEATTLE POST-INTELLIGENCER, Nov. 12, 1993, at A11.
trading relationships, either by nation-states or by private businesses within those states, is hostile or at best indifferent to human rights conditions.

Nonetheless, there is a strong empirical argument, even if counterintuitive, that increasing imports from China into the United States will ameliorate rather than worsen human rights in China. First, as discussed above, improvement of basic economic conditions is considered by many to be a human right, although many people in industrialized countries take their relative affluence for granted. Second, the economic security created by increased trade in China will help its growing middle class exert its own political power.

The Chinese still have a long way to go in acquiring adequate food supplies, running water, shelter, transportation, and other amenities of modern material life. China's economy is indeed huge in absolute terms because of the sheer size of the population, but the Chinese remain relatively poor on a per capita basis.

While increased trade will help build China's middle class, loss of MFN status would destroy trade and further impoverish China. Chinese manufacturers are major suppliers to United States' buyers of certain categories of toys, games, clothing, footwear, and electrical devices. The tariff on certain knitted sweaters, for example, is currently six percent of customs value, but if MFN is revoked the tariff would increase to sixty percent. The tariff on most toys would increase from approximately seven percent to seventy percent.

These increases would no doubt cause the quantity of imports from China to plummet. A revocation of MFN status by

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82. The number of people living in absolute poverty in 1985 is estimated to have been 100 million, down from 200 to 270 million in 1978. *China: The Titan Stirs*, ECONOMIST, Nov. 28, 1992, at 3, 4 [hereinafter *The Titan Stirs*]. While one hears the number of Mercedes and other expensive foreign cars is increasing in China, the Author observed on the drive from the Beijing airport into the city that as of the summer of 1993 such cars are not as numerous as donkey carts and horse-drawn wooden buckboards. Similarly, the Author observed that even in Shanghai, China's most cosmopolitan city, bicycles still far outnumber all automobiles.

83. The Chinese economy is considered the world's 3rd or 4th largest, behind only the United States, Japan, and perhaps Germany. *The Titan Stirs*, supra note 82.

84. China contains approximately 1.2 billion people; more than one fifth of the earth's current population. *Id.* at 4, 5.

85. See *id.* at 5.

86. MORRISON, supra note 67, at 4.

87. HARMONIZED TARIFF SCHEDULE, supra note 21, at 61-37.

88. *Id.* at 95-3.
the United States for imports from Chinese businesses would likely have a devastating effect on the economic prosperity of many Chinese businesses and their owners and employees.

Large quantities of exports by Chinese firms are good for economic development there. Human rights in China will naturally improve with economic development and the expansion of a middle class.\textsuperscript{89} It has been argued that democracy and personal freedom are artifacts of economic development itself.\textsuperscript{90} It has even been argued that economic development will lead to world peace.\textsuperscript{91}

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\item \textsuperscript{89} This has been eloquently stated by Richard Holbrooke, former Assistant Secretary of State for Asian Affairs:
\begin{quote}
In 1977 Deng Xiaoping saved China from the Cultural Revolution and gave it a remarkable decade of economic development. . . . But he could not shake his memories of China's continual turmoil, and feared that it would recur if he allowed a similar lessening of the political authority of the party.

So . . . he offered the Chinese a deal that not all of them were willing to accept: he would give them increasing economic and cultural freedom while retaining total political control in the party's hands. The failure of this approach was inevitable . . . .

For all his achievements, Deng made an absolutely basic mistake. He did not recognize that economic development creates pressure for political development. The more successful his economic program, the greater the pressure would be for political liberalization. And the more he allowed, even encouraged, Chinese students to study abroad, the more certain he was to create the conditions for a crisis between hard-line party officials and a new elite infected with such dangerous ideas as freedom of choice.
\end{quote}


\item One of China's leading dissidents agrees that Deng's "deal" is doomed to fail: What will emerge in China is a mixture of these many forces, but it will not be the kind of mixture that this regime wants. It will not mix economic freedom with political unfreedom. Communism and capitalism are so completely different that no one will be fooled for long that they can be joined.


\item \textsuperscript{90} Robert L. Bartley, \textit{The Case for Optimism, FOREIGN AFF.}, Sept.-Oct. 1993, at 15, 17.

Development creates a middle class that wants a say in its own future, that cares about the progress and freedom of its sons and daughters. Since economic progress depends principally on this same group, with its drive for education and creative abilities, this desire can be suppressed only at the expense of development.

In the early stages of development, as for example in Guangdong, the ruling elites may be able to forge an accommodation with the middle class, particularly if local military authorities are dealt into the action. But if the Chinese accommodation survives, it will be the first one.

\textit{Id.}

\item \textsuperscript{91} Id. at 17.

(H)istory teaches another profoundly optimistic lesson: . . . democracies almost never go to war with each other. The dominant flow of historical forces in the 21st century could well be this: economic development leads to demands for democracy and individual (or familial) autonomy; instant worldwide
B. The Fallacy of Reward vs. Punish the Government

The MFN issue is often approached in terms of whether the leaders in Beijing should be rewarded or punished.\(^{92}\) This Article suggests this is a misdirected inquiry.

China is not a "black box" in which internal ingredients cannot be seen or understood from the outside. Market developments have recently allowed aspiring entrepreneurs to gain limited economic freedoms. Those new-found freedoms have been used by entrepreneurs to build businesses with which they hope to obtain a measure of security for themselves and their families.\(^{93}\) These economic forces have tended to reduce the power of the Communist Party and have led to the beginnings of a legal system through which Chinese citizens can remedy wrongs.\(^{94}\)

By renewing MFN tariffs for the products manufactured by those Chinese entrepreneurs, the United States would help with their continued acquisition of economic and political power. The United States would also give credibility to the reformist politicians at the provincial level who have supported economic development and trade with the outside world.

Revoking MFN status will likely have little or no effect on the prosperity or lifestyle of the central government leaders, who may be expected to provide for themselves under most national economic conditions. Indeed, revoking MFN status will vindicate their fear of relying on outside trading powers. It will tend to strengthen the role of government as a smaller percentage of the Chinese economy is trade related and a higher percentage is dependent on government purchases.

Thus, ironically, if the United States revokes MFN status it will reward the hard-line central government and will punish the reform-minded politicians and the more liberal, outward-looking people of China.\(^{95}\)

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\(^{95}\) But see, Wu, supra note 92, at A11. Mr. Wu, himself a political prisoner in China from 1960 through 1979 and now a Hoover Institution resident scholar, argues that MFN trade status encourages the continuation of prison labor for export and that communications reduce the power of oppressive governments; the spread of democratic states diminishes the potential for conflict.
IV. Shifts of Power from Central Governments to Citizens

Throughout history, political and economic power has shifted away from central governments and towards citizens, and with that shift has come increased human rights for citizens. One reason for these shifts has been the rise of an internal and relatively affluent class. This phenomenon can be seen historically in Western civilizations and currently in China, as well as other Asian nations.

A. Western Historical Perspective

Political rights have historically been imposed upon national leaders by the relatively more powerful and affluent segments from within those societies. Rarely have they been imposed from without. As one example, in June 1215 certain barons in England forcefully negotiated the first issue of the Magna Carta with King John. They sought to ameliorate the arbitrary and extortionate methods of taxation being used at that time for supporting the King's foreign wars, to protect themselves from the ruthless and brutal reprisals against tax defaulters, and to provide redress for wrongs suffered. Two clauses of the Magna Carta have been widely interpreted in English law, and in legal systems deriving therefrom, to provide a wide range of political and human rights:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

"the United States must help China’s brave and suffering millions by cutting off most-favored-nation treatment this year." Id. This Author equally despises forced labor by, and torture of, political prisoners, but thinks developing the general economy and opening the country to outside influence is a surer path to that needed reform. Indeed, one of the root causes of the forced labor is the current need for hard currency. That need would be reduced with increasing exports by a free, private sector, while that need would only be increased if the exporting sector is weakened by an inability to sell into the U.S. market.

96. See, e.g., JAMES NEAL PRIMM, THE AMERICAN EXPERIENCE 61 (1973). In the colonial assemblies of New York, New Hampshire, New Jersey, South Carolina, Virginia, and Maryland, 85% of the members were wealthy. Id.

To no one will we sell, to no one deny or delay right or justice. 98

The English barons were in a position of power to secure these rights for themselves at that time, and they did so.

Similarly, five and a half centuries later the American colonies' Declaration of Independence from England was drafted by the relatively educated and affluent landowners of that society. 99 Although France helped in the ensuing armed struggle to prove and maintain that independence, the original impetus and power came from within the society. 100

B. The Shift of Power in China

A prosperous business community in China is starting to shift power within China. One example of this is the increased access the business community has provided to domestic and international communications with devices such as fax machines and satellite television. 101 These communications devices were critical in establishing the networks of demonstrators in 1989 and in relaying news into and out of China. News of the demonstrations in the coastal provinces was also communicated to Chinese people in the inner regions via the relatively independent domestic television and radio stations. 102 There are 215 million radio receivers in China (one for every five people), but only seventy-five million televisions (one for every sixteen people) and eleven million telephones (one for every 109 people). 103

There is a larger, general argument that the traditional nation-state is threatened by economic development and world integration:

98. Id. at 28. These are the 39th and 40th of the substantive clauses, which were not numbered in the original document. (Translation in source).

99. PRIMM, supra note 96.

100. It is ironic that the level of tariffs on imported products perhaps from China played a prominent role in the American colonies' early shift toward independence, in the form of the tea upon which the imposition of high tariffs by the British Parliament drove "a group of responsible citizens" to throw the product from three British cargo ships into the harbor in the famous "Boston Tea Party." 3 ENCYCLOPEDIA BRITANNICA 991 (1973).

101. Tyler, supra note 93.


Transnational companies and regional development leave the nation-state searching for a mission....

These difficulties confront all governments, but they are doubly acute for authoritarians who depend on isolation to dominate their people.... In 1993 Freedom House reports.... only thirty-one percent of the world's population, and most of that in China, living under repressive regimes, down from forty-four percent ten years ago. The combination of instant information, economic interdependence and the appeal of individual freedom is not a force to be taken lightly.104

The Chinese government issued new regulations in October 1993 banning private ownership and operation of satellite dishes except under limited circumstances.105 No doubt, this ban was in recognition of the threat to governmental control posed by such devices.

C. Shifts of Power in Other Asian Countries

If the application of deductive logic has not yet persuaded the reader, please bear in mind Oliver Wendell Holmes's famous maxim: "The life of the law has not been logic: it has been experience."106 It would be enlightening to test the above logic by conducting a scientific experiment on two identical economies, both controlled by authoritarian governments. One economy would be pressured by the United States to improve its human rights. If that pressure did not lead to satisfactory results, the United States would revoke MFN status. In the other identical economy, MFN status would be continued unconditionally. If one compared the development of human rights in the two economies, this Article predicts that human rights would develop faster in the second economy than in the first because of internal pressure from the middle class formed as the result of economic development.

We are unable, however, to conduct such an experiment. Nonetheless, the link between economic development and democratic political development has actually been demonstrated in countries with backgrounds similar to that of China. For example, North and South Korea come quite close to serving as the scientific experiment mentioned above. This Article will now examine the recent political histories of Korea and Taiwan.

104. Bartley, supra note 90, at 16.
1. Korea

The people of the Korean peninsula share a common heritage, language, and culture that traces its dynastic lineage back over four thousand years. The Korean kingdom had been occupied as a Japanese colony in 1910 and remained under Japanese control until liberation by Soviet and U.S. forces in 1945. In 1948 the peninsula was divided into two halves by a line running roughly east and west along the thirty-eighth parallel. After the Korean War, a jagged cease fire line reaffirmed the division. At this writing no peace treaty has been signed. For the sake of simplicity, I will refer to these halves as North Korea and South Korea, although the official names are the Democratic People's Republic of Korea and the Republic of Korea.

For purposes of this Article, let us assume North Korea was initially controlled by an authoritarian government leaning toward Marxism-Leninism along the Chinese example. Not only has the United States not extended MFN status to North Korea, but U.S. policy toward North Korea has been one of complete trade isolation. This policy of isolation has not moved the North Korean government to extend human rights to its citizens or to comply with any other demands of the U.S. government. Today, North Korea is one of the most repressive societies in the world, and the citizens of North Korea remain isolated and poor.

Let us assume South Korea was also initially controlled by an authoritarian government, but one leaning toward martial law based on a policy of anticommunism. The country was poor and lacked the natural resources found in the north. The economy could be described as "state-guided capitalism" but was not

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108. Id. at 313. It is beyond the scope of this Article to address the egregious human rights abuses inflicted by the occupying Japanese military, not only against individual Koreans but against the Korean language, culture, and heritage on a broader scale.

109. Id. at 375.

110. An armistice was signed on July 27, 1953, which established de facto boundaries and mechanisms for enforcing the peace. 22 Encyclopedia Britannica Korea 506 (1993).


112. 6 Encyclopedia Britannica North Korea 958-59 (1993).
truly a free market economy.\footnote{The government owned financial institutions and directed businesses into markets. 16 \textit{Encyclopedia Americana} Korea 556 (1992) [hereinafter \textit{Korea}].} Human rights abuses, in the form of arbitrary arrest, detention, and even torture, were widespread. Political power passed from one military leader to another.\footnote{Park Chung Hee (an Army general) filled the void left when student demonstrations caused the collapse of the government and the departure of the U.S.-installed President Singh Man Rhee in 1961. President Park ruled until 1979 when he was assassinated by the chief of the Korean CIA, which ironically had been Park's primary instrument of civilian repression. Another Army general, Chun Doo Hwan, in turn filled the ensuing void. President Chun ruled until 1988 when, in what has been described as the country's first major peaceful transfer of political power, Chun's vice president and chosen successor (another Army general, Roh Tae Woo) won the scheduled presidential elections. \textit{See generally id.} at 558-60.} Opposition to the established government was dealt with brutally.\footnote{Id. at 559.} But, over the years, South Korea has become remarkably democratic. Human rights conditions have improved substantially and show signs of continued improvement.\footnote{See \textit{generally id.} at 560.}

As an example of the remarkable change in circumstances, in May 1980 workers and students conducted a strike and demonstration in Kwangju (a city in the southwestern part of South Korea) against the policies of former President Chun Doo Hwan.\footnote{Id.} Among other things, the demonstrators demanded more democratic freedoms. An elite unit of the army, including paratroopers, crushed the demonstration with a great loss of civilian life.\footnote{\textit{Id.; see also} 16 \textit{Encyclopedia Americana} Kwangju 609 (1992).} Unlike the Tiananmen Square demonstration, however, there was no coinciding media event such as Mikhail Gorbachev's visit to Beijing in the spring of 1989. As a result, the crackdown was not covered by foreign journalists with the freedom to broadcast news and footage. Striking images were not carried into United States' homes via television, and most Americans remain unknowledgeable of and indifferent to the Kwangju crackdown.

Nonetheless, the Kwangju incident cut deep into the South Korean mentality, lastingly compromising Chun's legitimacy.\footnote{Korea, supra note 113, at 560.} During the 1980s and early 1990s, Koreans annually marked the incident's anniversaries with remembrance demonstrations.\footnote{James Sterngold, \textit{The Tear Gas Clears, the Tension Remains}, N.Y. Times, May 27, 1990, at E3.}
MFN status, nor did it threaten to do so.121 Indeed, the United States continued the even lower GSP (Column 1) rates of duty for developing countries.122

The Kwangju cover-up finally ended recently with televised hearings into the subject, including questioning of several top leaders. These hearings were broadcast by television throughout South Korea and were widely watched. Several factors made this change of face possible, not the least of which was the development of an educated and economically stable middle class that had found its voice and the confidence to support the traditional student demonstrators in standing up to their government and insisting on more control over their own lives.

Two other events built that sense of confidence. The first was the holding of the Olympic games in Seoul in 1988,123 which in turn brought international visibility and increased pressure for democracy upon Korea's government. That pressure led to the second event, the peaceful transfer of presidential power for the first time in Korea's history.124

2. Taiwan

Another neighbor of China that warrants comparison is the Republic of China, popularly known as Taiwan.125 The U.S.

121. Korea, supra note 113, at 560. The United States remained quite friendly to the South Korean government throughout its period of repression. The United States provided financial and military aid and was seen as Korea's "big brother." The United States considered good relations important for maintaining South Korea as a bulwark against Communism. Unfortunately, some of the financial and military aid was used to bolster the Korean government against its own people. The Author recalls the chagrin expressed by an observer of student demonstrators being tear-gassed by Korean troops, upon seeing a painted decal of the stylized handshake of friendship between the United States and South Korea appearing on the side of the tear gas dispenser, indicating the machine had been purchased with U.S. aid money.

122. Korea was "graduated" from GSP benefits in 1989 because of economic development above the statutorily prescribed levels.

123. Korea, supra note 113, at 560.

124. Id. Having witnessed the tremendous liberating effects on human rights in Korea resulting from the 1988 Seoul Olympics, this Author was disheartened to see so many human rights-based arguments raised against awarding the sponsorship of the 2000 Olympics to Beijing. Beijing's human rights record should have been a factor in favor of awarding the Olympic games to Beijing, for the very reason that, as in Seoul, civic pride would lead the Chinese toward improvement of human rights conditions. The foreign press typically gives uncontrollably intense scrutiny to modern Olympic host cities. The resultant public opinion, as distinguished from the demands of another government, is more likely to lead to progress in human rights.

125. China officially considers itself the rightful government over this "renegade province." 28 ENCYCLOPEDIA BRITANNICA Taiwan 375 (1993) [hereinafter Taiwan].
economic treatment of Taiwan has differed markedly from its trade policy toward the People's Republic of China.

General Chiang Kai-shek and his army were pushed into Taiwan after losing military control over mainland China.126 His political party, the Kuomintang, spread misrule and corruption throughout the island.127 General Chiang's efforts to raise money and resources in Taiwan to retake the mainland were often at the expense of the local Taiwanese.128 To consolidate its power in Taiwan and remove opposition, the Kuomintang massacred thousands of Taiwanese urban middle class in 1947.129

Yet U.S. foreign policy threw its political support in the form of economic and military aid behind General Chiang because the imperative of anticommunism was apparently judged to be more important than the imperative of the observation of human rights.130 Today, the Republic of China has developed a thriving entrepreneurial class and has developed political freedom far beyond the level known there previously.

As we have seen in the real-world experiments of South Korea and Taiwan, economic development does in fact lead to a loosening of control by central governments that are no longer able to keep up with the complexities of a modern, growing, and powerful private sector. North Korea, on the other hand, has not developed economically. It remains isolated from the United States, and it shows the least improvement in human rights. Obviously, it would be better to cooperate with China and help it follow the paths of South Korea and Taiwan rather than to isolate China and risk it following the path of North Korea.

V. HYPOCRISY IN U.S. FOREIGN AND DOMESTIC POLICY

As we saw in the cases of Taiwan and South Korea, the United States buttressed anticommunist military allies despite their significant internal human rights violations. Any hypocrisy perceived by China in the application of human rights standards by the United States will be counterproductive if the

126. Id. at 381.
128. Taiwan, supra note 125, at 381.
129. Id.
130. 22 Collier's Encyclopedia Taiwan 40 (1988).
Chinese government senses that it is the object of discrimination.

There is the danger not only of externally different standards by the United States, but internally different standards as well. Not so long ago (by the measure of a civilization as old as China), the legal system of the United States allowed one person to buy, own, and sell other persons as chattel.\textsuperscript{131} The U.S. government has forcibly relocated its own indigenous populations (e.g., Cherokees), contained them (e.g., Navajos), and gone to war with them (e.g., Sioux). Even more recently, women and minorities fought their way into participation in the political process, and today continue the fight to attain fully equal rights in the workplace.

Americans may feel their country has learned from its historical mistakes and is in the process of achieving the proper balance between security and freedom of action. Yet the current prevalence in the United States of drug and alcohol abuse, homelessness, and violent crime is unlikely to inspire the leaders of other countries. America has, for the moment, prioritized one set of freedoms (e.g., opportunity, political dissent, gun ownership) over others (e.g., employment, housing, health care, safety from crime). America may believe it has retained its moral ascendancy and may lecture China on human rights, but China is likely to return the lecture in kind and feel justified in doing so.

VI. Conclusion

Without apologizing for, or trivializing, recent and current human rights violations in China, it must be noted for the sake of honesty and perspective that human rights in China have improved markedly in recent decades.\textsuperscript{132} Furthermore, human

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\textsuperscript{131} The 13th Amendment to the U.S. Constitution was ratified in 1865.
\textsuperscript{132} The following are the personal views of Singapore's former Permanent Representative to the United Nations:

Western behavior toward China has been equally puzzling. In the 1970s, the West developed a love affair with a China ruled by a regime that had committed gross atrocities during the Great Leap Forward and the Cultural Revolution. But when Mao Zedong's disastrous rule was followed by a far more benign Deng Xiaoping era, the West punished China for what by its historical standards was a minor crackdown: the Tiananmen incident.

Unfortunately, Tiananmen has become a contemporary Western legend, created by live telecasts of the crackdown. Beijing erred badly in its excessive use of firearms but it did not err in its decision to crack down. Failure to quash the student rebellion could have led to political disintegration and chaos, a
\end{flushleft}
rights violations continue to occur in many countries of the world, including the United States. Nonetheless, few countries are denied MFN treatment because of human rights violations.

Despite the fact that human rights in China have markedly improved over recent decades, notwithstanding a few notable setbacks, they still need improvement. No one can argue, morally, that the United States should intentionally take action to worsen the human rights situation in China. Our country's actions, if based on a simplistic understanding of the Chinese people and government, may nonetheless have precisely that effect. Chinese victims of human rights violations are better served by effective actions than by well-meaning but ineffectual protestations.

Economic development provides impetus toward democratization. We have seen precisely this phenomenon occurring in several other Asian nations. Although none has yet achieved full Western-style democracy, each has achieved economic development to a level that its citizens are comfortable with using their affluence to gain political power. The balance of power is thus shifting away from the central governments and toward the people, which certainly is a measure of democracy if not the full achievement of it.

The best course of action for the United States government is to continue MFN tariff status for imports of products from China and to increase business, educational, and social contacts between the people of both nations. Imposing punitively high tariffs on products manufactured by Chinese people is not the right tool for the job that needs to be done. If the United States imposes discriminatory tariffs on Chinese products it will, quite ironically, hurt the very people it most wants to help.

perennial Chinese nightmare. Western policymakers concede this in private. . . . No major Western journal has . . . developed the political courage to say that China had virtually no choice in Tiananmen. Instead sanctions were imposed, threatening China's modernization. Asians see that Western public opinion—deified in Western democracy—can produce irrational consequences. They watch with trepidation as Western policies on China lurch to and fro, threatening the otherwise smooth progress of East Asia.

Mahbubani, supra note 2, at 10, 12-13.