

# States Monitoring States: The United States, Australia, and China's Human Rights, 1990–2001<sup>1</sup>

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## I. INTRODUCTION

In an era of globalization, universal human rights are judged to transcend state borders and fragment state sovereignty. International human rights treaties and multilateral human rights organizations play an increasing role in regulating state activity and exert a socializing impact on recalcitrant states. Recent research suggests that bilateral pressures are low on the scale of effectiveness in comparison to multilateral pressures.<sup>2</sup> Despite this, individual states continue to assume an ongoing role in monitoring each other's human rights performance. Far from diminishing, the regulatory burden of the state appears to be expanding, as the monitoring of China's human rights by the international community is diverted, at China's urging, into an increasing number of bilateral channels. Despite US extension of Permanent Normal Trade Relations (PNTR) to China in 2000, and despite

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1. This article is a synthesis and update of Ann Kent, *The United States and MFN* (20 June 1995) (unpublished paper, on file with author); Ann Kent, *Australia and China: Monitoring by a Middle Power* (20 July 1995) (unpublished paper, on file with author).
2. For a comparison between the role of multilateral and bilateral mechanisms, and the role of NGOs, see ANN KENT, *CHINA, THE UNITED NATIONS AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE* (1999). For an earlier assessment of the value of multilateral human rights bodies, see Ann Kent, *China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989–1994*, 17 *HUM. RTS. Q.* 1–47 (1995).

the newfound scepticism of European Union (EU) states, China is insisting on the efficacy of the bilateral mechanism of its human rights dialogue with the United States (US) and many other Western states, in preference to the potentially humiliating experience of a resolution critical of China in the UN Human Rights Commission.

This dialogue experience, described by China as turning “confrontation” into “cooperation,” is an essentially nonintrusive exercise which eschews resort to bargaining, shaming, sanctions, and even to publicity. However, as the Chinese description makes clear, its effects are palpable—they provide, quite simply, an alternative model for monitoring any state’s human rights, which is, moreover, determined by the target state. The shape of things to come is suggested by the recent diminution of the monitoring role of the UN Sub-Commission on the Promotion and Protection of Human Rights (or Human Rights Sub-Commission), and the alteration in the monitoring procedures of the UN Human Rights Commission.<sup>3</sup> It is even more strongly suggested by the shock development of 3 May 2001 when the US, the strongest champion of international human rights, failed to retain its seat on the UN Human Rights Commission and was replaced by other European states.<sup>4</sup> The question must therefore be rigorously examined: if bilateral monitoring is to become the preferred model for dealing with offending states, how effective has it been in relation to China, whether in its earlier active mode of US monitoring through the Most Favored Nation (MFN) trading status mechanism, or in its present manifestation of bilateral human rights dialogues with many Western states?

Bilateral monitoring of human rights differs from multilateral monitoring in that it begins as a unilateral initiative which, although it may be accepted

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3. For instance, one of the proposals of the UN Human Rights Commission Working Group to the Human Rights Sub-Commission at its August 1999 session was to forbid the Sub-Commission from adopting resolutions relating to country situations. See David Weissbrodt, et al., *An Analysis of the Fifty-first Session of the United Nations Sub-Commission on the Protection and Promotion of Human Rights*, 22 HUM. RTS. Q. 789, 834 (2000). In the 2000 session of the Human Rights Commission, the Chairman ruled that proceedings would be conducted in accordance with the recommendations of the report of the Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission of Human Rights, one of which was that “the Sub-Commission should not adopt country-specific resolutions.” See Andrea Coomber, *Analytical Report of the 56th Session of the Commission on Human Rights*, HUM. RTS. MON. 49–50, at 90–91 (2000). In addition, in a letter on 17 April 2000 to Commission members, Human Rights Watch noted that while in 1987, nearly half (47 percent) of all resolutions on human rights abuses in specific countries adopted by the Human Rights Commission were voted upon, by 1999 the number had dropped to 29 percent. See also, Human Rights Watch, *UN Human Rights Commission Urged to Vote on Abuses*, HUMAN RIGHTS INFORMATION NETWORK (17 Apr. 2000).

4. Barbara Crossette, *US is Voted Off Rights panel of the UN for the First Time*, N.Y. TIMES, 4 May 2001, available at <<http://www.nytimes.com/2001/05/04/world>>.

in part by the target state, is not based on any formal agreement or on any mutually agreed standard. It is ad hoc, undefined and informal and therefore lacks the collective, consensual, historical, and institutionally based moral authority of multilateral mechanisms. It imposes different constraints on the behavior of target states, being more dependent for its impact either on the superior power and economic sanctions wielded by the monitoring power or on the quality of the role model. On the other hand, it is more easily imposed, less vulnerable to collective opposition, and more accessible to nongovernmental (NGO) pressure.<sup>5</sup> Since it is not fixed in standard, or institutionalized, it is also open to more creative treatment.

There are two main types of bilateral monitoring: large power monitoring by the US, which is more likely to involve unilateral sanctions, and the "other" monitoring procedures of middle and small Western powers. The differences are articulated primarily in terms of strategic status<sup>6</sup> and political culture.<sup>7</sup> The US political system is seen by Jan Egeland to have a results-oriented, short-term, and media-dominated perspective which is less conducive to long-term results than the more stable and pragmatic Northern European tradition, in which the diplomatic bureaucratic establishment designs long-term human rights policies.<sup>8</sup> Jack Donnelly compares the consensus characteristic of the Nordic parliamentary system, in which there is no sharp division between executive and legislative branches and a strong reliance on a professional foreign and civil service, with the lack of consensus in the US presidential system, which is marked by a division between executive and legislative branches and the turnover of leadership in bureaucratic agencies at elections.<sup>9</sup> Whatever the differences between

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5. See KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 2, at 11–12.

6. Jan Egeland has identified an "Atlantic gap" between the approaches of the US, the "impotent superpower," and Norway, the "potent small state" as deriving from three main differences: strategic status, wherein the superpower has a more complex and security oriented foreign policy than the middle power; the sense of dominant international conflicts, wherein the superpower is more conscious of East-West differences than North-South inequalities; and differences in political culture. See JAN EGELAND, IMPOTENT SUPERPOWER—POTENT SMALL STATE: POTENTIALS AND LIMITATIONS OF HUMAN RIGHTS OBJECTIVES IN THE FOREIGN POLICIES OF THE UNITED STATES AND NORWAY 175 (1988).

7. Rhoda Howard differentiates more simply according to political cultures, between the individualistic, competitive liberalism of the United States and the social democratic tradition of human rights which is typical in most West European countries, Canada and Australia. See Rhoda E. Howard, *Monitoring Human Rights: Problems of Consistency*, 4 ETHICS & INT'L AFF. 36–37 (1990). Jack Donnelly sees the size and power of the monitoring state and the structure of the international system as of secondary significance to the state's political culture, which encompasses the distinction between liberalism and social democracy as well as the nature of the specific political system. See JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 131 (1993).

8. See EGELAND, *supra* note 6.

9. See Donnelly, *supra* note 7.

these theoretical positions, they concur in distinguishing between US monitoring of human rights and the monitoring practiced by middle and small powers such as Canada, certain European states, and Australia.

Utilizing these insights, this article seeks to assess China's compliance with the bilateral monitoring imposed by a large power, the United States, and by a middle power, Australia, with a view to comparing their monitoring strategies and to evaluating the overall effectiveness of bilateral mechanisms.

It is clear that the size of a power is important in determining the nature of monitoring because large powers have greater resources to achieve their foreign policy objectives by unilateral action. In contrast, middle and small powers are more likely to favor working through multilateral processes which give them more scope and greater influence.<sup>10</sup> They are also more likely to exert strong moral suasion than to attempt to resort unilaterally to economic sanctions. In addition, middle and small powers are more likely to be alive to the implicit threat to sovereignty that human rights monitoring represents and to be more sensitive to the perceptions of the target state. Moreover, those middle and small powers which have strong human rights policies tend also to be social democracies which demonstrate concern about North/South inequities and about economic and social rights.

Because of the variability and informal nature of standards in bilateral monitoring, both Egeland and Rhoda Howard have established criteria by which the quality of the monitoring state's own standards may be objectively measured.<sup>11</sup> Howard's criteria, adopted here, are consistent with international standards, particularly in terms of economic rights; the practice of self-assessment, particularly pertaining to rights which the reporting country itself violates domestically, and to its influence on human rights violations elsewhere; and sensitivity to domestic human rights concerns.<sup>12</sup> Egeland's desiderata, which reflect Norwegian experience, include a state's advocacy of international socioeconomic rights; its substantial outlays on bilateral and multilateral aid; its continuous support for intergovernmental (multilateral) human rights mechanisms; and its occasionally vocal criticism of human rights violations in Western-aligned, as well as socialist, countries.<sup>13</sup>

States, as opposed to multilateral bodies, generally have weak standard setting and promotional regimes because their standards are inconsistent and weakened by the sovereignty issue. Their main function is establishing accountability, whether by enforcement through actual or threatened

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10. See Howard, *supra* note 7, at 129.

11. See *id.*; EGELAND, *supra* note 6.

12. See Howard, *supra* note 7, at 35.

13. See EGELAND, *supra* note 6, at 44-45.

sanctions, annual sponsoring of human rights resolutions in UN forums, fact finding, or reviews of progress. This study distinguishes between active monitoring, or intrusive, effective fact finding *in situ*, and passive monitoring, or nonintrusive monitoring by regular reviews/examining progress made. In the US case study, all methods of establishing accountability have been used in respect of China: active monitoring, involving the threat of sanctions through the use of the MFN mechanism, the sponsoring of UN human rights resolutions, and visits by political leaders and members of the administration to China to inquire into or investigate human rights conditions; and passive monitoring, through the annual US Human Rights report and human rights dialogue. Australia, a middle power, has moved between sanctions and active monitoring by the human rights delegations and the current passive human rights dialogue.

## II. US MONITORING

To understand the particular shape assumed by US monitoring, it is important to examine not only the vital components of power, but also the particular political culture and historical setting in which US policy is embedded.

### A. Historical and Institutional Context

US foreign policy has traditionally contained a strong ideological component. Its more interventionist mode has also favored forms of conditionality in aid and trade legislation, despite their impact on other areas of national interest. Moreover, US policies have been characterized by Louis Henkin as “not only, or principally, different policies at different times by different administrations, but, rather, more than one policy at any time—a Congressional policy and a different executive policy; one policy in respect of international human rights in some countries and another policy for other countries; one policy abroad and another at home.”<sup>14</sup> This underlines the relevance of the Donnelly model, and the difference between large and middle powers.

In the 1970s, Congress enacted a number of statutes declaring the promotion of respect for human rights to be “a principal goal” of US foreign policy and outlining sanctions for states guilty of gross violations. The action taken included both general and country specific enactments, such as the

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14. LOUIS HENKIN, *THE AGE OF RIGHTS* 66 (1990).

amended Foreign Assistance Act of 1974.<sup>15</sup> In the case of states like China to which the Foreign Assistance Act did not apply, the relevant legislation was the Jackson-Vanik Amendment to the Trade Act of 1974.<sup>16</sup> The Trade Act authorized the president to negotiate three year bilateral trade agreements with socialist countries, allowing MFN treatment which gave the beneficiaries the right to concessions which were the same as those enjoyed by any other MFN country, and maintaining low tariff schedules.<sup>17</sup> The Amendment was not a treaty, but a part of domestic legislation. It originated as a mechanism to facilitate the emigration of Soviet Jews, so its human rights conditions emphasized the right of freedom of movement rather than the more general civil rights of immunity itemized in the Foreign Assistance Act.<sup>18</sup>

Other aspects of US domestic legislation were crucial to the post-Tiananmen US-China relationship. Export-Import loan decisions were made on the basis of three criteria, the last of which was the requirement for State Department clearance on political and human rights grounds.<sup>19</sup> Private

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15. Under the Foreign Assistance Act of 1961 as amended in 1974, foreign aid, military assistance, and the sale of agricultural commodities were denied to states guilty of gross violations of internationally recognized rights, defined as "torture or cruel, inhuman or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty or the security of person." 22 U.S.C. § 2151 n(a) and § 2304 (1994). The Secretary of State was also required to transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations, by 31 January each year, a comprehensive report on the human rights conditions of countries receiving foreign assistance and all other foreign countries which were members of the United Nations. See *id.* at 68.

16. See The Jackson-Vanick Amendments to the Trade Act of 1974, 19 U.S.C.A. § 2193, § 2432, § 2437, and § 2439 (1975).

17. See The Trade Act of 1974, 19 U.S.C.A. § 2101 (1974).

18. It stated that:

[T]o assure the continued dedication of the United States to the fundamental human rights and welfare of its own citizens, and not withstanding any other provision of law, on or after January 3, 1975, no nonmarket economy country shall participate in any program of the Government of the United States which extends credits or credit guarantees or investment guarantees directly or indirectly, and the President of the United States shall not conclude any commercial agreement with any such country, during the period beginning with the date on which the President determines that such country—

(1) denies its citizens the right or opportunity to join permanently through emigration, a very close relative in the United States, such as a spouse, parent, child, brother or sister;

(2) imposes more than a nominal tax on the visas or other documents required for emigration described in paragraph (1); or

(3) imposes more than a nominal tax, levy, fine, fee, or other charge on any citizen as a consequence of the desire of such citizen to emigrate as described in paragraph (1), and ending on the date on which the president determines that such country is no longer in violation of paragraph (1), (2), or (3).

19 U.S.C.A. § 2439.

19. For a detailed discussion of relevant legislation, see LAWYERS' COMMITTEE FOR HUMAN RIGHTS, HUMAN RIGHTS DIPLOMACY AND STRATEGIES: A COUNTRY CASE STUDY OF CHINA 15–40 (1991).

investment in China was encouraged through two programs of the Overseas Private Investment Corporation (OPIC) insurance of investments against political risk and loans and guarantees. According to its original legislation, OPIC was required to take into account the observance of human rights in the country concerned, in consultation with the secretary of state.<sup>20</sup> In its relations with the World Bank, the US was required by law, "in connection with its voice and vote," to advance the cause of human rights by channeling assistance towards countries which did not systematically violate internationally recognized civil rights.<sup>21</sup> The importation of goods produced by prison labor, which was to become such a thorny issue in the US-China relationship from 1991, had been banned by the McKinley Tariff Act of 1890<sup>22</sup> and the Smoot-Hawley Tariff Act of 1930.<sup>23</sup> Finally, Section 660 of the Foreign Assistance Act banned US aid to foreign police forces.<sup>24</sup> Thus, while MFN conditions formally empowered US authorities only to enforce the civil right of freedom of movement, other US laws imposed broader civil rights standards on the US-China relationship.

Even before MFN status became a part of US-China trade, there were indications that both the US and China were prepared to use trade to promote or maintain political relationships.<sup>25</sup> In 1978, with the establishment of formal US-China diplomatic relations and the introduction of China's new economic modernization program, it was apparent that future expansion required the normalization of economic relations and the extension to China of MFN status. The 7 July 1979 Agreement on Trade Relations between the United States and the People's Republic of China granted reciprocal MFN status, and developed and protected business interests and services during the expansion of trade relations.<sup>26</sup> The chief significance of the new trade agreement within the overall US-China relationship was that it represented a change from the restrictive rules governing US economic relations with socialist countries, to the rules governing its relations with friendly countries.<sup>27</sup> Particularly important was

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20. See The Foreign Assistance Act of 1961, § 239 (i), 22 U.S.C.A. § 2199 (2001).

21. The International Financial Institutions Act, 22 U.S.C.A. § 262 (1977), *in* LAWYERS' COMMITTEE FOR HUMAN RIGHTS, *supra* note 19, at 20.

22. See The McKinley Tariff Act, ch. 1244, 26 Stat. 567 (1890).

23. See The Smoot-Hawley Tariff Act of 1930, 19 U.S.C.A. § 1304 (1930).

24. See The Foreign Assistance Act § 660, 22 U.S.C. § 2420 (2001).

25. US containment of China in the post 1949 period brought economic pressures to bear on the relationship. Between 1974 and 1977 China also used trade pressures to express dissatisfaction with the lack of progress in the establishment of formal diplomatic relations. US-China trade dropped by half, and China diversified its sources of raw materials. For an analysis, see TAN QINGSHAN, *THE MAKING OF US-CHINA POLICY: FROM NORMALIZATION TO THE POST-COLD WAR ERA* 60-64 (1992).

26. The July 7, 1979 Agreement on Trade relations between the United States and China, 19 U.S.C.A. § 2434 (1979).

27. See *id.* at 57.

President Carter's use of the loophole in the Jackson-Vanik Amendment to waive the emigration requirement in China's case.<sup>28</sup> In this way, it suggested a "special relationship" with China which was not extended to the Soviet Union.<sup>29</sup> From this time on, US-China trade relations became a bipartisan policy, and China's MFN status was regularly and automatically renewed by three US Presidents using the Jackson-Vanik Amendment waiver. For numerous historical and strategic reasons, US policy to exempt China from accountability for its poor human rights record was bipartisan, and with single exceptions, lasted until China's repression of the democracy movement in June 1989.<sup>30</sup>

## B. Active Monitoring Phases

The main impact of Tiananmen was that it brought to an end the soft US policy on China's human rights violations, and polarized executive and congressional attitudes towards China. From June 1989 there were four main phases of US monitoring: unilateral economic sanctions in the immediate aftermath of the 4 June crisis; the MFN phase until May 1994, when human rights and trade were delinked; the period from 1994, which still maintained the annual MFN (renamed PNTR in 1998) review; and the foreshadowed, post-PNTR period, in which a human rights commission may replace the annual review of PNTR as a source of pressure on China's human rights, and in which US monitoring of China's World Trade Organization (WTO) compliance will involve continued human rights evaluation. The most active period to date has been the MFN phase, which evolved from 1990 to fill the vacuum resulting from the gradual easing of the multilateral and bilateral economic, military, and diplomatic sanctions.<sup>31</sup> In this period, there were four subphases of state-to-state monitoring,

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28. See *id.* at 79–80.

29. As a result of President Carter's intervention, as well as the effect of the Soviet invasion of Afghanistan, Congress retracted its previous insistence that MFN status be extended both to China and the Soviet Union. On 24 January 1980, the House voted 294–88 to approve the trade agreement for China, and the Senate voted 74–8 on the same day.

30. See Roberta Cohen, *People's Republic of China: The Human Rights Exception*, 9 HUM. RTS. Q. 447 (1987).

31. For literature consulted on the United States, China, and MFN, see generally HARRY HARDING, *A FRAGILE RELATIONSHIP: THE UNITED STATES AND CHINA SINCE 1972* (1992); BEYOND MFN: *TRADE WITH CHINA AND AMERICAN INTERESTS* (James R. Lilley & Wendell L. Wilkie eds., 1994); Robert F. Drinan, S.J. & Teresa T. Kuo, *The 1991 Battle for Human Rights in China*, 14 HUM. RTS. Q. 21 (1992); David M. Lampton, *America's China Policy in the Age of the Finance Minister: Clinton Ends Linkage*, 139 CHINA Q. 597, 621 (1994); Andrew J. Nathan, *Human Rights in Chinese Foreign Policy*, 139 CHINA Q. 622, 643 (1994); James D. Seymour, *Human Rights in Chinese Foreign Relations*, in *CHINA AND THE*

preceded by two pre-MFN phases, the first pre-MFN phase was from June to December 1989, the second, from December 1989 to October 1990. A close analysis of the entire post-1989 period reveals which phases were the most effective in eliciting Chinese compliance, and why.

In the post-1989 period, China's response to monitoring, whether by the annual human rights reports or the threat of loss of MFN status, was both positive and negative. While it made concessions, it also retaliated with its own sanctions and with critiques of US human rights. Sometimes Chinese sanctions came in the form of concessions revoked at the same time as new concessions were offered. This contradictory response signaled China's sovereign right to determine its own policies, whatever the wishes of the monitoring power. It was also a reflection of the concurrent need to maintain domestic control over forces it perceived to be undermining internal stability, while making some concessions to the West. For this reason, although the US decision to monitor China's human rights was a unilateral one, the overall process is best described as bilateral. Australian monitoring was also bilateral, but for a different reason: in theory, Australian monitoring was meant to be reciprocal, with China also reviewing Australia's human rights.

Throughout the period of active monitoring, the role of NGOs and of Chinese student and academic organizations within the US was crucial, both as a support for the MFN sanction and as an ancillary monitoring mechanism. Because China was an authoritarian state relatively inaccessible to political pressures from within its own society, it was also resistant to criticism from outside bodies such as Amnesty International and Human Rights Watch. However, when channeled through state mechanisms such as the annual state department human rights report, congressional votes, presidential edicts, or official visitors presenting lists of political prisoners, the information and pressures generated by these societal organizations were extremely influential. In many cases, US NGOs such as Human Rights in China established open links with dissidents still inside China. Also important were individuals, such as US businessman John Kamm in Hong

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WORLD: CHINESE FOREIGN RELATIONS IN THE POST-COLD WAR ERA 202–25 (Samuel S. Kim ed., 1994); Holly Burkhalter, *Bargaining Away Human Rights: The Bush Administration's Human Rights Policy Towards Iraq and China*, 4 HARV. HUM. RTS. J. 105, 116 (1991); Patricia Wing Lau & Jeffrey Sims, *Human Rights in Tibet: An Emerging Foreign Policy Issue*, 5 HARV. HUM. RTS. J. 193, 203 (1992); Gary W. Vause, *Tibet to Tiananmen: Chinese Human Rights and United States Foreign Policy*, 42 VANDERBILT L. REV. 1575, 1615 (1989); Robert A. Manning, *Clinton and China: Beyond Human Rights*, 38 ORBIS 193 (1994); Allen S. Whiting, *Chinese Nationalism and Foreign Policy After Deng*, 142 CHINA Q. 295, 316 (1995); Alan D. Romberg, *The Role of Human Rights in US Foreign Policy and the Implications for Relations with China*, in UNITED STATES AND CHINA: RELATIONS AT A CROSSROADS 169 (David M. Lampton & Alfred D. Wilhelm Jr. eds., 1995).

Kong, who wielded an extraordinary influence as an informal human rights ambassador, shuttling between the US and China in order to achieve the release of political prisoners.

### C. Pre-MFN Phase

In the first pre-MFN period from June to December 1989, unilateral and multilateral sanctions were applied as punishment for the Tiananmen massacre, and were followed by aggressive, noncompliant Chinese reaction. This period set the stage for future monitoring. At a time when China was under pressure from international sanctions, the White House was more conciliatory, while Congress, more sensitive to US public opinion, took a harsher line.<sup>32</sup> A comprehensive sanctions amendment, later attached to the Foreign Relations Authorization Act incorporating and adding to sanctions already announced by President Bush, required evidence, before the President could lift these measures, that it was either in the national interest to do so, or that progress had been made on "political reform," whether in China proper or Tibet.<sup>33</sup> Political reform was defined as the lifting of martial law, an end to executions of demonstrators and other reprisals against them, the release of political prisoners, an end to the jamming of Voice of America (VOA) broadcasts, and greater access for foreign journalists. Should repression increase, sanctions were foreshadowed, including US opposition to China's full membership in the General Agreement of Tariffs and Trade (GATT), revocation of China's MFN status, and the cessation of Sino-US agreements on nuclear cooperation and satellite launches. These conditions were changed over the years to incorporate a range of other US interests, including controls on Chinese arms sales and on its export of ballistic missile technology and the opening of Chinese markets to US goods.<sup>34</sup>

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32. For studies of the international sanctions, see INTERNATIONAL LEAGUE FOR HUMAN RIGHTS (TIMOTHY GELATT), *BUSINESS AS USUAL . . . ? : THE INTERNATIONAL RESPONSE TO HUMAN RIGHTS VIOLATIONS IN CHINA* (New York, 29 May 1991); INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, *GETTING DOWN TO BUSINESS: THE HUMAN RIGHTS RESPONSIBILITIES OF CHINA'S INVESTORS AND TRADE PARTNERS* (July 1992); LAWYERS' COMMITTEE FOR HUMAN RIGHTS, *supra* note 19; James D. Seymour, *The International Reaction to the 1989 Crackdown in China*, EAST ASIAN INSTITUTE (1990); Peter Van Ness, *Analyzing the Impact of International Sanctions on China*, Working Paper 1989/94 (Australian National University, 1989); ANN KENT, *BETWEEN FREEDOM AND SUBSISTENCE: CHINA AND HUMAN RIGHTS* 185-92, 213-17 (1995).

33. See Foreign Relations Authorization Act, FY90-FY91, 16 Feb. 1990 (Pub. L. 101-246). See also HARDING, *supra* note 31, at 232.

34. See Keith Bradsher, *Senate Backs Curbs on Beijing's Access to Markets in US*, N.Y. TIMES, 26 Feb. 1992, at A1, A9. The latter conditions were laid down by the Senate when it agreed to conference report on bill re-extension of MFN treatment to Chinese products

A period of stalemate followed, from December 1989 to October 1990, marked by a moderation of international sanctions, a widening gap between congressional and executive positions, continued suggestions that the extension of MFN to China should be made conditional on improvement in its human rights performance, and an exchange of concessions between the US and China. In this period, China's bilateral interaction with the US became the more immediate pressure on its international human rights policies. The possibility of a nonrenewal of MFN, raised in early 1990 both by Congress and by President George H. Bush in response to his domestic critics, became the subject of domestic debate, with China specialists, representatives of the 40,000 Chinese students studying in the US, representatives of NGOs and the business community, clustering around the congressional or the executive poles. The executive emphasized the importance of relying on the democratizing "trickle down" effect of the liberalization of China's economy, of maintaining cultural contacts with China, and reinforcing commercial links, so as not to disadvantage the ordinary Chinese people. The congressional view was that "business as usual" should be made conditional on an improvement in China's human rights.

One week short of a vote in the House to override President Bush's veto of a bill to protect Chinese students in the US, China announced the release of 573 people imprisoned for taking part in the democracy movement.<sup>35</sup> A secret document handed over to US authorities by a defecting diplomat, Xu Lin, disclosed the Chinese leadership's intention to use political prisoners as one of the few available "cards" at their disposal to influence US policy.<sup>36</sup> However, an administration spokesman welcomed such positive actions, regardless of their motive.<sup>37</sup> On 10 May, twelve days before President Bush announced his decision to renew MFN status for China, 211 more prisoners were reportedly released. According to a Public Security spokesman, this left another 431 "such lawbreakers" being detained and investigated.<sup>38</sup> Whatever the accuracy of these unverified statistics, one concrete concession was China's subsequent permission to leading dissident, Fang Lizhi, and his wife Li Shuxian, to leave China on 25 June.

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on 25 February 1992. See also THE FEDERAL INDEX 1992 ANNUAL EDITION, vol. 1 (1992), at 374.

35. Nicholas D. Kristof, *China Reports Release of 573 Held in Revolt*, N.Y. TIMES, 19 Jan. 1990, at A5.

36. Fox Butterfield, *Beijing Aims Jail Releases at Influencing US*, N.Y. TIMES, 11 May 1990, at A6.

37. See Thomas L. Friedman, *US Welcomes Move*, N.Y. TIMES, 11 May 1990, at A7.

38. *211 Involved in Turmoil Released*, 33 BEIJING REV. 5 (21-27 May 1990).

#### D. MFN Phase

On 18 October 1990, the vote by the House of Representatives to attach human rights conditions to China's MFN status ushered in the first formal stage of MFN monitoring.<sup>39</sup> Because the human rights conditions of the pre-MFN sanctions were transferred to the MFN mechanism, and because even in the pre-MFN period there were already fears that MFN would be withdrawn, there was a basic continuity between China's response to the pre-MFN and MFN subphases. Nevertheless, owing to the number of variables feeding into China's responses, it is difficult to quantify MFN's precise impact. One index, apart from Chinese statements conceding cause and effect, was the temporal coincidence of MFN decision-making and Chinese concessions; another was the decline of such concessions once MFN and human rights were delinked in May 1994. Yet, it is important to note that, whatever the degree of compliance in particular instances during this MFN period, Chinese authorities rarely desisted from a continuing process of arrest and detention of political prisoners, and of arrest, imprisonment, or execution of common criminals.<sup>40</sup>

At all points between 1990 and 1994, China's response was determined not by MFN alone but by its assessment of the balance of US domestic political forces; its current strengths and weaknesses in the international arena; and the potential impact of a loss of MFN status on both China and the US. Also influential were the relative strengths of different Chinese political factions and a host of domestic variables, in particular the state of the economy and the degree of social discontent.

Within these constraints, the timing of China's response to US pressures was determined by a number of set dates. The annual US human rights report, which, in its influence on Congress was a source of concern to the Chinese government, was published each February. In the case of MFN, the President was obliged by US law to formally notify Congress of his intent to renew China's MFN status by 3 June, coincidentally the anniversary of the Tiananmen crackdown. If Congress took no action to oppose the renewal, the waiver took automatic effect in thirty days. If, on the contrary, it decided to oppose the waiver, it had sixty days to pass a joint resolution opposing the presidential action. The President was then required either to sign or veto the resolution, while any attempt to override a veto required a two-thirds majority. Later, when China put in a bid for the 2000 Olympics, another date was added, that of the International Olympic Committee (IOC)

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39. See Clyde H. Farnsworth, *Assailing Beijing, House Votes a Rise in China's Tariffs*, N.Y. TIMES, 19 Oct. 1990, at A1, A8.

40. For documentation of these continuing practices, see reports by Amnesty International, Human Rights Watch/Asia, and Human Rights in China.

vote in September 1993. Invariably, the release of prisoners occurred just in advance of these critical dates.

During the first MFN subphase from October 1990 to mid 1991, China complied with some US human rights conditions.<sup>41</sup> Rhetoric about noninterference was scaled down, prominent dissidents such as Wang Ruowang were released, a vigorous domestic campaign of conferences and scholarly research on human rights was launched, and an invitation was issued to an Australian parliamentary delegation to visit China. At the same time, in January 1991, China held its first public trials of more than thirty leading dissidents, giving seven lesser known democracy supporters light sentences of between two and four years, and releasing seven others, but sentencing Chen Ziming, Wang Juntao, Wang Dan, Ren Wandong, and Bao Zunxin to prison terms ranging from two to thirteen years.<sup>42</sup>

In the second subphase of MFN monitoring, from mid 1991 to November 1992, the administration adopted a stronger declaratory human rights policy on China, albeit based on the policy of "constructive engagement," which was more closely attuned to congressional opinion. This elicited a mixture of compliance and sanctions from China. However, despite President Bush's declared change in tactics, his policy was still reactive rather than proactive, and countenanced a gradual lifting of US sanctions, in some cases in the face of clear noncompliance from China. The active monitoring initiative was instead assumed by Congress, which, in contrast to previous years, moved twice in 1992 to vote on MFN before the President had announced a decision. China's response to the 1991 congressional vote was complicated by the collapse of the Soviet Union in August 1991, and manifested itself in increasing uneasiness about internal security and the activities of foreign journalists. Some political prisoners were released, but some, particularly trade unionists, were detained. China's first White Paper on Human Rights, published in October 1991, both responded to Western criticism and propounded a new formula of human rights with Chinese characteristics.<sup>43</sup> In doing so, it mirrored the ambiguity of China's overall position.

From the beginning of 1992, however, and particularly after the call by Deng Xiaoping in late January to expand economic development, China's assessment of its strategic position became increasingly positive, and its more selective compliance with US monitoring now reflected its heightened

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41. For detailed study of the congressional politics, see Drinan & Kuo, *supra* note 31, at 21–42.

42. See Asia Watch (Human Rights Watch/Asia), *The Beijing Trials: Secret Judicial Procedures and the Exclusion of Foreign Observers* (27 Feb. 1991).

43. See Information Office of the State Council of the P.R.C., *HUMAN RIGHTS IN CHINA* (1991) (China's first White Paper on Human Rights).

awareness that the faltering economies and unemployment problems in the developed world, and in particular the US, could be exploited in the MFN debate. By the end of October 1992, China had complied with a Senate request by releasing Shen Tong and Qian Liyun; and it also freed Bao Zunxin.<sup>44</sup> On the other hand, despite its concern about president elect Bill Clinton's tougher line on MFN, the Chinese government was reported by the end of November to have suspended talks with the US on human rights issues, including specific US inquiries about political prisoners.<sup>45</sup> This failure of communication, aggravated by plans of the sale of US jet fighters to Taiwan, was seen as a rebuff to President Bush, and as a warning to the incoming President. Chinese compliance was increasingly diverted into indirect channels, with the visits to China of a second Australian human rights delegation and a British delegation.

In the third subphase, which began in November 1992, there was initially a slight hiatus in US-China human rights interaction because of the elections, and uncertainty about the attitude of the new administration. Gradually, however, the congressional position was subsumed under a tougher administration line. As the new President declared in his executive order of 28 May 1993, "starting today, the United States will speak with one voice on China policy."<sup>46</sup> Rejecting the previous use of MFN conditions unrelated to human rights, he established seven specific human rights conditions, two of which were mandatory and five of which required China to make "overall, significant progress."<sup>47</sup> In this subphase, China showed increasing compliance with US requirements in an effort to attract the new administration's support, as well as to win the backing of the international community for its Olympics bid and for GATT membership. Prior to the President's decision on MFN, major dissidents such as Wang Dan, Guo Haifeng, Gao Shan, Wang Xizhe, Li Guiren, eighteen Catholic priests, and five Tibetans, were released.<sup>48</sup> By releasing such important political prison-

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44. See *Chinese Dissident is Freed, Human Rights Group Says*, N.Y. TIMES, 1 Nov. 1992, at L6; Sheryl WuDunn, *Chinese Dissident Freed from Prison*, N.Y. TIMES, 26 Nov. 1992, at A13.

45. See Nicholas D. Kristof, *Chinese Apparently Halt Rights Talks with US*, N.Y. TIMES, 25 Nov. 1992, at A12.

46. Yoshikazu Shimuzu, *The Clinton Administration's Failed China Policy: Implications of US-China Negotiations over MFN and Human Rights*, INSTITUTE REPORTS 3 (East Asian Institute, Columbia University, June 1996).

47. These conditions included: two relating to emigration and prison labor exports, observance of the Universal Declaration of Human Rights, protection of Tibet's distinctive culture, humane treatment of prisoners, allowing international radio and television broadcasts in China, and the release and accounting for of political prisoners. See Lampton, *America's China Policy*, *supra* note 31, at 602.

48. See ASIA WATCH, *DETAINED IN CHINA AND TIBET: A DIRECTORY OF POLITICAL AND RELIGIOUS PRISONERS* 58 (1994).

ers, and at the same time intensifying commercial relations with the US and lobbying business and sympathetic academic circles, on the one hand China complied with US conditions, and, on the other, sought to tie the US into trade deals that made MFN difficult to revoke.<sup>49</sup> In this third period, the chief contradiction in the US position revealed itself not as a split between the executive and Congress, but as the divergence between the US business community, increasingly supportive of China's right to MFN, and the executive position. In the Congress itself, opinion became more divided. Nevertheless, the climax to this period was the Congressional vote on 26 July 1993 to dissuade the IOC from supporting the Chinese bid. Its effect was to ensure that China could not bypass MFN in its effort to win international legitimacy. In a vain attempt to counter this move, just prior to the IOC vote, China released its most prized dissident, Wei Jingsheng, who had been languishing in prison since the early 1980s.

The fourth and final subphase of MFN monitoring followed the failure of China's Olympics bid, blamed by angry Chinese leaders on the Congressional vote, and a modification of the position of the Clinton administration. In July 1993, senior policymakers had drafted a classified "action memorandum" arguing the need for more dialogue with Beijing.<sup>50</sup> This was not adopted by Clinton until September, the month of the IOC vote, and was possibly partly aimed at mollifying Beijing. The new policy of "comprehensive engagement," like Mr. Bush's earlier "constructive engagement," sought to integrate US human rights policy towards China with a wide range of commercial, military, and political interactions.<sup>51</sup>

Despite its intense disappointment over the failure of its Olympics bid, China initially responded positively to the President's new policy, with Foreign Minister Qian Qichen indicating the possibility of China giving the International Committee of the Red Cross permission to visit political prisoners. However, following a number of incidents, including a much publicized meeting in February 1994 between John Shattuck, Assistant Secretary for Human Rights in the state department, and Wei Jingsheng in Beijing, China shifted to a hard line policy on human rights. This move, part of an overall factional swing in favor of the military, who were highly critical of the poor results of US-China engagement, culminated in a refusal to make even token face-saving gestures in public that might facilitate the delinkage

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49. See KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 2, at 23.

50. Shimuzu, *supra* note 46, at 11.

51. Its key points were: reaffirmation by the US of a "One China" policy; US recognition of China's importance as a regional and global player; resumption of high-level contacts, including direct military discussions; liberalizing technology controls on US exports to China; and expansion of financial support for US exports to China. See Richard Brecher, *Comprehensive Engagement: Clinton's New China Policy*, 21 CHINA BUS. REV. 6 (1994), in Shimuzu, *The Clinton Administration's Failed China Policy*, *supra* note 46, at 11–12.

of human rights and trade. There followed a period of complex diplomatic and domestic debate within the US, climaxed by China's humiliating treatment of Secretary of State, Warren Christopher, in Beijing in March 1994. Rather than provoking a tit-for-tat reaction, this hardline stance precipitated the US administration's final retreat. The diplomatic softener was a secret visit by US envoy Michael Armacost from between 7 and 10 May during which China agreed in secret to some minor, unpublicized concessions,<sup>52</sup> thereby maintaining an appearance of noncompliance, but allowing the US the excuse to delink.

President Clinton's delinkage of MFN and human rights with a minor condition on weapons sales to the US occurred on 26 May, despite a report by Secretary of State Christopher three days earlier that, while China had largely complied with two of the mandatory requirements in the executive order regarding trade in prison labor and release of some political prisoners, it had not performed so well in five other areas.<sup>53</sup> It also went ahead despite a report by Human Rights in China that "*the pressure of trade sanctions appears to be the only thing to which the Chinese leadership will respond.*"<sup>54</sup> In his statement on delinkage, which was welcomed enthusiastically by Beijing, Mr. Clinton declared that the MFN mechanism had "reached the end of its usefulness."<sup>55</sup> He even queried the basic viability of US bilateral monitoring:

A country with 1,200 million people, and the third largest economy in the world, conscious of all the cross currents of change and the difficulties it is facing, is going to have, inevitably, a reluctance . . . to take steps which are right, if it looks like every step it has taken, is taken under pressure of the US.<sup>56</sup>

### E. Delinkage and its Consequences

The delinkage of human rights and MFN was seen as part of a new Asia policy which more cautiously assessed the advantages and disadvantages of unilateral US action in the region.<sup>57</sup> In the *Los Angeles Times* of 31 May, President Clinton sought to clarify the alternative mechanisms which would be employed by the administration to further China's human rights—the

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52. See Lampton, *supra* note 31, at 619.

53. Hardev Kaur, *Kinder, Gentler Clinton Shifts US Asia Policy*, *BUS. TIMES*, 30 May 1994, at 20.

54. Sophia Woodman, *From the Editor*, *CHINA RTS. FORUM* 2 (Summer 1994) (author's underlining).

55. Kaur, *supra* note 53, at 20.

56. *Id.*

57. *Id.*

transmission of new foreign broadcasts to China, including Radio Free Asia; support for US organizations assisting private Chinese groups working on human rights issues; development of voluntary standards for US firms doing business with China; promotion of international support for human rights in China; and a ban on the import of Chinese guns and ammunition.<sup>58</sup>

A few months later, after brief indecision, Congress swung behind the President's new policy.<sup>59</sup> Thus, from the 1970s to 1994, US-China monitoring had come full circle, evolving from a bipartisan line disassociating US-China policy and human rights, to a polarized and radical position spearheaded by Congress, to a tough line led by the executive, and thence to a low key and bipartisan stance renouncing any linkage between MFN and human rights. The MFN mechanism for monitoring China's human rights had come to the end of its effective life.

Within hours of receiving the President's announcement, Chinese authorities detained two democracy activists, Christian theologian Guo Qinghui and Christian Gao Feng. Wang Zhongqiu, spokesman for the Independent Labor Rights Protection Alliance, disappeared from home and was presumed detained.<sup>60</sup> Public and state security agents also began hunting down about 120 members of the League for the Protection of Workers' Rights, from Beijing, Shanghai, Wuhan, and Xian.<sup>61</sup> In Beijing the search was widened to include "second tier" dissidents, or those not involved in the frontline of the democracy movement. A 29 July report by Human Rights in China and Human Rights Watch/Asia, "Pressure Off, China Targets Activists," detailed the impact of the delinkage on the detention and sentencing of dissidents, and on public security.<sup>62</sup> It argued that the trial of fifteen dissidents on 14 July and the implementation of the new Detailed Implementation Regulations on the State Security Law were

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58. See Robin Wright & Jim Mann, *Clinton Outlines Program Aimed at Human Rights in China*, L.A. TIMES, 31 May 1994, at A6.

59. On 9 August the House of Representatives, by a vote of 356–75, overwhelmingly rejected a resolution from Republican George Solomon urging Congress to revoke MFN outright. It then voted by 280 votes to 152 for legislation endorsing Mr. Clinton's decision to delink MFN and human rights. Finally, it convincingly defeated by 270 votes to 158 an alternative version proposed by Nancy Pelosi that would have revoked MFN on products of Chinese state-owned industries, including those produced by the People's Liberation Army. A bill similar to Pelosi's had been introduced in the Senate by Democratic leader George Mitchell, but the House vote made any Senate action irrelevant. See Simon Beck, *Clinton MFN Verdict Backed*, S. CHINA MORNING POST, 11 Aug. 1994, at 9.

60. See Susumu Awanohara & Lincoln Kaye, *Full Circle*, 157 FAR E. ECON. REV. 15 (9 June 1994).

61. See Willy Wo-Lap Lam, *Agents Hunt 120 Dissidents*, S. CHINA MORNING POST, 22 June 1994, at 9.

62. HUMAN RIGHTS WATCH/ASIA, *PRESSURE OFF, CHINA TARGETS ACTIVISTS* (1994).

part of a coordinated campaign to crack down on all forms of dissent. The trials of the dissidents had been first scheduled for September 1993 but had been postponed until after the IOC vote. A second trial date of April 1994 had been postponed until the decision on MFN. The report concluded that:

In the absence of international pressure, China has steadily tightened the noose on all forms of dissident activity . . . Mr Clinton's May decision . . . has left the Chinese authorities with the impression that their repression of dissent will have no negative consequences.<sup>63</sup>

At the same time, there was little evidence of the new monitoring mechanisms which the administration had indicated would replace MFN. US businessman and human rights activist John Kamm complained that there had been no progress on the code of conduct for businessmen.<sup>64</sup> The only advance was on the "quiet diplomacy" front, when a trade delegation led by US Secretary for Commerce Ron Brown, which signed up almost \$5 billion of new business for US companies, also drew from Chinese authorities an agreement to resume the bilateral talks on human rights which had foundered in the spring as Clinton weighed his options on MFN.<sup>65</sup> However, the delinkage brought to an end the era of active international human rights delegations, which had facilitated the monitoring of China by middle powers. The negative impact of the delinkage decision was, therefore, unquestionable.

## F. Passive Phase: Post-Delinkage and PNTR

After the delinkage decision, the US redoubled its efforts to secure the adoption of the UN Human Rights Commission country situation resolutions on China. This led to the closest China vote in the Commission's history, when the resolution failed by only one vote in 1995. Such a narrow escape spurred China's diplomats to greater efforts, which culminated in its direct challenge to the international community in 1997, and threats to those states cosponsoring the draft resolution. The shock caused by the success of China's divisive tactics resulted in the collapse of any Western attempt to sponsor a resolution in 1998. The US, however, sponsored another resolution in 1999, albeit at the last moment, and Secretary Albright

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63. Geoffrey Crothall, *Crackdown on Dissent Follows MFN Decision*, S. CHINA MORNING POST, 29 July 1994, at 11.

64. See Ted Plafker, *Human Rights in Danger of Being Forgotten*, S. CHINA MORNING POST, 5 Sept. 1994, at B3.

65. John Kohut, *Business Deal and Rights Pledge Delight Brown*, S. CHINA MORNING POST, 31 Aug. 1994, at 1.

went to Geneva especially to argue the case for the resolution of 2000. In 2001, under the new administration of George W. Bush, continuity was maintained, with the US again supporting the draft resolution.<sup>66</sup>

By contrast, US bilateral pressures were passive and diffuse; monitoring activities included President Clinton's direct statements to the Chinese people in June 1998, and his expressions of concern about China's repression of Falun Gong members in 1999 and 2000; the enforcement of US laws banning imports produced by prison labor; support for broadcasts of Radio Free Asia in China; the appointment of an Ambassador at Large for International Religious Freedom, who visited China in January 1999; US designation of China as a "country of particular concern" for violations of religious freedom under the International Religious Freedom Act;<sup>67</sup> and the appointment by the secretary of state of a Special Coordinator for Tibetan Issues to promote dialogue between the Dalai Lama and China. Until the US bombing of the Chinese embassy in Belgrade in 1999, the US continued its human rights dialogue with China. In addition, following the 1997 summit between President Clinton and President Jiang Zemin, it established a China Rule of Law Initiative, which produced a number of seminars and meetings in 1998 and 1999.<sup>68</sup> Special claims were made about the liberalizing effect of the US World Trade Organization (WTO) agreement with China, which, in conjunction with the provision of permanent normal trade relations to China, would "empower its people, increase their access to information, expand their contact with the democratic world, and deepen their connections to outside influence and ideas."<sup>69</sup> In May 2000, President Clinton even argued that granting PNTR to China was a "moral imperative."<sup>70</sup>

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66. As on all previous occasions since 1990, apart from 1995, the 2001 draft resolution on the situation of human rights in China (E/CN.4/2001/L.13) was not acted on by the Commission, since, in a roll-call vote of 23 for, and 17 against, and 12 abstentions, the Commission passed the no-action motion requested by China. See UN Press Release, *Commission on Human Rights Adopts Resolutions on the Right to Development and Lebanese Detainees Held by Israel*, 18 Apr. 2001, at 1–2, available on <<http://www.unhchr.ch/>>.

67. International Religious Freedom Act of 1998, 22 U.S.C.A. § 6401 (1998).

68. See *US Policy Options toward China: Rule of Law and Democracy Programs*, Hearing before the Subcommittee on Asia and the Pacific of the Committee on International Relations, House of Representatives, 105th Congress, 2nd Sess., 30 Apr. 1998, at 2; (letter from John Kamm) (22 Apr. 2001).

69. The White House China Trade Relations Working Group, *China's Human Rights Record*, Online NewsHour (6 Apr. 2000) <<http://www.pbs.org/newshour>> (visited 14 Mar. 2001).

70. He claimed: "By forcing China to slash subsidies and tariffs that protect inefficient industries, which the Communist Party has long used to exercise day-to-day control, by letting our high-tech companies in to bring the Internet and the information revolution to China, we will be unleashing forces that no totalitarian operation . . . can control." Arshad Mohammed, *Clinton Calls China Vote Moral Imperative*, REUTERS CHINA NEWS, 21 May 2000.

Over the years, US thinking about the relationship between trade and human rights had undergone a radical shift. Between 1989 and 1993, trade had been made contingent on human rights, whereas by 2000, human rights were represented as contingent on trade. These claims were disputed by Mike Jendrzeczyk, Washington Director of Human Rights Watch:

WTO membership in itself will not guarantee the rule of law, respect for worker rights, or meaningful political reform. . . . The Chinese government might seek to build the rule of law in the economic sphere while simultaneously continuing to pervert and undermine the rule of law elsewhere. For example, Chinese authorities claim to be upholding the "rule of law" by arresting and throwing in jail pro-democracy activists, and the nationwide crackdown on the Falun Gong movement has been cloaked in rhetoric about the "rule of law".<sup>71</sup>

### G. Assessment

Detailed examination of US monitoring of China from 1990–1994 suggests that, contrary to general belief, China did indeed comply with many of the specific conditions laid down for the renewal of MFN at different periods, at least on paper, and even if the motivation behind compliance was instrumental. The correlation between the release of dissidents and the decision making dates for MFN indicate the effectiveness of MFN in this respect. Over a period of five years, as the 1993 executive order and previous congressional bills had required, Chinese authorities released political prisoners; agreed to ensure that goods made with prison labor were not exported to the US; arranged the emigration of political prisoners; and agreed, at least on paper, to discuss Red Cross visits to Chinese political prisoners. They also claimed adherence to the Universal Declaration of Human Rights<sup>72</sup> and agreed to look into the issue of the jamming of VOA as well as to consider the issue of Tibetan prisoners.<sup>73</sup> Aside from these specific concessions, the publication of China's three White Papers and the invitation to foreign human rights delegations also appear to have been motivated by concern to be seen to respond to the MFN challenge. On the other hand, changes more clearly related to multilateral pressures saw the

71. *China's Accession to the WTO and Human Rights*, Online NewsHour (16 Feb. 2000) <<http://www.pbs.org/newshour>> (visited Apr. 9, 2001).

72. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, pt. 1), at 71, U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT'L L. 127 (Supp. 1949).

73. For analysis, see KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 2, at 71–72. See also Tao-tai Hsia & Wendy Zeldin, Law Library of Congress, China: Legal Developments in the Rule of Law, in US Policy Options, *supra* note 68, at 96–102.

dispatch overseas of many Chinese legal experts to study the application of human rights law, and the incorporation of human rights standards in new legislation.<sup>74</sup> The only issues on which China appeared impervious to both multilateral and bilateral monitoring were those regarded as challenging the integrity and legitimacy of the Chinese state or as endangering political stability, such as a resumption of dialogue with the Dalai Lama on Tibet, or controls on the death penalty, abortion and forced sterilization, and religious persecution.

However, MFN was meant by US authorities and Western NGOs to induce an immediate, meaningful, deep-rooted internalization of human rights norms. That this was not achieved is suggested by the continued excessive use of the death penalty, repeated reports of torture and the continued detention and imprisonment of political prisoners, documented between 1989 and 1994 by Amnesty International, Asia Watch, the International League for Human Rights, and Human Rights in China. The failure of MFN to effect a change in the basic administration of justice was also indicated in the 1992 report of the second Australian human rights delegation and in a 1993 report by the Lawyers' Committee for Human Rights, "Criminal Justice with Chinese Characteristics."<sup>75</sup> The unsatisfactory state of overall human rights was indicated by China being rated eighty-second on the 1991 Human Freedom Index, and above only Burma, Iraq, and North Korea in Charles Humana's *World Human Rights Guide* of 1992.<sup>76</sup> A failure to internalize human rights norms was also suggested by the instrumentalist manner in which the barter of men and women was linked to approaching congressional votes or presidential vetoes.

From the evidence, it is clear that China was prepared to allow curbs on its sovereignty in a highly formalized sense, such as in the release of prisoners on set dates, or in areas where the concessions would not receive publicity. Its leaders were also prepared to concede sovereignty in areas which proved to be nonthreatening. For instance, after the initial refusal to allow Fang Lizhi to leave the country, Chinese authorities discovered that the emigration of dissidents had the effect of neutralizing them politically. They therefore adjusted their policy, allowing Han Dongfang, Shen Tong and, later, Wang Xizhe and Wei Jingsheng, to leave China, but not to return.

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74. KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 2, at 194–215.

75. See Department of Foreign Affairs and Trade, *Report of the Second Australian Human Rights Delegation to China, 8–20 November 1992* (10 Mar. 1993); *Visit to China by the Delegation led by Lord Howe of Aberavon: Report* (London, HMSO, 1993); LAWYERS' COMMITTEE FOR HUMAN RIGHTS, CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS (1993).

76. See Freedom index, *cited in* S. CHINA MORNING POST, 24 Nov. 1991; CHARLES HUMANA, *WORLD HUMAN RIGHTS GUIDE* 72–75 (1992). For a general assessment of China's human rights before 1992, see KENT, BETWEEN FREEDOM AND SUBSISTENCE, *supra* note 32.

The limits of compliance were thus defined by China's internal imperatives. The pattern of Chinese compliance with MFN monitoring, moreover, revealed neither progressive improvement nor progressive decline, and thus differed from the steadier progress observable in some multilateral forums.<sup>77</sup> China's behavior was contingent on the waxing or waning of its comparative power *vis-a-vis* the US, both in the foreign policy and domestic senses, on its influence within the international community, and on the degree of internal political stability. The common denominator in the two more successful subphases, the first and third, was strong US leadership, whether by the US Congress or the new President, Bill Clinton. Compliance in the third subphase occurred, despite China's increased international and commercial clout, because China's achievement of two new goals was also dependent on its human rights record. By the beginning of the fourth subphase, however, the 2000 Olympics had been awarded to Sydney, and another variable, strong presidential leadership, had waned. Henceforth, for China, brinkmanship tactics became less dangerous, because there was both less to win and less to lose.

On the US side, the process of monitoring was highly volatile because of changing human rights indices, shifting variables of domestic political constituencies, and fluctuating international economic indicators. There was no constant and common denominator as in the multilateral monitoring process, where the political constituencies might change but the monitoring standards remained consistent. Without consistency in the content and application of monitoring, there could be no consistency in response. Moreover, China's continual attacks on the condition of US human rights, and particularly economic and social rights, indicated that its compliance was due less to any regard for US values than for the material benefits that a renewal of MFN status could bring. In turn, US monitoring was as much a response to internal political divisions as to indications of Chinese compliance. There was, therefore, no necessary correlation between Chinese compliance and the formal US response.

One reason for this lack of correlation may be found in the weakness of the MFN mechanism itself, and of the human rights indices with which it was linked. As originally conceived, the right to MFN status was subject only to the right to freedom of emigration from the country concerned. It was not until the international sanctions imposed on China in 1989, which covered a broader matrix of civil rights, were lifted, that MFN appeared as the only available mechanism to replace them. In seeking to enforce a broad spectrum of civil rights, and even cooperation on issues of trade and arms sales in the earlier congressional bills, a task for which it was not

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77. See KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 2, at 232–50.

equipped, MFN became a receptacle of convenience for any outstanding issue in US-China relations. This overloading, rather than facilitating renewal of MFN, became a reason for revocation. As Senator Slade Gordon famously observed: "If MFN treatment for the People's Republic of China were a ship, it would long since have been loaded beyond its capacity and would have sunk without trace."<sup>78</sup>

On the other hand, President Clinton's 28 May 1993 executive order divorcing the renewal of MFN from trade and arms issues, and making its renewal conditional on "measurable" human rights indicators, was ill-conceived because human rights are in essence qualitative rather than quantitative. The rights of freedom of speech, press, and association, the right to a fair trial, to freedom from arbitrary detention, torture, and murder are rights whose existence is assessed according to their entrenchment in constitutions, in laws, in institutions, and in their realization in the empirical application of rules. They are integral to the structure of state and society, and cannot be evaluated according to indices such as the number of prisoners released. The quantifiable aspect of rights is the number of rights fully observed and implemented, not the number of times the denial of a right is waived in particular cases.

Thus, the problem of MFN was not that China did not comply with its conditions, but that the conditions themselves were not sufficiently broad to assess and influence China's human rights conditions. This emphasis on quantity in the monitoring process facilitated both China's compliance and noncompliance, as it was the number of political prisoners released, and not the overall condition of prisoners' human rights, which was being formally assessed. The effect of a quantitative emphasis was that once the leading political prisoners had been released, as was the case by 1994, only their subsequent rearrest, followed by rerelease, could serve as an indicator of Chinese compliance. The paradoxical outcome was that the continuation of repression itself became a measure of compliance. Such was the case of China's most famous dissident Wei Jingsheng, rearrested on 1 April 1994.

In addition, the emphasis on quantity had the effect of disguising the qualitative, if still limited, improvements which in fact occurred within this period. An increasing tolerance of dissent brought significant change. As the cases of Wang Juntao and Chen Ziming demonstrated, the defiance of the state by prisoners' spouses and friends, which would not have been possible five years earlier, was now effective in improving the conditions of individual political prisoners, particularly those who were well known abroad, and also in finally obtaining their release. A challenge through the courts relating to the abuse of an individual's rights, such as that launched

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78. Drinan & Kuo, *supra* note 31.

by former Minister for Culture Wang Meng, although not successful, would have been unthinkable five years previously. As a result of the promulgation of the 1990 Administrative Litigation Law, moreover, the number of civil suits against the government rose rapidly, from about 600 in 1986 to nearly 80,000 in 1996.<sup>79</sup> However, without perhaps being conscious of the fact, US decision makers who were looking for improvements in China were dissatisfied with the *quality* of the result, and therefore subconsciously discounted all the *quantitative* indicators of compliance, even though it was above all *quantity* that their conditions were measuring. US failure to acknowledge China's compliance became a further disincentive to its cooperation in the fourth stage, particularly when the majority of well-known dissidents had already been released.

On the other hand, US adoption of measurable indices was predictable, given the need of a democratic state to identify and enumerate visible concessions by the target state. The hidden and powerful variable in the MFN monitoring process was US public opinion, and the US government's need to be seen to respond to it. Thus, not only were the conditions attached to MFN inadequate, but the unsuccessful outcome could be attributed to the imperatives within the democratic process itself. The Chinese case illustrates that unilateral monitoring by a strong democratic state relies on quantifiable outcomes; that its monitoring standards change according to the pressures in the democratic process; and that its internal tensions can be exploited by the monitored state.

The problems inherent in strong bilateral monitoring are thereby revealed. Irrespective of the value of MFN conditions, they were complied with by China when the US was perceived as the more powerful state, whose approval was necessary in order to achieve a variety of national goals. By the same token, when the power balance between the two states equalized, and the sanctions themselves lost their force, the efficacy of the MFN mechanisms waned, and the preservation of sovereignty became a paramount concern for China. In turn, US monitoring mechanisms became vulnerable to other US goals, such as the need to use China's good offices to maintain peace in the Korean peninsula, and other commercial and strategic objectives. Finally, as Warren Christopher's visit to Beijing in the final phase attested, and as President Clinton himself acknowledged,<sup>80</sup> the strong unilateral MFN mechanism suffered from the defect that it derived part of its force from open publicity, but in the process exposed itself to the charge of attempting to undermine the sovereignty of the target state.

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79. See Minxin Pei, *Testimony before the Asia-Pacific Subcommittee of the House International Relations Committee*, in *US Policy Options*, *supra* note 68, at 92.

80. See Kaur, *supra* note 53.

On the other hand, during the period of US post-1994 quiet diplomacy, where the issue of sovereignty has been less of a problem, the record of Chinese compliance has been even less satisfactory. In a retrospective assessment of the constructive engagement policy, Amnesty International cited the State Department's own 1996 human rights report as proof that the policy "has not produced any substantial results in the human rights field."<sup>81</sup> Since late in 1998, China has conducted a widespread campaign to eliminate all peaceful opposition in the name of social stability. Repression has become harsher in those very areas which the US has continued to monitor. Restrictions on religious and ethnic freedom have increased, with the crackdown on Falun Gong, the continuing arrest of Tibetan separatists, more rigid control of Tibetan Buddhism, and more frequent arrests and executions of activists in Xinjiang.<sup>82</sup> China has also specifically reacted against US initiatives to ameliorate the situation. US attempts to bring together the Chinese government and the Dalai Lama, for instance, were rebuffed by China's confiscation of thousands of copies of *The Clinton Years*, which contained a picture of President Clinton shaking the Dalai Lama's hand.<sup>83</sup> More seriously, in early 2001, despite, and possibly because of, the forthcoming UN Human Rights Commission session, China began to arrest US citizens or permanent residents who had been born in China.<sup>84</sup> With regard to Chinese prisoners, veteran human rights activist, John Kamm, reported that although 650 "counterrevolutionaries" had been released between 1998 and 2000, the majority before the end of their term, 600 had been imprisoned over the same period for "endangering state security."<sup>85</sup> The only remaining way to obtain the release of political prisoners was to bargain for them just prior to a US decision involving crucial Chinese

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81. See Amnesty International Testimony, *US-China Relations and Human Rights: Is Constructive Engagement Working?*, before the House International Relations Committee, International Operations and Human Rights, in *US/CHINA RELATIONS AND HUMAN RIGHTS: IS CONSTRUCTIVE ENGAGEMENT WORKING?* 86 (Christopher Smith ed., 1998).
  82. For instance, as the debate on PNTR began in the US Senate, Chinese dissidents in Hong Kong claimed that at least thirty members of the Falun Gong sect had died after being tortured and beaten, and that an estimated 47,000 practitioners had been jailed, purged, or sent to labor camps to be re-educated. See Eric Schmitt, *As Vote on China Trade Bill Nears, Senate Looks to Smooth its Passage*, N.Y. TIMES, 6 Sept. 2000; *Chinese Dissidents Report Deaths of 30 Falun Gong Sect Members*, EFE via Comtex, REUTERS CHINA NEWS, 6 Sept. 2000. See also U.S. STATE DEPT., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993 (1994).
  83. See *The Clinton Years* (PBS Home Video 1999).
  84. See Steven Mufson, *US Issues Warning on Travel to China*, WASH. POST, 20 Apr. 2001, at A16.
  85. John Kamm, *Accounting for China's Prisoners: Implications for Humanitarian Intervention and Systemic Reform*, Contemporary China Centre Seminar, Australian National University, Canberra (8 June 2000).

national interests.<sup>86</sup> Thus, just prior to the vote on PNTR in the US Senate in September 2000, the Chinese authorities signaled to Kamm that they could now “do business.”<sup>87</sup>

This absence of progress in areas of specific US concern is best illustrated by a paper of the White House China Trade Relations Working Group, whose main claim to the success of China’s engagement with the international community, apart from the general benefits of its exposure to the outside world, was China’s overall legal reform activity.<sup>88</sup> Legal reform in China, however, was clearly the outcome of multilateral, rather than bilateral, pressures, since it only occurred after the cessation of active bilateral monitoring in 1994 and before the onset of “quiet dialogue” in 1997.<sup>89</sup> Nevertheless, for all the inadequacies of this passive phase of bilateral monitoring, the US continued to occupy the international high moral ground. Moreover, China’s readiness to pursue its bilateral dialogue with the US while the US continued its multilateral monitoring role undermined the argument of other Western states that, if they continued to cosponsor the draft country situation resolution on China in the Human Rights Commission, China would cease bilateral dialogue. US failure to retain its seat in the Commission elections of May 2001, blamed not only on the machinations of developing states in the Commission, but, paradoxically, on the failure of the new Bush administration to pay its UN dues and to support international action on the environment and arms control, simply threw down the challenge to the European states which succeeded it to continue the US tradition of two-track human rights diplomacy.<sup>90</sup>

### III. AUSTRALIAN MONITORING

As a middle power, a parliamentary democracy, and a welfare state, Australia conformed, at least until 1997, with the profile drawn by Jack Donnelly of the “other” Western human rights tradition, and by Jan Egeland of “like-minded” states, established by Canada and the Nordic countries and contrasting with the US tradition.<sup>91</sup> In its monitoring, Australia declared the same preference for moral persuasion over economic sanctions, the

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86. See *id.*

87. Interview with Chinese human rights expert, Canberra, Australia (Aug. 2001).

88. See White House China Trade Relations Working Group, *supra* note 69.

89. For an analysis, see KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 2, at 204.

90. Crossette, *US is Voted Off Rights Panel*, *supra* note 4. China and Cuba, in particular, expressed satisfaction at the outcome of voting.

91. See EGELAND, *supra* note 6; DONNELLY, *supra* note 7.

same emphasis on bipartisanship and consistency in human rights policies, and the same sensitivity towards economic and social rights. It was also inclined to view bilateral pressures as a supplement, rather than a replacement, for multilateral mechanisms. Its monitoring goals, procedures, and philosophy thus provide a clear contrast with the US case.

In one respect, Australia saw its human rights interaction with China as unique in comparison with other middle powers. Given its geographical location in the Asia-Pacific, a region with a very patchy human rights record, Australia perceived itself to be under greater pressure than other middle powers to promote human rights interests in a way which furthered, rather than undermined, its national interests. These tensions were heightened by the fact that, despite the existence of an Asia Pacific Forum of National Human Rights Institutions, there was as yet no effective regional human rights body, as there was elsewhere, to monitor regional abuses or to assume the role of mediator in the event of claims against a neighboring state.<sup>92</sup> As one of only two Western states in the immediate region, Australia was therefore obliged in some cases to assume the role of regional conscience and arbitrator, as it did, for instance, in East Timor in 1999. At stake in its bilateral relations was either the consistency, or the integrity, of its human rights values, or both.

### A. Historical and Institutional Context

Before the 1980s, human rights were not normally a component of Australia's bilateral relationships as they were with the US, but rather a facet of its multilateral diplomacy.<sup>93</sup> On the contrary, rather than using trade and aid as political levers, it tended to trade with states of which it disapproved politically. Even deeply conservative Australian governments continued to trade with China after 1949. As a middle power, Australia's main lever was seen to be its quality as a role model. From the mid 1940s, when Australia's External Affairs Minister, Bert Evatt, was elected President of the UN General Assembly, Australia took a leading role in multilateral human rights forums.<sup>94</sup> When in the 1980s it finally began to incorporate human rights into its bilateral relationships, it was on a bipartisan basis and one fusing principle and pragmatism. Bipartisanship was encouraged by the setting up of an Amnesty International Parliamentary Group and a Human Rights

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92. For details of Forum, see Asia Pacific Forum of National Human Rights Institutions, *Report on Forum Activities*, <http://www.apf.hreoc.gov.au>.

93. See Ann Kent, *Australia and the International Human Rights Regime*, in *AUSTRALIA IN WORLD AFFAIRS, 1996–2000* (James Cotton & John Ravenhill eds., forthcoming 2001).

94. See *id.*

Subcommittee of the Joint House Foreign Affairs, Defense and Trade Committee, which issued biennial reports on Australia's human rights diplomacy.<sup>95</sup> By the mid 1980s, the defining characteristics of Australia's policy, as articulated by the Foreign Minister, Gareth Evans, were that: (1) it saw itself as having a position on human rights closer to Asia than other Western states, primarily because it respected economic, social, and developmental rights as well as civil and political rights; (2) it emphasized a nonconfrontational style of mutual consultation with states in the region; (3) it combined principle and pragmatism with patience, anticipating change in the long-term, but also attempting change in the short-term; (4) it supported reciprocity, was self-critical of its own performance and welcomed assessment by others; (5) it saw its human rights policy as consistent, both in application, and in the standards it set; and (6) it adopted the notion of the trickle down effect of economic development into areas of political liberalization and social welfare.<sup>96</sup> This enabled it to pursue its commercial self-interest in the confident expectation that human rights were thereby also being served, and in the belief that principle was being reconciled with pragmatism.

From the perspectives of Jan Egeland's criteria, these Australian standards were insufficient, since, despite its concern with domestic human rights, Australia did not have a good domestic record of respect for indigenous rights, and, although respecting New International Economic Order (NIEO) principles, had allowed its level of foreign aid in proportion to its Gross National Product (GNP) to decrease.<sup>97</sup> However, Evans' theoretical checklist corresponded closely to Rhoda Howard's criteria of monitoring credibility: (1) consistency with international standards, especially regarding economic rights; (2) self-assessment; and (3) sensitivity to domestic human rights concerns.<sup>98</sup>

Despite its stated concern for human rights, Australia was, like the United States, willing to exempt China from scrutiny. This was because Australia-China relations were largely a reflection of US policies, apart from

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95. See Ann Kent, *Human Rights, in AUSTRALIAN FOREIGN POLICY: INTO THE NEW MILLENNIUM* 164–65 (F.A. Mediansky ed., 1997).

96. See GARETH EVANS & BRUCE GRANT, *AUSTRALIA'S FOREIGN RELATIONS: IN THE WORLD OF THE 1990s* 153–62 (2d ed. 1995).

97. Evans has written:

Aid has an obviously important role to play in improving human rights in the broadest sense of the term . . . But experience has shown that it is not necessarily helpful to try to directly link—as some advocate—the level of Australian aid to the recipient's human rights performance in any obvious carrot-and-stick fashion.

*Id.* at 161. For philosophy of foreign aid, see JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE, *A REVIEW OF AUSTRALIA'S EFFORTS TO PROMOTE AND PROTECT HUMAN RIGHTS* 69–73 (Commonwealth Parliament, Nov. 1994).

98. See Howard, *supra* note 7.

the years immediately following the communist victory, when there were signs that Australia was considering a more independent position, and the Whitlam years of the early 1970s.<sup>99</sup> Australia's attitude also derived from an overall regional and global context, whether during the early cold war period in which China was defined as "the enemy," or the later cold war phase in which China was seen as an ally offsetting Soviet expansionism. Although the government's concerns about China's human rights were privately conveyed from as early as 1983, it was not until after the Tiananmen crackdown in 1989, and under the umbrella of multilateral sanctions, that Australia first took public issue with China's human rights policies.

### **B. Active Phase: Human Rights Delegations**

From June 1989 to 2000, Australia adopted three different types of monitoring: sanctions, in the shape of both shaming and economic mechanisms, but, unlike the US case, for punitive and shaming, rather than monitoring, purposes;<sup>100</sup> active monitoring via human rights delegations; and passive monitoring, or human rights dialogue.

Following the period of multilateral sanctions, in which Australia participated, Australian monitoring of China's human rights became ancillary to US monitoring through MFN. However, the shape it assumed diverged from that of the United States well ahead of the formal delinkage of MFN and human rights in May 1994. Australia set more modest goals than the United States, as was in keeping with the limited, if flexible, mechanisms open to a middle power. Even its initial sanctions did not seek direct outcomes, but were indirectly effective in that they caused a deterioration of bilateral relations sufficient to generate efforts to improve them. This was the impetus behind its joint decision with China to initiate human rights delegations. From mid 1991 to late 1992, Australia undertook an active monitoring role in the form of two human rights delegations to China. Separated by a space of one and a half years, these delegations placed pressure on Chinese authorities, while providing a measuring stick of progress over the period. They also established the model for subsequent delegations from Europe and the United Kingdom (UK).

The objectives of the first delegation were: (1) to commence a "constructive and serious dialogue in human rights issues of concern, or of

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99. See Ann Kent, *Australia and China: Asymmetry and Congruence in an Evolving Relationship, 1966–1996*, INSTITUTE REPORTS (East Asian Institute, Columbia University, Dec. 1996).

100. See KIM RICHARD NOSSAL, *THE BEIJING MASSACRE: AUSTRALIAN RESPONSES* 49–52 (1993).

interest, to either side"; (2) to obtain information on Chinese laws and policies affecting human rights, including formal and constitutional rights; on the Chinese legal, judicial and penal systems; and on the manner in which laws and policies were observed and implemented in practice, particularly in relation to individual rights; (3) to hold "discussions with, and convey Australian views on human rights issues to relevant Chinese organizations, officials and others involved in human rights matters"; (4) to seek information and make representations about particular cases and inquire into the setting up of a satisfactory mechanism for such representations; and (5) to "respond to Chinese interest in human rights issues in Australia."<sup>101</sup>

Adopting President Bush's terminology of "constructive dialogue," Australia's purpose was to encourage China to respect internationally accepted standards of human rights, to urge its ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the improvement of its overall human rights situation; to persuade the Chinese that human rights constituted a legitimate subject of international inquiry; and to demonstrate Australia's willingness to listen to different perspectives on human rights issues.<sup>102</sup>

Since a wide range of expertise and interests were required, the nine members of the delegation included politicians with experience in international relations and human rights, academic Sinologists and linguists, a specialist in the Chinese legal system, and specialists in international and Australian domestic human rights issues, including a representative from the Australian Human Rights and Equal Opportunity Commission (HREOC). Its canvas of issues and scope of inquiry was also broad.<sup>103</sup>

The ensuing public report, as the delegation leader, Senator Chris Schacht, had promised, was not a "whitewash."<sup>104</sup> It criticized many aspects of the Chinese legal system such as the lack of "judicial independence," Party interference in judicial decisions, the failure to make public many laws and guidelines, and the lack of effective time limits for detention and

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101. Minister of Foreign Affairs and Trade, *Delegation to Visit China to Discuss Human Rights*, News Release (5 May 1992).

102. Department of Foreign Affairs and Trade, *Report of the Australian Human Rights Delegation to China, 14–26 July 1991*, at ix–xiii, 37 (9 Sept. 1991).

103. See *id.* at 1. Between 14 and 26 July 1991, the delegation visited Beijing, Chengdu (Sichuan), Tibet, and Shanghai. In Beijing they visited the People's Institute of Foreign Affairs; the Ministry of Public Security; the Supreme People's Procuratorate and the Supreme People's Court; the Ministry of Justice; Defense lawyers; the State Council Information Office; the Religious Affairs Bureau; International Organizations Department, Ministry of Foreign Affairs; and Beijing No 1 Prison. See *id.* at 39.

104. *Id.*

trial.<sup>105</sup> It expressed concern about the practice of administrative detention, about reports of mistreatment of prisoners, and the “frequent, and often inconsistent use of the death penalty.”<sup>106</sup> It considered that “the prosecution of so-called counter-revolutionary crimes” amounted to “an infringement of basic freedoms as set out in the Universal Declaration of Human Rights.”<sup>107</sup> It also found that the freedoms of assembly, peaceful association, and the press guaranteed under the Chinese constitutions were not in fact respected, and deplored the total monitoring of the individual through personal dossiers, household registration, and the ID card, as well as through the street committee and its security organization, and the security section in the factory.<sup>108</sup>

The report reserved its most stinging criticism for the state of civil, political, economic, and social rights in Tibet where “martial law . . . continues to exist in all but name.”<sup>109</sup> Apart from observing the absence of religious freedom and of other civil as well as political rights, it reported Tibetan complaints of a lack of justice, a lack of access to education and employment, as well as a restriction on freedom of movement.<sup>110</sup>

The recommendations of the report were to continue the dialogue through a second Australian delegation in 1992 and a reciprocal visit to Australia from a Chinese delegation; to explore a mechanism for a Joint Australian/Chinese Working Group on Human Rights; to promote exchanges in the legal and judicial fields, including training programs in Australia for Chinese justice and security personnel; to urge China to become a party to the ICCPR and the ICESCR; to press for China’s greater international accountability in cooperation with the UN Commission on Human Rights; to continue to seek information on the circumstances of individual prisoners of conscience; to follow up the delegation’s representations on human rights cases; to assist both in the provision of technical advice on family planning and in contraception methods; to maintain Australia’s policy of accepting international scrutiny of its own human rights record; and to encourage both China and the Dalai Lama to meet “without preconditions” to discuss the situation in Tibet.<sup>111</sup>

These vigorous criticisms and recommendations were well received by a previously skeptical Australian press and public. Yet the report also emphasized the positive achievements in legal reform in the modernization

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105. *Id.*

106. *Id.*

107. *Id.*

108. *See id.*

109. Department of Foreign Affairs and Trade, *supra* note 102, at 68.

110. *See id.*

111. *Id.* at 75–77.

era. Its basically constructive and cautiously optimistic tone ensured that, apart from the section on Tibet,<sup>112</sup> its criticism was palatable to Chinese officials, and provided the basis for an invitation from Vice Premier Zhu Rongji that the delegation return at some future date.<sup>113</sup>

The visit of the second delegation took place in November 1992. Its stated goals included to follow up issues raised during the initial visit and to pursue specific concerns such as judicial processes and investigative procedures; the use of the death penalty; family planning policies; the "personal dossier" and household registration systems; religious freedom; recent academic work in the area of human rights and law; and human rights in Tibet and in Xinjiang.<sup>114</sup> In the event, the Chinese side refused the delegation access to Tibet, but the visit to Xinjiang proceeded.

The second report identified some of the progress which had been made since the delegation's first visit.<sup>115</sup> This included the enhanced appreciation reflected in the first Chinese White Paper on human rights, of "the efforts of the UN in promoting universal respect for human rights and fundamental freedoms;" a greater openness in providing data on prisons, on the practice of torture to extract confessions, and detention; and a number of important legal developments affecting human rights, including an acceptance of the need for more formal laws dealing with detention, the prohibition of the public execution of criminals, and permission of early access to lawyers by detained persons on an experimental basis.<sup>116</sup> The report also noted a greater openness and freedom of religion in Shanghai and a diminution of the importance of the personal dossier (*dang'an*) system.<sup>117</sup>

Some abuses, however, were perceived to have persisted, or to have worsened. These included continuing curbs on freedom of expression, assembly, association, and religion; the broad scope of "counter-revolutionary" crimes; the extensive use of capital punishment; the *laojiao* system of administrative detention; the serious mistreatment of prisoners; and human rights abuses in Xinjiang and Tibet.<sup>118</sup> Most of these are still problems today.

New recommendations in the second report included the need to maintain the bilateral dialogue on Tibet and encourage the Tibetan authorities to send a delegation to visit Australia; to promote contacts

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112. According to a member of the delegation, Chinese officials strongly objected to this section of the report.

113. See also KENT, BETWEEN FREEDOM AND SUBSISTENCE, *supra* note 32, at 217–18.

114. Department of Foreign Affairs and Trade, *Report of the Second Australian Human Rights Delegation to China, 8–20 November 1992*, at 3–4 (10 Mar. 1993).

115. See *id.*

116. *Id.* at 23, 34, 35.

117. See *id.*

118. See *id.*

between Australian and Chinese judges; to provide resources and expertise in training programs to further develop the Chinese procuracy's monitoring and supervisory roles; to encourage further bilateral visits, which would include a visit to one or more of the prisons or detention-interrogation centers; to monitor China's reported transmigration policy to autonomous regions; to revisit Xinjiang and visit other minority areas on future occasions; and to direct any future official development aid for Xinjiang to the national minority populations.<sup>119</sup>

The second report, like the first, was well received in Australia. When measured against its own initial objectives, it was thorough and meticulous. Overall, it was regarded as a more sophisticated and detailed contribution to an understanding of human rights in China than its predecessor. At a delegation debriefing for Australian human rights experts, China's new interest in human rights was generally interpreted positively as a result of the economic surge which allowed it to see itself as a much more significant actor in world politics. As part of this status, its leaders had to learn to deal with human rights. Thus, the delegation reported, although there were still occasional references to human rights being "an internal matter," this was seen as a "perfunctory" issue which was "not stressed."<sup>120</sup> Ideological confusion and a total pragmatism, as well as Beijing's wish to extricate itself from the international situation it had created meant that Chinese were now even considering the notion that the desire not to be tortured or arrested without cause was a universal one. If talked about long enough, such ideas were likely to "lead to something."<sup>121</sup> Some members, however, worried that such theoretical sophistication disguised the lack of practical change at the coal face.

The most important aspect of this early human rights diplomacy was its two-track character. At the same time as it pursued bilateral human rights diplomacy, from 1989 to 1996 Australia cosponsored draft country situation resolutions on China in the UN Human Rights Sub-Commission and UN Human Rights Commission, two of which were adopted. These draft resolutions, whether or not subsequently adopted, had the important function of what John Braithwaite has called "reintegrative shaming," placing pressure on China and other defaulting states to bring their domestic human rights conditions into conformity with international human rights standards, yet crediting them with reform efforts.<sup>122</sup> However, because the human rights delegations had been conceived as joint enterprises, Australia

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119. See *id.* at 84–86.

120. Debriefing by delegation to original briefing panel, Parliament House, Canberra, 15 Dec. 1992. (On file with author.)

121. *Id.*

122. JOHN BRAITWAITE, *CRIME, SHAME AND REINTEGRATION* (1989).

was ultimately dependent on Chinese goodwill to continue its monitoring role, and therefore, indirectly, on the pressures exerted by MFN. For this reason, as China became increasingly immune to US pressure from 1993, Australia proceeded to demote human rights in its overall political relationship with China, rather than regarding them as integral to its own strategic and even commercial relations.

Thus, from early 1993, although continuing to invite a return Chinese delegation to monitor Australia's human rights, Australia made a subtle shift back to its pre-1989 practice of "quiet diplomacy." By September 1993, it was even urging the US to adopt similar tactics to those employed by middle powers in their human rights policies—to delink economic sanctions and human rights and to operate through multilateral institutions and quiet diplomacy.<sup>123</sup> Australia's advocacy of this delinkage, consistent with the values of a middle power, was believed to have had an impact on the eventual fate of MFN.<sup>124</sup>

### C. Passive Phase: Quiet Diplomacy and Human Rights Dialogue

Although reverting to "quiet diplomacy" from early 1993, Australia continued to support multilateral pressure on China until 1997. By that time, as we have seen, China's increasing international status within the international community had emboldened it to step up its political pressure on the UN Human Rights Commission by a mixture of threats and inducements of bilateral dialogue offered to potential opponents of the China resolution. Australia, along with a number of European states, succumbed to these tactics.<sup>125</sup> In this way, China successfully bilateralized a multilateral process, undermining the ability of the UN Human Rights Commission and Sub-Commission to monitor its human rights effectively. Australia's excuse that it had to withdraw its annual co-sponsorship of the resolution on the grounds of the alleged ineffectiveness of the exercise had a hollow ring, particularly in view of its subsequent co-sponsorship of a resolution on Burma in the same forum.

The Australia-China human rights dialogue, which began in Beijing in August 1997, was not as transparent as the human rights delegations of the

123. See Kent, *supra* note 99, at 373.

124. See Henry S. Albinski, *Responding to Asia-Pacific Human Rights Issues: Implications for Australian-American Relations*, 50 AUSTRALIAN J. INT'L AFF. 43–58 (1996).

125. For a detailed analysis of European, Brazilian, and Australian dialogue delegations, see HUMAN RIGHTS IN CHINA, FROM PRINCIPLE TO PRAGMATISM: CAN "DIALOGUE" IMPROVE CHINA'S HUMAN RIGHTS SITUATION? (1998). See also KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 2; Ann Kent, *Form over Substance: The Australia-China Bilateral Human Rights Dialogue*, CHINA RTS. FORUM 30–33, 46 (Sept. 1999).

early 1990s, nor did it publish a report.<sup>126</sup> It was neither representative nor accountable, being conducted entirely in camera by government officials, who included only one China specialist. It produced no public recommendations and was conducted with little or no interaction with China's European dialogue partners. In response to domestic criticism, efforts were made in subsequent dialogues to include more parliamentary representation: but the most that participants have claimed privately was that their dialogue was held at "a more senior level" than that of the Europeans, that it might presage some breakthrough on *laojiao* (re-education through labor) and that it had the advantage of establishing continuity.<sup>127</sup> One official even conceded that "it is difficult to identify and hold up any particular trophies, particular achievements that are a direct consequence of our human rights dialogue with China."<sup>128</sup>

Although China sent reciprocal human rights dialogue delegations to Australia in 1998, and again in 2000, their achievements were more symbolic than real. In 1998, a meeting of the Chinese delegates with NGOs and a few human rights scholars was extremely short and the latter were heavily constrained in the questions they were allowed to ask. On the second occasion, no NGO meeting was held, and the opportunity was used by the Chinese delegation to discuss other political issues, such as Australia's support for the Theatre Missile Defence System, in forums outside the dialogue.<sup>129</sup> On that occasion, the official dialogue lasted only one day. Nevertheless, on this second visit, the Chinese delegation was more relaxed, and, in a meeting with members of the Joint Standing Committee on Foreign Affairs, Defence and Trade, for the first time asked questions about Australia's human rights, in particular about the plight of Aboriginals, the Native Title Act,<sup>130</sup> and the representation of women in the workforce. It is understood that a Chinese official also requested further information on Australia's controversial refutation of a UN Committee on the Elimination of Racial Discrimination (CERD) report on Australia's treatment of indigenous Australians. This suggested that China was keeping a close eye on any instance of Australia's failure to respect the authority of

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126. The only publication issuing from it was a brief report, containing an itinerary and a short list of issues raised, by the first parliamentarian to take part in the dialogue, Peter Nugent, who was obliged by parliamentary rules to issue a personal report. *See Report of the Parliamentary Representative on the Australian Delegation to the Third Round Australia-China Bilateral Human Rights Dialogue, Beijing, 14–21 August 1999* (18 Oct. 1999).

127. Although author cannot reveal sources, she can verify accuracy of information.

128. Bob Burton, *Politics—China, Australia Tussle over Rights, Missile System*, REUTERS CHINA NEWS 17 Aug. 2000.

129. See Interview with human rights expert, in Canberra (7 Sept. 2000).

130. See The Native Title Act, 1993, No. 110 of 1993 (Austl.).

UN treaty committees, and raised the disquieting possibility that, in the future, Australia could constitute not just a positive role model for China, but a negative one.

By contrast, the Human Rights Technical Assistance Program that Australia, like the United States and Europe, offered in conjunction with the dialogue was more meaningful. Government pledges of \$A300,000 from 1997 to 1998 and \$A800,000 from 1998 to 1999 promoted human rights exchanges.<sup>131</sup> Between 1997 and 2000, these exchanges comprised seventeen main activities, with six more planned for 2000–2001. They included a high-level delegation from the Chinese Ministry of Justice and the Supreme People's Procuracy to study the Australian criminal justice system, looking at specific issues such as police investigation, prison administration, legal aid, structures of decision making, anticorruption bodies, and the supervision of activities of prison workers.<sup>132</sup> There were visits by Australian judges to the National Judges' College and a grant to a Chinese student to complete a Master of Arts (MA) in jurisprudence/human rights. In 2000, a Chinese delegation visited Australia for a two week training course on human rights reporting. Other activities included a visit by judges to observe the Australian judicial process, a domestic violence workshop, a Ministry of Justice Correctional Administration Reform Visit, a minority rights seminar, training in rules of evidence, and a joint seminar on civil society.<sup>133</sup> Many of these worthwhile achievements, however, had been recommended by the 1991–1992 human rights delegations and were not an outcome of the dialogue process per se. Moreover, the details of the technical assistance program had already been worked out before the 2000 Chinese dialogue delegation arrived in Canberra. It was, therefore, quite possible for Australia to maintain this program (now renamed "Human Rights Technical Cooperation Program"), without having to persist with the dialogue.

In sum, the 1997 to 2000 human rights dialogue could scarcely match the achievements of the 1991 to 1992 human rights delegations. By 1997,

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131. Scott Hillis, *Australia Pledges Human Rights Aid to China*, REUTERS CHINA NEWS, 14 Aug. 1997; Dept. of Foreign Affairs and Trade letter, 15 July 1999 (on file with author).

132. They had a full schedule, organized by the Attorney General's Department, involving an introduction to Australia's Constitutional framework and human rights protection, including a discussion of the separation of powers; talks with the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade; with the Senate Regulation and Ordinances Committee; with the Joint Standing Committee on Treaties; the Department of the Parliamentary Library; with the Institute of Criminology; and the Office of the Status of Women. Lectures included discussions of the relationship between international human rights law and domestic law; and an introduction to reporting to UN Committees. See *Human Rights Technical Assistance Program*, Attorney General's Department, 13–25 May 2000.

133. For details of activities, see Australian Dept. Of Foreign Affairs & Trade, Australia-China Human Rights Technical Cooperation Program, <http://www.dfat.gov.au/hr/achrd/hhta.html>.

in contrast to its earlier leadership, Australia had backed away from human rights diplomacy and from multilateral mechanisms. The dialogue laid down no specific benchmarks of achievement, nor did it involve many China experts. It did not make policy recommendations, nor was it transparent or accountable in its operations. In comparison with the United States, which continued to hold regular talks on human rights through its embassy in Beijing after May 1994, and which maintained its public accountability through regular human rights reports, Australia emphasized the style of its dialogue at the expense of content and outcome. While the money and effort directed to technical assistance were useful, the dialogue itself made no discernible progress, as occasional official remarks made clear.<sup>134</sup> Without establishing evaluative benchmarks of China's performance and without imposing some form of public pressure through the issuing of a public report, the dialogue ran the risk of legitimizing, rather than ameliorating, China's current human rights conditions.<sup>135</sup> Most importantly, it narrowed Australia's tactical options, as it did those of European dialogue partners, because of China's insistence that continuing bilateral dialogue was conditional upon states refraining from cosponsoring a China resolution in the UN Human Rights Commission.

Another unanticipated obstacle to effective monitoring was the gradual erosion of Australia's status as a positive human rights model for China from 1997. A new, conservative government in Canberra, acutely sensitive to domestic rural discontent, widespread disenchantment with globalization, and high rates of domestic unemployment, adopted an increasingly insular attitude to the global community, at least with respect to human rights. In questioning the authority of such multilateral bodies as the UN Committee on the Elimination of Racial Discrimination (CERD) and the UN Human Rights Committee to query its policy toward Australian Aboriginals and refugees, and in throwing down the gauntlet to the entire human rights treaty system, the Liberal Coalition government was behaving in an isolationist, anti-multilateralist manner.<sup>136</sup> Perhaps it was not coincidental that its most petulant outburst occurred only days after the year 2000 Chinese human rights dialogue in Canberra had ended. In announcing its

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134. Hillis, *supra* note 131.

135. See also an excellent article, Bruce Gilley, *Real Aid, No Band-Aids: Promoting Democracy in China*, *ASIAN WALL ST. J.*, 4 Mar. 2001, at 4.

136. For government's response to criticisms by the UN Committee on the Elimination of Racial Discrimination and the UN Committee on Human Rights, see Geoffrey Barker, *UN-friendly*, *AUSTLN. FIN. REV.*, 17 July 2000, at 30. For UN criticisms of the Australian government's policy towards Aboriginals and refugees, see *Summary record of the 1856th meeting: Australia*, U.N. Doc. CCPR/C/SR.1856 (2000); *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, U.N. Doc. CERD/C/304/Add.101 (2000).

refusal to sign the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which Australia had helped to draft, and insisting that it would not allow monitoring by UN bodies on Australian soil, the Liberal Coalition government showed less compliance with international monitoring than China itself.<sup>137</sup> Australia thus jettisoned the only reliable weapons in its monitoring armory—its strong human rights advocacy and support for multilateralism.

#### D. Assessment

Outwardly, at least until 1997, Australian monitoring techniques were those of a middle power, emphasizing moral persuasion rather than economic sanctions, and characterized by bipartisanship, consistency, and sensitivity to economic and social rights. Bilateral pressures were regarded as a supplement to, rather than a replacement for, multilateral mechanisms. In its actual practice, however, Australia diverged in a number of ways both from the middle power model and its own declared goals. Its monitoring demonstrated a nonconfrontational style of discourse and supported reciprocity, as well as combining principle and pragmatism successfully in the sanctions and active monitoring phase. However, in the passive phase of monitoring from 1993, it downplayed principle and showed little concern for economic, social, and developmental rights, chiefly because of the belief in the trickle down effects of economic growth.

Such inconsistency in the practice of Australia's own principles was mirrored in respect of the other standards enumerated by Rhoda Howard. In terms of vertical consistency over time, Australia's requirements and expectations of China as the target state changed; and in terms of horizontal consistency, that is, its treatment of all other states, Australia's human rights policies toward Burma, China, and Indonesia were quite different.<sup>138</sup> In the case of Burma, for instance, the Australian government pursued until 1999 a "benchmark diplomacy" which allocated rewards according to the degree of Burma's compliance, thus invoking the notion of accountability lacking in the monitoring of China.

Apart from lack of monitoring consistency, three other major problems manifested themselves. First, as we have seen, was the issue of accountability. In the US case, the need to be continually accountable forced it to

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137. China's response to the human rights treaty system has been more cooperative. See KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 2.

138. For a comparative analysis, see Albinski, *supra* note 124; see also Ann Kent, *The Limits of Ethics in International Politics: The International Human Rights Regime*, 16 *ASIAN STUD. REV.* 26–35 (1992).

operate so openly that its monitoring mechanism came to represent an unacceptable threat to Chinese sovereignty and provoked a hostile backlash. In Australia's case, the problem was the reverse. The lack of accountability, both in relation to the Australian public and to Chinese authorities, meant there was no way of testing the effectiveness of monitoring, because no evaluative benchmarks were established and little public information disseminated. Initially, the 1991–1992 human rights delegations demonstrated some public accountability: having visited China at public expense, they were required to present a report on their findings. However, as in the case of other governmental reports, the decision as to which of their recommendations should be adopted lay with the Australian government itself. The weakness of this accountability mechanism was suggested by the repetition in the second delegation's report of many of the recommendations which had been in the first. Of these, only the recommendations on assistance in matters of family planning, and the continuation of governmental overtures to press for follow-up delegations, either to China, or for a reciprocal visit to Canberra, appear to have been pursued. As of mid 1995, these had not borne fruit. Nor was a proposal for legal exchanges between Australia and China, presaged in a Memorandum of Understanding between the Attorney-General's Department and China's Justice Department, followed up, even though, once again, China undertook many such visits and exchanges with the United States.<sup>139</sup> One reason for this failure was that the Australian government was not prepared at the time to make funds available for such visits, while in the US case, the Ford Foundation, the Asia Foundation, and the International Republican Institute gave generous support.<sup>140</sup>

During the passive post 1997 phase of human rights dialogue, however, even this minimal degree of accountability was lacking. Such evasion of political responsibility highlighted a second problem, Australia's lack of effective material levers. An absence of bargaining power meant that once again, unlike the case of MFN, there was no way Australia could measure China's practical compliance, even if it wished. There was no intermittent correlation between China's actions and an applied stimulus. In the absence of measurable indicators, compliance was necessarily symbolic rather than materially based. The greatest effect of the active phase of the human rights delegations was seen to be the modification of China's strong sovereignty claims. The delegations' reports, parliamentary human rights reports, and interviews with some of its members, cited the symbolic importance of

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139. See Telephone interview with government expert, in Canberra (27 June 1995).

140. For details of their support see US Policy Options, *supra* note 68, at 77–88; interview with Sydney Jones, Human Rights Watch/Asia, in Canberra (21 July 1995).

China's invitation of a human rights delegation to visit and monitor its human rights conditions.<sup>141</sup> However, the crucial obstacle to even symbolic compliance was that, for China, precedent was not regarded as a guarantee of continuing concessions. Having conceded the right of the international community to monitor its human rights at a politically opportune moment, China had no scruples about returning to its noninterference argument at a later date when such concessions no longer suited it politically. Whereas, in Australia's terms, China's invitation to the human rights delegations to monitor its human rights had effected a modification of China's strict legal interpretation of sovereignty, in China's view it had not.

The third problem was equally intractable. Australia's physical position in the Asia-Pacific region meant that, unlike other middle and "like-minded" powers, its human rights policies in a region lacking human rights awareness were closely intertwined with geopolitics. Principle and pragmatism could only be reconciled while Australia maintained the fiction of the trickle down effect of economic reform on human rights. When that fiction was exploded by the deepening social unrest in China, and when China's leaders adopted a hardline position on human rights, particularly in early 1997, Australian policy makers, who had been subordinating principle to pragmatism since 1993, did not hesitate to move from multilateral monitoring to quiet, bilateral dialogue. Australia's consciousness of its geostrategic fragility led it to trade off other national interests against human rights, just as the US had done. In addition, Australia was susceptible to the same commercial considerations that modified US and European policy towards China. The essential difference between the two states was that, unlike Australia, the US continued to support multilateral initiatives. As early as the middle of 1993, a lack of accountability and preponderant geostrategic and commercial interests had produced a lack of transparency in Australia's monitoring of China's human rights which gave rise to the suspicion that form rather than substance, and pragmatism rather than principle, were now its defining priorities.

#### IV. CONCLUSION

The quality of US and Australian monitoring of China largely conforms to existing theoretical paradigms.<sup>142</sup> Political culture, size, and strategic status

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141. See Minister of Foreign Affairs and Trade, *supra* note 102; Minister of Foreign Affairs and Trade, *supra* note 114.

142. See *supra* notes 6–7.

have all contributed to differences in the goals, instruments, and outcomes of their monitoring. Until 1994, the US used more coercive instruments and was able to establish China's accountability in specific areas such as the release and emigration of political prisoners and an agreement not to export to the US goods made with prison labor. Until 1993, Australia, in keeping with its middle power status, relied more on its role as a human rights model to conduct *in situ* investigations into conditions in China, utilizing the ensuing published reports to place pressure on China. However, because of its more diffuse goals, and because of the lack of ultimate accountability of its instruments, Australian monitoring did not produce specific outcomes. Subsequently, as China's power and resistance to pressure increased, both the US and Australia modified their approaches, maintaining dialogue, but eschewing the threat of sanctions. The two states differed, however, in their continuing commitment to two-track diplomacy. While the United States strategic status enabled it, at least until 2002, to continue sponsoring the China resolution in the UN Human Rights Commission, the price of Australia's dialogue, and of its lack of bargaining power, was an end to its co-sponsorship of multilateral resolutions. Moreover, in the late 1990s, Australia's own status as a role model weakened. This shift suggests the need to modify the over-optimistic picture of the normative consistency of middle power democracies drawn in the theoretical models.

On the other hand, whatever the differences in goals, mechanisms and short-term outcomes, both the US and Australia failed to achieve their ultimate aim—China's internalization of basic human rights norms. The reasons lay in the very qualities that distinguish bilateral monitoring from multilateral monitoring. Although, as a result of pressures from China and other developing states, the UN Human Rights Commission and Human Rights Sub-Commission lost their effective monitoring role, consistency in monitoring standards, non-selectivity, and authoritative status gave UN human rights bodies, whether treaty bodies, Working Groups, or Special Rapporteurs, the edge. They could point to numerous indications that China had internalized norms in response to its participation in multilateral human rights activity. Not the least of these were its accession to numerous international human rights instruments, in particular its ratification of the UN Covenant on Economic, Social and Cultural Rights in 2001, its cooperation with the reporting procedures of UN human rights treaty committees, its November 2000 Memorandum of Understanding on technical human rights cooperation with the UN High Commissioner for Human Rights, Mary Robinson, its invitation to some Special Rapporteurs and Working Groups to visit China for inspections *in situ*, and its gradual incorporation of human rights norms into domestic Chinese legislation, a development which occurred only after the cessation of active bilateral

monitoring by the US and other states, and before the commencement of bilateral dialogue.<sup>143</sup>

By contrast, because bilateral, or unilateral, monitoring is not based on any mutually agreed standard, and because it lacks the collective, consensual, historical, and institutionally based authority of multilateral mechanisms, its impact on China depended either on the significance of bilateral bargaining chips or, in the case of middle powers, on the quality of the role model. In the US case, bargaining chips in the shape of MFN produced specific Chinese concessions: but the instrumental nature of China's compliance was reflected in the close correlation between those concessions, such as the release of political prisoners, and the key dates of MFN decision making. In Australia's case, its readiness to establish effective benchmarks for monitoring China's human rights, and its quality as a role model deteriorated over time. In this way, both large and middle power monitoring proved fallible. Ultimately, the effectiveness of bilateral monitoring founded on the mismatch between China's authoritarian political system, which lacked popular accountability, and the democratic political systems of the monitoring powers, which depended on such accountability. China was able to trade bargaining chips on the basis of its national interests, and comparative power balance, rather than according to the needs of its citizens, in the confident knowledge that it held the trump card. That card was the ultimate dependence of both the US and Australia on China to produce human rights outcomes for the satisfaction of their domestic constituencies.

Thus, the lack of consistent and authoritative standards, the problems posed by democratic accountability, or lack of it, the significance of power, and the enduring obstacles presented by sovereignty, bedeviled both large and middle power monitoring. The evidence is clear: pitting state against state cannot deliver the internalization of norms by a monitored state, particularly if it is powerful. Human rights dialogue and technical assistance, while useful as accessories to multilateral monitoring mechanisms, cannot replace them. Unless a critical mass of consensual state opinion, expressed through United Nations or regional human rights bodies and forums, can be arrayed against an offending state, with the built in socializing process that implies, normative adjustment is unlikely to occur. At most, bilateral monitoring achieves temporary, superficial, and instrumental change and, at worst, as has been the case with China, erodes the power, influence, and efficacy of the most effective monitoring agencies—multilateral human rights institutions.

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143. See KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 2, at 194–215; Highlights from the Noon Briefing of Fred Eckhard, Spokesman of the UN Secretary General, New York, 28 Mar. 2001 (<http://www.un.org/News/press/docs/2001/hilities.htm>). He announced that on 27 March, China became the 148th country to ratify the ICESCR.