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# Law and Legitimacy in Sino-U.S. Relations

## **Cover Page Footnote**

International Law; Commercial Law; Law

## PERSPECTIVE

### Law and Legitimacy in Sino-U.S. Relations

*W. Gary Vause\**

#### I. Introduction

One of the few winners emerging from the Persian Gulf conflict is the ruling communist elite in the People's Republic of China (China). The meeting between President Bush and China's Foreign Minister Qian Qichen in Washington, D.C., on November 30, 1990, was the highest official contact between China and the United States since June 1989, when hundreds of civilians were killed in Beijing during the Tiananmen massacre—the Chinese Army's violent crack-down on democracy demonstrators. Although short on substance, the meeting between Bush and Qian signalled the victory of the Chinese regime's strategy of waiting out world criticism of the Tiananmen massacre.

The day before Qian's meeting with the President, China abstained from the United Nations Security Council's critical vote that authorized the use of force to expel Iraq from Kuwait. By its abstention, China allowed the United States to achieve its hard-won objective of marshalling world opinion against Iraqi aggression, while preserving China's own relationship with the Third World countries, including Iraq, which has been a major customer for Chinese weapons. Soon thereafter, as the world's attention was riveted on the Gulf War, China began a blitz of closed-door trials of prisoners who had been under arrest or detention for as long as twenty months for leading the democracy demonstrations of 1989.

The Gulf crisis accelerated the ending of China's isolation, a process that already was underway by the time Saddam Hussein's forces invaded Kuwait in August 1990. This essay reviews those events that led to China's quiet comeback from Western sanctions, examines the relationship of law and economic reform, and suggests an agenda for the human rights issue in future Sino-U.S. relations.

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## II. The Changing Hues of Sino-U.S. Relations

It was prophetic that the Sino-U.S. economic rapprochement of the 1970s could not gain momentum until the passing of China's supreme leader, Mao Zedong. The United States post-war policy of containment of communism, coupled with the isolationist policies of Mao Zedong, ensured that there would be virtually no economic ties between the two nations throughout Mao's lifetime. Beginning with the Nixon-Kissinger initiatives towards China in 1971-1972, however, China later became the major player in the U.S. geostrategic foreign policy goals of isolating the Soviet Union from potentially powerful allies in East Asia and distracting it from the United States protectorate in Western Europe. Additionally, U.S. policymakers hoped that, through exposure to the West, a process of domestic political liberalization would accompany the economic reforms in China.

To serve those goals, the United States became a willing partner with China's paramount leader, Deng Xiaoping, as he embarked upon a modernization program in the late 1970s after the death of Mao Zedong. China's remarkable economic successes that followed, particularly those achieved during the early years of Deng's reforms, provided tangible proof that a more decentralized, incentive-based system, working in close partnership with the capitalist West, could dramatically out-perform Stalinist/Maoist-style socialism. During the decade that began in 1978, China experienced a pronounced shift from the Maoist system of moral incentives to a system that, although not without a moralist component, emphasized material incentives.<sup>1</sup>

Those reforms were not limited to domestic economic issues. In the arena of foreign relations, China quickly emerged from its position of xenophobic isolation with a new openness to the outside world, and particularly to the West, which possessed the capital, technology, and "know-how" so necessary to China's modernization. Although democracy as practiced in the United States was given only the faintest of lip service, there nevertheless were signs that the Deng leadership was moving toward political liberalization. Stressing economic and geostrategic successes in the new Sino-U.S. relationship, the United States deemphasized its traditional policy goals on human rights throughout most of the 1980s in its relations with China.

By the mid-1980s, however, the economic boom in China brought by the new reforms had begun to slow down, and Western investors and trading partners were beginning to confront the frustrations of doing business in and with China. The romance between

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<sup>1</sup> For a comparative study of the Chinese economy under Mao Zedong and Deng Xiaoping, see J. PRYBYLA, *MARKET AND PLAN UNDER SOCIALISM: THE BIRD IN THE CAGE* (1987).

Western businesses and China became increasingly troubled at a time when the divisiveness and frustrations among the Chinese people over the slow pace of political reforms were growing. To make matters worse, Congress and the executive branch had become locked in a continuing conflict by 1987 over alleged human rights abuses in China in general and Tibet in particular.

In fairness to the economic reformers in China, many of the Western investors were unrealistic in their expectations that China would provide a market of one billion consumers for their products. Chronically short of hard currency, and with an extremely low per capita income, China could not offer a viable market for most consumer goods. Even if external export markets existed for the products of Chinese-Western joint venture enterprises, manufacturing in China was fraught with the difficulties commonly associated with centrally controlled socialist regimes. Major Western investors, such as the American Motors Corporation (now Chrysler) with its investment in Beijing Jeep Company, Ltd., almost terminated their China operations because of problems with unskilled and unproductive labor, low quality of Chinese goods, high customs duties on imported components, an inadequate infrastructure, a rigid and meddlesome bureaucracy, inability to repatriate capital and profits, corruption in government, and a host of other related problems.<sup>2</sup> Moreover, China's legal reforms proved to be inadequate, and Chinese bureaucrats appeared to have trouble assimilating Western notions of law. Many foreign investors were complaining openly and bitterly during 1986 and 1987, and some threatened to withdraw their investments from China.

On the domestic front, China was experiencing significant economic difficulties, and the reforms were resulting in costly political consequences. Beijing was unable to satisfactorily address its wage and price controls dilemma, and was faced with rising inflation and growing worker unrest. Once nonexistent or at least concealable, unemployment was acknowledged as a growing problem. Although once virtually unknown in China, corruption was running rampant, and became particularly noteworthy when practiced by the close friends and family members of the nation's highest leaders. Credit was severely restricted, and by 1989 China already had entered a period of economic retrenchment as the reform efforts were slowing down. On the political front, an internal leadership struggle was heating up between the progressive reformists and the old-guard conservatives. With their heightened exposure to the outside world,

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<sup>2</sup> See J. MANN, *BEIJING JEEP: THE SHORT, UNHAPPY ROMANCE OF AMERICAN BUSINESS IN CHINA* (1989); Vause, *China's Developing Auto Industry: An Opportunity for United States Investment—And Challenge for China's New Foreign Investment Laws*, 10 U. PA. J. INT'L BUS. L. 195 (1988).

China's university students and intellectuals grew increasingly restless with their lack of political freedoms.

The recurring waves of democracy protests that had challenged the conservative leadership peaked in Beijing's Tiananmen Square demonstrations in the spring of 1989. With the benefit of unprecedented media coverage, the world watched the entire seven weeks of confrontation as a popular grass-roots dissent movement challenged China's leadership. The Party-dominated government, under the leadership of Deng Xiaoping and Li Peng, eventually responded with what many people viewed as lawless abandon. Civilian demonstrators were dispersed by a brutal attack launched by units of China's 27th Army on June 3-4, 1989. A nationwide crackdown on dissenters immediately followed. In view of the progress made in China through legal reforms in the preceding decade, the new cycle of repression and retrenchment that began in 1989 was particularly disconcerting.

### III. Forging a "China Policy"—The Congressional-Presidential Debate

Long before the Tiananmen massacre, the Republican Presidents and Democrat-controlled Congress already had been in a heightened state of conflict over U.S. foreign policy toward China since the "Tibet Question" focused attention on Chinese human rights abuses in 1987. Tibet was made an autonomous region after Chinese troops took it by force in 1950 under the political claim that China had an historical right to sovereignty over the region. The Dalai Lama, Tibet's God-King in exile, has argued for many years that China has no right to dominate Tibet. In 1987, he received substantial support for his position from the United States Congress.

On June 18, 1987, in the context of debates over amendments to the 1988-1989 appropriations bill, House Bill 1777, members of the United States House of Representatives charged China with human rights abuses throughout China and particularly in Tibet.<sup>3</sup> Further, the Dalai Lama was commended for his efforts to secure peace and religious freedom in Tibet. The subsequent appearance of the Dalai Lama before the Congressional Human Rights Caucus,<sup>4</sup> followed by a cycle of Tibetan riots and Chinese repression in Tibet's holy capital city of Lhasa, fueled Congressional-Presidential conflicts over U.S. foreign policy towards China.<sup>5</sup>

The debate over the Tibet Question had not yet been resolved

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<sup>3</sup> 133 CONG. REC. H5217-30 (daily ed. June 18, 1987) (statements of Reps. Mica and Rose).

<sup>4</sup> See Roy, *Human Rights Situation of the Tibetan People*, DEP'T ST. BULL., Dec. 1987, at 50.

<sup>5</sup> See Vause, *Tibet to Tiananmen: Chinese Human Rights and United States Foreign Policy*, 42 VAND. L. REV. 1575 (1989).

when the Chinese Army carried out the Tiananmen massacre on July 3-4, 1989. Threatening the enormous gains in Sino-U.S. relations, the Tiananmen massacre had immediate ramifications for China's foreign relations. The fashioning of U.S. policy towards China in the wake of the massacre became the new focus for the Presidential-Congressional policy conflict. President Bush took the initiative by immediately joining other Western nations in imposing sanctions. However, the President's sanctions focused on military relations and high technology exports rather than upon economic ties. United States military sales to China were suspended, visits between U.S. and Chinese military leaders were suspended, and sympathetic review of requests by Chinese students to stay in the United States was promised. Subsequent sanctions imposed on June 30, 1989, included suspension of high-level government exchanges and threats to block new loans from international lending institutions.<sup>6</sup> Dissatisfied with President Bush's measured approach, members of Congress introduced several different amendments to the Foreign Aid Authorization Bill for fiscal years 1990 and 1991 that would severely curtail U.S. exports of computers, weapons, and satellites, and financing to China.<sup>7</sup>

The major industrial nations suspended official and multilateral agency credit to China as their main avenue of protest. Ten billion dollars in aid projects from the World Bank and Japan were frozen.<sup>8</sup> Under pressure from the United States and Europe, the World Bank froze loans to China totaling 780.2 million dollars (even though the loans already had been slated for approval by the end of June).<sup>9</sup>

In an attempt to limit "subversive" Western influences, Beijing announced that fewer Chinese students would be permitted to study in the United States. Although official announcements following the Tiananmen massacre proclaimed adherence to economic reform objectives, it was clear by the fall of 1989 that China was locked into a period of economic retrenchment and reversal of many of the earlier reform efforts. Among key programs aborted were decontrol of prices, sales of state-owned enterprises, strengthening of the private enterprise sector, and encouragement of rural enterprises. By early November, 1989, Beijing had adopted a new economic program that assured increased political and economic centralization.<sup>10</sup> A sweeping national crackdown on the growing private enterprise sector oc-

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<sup>6</sup> Presidential News Conference, 25 WEEKLY COMP. PRES. DOC. 839 (June 5, 1989); *Bush Imposes More Sanctions Against Beijing*, Asian Wall St. J., June 21, 1989, at 1, col. 6.

<sup>7</sup> International Cooperation Act of 1989, H.R. 2655, 101st Cong., 1st Sess.; Friedman, *Congress, Angry at China, Moves to Impose Sanctions*, N.Y. Times, June 23, 1989, at A5, col. 1.

<sup>8</sup> *Put on Hold*, FAR E. ECON. REV., July 6, 1989, at 69.

<sup>9</sup> *Id.*

<sup>10</sup> Leung, *Beijing Maps Radical Economic Program*, Asian Wall St. J., Nov. 28, 1989, at 1, col. 3.

curred in the late fall of 1989.<sup>11</sup>

By early November 1989, the United States Congress had approved a package of sanctions against China that were designed to limit economic support, including the suspension of trade assistance and the elimination of insurance for U.S. companies doing business in China. The sanctions also froze U.S. exports of satellites, controlled munitions (such as helicopters), and certain nuclear material and components. China reacted to the sanctions by expressing "utmost indignation."<sup>12</sup>

Conciliatory overtures were made to China during the "unofficial" visits of former President Richard Nixon and former Secretary of State Henry Kissinger.<sup>13</sup> In early December, 1989, President Bush sent his National Security Advisor, Brent Scowcroft, to China in an effort to improve relations with Beijing. Shortly thereafter, it was discovered that the President earlier had sent Scowcroft on a similar mission to Beijing in July in violation of the President's own ban on high-level official visits between the two countries. This only intensified the tensions between Congress and the White House. Later, in December 1989, President Bush approved the sale of three American-made satellites to be launched on Chinese rockets, and waived restrictions on financing for China by the U.S. Export-Import Bank.<sup>14</sup> No additional economic sanctions were imposed by the President.

In an apparent effort to appease the U.S. Congress and other foreign critics, China lifted martial law in early January 1990,<sup>15</sup> and thereafter announced that it was freeing 573 people who had been imprisoned for their involvement in the democracy movement.<sup>16</sup> Though President Bush called the lifting of martial law in China a "very sound step," similar enthusiasm could not be found in Congress.<sup>17</sup>

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<sup>11</sup> WuDunn, *China Cracks Down on Private Work*, N.Y. Times, Nov. 8, 1989, at A3, col. 4.

<sup>12</sup> WuDunn, *Chinairate at Congress' Sanctions*, N.Y. Times, Nov. 20, 1989, at A6, col. 3. See Foreign Relations Act, Fiscal Years 1990 & 1991, H.R. 1487, 101st Cong., 1st Sess. § 501 (1989) (limits grants made to The Asia Foundation for the benefit of Polynesia, Micronesia and Melanesia).

<sup>13</sup> Deng responded to Nixon's overtures by saying that "[t]he U.S. was involved too deeply in the turmoil and the counterrevolutionary rebellion that occurred in Beijing . . . . China was the real victim and it is unjust to reprove China for it. . . . It is up to the U.S. to take the initiative." Kristof, *Better Relations Depend on U.S., Deng Tells Nixon*, N.Y. Times, Nov. 1, 1989, at A8, col. 3.

<sup>14</sup> Seib & Greenberger, *Bush Clears Satellites for China Launch*, Asian Wall St. J., Dec. 21, 1989, at 1, col. 3.

<sup>15</sup> Ignatius, *End of Beijing Martial Law is Called Cosmetic by Many*, Wall St. J., Jan. 11, 1990, at A10, col. 1.

<sup>16</sup> Kristof, *China Reports Release of 573 Held in Revolt*, N.Y. Times, Jan. 19, 1990, at A5, col. 1. China announced the release of additional prisoners in May 1990.

<sup>17</sup> Pear, *Bush Hails a Thaw in China: Congress is Skeptical*, N.Y. Times, Jan. 12, 1990, at A1, col. 3.



President Bush signed the State Department authorization bill that contained congressional sanctions language in February 1990, and the State Department subsequently released its annual report on human rights, containing assessments that were highly critical of China.<sup>18</sup>

The status of Chinese visitors in the United States proved to be a major point of controversy between Congress and the President during late 1989 through spring 1990. Dissatisfied with the President's earlier assurances of sympathetic treatment for the students, Congress passed the Emergency Chinese Adjustments of Status Facilitation Act, guaranteeing Chinese students and certain other Chinese visitors the right to remain in the United States.<sup>19</sup> The President vetoed the Act, stating that he did not wish the extension of visa rights to be embedded in statute because such action would upset the U.S.-China relationship and impair his ability to manage foreign relations.<sup>20</sup> Congress subsequently failed in its attempt to override the President's veto.<sup>21</sup> On April 11, 1990, the President followed through on his promise to provide Chinese in the United States with similar visa extension rights by promulgating Executive Order 12,711.<sup>22</sup>

The timing for the President's consideration of a waiver of provisions under the Jackson-Vanik Amendment of the U.S. Trade Act proved embarrassing; the 1990 waiver became due for action by June 3, 1990—coincidentally the eve of the first anniversary of the Tiananmen massacre. Nevertheless, the President announced on May 24th that the waiver would be granted, and Congress was not successful in attempts to block the resulting extension of most-favored-nation trade treatment to China. Sino-U.S. relations improved markedly that same month when the Chinese leadership permitted dissident Fang Lizhi, who had taken refuge in the American Embassy a year earlier, to leave the country.

The U.S. allies who joined in sanctions of China began to renew economic ties with Beijing within a year following the massacre, increasingly isolating the United States in its persistent application of sanctions against the Beijing regime. Japan reopened a multibillion-

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<sup>18</sup> U.S. Dep't of State, Country Reports on Human Rights Practices for 1989, at 802-25 (1990).

<sup>19</sup> H.R. 2712, 101st Cong., 1st Sess. (1989).

<sup>20</sup> Memorandum of Disapproval for the Emergency Chinese Immigration Act of 1989, WEEKLY COMP. PRES. DOC. 1853 (Dec. 4, 1989). See also Statement on the Disapproval of the Emergency Chinese Immigration Relief Act of 1989, WEEKLY COMP. PRES. DOC. 1854 (Dec. 4, 1989).

<sup>21</sup> The House voted to override the veto, but the Senate failed to do so. 136 CONG. REC. H44 (daily ed. Jan. 24, 1990); 136 CONG. REC. S335 (daily ed. Jan. 25, 1990).

<sup>22</sup> Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (1990). This executive order defers the "enforced departure" of all nationals of the People's Republic of China until January 1, 1994. *Id.*

dollar lending program for China after the summit meeting of major industrialized nations in June 1990. In October, the European Community lifted economic sanctions against China. By November, two large loans to China had been approved by international commercial banks, while the U.S. delegation to the Asian Development Bank abstained from voting on a major agricultural loan to China supported by Europe, Japan, and other Asian countries. Soon thereafter, the World Bank approved a major technical assistance loan to China.

China has taken a number of successful diplomatic initiatives to further enhance its warming relationship with the West, and with the United States in particular. A notable example is the change of position taken by China in 1990 to support a settlement of the Cambodian crisis. China's prominence on the world stage was further enhanced that year by its normalization of relations with Indonesia and Saudi Arabia. China's tacit support of U.S. efforts in the United Nations to isolate Saddam Hussein and the meeting between President Bush and China's Foreign Minister in November 1990 restored at least the appearance of normalcy in Sino-U.S. relations.

Throughout this entire period, Premier Li Peng and the other conservative leaders who supported the massacre have never wavered from their position that the 1989 confrontation was an "internal matter" not subject to international scrutiny. Although repressive measures have been implemented quietly, they have continued unabated, and dissent is simply not permitted.

On January 26, 1991, the Chinese government announced that it had tried and sentenced Wang Dan, the Beijing University student who helped spark the 1989 democracy movement, to four years in prison. Another dissident, Ren Wanding, received a seventeen-year sentence. A total of five democracy activists were sentenced to prison terms. In an attempt to show leniency, three others were convicted but released, eighteen were released without trial, and forty-five were released without charges. All had been held for long periods, as much as twenty months, after being rounded up in the repression that began in June 1989. Other prisoners were held, pending trial for more serious offenses. Although officials proclaimed that the trials were being conducted "in accordance with law," it was clear that the traditional approach of Chinese communist justice prevailed: guilt had been predetermined, and the perfunctory trials focused principally upon condemnation and punishment.

#### **IV. The Law as an Instrument of Reform and Legitimization**

Perhaps the most encouraging indicator of reform during the decade of 1979-1989 was the trend in China favoring the rule of law

over the rule of man.<sup>23</sup> The development of a modern legal system was considered a cornerstone of China's modernization program and a necessary prerequisite to its significant economic relations with the West. To that end, Western legal sources were studied, the consultation and advice of Western experts were invited, and numerous Chinese were sent to study in the United States and other Western nations.

In 1979, the Sino-U.S. Trade Agreement<sup>24</sup> established the legal foundation upon which significant two-way trade between China and the United States would grow at a rapid pace. Adopted in the same year, the Chinese Equity Joint Venture Law<sup>25</sup> provided Western investors with an unprecedented opportunity to establish enterprises in China. Other significant laws and regulations were passed in 1979 governing criminal law and procedure, environmental protection, the judicial system, and governmental organization,<sup>26</sup> and the law-making process continued with vigor thereafter. In 1982, a revised version of the Chinese Constitution was adopted, promising, among other things, the right to vote, freedom of speech, and freedom of religion.<sup>27</sup> These reforms were interpreted by many Westerners as indicators that China was moving toward greater liberalization of human rights policies.

Understandably, this departure from China's traditional antipathy toward the West and Western legal systems stirred the imagination of legal scholars everywhere. China's law reform process attracted the unprecedented attention of Western legal scholars during the first decade of reforms; hundreds of law review and law journal articles were published in the United States addressing Chinese law, trade, and investment issues. In the United States, a particularly beguiling notion was that China was moving away from the arbitrary rule of man and toward the stable and predictable rule of law. The demise of socialism and the adoption of capitalism, many scholars concluded, would be the inevitable result of the economic reform process. Deng Xiaoping encouraged such conclusions by his emphasis on separation of Party and government, decentralization of economic controls, development of friendly relations with the West, and

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<sup>23</sup> There are a number of sources for English translations of Chinese laws. The P.R.C.'s official English translation is 1 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA: 1979-1982 (1987) and 2 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA: 1983-1986 (1987) [hereinafter LAWS OF CHINA].

<sup>24</sup> Trade Relations Agreement, July 7, 1979, United States-People's Republic of China, 31 U.S.T. 4651, T.I.A.S. No. 9630.

<sup>25</sup> Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, July 1, 1979, reprinted in 1 LAWS OF CHINA, *supra* note 23, at 150.

<sup>26</sup> See generally 1 LAWS OF CHINA, *supra* note 23, at 35-172.

<sup>27</sup> CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, Dec. 4, 1982, arts. 34-36, reprinted in 1 LAWS OF CHINA, *supra* note 23, at 3, 12.

adoption of Western-style business techniques and material incentives to encourage productivity.

Deng Xiaoping and his followers took a political gamble in implementing this ambitious program of reforms and in opening China to the influence of the outside world. Failure of the economic reforms would have guaranteed a power struggle in which the reformists could have become political scapegoats. However, the greatest risk to Deng and other Party leaders was that extensive dealings with Westerners, with the resulting diffusion of information and ideas about alternative political and economic systems, would destroy the cultural isolation that was so necessary to maintain absolute control over a subservient Chinese populace. Essentially, as is the case with almost any totalitarian regime, China's ruling elite survived in power by maintaining the status quo. The changes inherent in a sweeping economic reform program clearly had threatening implications for the leadership hierarchy.

The popular democracy movement in China during the spring of 1989 initially provided encouragement to those who argued that China's new open-door policy in foreign relations and its domestic and legal reforms would lead to a more democratic political environment. In the end, however, Beijing eventually imposed martial law in the capital by virtually ignoring inconvenient procedures in the Chinese Constitution. Soon thereafter, the world was shocked into reality when the Deng government ordered the Chinese Army to use force in dispersing the demonstrators on June 3-4, 1989. The brutality of the crackdown, the subsequent widespread arrests of those involved, and the abrupt reversal of many economic reform policies weakened Western confidence in China's leadership. These events have had a sobering effect on scholarship about China, as well as upon Western economic and political policies towards China, and call into question the legitimacy of China's new legal system and the government that created it.

## **V. The Post-Tiananmen Investment Climate**

Recognizing that political risk assessment should be one of the principal concerns of any investor who contemplates doing business in a foreign country, China had attempted for more than ten years to develop a legal infrastructure that would give prospective foreign investors confidence that their investments would be secure. The imposition of martial law in Beijing in disregard of constitutional procedures, and the Tiananmen massacre that followed, shattered that confidence for many prospective investors, and belied the reliability of the legal infrastructure that China had so painstakingly sought to build during the reform era. Many American investors left China in the aftermath of the Beijing massacre, and some have not

returned. Moreover, many prospective investors who were contemplating doing business in China have shelved those plans for the indefinite future.

A study published in March 1990 discloses that many American joint venture investors in China continued to have serious problems, including difficulties associated with the shortage of trained Chinese managers, sourcing materials in China, infrastructure, quality control, shortage of skilled Chinese labor, foreign exchange shortage, export and import controls, and shortages of cash.<sup>28</sup> Most of the pre-existing problems have been worsened by the economic and political retrenchment. In addition to these practical economic problems confronting investors, the specter of political instability makes China a much less desirable site for significant investment.

In spite of the obvious risks, however, investment in China by some nations actually increased during the post-massacre period. One of the great ironies is that Taiwan businesses, with their concern over the threats posed by the Chinese Communist regime, substantially increased their investments in China after the 1989 massacre.<sup>29</sup> Investment in China from Taiwan sources grew to an estimated 400-500 million U.S. dollars during the first half of 1990, representing a 111 percent increase over the same period in 1989.<sup>30</sup> Taiwan's investment rate declined during the latter half of 1990, partly due to the collapse of the Taipei stock market and lower corporate profits.

The first six months of 1990 reflected a decline of only six and a half percent in the number of contracts signed by foreign investors, compared to the same period in 1989 when foreign investment was still abundant. Significantly, however, the overall dollar value of investments dropped twenty-two percent, reflecting the trend toward smaller and less risky projects. In the same period, U.S. firms' investments dropped seventy-two percent, Japan's dropped fifty-two percent, Hong Kong's and Macao's dropped only ten percent, and Europe's rose by forty-five percent.<sup>31</sup>

While the Tiananmen massacre and subsequent political repression in China no doubt caused foreign investors to evaluate investment opportunities in China more critically, it appears that business decisions will continue to be driven by pragmatic economic considerations. By early 1991, it appeared that the major concern of foreign

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<sup>28</sup> Wagner, *A Survey of Sino-American Joint Ventures: Problems and Outlook for Solutions*, 12 E. ASIAN EXEC. REP. 7, 10 (Mar. 15, 1990).

<sup>29</sup> Taiwan's four-year economic plan (1990-1993) specifically encourages transshipment trade through Hong Kong and Singapore, most of which goes to China. By early 1990, total Taiwan investment was estimated at one billion U.S. dollars, centered primarily in Guangdong and Fujian provinces. *Globalization of Trade*, 12 E. ASIAN EXEC. REP. 24 (Apr. 15, 1990).

<sup>30</sup> Cheung, *The Water Margin*, FAR E. ECON. REV., Nov. 15, 1990, at 76.

<sup>31</sup> McGregor, *Foreign Business Confidence in China Remains Hampered by its Cash Shortage*, Wall St. J., Jan. 17, 1991, at A8, col. 2.

investors was not so much the fear of political instability and operational difficulties, but the shortage of credit in China caused by the continuing austerity program.

Foreign investment continues to be a priority in China's development plans. Throughout late 1990, China's leadership struggled to finalize the next Five-Year Plan. Although Premier Li Peng and other conservative leaders initially promoted further retrenchment and return to greater central control (a return to collective farming was even promoted at one point), compromises were made, and the Communist Party Central Committee finally approved a moderate, cautious plan for 1991-1995, along with a broader ten-year "program" for the 1990s. The policy of economic openness was endorsed.

## VI. The Future of Sino-U.S. Relations

One of the greatest puzzles that foreign powers must face in dealing with the United States is the apparent lack of central control over the making of U.S. foreign policy. This is not a matter of historical accident; the United States Constitution was deliberately designed to provide for a balancing and sharing of powers, with the commerce powers vested in the Congress and the foreign policy powers vested in the President.<sup>32</sup> Clearly, *economic* foreign policy, which is so critical in today's shrinking global marketplace, crosses the respective jurisdictions of both branches of government.

America's decision-making apparatus has become exceedingly complex. Within the executive branch, numerous divisions of government may exercise powers that directly or indirectly affect the making or implementation of foreign policy. Within Congress, there is a multitude of committees and subcommittees whose actions also affect foreign policymaking. With increasing frequency in recent years, many individual Congressmen have conducted themselves as if each has his or her own personal foreign policy role in dealing with foreign nations.<sup>33</sup>

In spite of this expansive governmental pluralism, the Republican Presidency and Democrat-dominated Congress have been able to formulate and implement significant foreign policy measures since the Chinese reform process began. However, consistency and predictability in our foreign policy toward China have become extremely difficult to maintain. For some time now, the divisiveness in the U.S. foreign policymaking apparatus reflects the difficulty of balancing

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<sup>32</sup> Presidential powers over foreign affairs are grounded primarily in article II of the U.S. Constitution. Congressional powers over foreign commerce are found principally in article I, section 8.

<sup>33</sup> Brock, *The Prince Metternichs of Congress*, THE AMERICAN SPECTATOR, Feb. 1990, at 22-27.

human rights concerns with the demands of realism in foreign relations.

The coming end of the post-World War II bipolar balance of powers likely will yield a new multipolar international regime in which five powers will predominate: the United States, the U.S.S.R., the European Community, Japan, and China.<sup>34</sup> Although China largely remains an undeveloped country, its vast land mass is strategically located in Asia, and it fields one of the largest standing armies, contains significant resources, and is home for approximately one quarter of the earth's population. Clearly, China must be included as an important nation in the making of American foreign policy—both from geopolitical and economic perspectives.

The measured approach of President Bush, which has been carefully calculated to avoid a rupture in U.S.-China relations, is based on the practical recognition that China will continue to be a major world power. To the extent that it remains integrated into the world economic scheme, China will be susceptible to external influences, including positive influences in the area of human rights. It is unlikely that China will return to its dark ages of isolation and ethnocentrism, but if it should do so, the democratic nations will have little opportunity to influence this last major holdout for Stalinist-style repression.

If communism continues its rapid worldwide decline, the United States policymaking apparatus faces a difficult transition from its single-minded focus on the Soviet threat; new policies must be devised in the post-Cold War world in which there will be no single, clearly identifiable national security menace. While the Persian Gulf War highlights the continuing risks of regional conflicts, the United States focus on geostrategic concerns should be reduced if the Cold War actually ends.<sup>35</sup> At the same time, the United States must develop a new and concentrated focus on international competitiveness in the economic arena. Thus, foreign *economic* policy predictably will be in its ascendancy during the decade of the 1990s; international trade, investment, and finance will become the sources of both alliances and conflicts.

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<sup>34</sup> See DEPARTMENT OF DEFENSE, DISCRIMINATE DETERRENCE—REPORT OF THE COMMISSION ON INTEGRATED LONG-TERM STRATEGY 6-7 (1988) (report listing the U.S., the U.S.S.R., Japan, and China as possible major powers of the future). The report predicted that by 2010, China and Japan will have the economic capacity to act as major world powers. *Id.* at 7.

<sup>35</sup> Contrary to the popular view that the Cold War has ended, the actions of the Gorbachev regime in the Soviet Union during late 1990 and early 1991 suggest that such optimistic conclusions may be premature. As this essay goes to press, the Soviet Army's bloody crackdown in the Baltics, resignations of key reformers, Soviet equivocation on the United States role in the Persian Gulf, and the recent strengthening of the KGB, the military, and the Communist Party, all suggest that the rapprochement between the United States and the Soviet Union may be in serious jeopardy.

The United States also must develop a uniform and consistent approach in its China policy, avoiding the roller-coaster cycles of romance and sanctions. The certainty of periodic battles between the President and Congress does not provide an impressive scenario on the world stage for U.S. policymaking. The conflicts between geopolitical and economic concerns on one hand, and human rights concerns on the other, likely will not end, but should be moderated. As Europe, Japan, the Soviet Union, Taiwan, and other nations quietly continue to expand their economic ties with China, the United States appears to be floundering in its own quandary of divisiveness. While no American business wants to be identified with the Tiananmen repression, many have argued that the United States needs a good dose of *realpolitik*, or realism.

The human rights issues in the Sino-U.S. relationship likely will remain dormant so long as the Persian Gulf conflict endures. By summer of 1991, however, China likely will rise again to the top of Congress' human rights agenda, as the annual deadline for renewal of China's most-favored-nation treatment approaches. On October 18, 1990, the House of Representatives voted on whether to sanction the Beijing government by removing this trade privilege that China has enjoyed since 1980.<sup>36</sup> However, the House vote of 247-to-174 fell short of the two-thirds needed to override the President's decision to renew the special treatment for another year.

Several factors should emerge in the renewed debate next summer. China's recently adopted Five-Year Plan for 1991-1995, while encouraging foreign trade and investment, also emphasizes the notion of "self-reliance," an idea held sacred by conservatives in China from Mao Zedong to Li Peng. While Li Peng has allayed his attacks on past reform policies, he continues to emphasize retrenchment and central planning. A central feature of the retrenchment process has been tight control over foreign imports and increased emphasis on export generation.

Although China has sought to reduce its reliance on the U.S. market by aggressively exploring markets in Southeast Asia, the United States is still a major purchaser of Chinese goods. Chinese trade surpluses with the United States soared from six billion dollars in 1989 to approximately eleven billion dollars in 1990; China's projected trade surplus for 1991 has been estimated at fifteen billion dollars.<sup>37</sup> There is widespread and growing concern in the United States that these trade surpluses are rising not because of competitive factors, but due to calculated decisions by Beijing's central authorities on such matters as targets, quotas, administrative guidance,

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<sup>36</sup> Farnsworth, *Chinese Tactics in Trade to U.S. Raise Concerns*, N.Y. Times, Dec. 26, 1990, at A1, col. 2.

<sup>37</sup> *Id.*



and other market-distorting, anti-competitive activities. In short, the accusation is that China has imposed artificial barriers on imports while engaging in the dumping or subsidization of exports to the United States. These concerns are bound to generate heated discussions in Congress over Sino-U.S. trade, and the human rights issue inevitably will become a part of the debate. China again will be forced to wrestle with the necessity of implementing free market reforms, and ending the unfair trade tactics of a centrally controlled economy, if it is to be a major player in international trade.

Moreover, the economic cost of maintaining "stability" through a centrally controlled system of employment is very high. Mao Zedong's notion of the "iron rice bowl," whereby every worker is guaranteed employment by the state, has enjoyed a rebirth during the post-massacre period of retrenchment, and it is proving to be a substantial drain on the nation's resources as the government attempts to prop up inefficient state enterprises. The necessary massive injections of fresh credit have created new sources of inflationary pressures while only temporarily disguising real unemployment levels.<sup>38</sup>

Another key lesson that China can derive from its own experience since the economic reforms began in 1979, and particularly from its experience during and after the Tiananmen massacre, is that economic reforms can never be wholly successful without accompanying political reforms. China has adopted many of the trappings of a modern democratic state, including a written constitution that on its face promises such freedoms as those respecting religion and speech. However, unless the rule of law, as opposed to the rule of man, is adopted and assimilated into China's political culture, all of the carefully drawn laws and regulations will remain as nothing more than window dressing for a repressive totalitarian state.

Legal and political reforms are needed in China at the most fundamental level to provide a structure for peaceful, systematic, and scheduled transfers of power. One of the greatest deficiencies of the modern Chinese communist state is that it perpetuates the errors of its feudalist past: a small group of ruling elite continues to cling to power, with the use of military force, long after the confidence of the people has been lost. Some system of balance of powers is sorely needed, coupled with an established system for the orderly transfer of power. The macabre death-watch over aging emperors during China's feudal period is being repeated over and over in the communist era, delaying needed reforms according to the cycles of mortality of individual rulers.

Until the Chinese leadership is willing to address the need for a

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<sup>38</sup> See Delfs & Bowring, *China's Credit Gamble*, FAR E. ECON. REV., Dec. 6, 1990, at 40.

basic reform of the nation's political structure, China will continue to face recurring setbacks in economic reform, recurring waves of dissent, repression and isolationism on the world stage, and foreign policy dilemmas in its relations with the free world. No amount of superficial law reform will provide an effective palliative for such fundamental deficiencies.