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## Most Favored Nation Trade Status and China: The Debate Should Stop Here, 31 J. Marshall L. Rev. 1321 (1998)

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## COMMENTS

# THE MOST FAVORED NATION<sup>1</sup> TRADE STATUS AND CHINA: THE DEBATE SHOULD STOP HERE

DI JIANG-SCHUERGER\*

Mary is a shopper, and smart shopping is how she supports the family.<sup>2</sup> Each spring for the last several years, Mary listens to the news tentatively. She does not know whether in the next months the family will lose the level of purchasing power they have obtained in recent years.<sup>3</sup> Mary is not sure whether she will be able to afford the toys the kids want for the next Christmas.<sup>4</sup>

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1. Most Favored Nation (MFN) is a term used in many treaties. An MFN clause provides that the contracting nations may receive the same privileges either party grants to its most favored nations. BLACK'S LAW DICTIONARY 1013 (6th ed. 1990). A primary effect of MFN status is lower import tariffs or duties. *Id.*

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2. Mary is a person created to represent many other ordinary American consumers.

3. See Administration Voices 'Cautious' Optimism Concerning Renewal of China's MFN Status, 14 Int'l Trade Rep. (BNA) 1057, 1058 (June 18, 1997) [hereinafter Administration Voices] (reporting Clinton administration's concern on the damaging effect of MFN revocation for China). If Congress terminates MFN treatment for China, U.S. consumers would have to pay about \$590 million more each year for such everyday items as shoes and clothing. *Id.* Terminating China's MFN status would drastically increase tariffs on imports from China, which will cost U.S. consumers an extra "tax" of \$27 billion to \$29 billion each year to buy the same goods they have been currently purchasing. Rep. Bereuter Introduces Bill Offering Permanent MFN Trade Status to China, 14 Int'l Trade Rep. (BNA) 944, 944 (May 28, 1997) [hereinafter Rep. Bereuter]. According to Robert Hall's testimony, revoking China's MFN status would force the average American family to spend \$300 more per year. *In Support of Renewing China's Most Favored Nation Trading Status: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means, 105th Cong. (1997)* [hereinafter 1997 MFN Hearings], available in LEXIS, Legis Library, Cngtst File, (statement of Robert Hall, Vice President and International Trade Counsel for National Retail Federation).

4. See Cost to China of U.S. Withdrawing MFN at Least \$7 Billion, World Bank Says, 11 Int'l Trade Rep. (BNA) 541, 541 (Apr. 6, 1994) (reporting the economic cost for the United States to revoke China's MFN status).

She hopes her husband John will still have his current job<sup>5</sup> and their investments will at least recover after the summer.<sup>6</sup> Mary listens to the news and waits for a single decision the U.S. government needs to make every summer regarding a country on the opposite side of the globe - the MFN status for China.<sup>7</sup>

A nation with MFN status can export products to the United States at low tariffs enjoyed by the many other nations that the United States regards as trading partners in "good standing."<sup>8</sup> China has become the fifth largest trading partner with the United States.<sup>9</sup> In 1996, U.S. exports to China reached \$11.9 billion, with California's exports to China alone totaling more than \$1.7 billion.<sup>10</sup> Consumers, investors, and workers have a "huge stake" in keeping a normal trade relationship with China.<sup>11</sup> As a result, terminating China's MFN treatment, which ensures low prices of

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Termination of China's MFN status would "heavily" affect the cost and availability of toys and games imported from China. *Id.*

5. See Administration Voices, *supra* note 3, at 1058 (reporting U.S. Trade Representative Charlene Barshefsky's statement that exports to China support about 170,000 U.S. jobs). In addition to jobs created from U.S. export to China, more than 2.4 million U.S. jobs are sustained as a result of the importation of consumer goods from China. *1997 MFN Hearings, supra* note 3 (statement of Robert Hall).

6. See China Presses U.S. Congress for Long-Term MFN Trade Status, 14 Int'l Trade Rep. (BNA) 944, 944 (May 28, 1997) [hereinafter China Presses] (reporting possible retaliation and economic losses for both countries if the United States terminates China's MFN status). According to the U. S. Ministry of Foreign Trade and Economic Cooperation, U.S. investment in China exceeded \$14.3 billion in 1996. *Id.* In addition to the unpredictable future of U.S. investment in China, the annual MFN renewal processes bring direct business losses to the public. *1997 MFN Hearings, supra* note 3 (statement of Jim Williams, General Manager and Controller of Ohsman & Sons Co.). During the uncertain period of China's MFN status, business transactions and transportation of merchandise are delayed, and freight rates go up once the MFN is granted due to overload. *Id.*

7. See Matsui to Pursue Porter-Dreier Bill Setting Out Code of Conduct in China, 14 Int'l Trade Rep. (BNA) 1234, 1234 (July 16, 1997) [hereinafter Matsui] (explaining MFN and the congressional procedure to grant a MFN status to China). China's MFN status expires on July 3 every year if the president does not recommend renewal. *Id.* Even with the President's recommendation, MFN can be revoked by a joint resolution of Congress within 60 days after its expiration date. *Id.* The President can subsequently veto the joint disapproval of Congress, which then needs a two-thirds majority to override the President's veto. House Approves Chinese MFN Renewal; Lawmakers Readying More China Bills, 14 Int'l Trade Rep. (BNA) 1096, 1096 (June 25, 1997) [hereinafter House Approves]. See 19 U.S.C. § 2432 (1988 & Supp. V 1993) for the text of the law that currently governs China's MFN status.

8. Matsui, *supra* note 7, at 1234.

9. *1997 MFN Hearings, supra* note 3 (testimony of Charlene Barshefsky, Trade Representative).

10. U.S. Chamber Report Finds California Top State Exporter to China, 14 Int'l Trade Rep. (BNA) 1100, 1100 (June 25, 1997).

11. *Id.*

goods imported from China and large purchase demands from China, would bring "severe damage" to the U.S. economy.<sup>12</sup> Today, the United States grants MFN status to over 150 countries and gives special tariff treatment even better than MFN status to over 100 countries,<sup>13</sup> while it withholds MFN treatment to fewer than ten countries around the world.<sup>14</sup> Nevertheless, Congress only renews MFN to China after yearly, heated debates.<sup>15</sup> The difficulties China has encountered in obtaining the MFN treatment originate from a single piece of U. S. legislation - the Jackson-Vanik Amendment<sup>16</sup> (Amendment) to the 1974 Trade Act.<sup>17</sup>

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12. Rep. Bereuter, *supra* note 3, at 944. Terminating China's MFN status would increase average tariffs on Chinese imports from less than 10 percent to 50 percent. *Id.* Such a dramatic tariff increase would cost U.S. consumers much more to obtain the same goods. *Id.* Furthermore, retaliation by China would harm the U.S. economy if China chose to purchase from other countries rather than from the U.S. *Id.* (citing Sen. Craig Thomas who stated that "revoking [China's MFN status] would hurt the United States more than it would harm China").

13. House Approves, *supra* note 7, at 1097; Jacob Weisbert, *Playing Favorites: Just What Is MFN Anyway?*, THE NEW REPUBLIC, June 18, 1991, at 10.

14. House Approves, *supra* note 7, at 1097. See also Randall Green, *Human Rights and Most-Favored-Nation Tariff Rates for Products from the People's Republic of China*, 17 PUGET SOUND L. REV. 611, 613-14 (1994) (pointing out that MFN status is not a favor since only a few countries in the world do not have MFN status from the United States, and a country without MFN status would be subject to "punitively" high tariffs). The U.S. has denied MFN status to countries such as Afghanistan, Azerbaijan, Cuba, Kampuchea (Cambodia), Laos, North Korea, and Vietnam. *Id.* at 614 n.21.

15. In 1991, Congress passed a bill to restrict the renewal of China's MFN status. H.R. 2212, 102d Cong. § 2 (1991). After President Bush vetoed the bill, the House voted to override his veto, 138 CONG. REC. H1144-06 (daily ed. Mar. 11, 1992), but the Senate was six votes short of the two-thirds majority needed to override the veto. 138 CONG. REC. S3853-01 (daily ed. Mar. 18, 1992). In 1992, Congress again passed a resolution to reject the President's recommendation of MFN renewal for China. H.R. 5318, 102d Cong. § 2 (1992). And again, the Senate failed to gather enough votes to override the President's veto. 138 CONG. REC. S15957 (daily ed. Oct. 1, 1992). President Clinton recommended an extension of China's MFN in 1993, but he also issued an Executive Order conditioning China's MFN on its substantial performance regarding several U.S. concerns on human rights. Exec. Order No. 12,850, 3 C.F.R. 606 (1993). In 1997, the House voted in favor of China's MFN by 60 to 40 percent, a decrease from the 1996 ratio of 67 to 33 percent. Matsui, *supra* note 7, at 1234.

16. The amendment is named after its two sponsors: Senator Henry Jackson, D.-Washington, and Congressman Charles A. Vanik, D.-Ohio. Michael S. McMahon, Comment, *The Jackson-Vanik Amendment to the Trade Act of 1974: An Assessment After Five Years*, 18 COLUM. J. TRANSNAT'L L. 525, 525 n.1 (1979).

17. The Trade Act of 1974 is codified at 19 U.S.C. §§ 2101-2487 (1974). See 19 U.S.C. §§ 2101-2487 for the text of the act. The Jackson-Vanik Amendment is Section 402 of the Trade Act and is codified at 19 U.S.C. §

This Comment examines China's MFN status in relation to the Amendment. Part I explains a MFN clause and its nondiscriminatory principle to facilitate multilateral trade relations. This Part also explains the content of the Amendment, its historical mission of improving Jewish emigration conditions in the Soviet Union, and the immediate adverse result of its enactment. Part II demonstrates the application of the Amendment to China, the debates on the annual renewal of China's MFN status as required by the Amendment, and the reactions from China concerning the MFN renewal debates in the United States. This Part further describes the economic conditions in China that may render the Amendment inapplicable. Part III proposes that the Amendment violates the MFN principle of nondiscrimination and trade facilitation and should be narrowly applied if not modified or repealed. More specifically, Congress should stop reviewing China's MFN annually under the Amendment because applying the Amendment to China does not serve the original purpose of the Amendment: ensuring that communist countries have unhindered emigration.<sup>18</sup> Furthermore, this Comment will examine how market reforms and the current economic situation in China may render the Amendment no longer applicable.

## I. MFN AND THE JACKSON-VANIK AMENDMENT

Trading between modern China and the United States was circumscribed from the establishment of the relationship by the application of the Jackson-Vanik Amendment, which requires Presidential evaluation of a communist country's MFN status in successive twelve month periods.<sup>19</sup> This Amendment, despite its political purpose and function, is nevertheless the only legal cause behind the yearly U. S. debate on China's MFN renewal. This Part illustrates the MFN concept and the Jackson-Vanik Amendment. Section A explains an MFN clause and the United States' practice with such a clause. Section B presents the content and the legislative background of the Amendment. Congress enacted the Amendment to target the Soviet Union. However, the Amendment's first application to the Soviet Union manifested its counterproductivity in reaching intended political or humanitarian goals.

### A. *An MFN Clause and Its Use in America*

A country may grant MFN status by a legislative or

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2432. McMahon, *supra* note 16, at 525 n.2.

18. 19 U.S.C. § 2432(a).

19. Administration Voices, *supra* note 3, at 1057. See 19 U.S.C. § 2432 for the procedure to renew a given country's MFN status.

administrative act, decree, a diplomatic exchange of notes, or treaty.<sup>20</sup> An MFN clause appeared as early as the 14th century and became more comprehensive in use after the 17th century.<sup>21</sup> The principles of an MFN clause lie in nondiscrimination and improved multinational trade relations, although the U. S. practice of the MFN clause has not always been in conformity with these principles.

*1. Facilitating Nondiscriminatory Trade Among Nations: The Purpose of the MFN Status*

The MFN concept developed in Europe when the nation-states endeavored to enhance nondiscriminatory trade among multiple trade partners.<sup>22</sup> Fearing to receive a worse deal than others, each state attempted to obtain at least the same favorable terms its trading partners granted to other nations.<sup>23</sup> This attempt led to the MFN clause, under which parties had an obligation to extend to each other the most favorable trade concessions that they had granted or would grant to any third nation.<sup>24</sup> There are generally two forms of MFN clauses: conditional and unconditional.<sup>25</sup> A conditional MFN clause limits a grantee's MFN treatment to existing trade concessions and in the event that better terms are granted to third nations, the original grantee has to make additional concessions in order to obtain the new and more favorable terms.<sup>26</sup> By contrast, an unconditional MFN clause entitles the grantee to the most favorable terms from both existing and future concessions as those enjoyed by other nations, and therefore, eliminates the need to renegotiate concessions.<sup>27</sup>

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20. Paul Lansing & Eric C. Rose, *The Granting and Suspension of Most-Favored-Nation Status for Nonmarket Economy States: Policy and Consequences*, 25 HARV. INT'L L.J. 329, 332 n.18 (1984).

21. L. Jay Kuo, *Farewell to Jackson-Vanik: The Case for Unconditional MFN Status for the People's Republic of China*, 1 ASIAN L.J. 85, 90 n.29 (1994).

22. *Id.* at 91-92.

23. Favorable concessions between two contracting parties often put third parties in a competitively disadvantageous position for lack of the same favorable terms. *Id.*

24. RICHARD C. SNYDER, *THE MOST-FAVORED-NATION CLAUSE: AN ANALYSIS WITH PARTICULAR REFERENCE TO RECENT TREATY PRACTICE AND TARIFFS* 10 (1948). MFN provisions in a treaty:

Obligate . . . contracting parties to extend all concessions or favors made by each in the past, or which might be made in the future to . . . any other state in such a way that their mutual trade will never be on a less favorable basis than is enjoyed by that state whose commercial relations with each is on the most favorable basis.

*Id.*

25. Lansing & Rose, *supra* note 20, at 332.

26. *Id.*

27. Kuo, *supra* note 21, at 91. Under the unconditional MFN clause, if a party reduces tariffs for one nation, it would be obligated to reduce tariffs at

An MFN clause advances international commerce by reducing trade barriers among nations because each nation granting or receiving MFN status can not discriminate or be discriminated against by other contracting nations.<sup>28</sup> The MFN practice results in low tariffs and other customs duties among multiple nations, and therefore, lower priced products and increased trade.<sup>29</sup> To ensure a mutual benefit from a trade relation, an MFN clause also naturally embodies and emphasizes the principle of reciprocal obligations.<sup>30</sup> However, nations, including the United States, sometimes would rather forgo the benefits of the MFN clause for other national interests.

## 2. *The American Exercise of The MFN Clause*

While European nations generally used unconditional MFN clauses in commerce, the United States historically relied on conditional MFN provisions which provided the United States with more leverage to protect its own interests but impeded free flow of trade.<sup>31</sup> Many nations' policies of trade protection of their domestic products at the expense of free international commerce contributed to the Depression starting in 1929.<sup>32</sup> In the 1930's, the United States changed its trade policy to include a grant of unconditional MFN status and tariff reduction, which helped its recovery from the Depression by reversing the decline in world

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the same rate for all the other nations with the most favored nation status. *Id.* Nations choose to use unconditional MFN treatment as an effort to trade at a multinational level, where each nation regards its trading partners as "a group rather than as particular actors." *Id.* As a result, nations tend to trade using standards that are conforming to the whole group. *Id.*

28. Lansing & Rose, *supra* note 20, at 332.

29. *Id.* at 332-33.

30. Kuo, *supra* note 21, at 90-92. A state is not willing to grant favorable terms to another state without a reciprocal term as return. *Id.* Otherwise, the world competitive market would put the nation in great commercial disadvantages. *Id.* at 90-91.

31. Lansing & Rose, *supra* note 20, at 333. The European efforts to penetrate the U.S. market while excluding the U.S. from their own markets are probably the main reasons for the U.S. preference to conditional MFN clauses. *Id.* at 333 n.20. While the conditional MFN clause made it possible for the U.S. to maintain separate, bilateral agreements with a trading partner without automatically extending the same concessions to third parties, such practice lacked nondiscriminatory and reciprocal obligations. Kuo, *supra* note 21, at 93-94.

32. Lansing & Rose, *supra* note 20, at 334. The U.S. preference for the conditional form of MFN started to change in the 1920's when the United States became a strong economic power and needed to expand its trade with other nations. *Id.* at 333. However, the effort to adopt freer and reciprocal trade policies came too late to prevent the Depression. *Id.* at 333-34. Following the Depression, state protectionism grew stronger which worsened the decline in world commerce. *Id.* at 334.

trade.<sup>33</sup>

After the Second World War, as a member of the General Agreement on Tariffs and Trade (GATT), a multilateral world trade organization, the United States had to apply unconditional MFN clauses according to the non-discriminatory and reciprocal principles essential to all GATT members.<sup>34</sup> However, the United States is able to continue its bilateral trade practice with communist nations according to its own traditional, economic, and political needs because communist nations are generally excluded from GATT despite the GATT mandate of multilateralism and nondiscrimination.<sup>35</sup> As a result, one scholar criticized the U.S. MFN practice for generally "favor[ing] conditional over unconditional MFN extensions, non-reciprocal over reciprocal arrangements, and the use of MFN status as a political tool to extract certain behavior from other nations."<sup>36</sup> One explicit

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33. H. DAVIS, AMERICA'S TRADE EQUALITY POLICY 111, 126 (1942). In 1933, the Roosevelt administration proposed trade policy changes such as reducing trade duties bilaterally and multilaterally and applying unconditional MFN clauses. *Id.* These changes aimed at equality and non-discrimination in trade to allow unconditional receipt of the most favored concessions by any third contracting nations. *Id.* at 126.

34. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. I, 61 Stat. A3, A12, 55 U.N.T.S. 194, 196-98 (demanding non-discriminatory tariff treatment among contracting member countries). Article I, Section 1 of the GATT states:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

*Id.* "Non-discrimination is the central principle of GATT," even though there are "significant erosions" of the principle to allow special trade actions to protect a GATT member's security or promote economic development of a developing country. Lansing & Rose, *supra* note 20, at 335-37.

35. Kuo, *supra* note 21, at 97-101. The exclusion of nonmarket economy countries (NME) from GATT arises from the notion that a mutual MFN clause disproportionately benefits a NME state more than a market economy state. Lansing & Rose, *supra* note 20, at 340. While a market economy state imports or exports according to prices of goods affected by tariffs, an NME state, which is both a tariff collector and goods purchaser, does not need to link its purchase to tariff level. *Id.* Thus, the lower tariffs a MFN clause can guarantee does not naturally generate incentive to import in a NME country. *Id.* In addition to the market structure of communist countries, "fierce political and ideological differences also kept the United States and the Communist bloc from trading on a nondiscriminatory basis." Kuo, *supra* note 21, at 97-98. In its anti-Communist campaign, the U.S. enacted the Trade Agreements Extension Act of 1951 to deny MFN status to communist controlled nations and the Trade Expansion Act of 1962 to "prevent Communist economic penetration" of the West. *Id.* at 99-100.

36. Kuo, *supra* note 21, at 93.



demonstration of the political motivations behind the U. S. practice of the MFN is the enactment of the Jackson-Vanik Amendment.

### *B. The Jackson-Vanik Amendment*

In the early 1970's, the United States found itself in a new phase of its relationship with the Soviet Union, a relationship later known as *détente*.<sup>37</sup> In hoping for improved diplomatic and trade relations, the Nixon administration signed the Soviet-American Trade Agreement which would have granted MFN status to the Soviets were it not for the Jackson-Vanik Amendment.<sup>38</sup> This section explains the Amendment as well as the history behind its enactment.

#### *1. The Amendment Limits the President's Power to Grant MFN Treatment to Communist Countries*

Subsection (a) of the Jackson-Vanik Amendment requires the President to withhold "nondiscriminatory" treatment (MFN treatment) and other U.S. government credits or investment guarantees from a nonmarket economy country if that country denies its citizens the right to emigrate or imposes more than a nominal fee on emigration.<sup>39</sup> Under subsection (b), the President may grant MFN and other favorable treatments to a country only after he reports to Congress about that country's emigration policies and determines that such policies do not violate the

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37. Lansing & Rose, *supra* note 20, at 341.

38. *Id.* at 341-42 & n.78.

39. 19 U.S.C. § 2432:

(a) To assure the continued dedication of the United States to fundamental human rights, and notwithstanding any other provision of law, on or after the January 3, 1975, products from any nonmarket economy country shall not be eligible to receive nondiscriminatory treatment (most-favored-nation treatment), such country shall not 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 emigrate;

(2) imposes more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatsoever; 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 to the country of his choice, and ending on the date on which the President determines that such country is no longer in violation of paragraph (1), (2), or (3).

*Id.*

emigration requirements set forth in the Amendment.<sup>40</sup> The President shall make such a report to Congress twice a year as long as the country in question receives MFN status or other similar guarantees from the United States.<sup>41</sup>

Subsection (c) of the Amendment gives the President the power to waive the requirement of the emigration evaluation mandated by subsections (a) and (b) to a given country if he reports to Congress that "(A) he has determined that such waiver will substantially promote the objectives of this section; and (B) he has received assurances that the emigration practices of that country will henceforth lead substantially to the achievement of the objectives of this section."<sup>42</sup> The President may extend his waiver authority for a twelve month period if both Houses of Congress approve such extension by a majority vote.<sup>43</sup> In the last two decades, U.S. presidents have used the waiver authority with respect to a number of countries, including China.<sup>44</sup>

The Amendment only applies to nonmarket economy countries which are generally regarded as Communist nations where the central governments, rather than the free market, dictate allocation of resources and pricing of goods.<sup>45</sup> The Amendment also states its purpose to "assure the continued dedication of the United States to fundamental human rights."<sup>46</sup> Thus, Congress may only use the Amendment for a limited number of nations and for a humanitarian purpose. These two notions, which run contrary to the MFN principle of nondiscrimination and its function in trade facilitation, can

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40. *Id.* § 2432(b). A country may receive MFN treatment, credits or investment guarantees from the U.S. government programs, and establish commercial agreement with the U.S. only if the President has reported to the Congress that such country is not in violation of paragraph (1), (2), or (3) of subsection (a). *Id.* The Presidential report of any such country would include information about the country's emigration laws and policies and its treatment of people who wish to emigrate. *Id.*

41. *Id.*

42. *Id.* § 2432(c). The waiver authority applies to the 18-month period beginning on January 3, 1975 and any period thereafter unless it is terminated pursuant to subsection (d) or the President's Executive Order. *Id.* § 2432(c)(1)-(3).

43. *Id.* § 2432(d).

44. James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793, 802 (1994). The President has used the waiver right to obtain MFN for countries such as East Germany, Romania, Hungary, China, Nicaragua, Czechoslovakia, Czech and Slovak Republics, the Soviet Union, Bulgaria, and Mongolia. *Id.*

45. Yen D. Chu, *The Making of a Quagmire: the Inadequacies of Applying the Jackson-Vanik Amendment to Vietnam's Transitional Economy*, 35 COLUM. J. TRANSNAT'L L. 453, 454 n.7 (1997). Congress used the term "nonmarket economy" to mean a "communist" state in the Trade Act of 1974. Lansing & Rose, *supra* note 20, at 330 n.7.

46. 19 U.S.C. § 2432(a).

probably be best understood from the legislative history of the Amendment.

2. *The "Freedom of Emigration" Amendment<sup>47</sup> Is A "Cold War Lever."<sup>48</sup>*

The Jackson-Vanik Amendment resulted largely from a vigorous campaign by the American Jewish community to impel the Soviet Union to adopt freer emigration policies.<sup>49</sup> Most countries in the world regard the freedom of movement as a person's inherent right, however, many communist countries have denied or restricted this basic right.<sup>50</sup> In the early 1970's, in addition to procedural and physical harassment, such as excessive paperwork and police interrogations or searches,<sup>51</sup> the Soviet government demanded a Jewish émigré to pay from \$5,000 to \$30,000 before he or she could emigrate.<sup>52</sup> In reaction to the Soviet emigration situation, Senators Henry Jackson, Jacob Javits, Abraham Ribicoff, and Representative Charles Vanik, supported by the National Conference on Soviet Jewry, originated the movement to use trade sanctions to press the Soviet government into improving its emigration policies.<sup>53</sup>

Members of the administration, represented by Secretary of State Henry Kissinger, and business organizations objected to the linkage of trade with emigration.<sup>54</sup> The administration pointed out that the Amendment would impair the vulnerable U.S. relationship with the Soviets and frustrate the Amendment's

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47. Emmanuelle Lee, *Will the Renunciation of U.S. Citizenship Still be Worth Some Tax Savings? An Analysis of the Recent Reform on the Taxation of Expatriates*, 37 SANTA CLARA L. REV. 1063, 1098 (1997).

48. Smith, *supra* note 44, at 802.

49. McMahon, *supra* note 16, at 530.

50. Francis A. Gabor, *Reflections on the Freedom of Movement in Light of the Dismantled "Iron Curtain"*, 65 TUL. L. REV. 849, 852 (1991). Limitation of the right of free movement was one of the key features of the Stalinist and post-Stalinist model until 1987. *Id.* at 855.

51. Michael W. Beasley et al., *An Interim Analysis of the Effects of the Jackson-Vanik Amendment On Trade and Human Rights: the Romanian Example*, 8 LAW & POL'Y INT'L BUS. 193, 195 n.14 (1976). In order to emigrate, a Soviet citizen had to go through massive documentations, and could be interrogated and searched by the police or even arrested on fabricated charges. *Id.*

52. *Id.* The money paid for emigration was to compensate for the Soviet free education, thus, a trade institute graduate was to pay \$4,320, a university graduate \$15,000, and a person with a doctoral degree \$37,400. *Id.* at 195 & n.13.

53. Albright, *The Pact of Two Henrys*, N.Y. TIMES, Jan. 5, 1975, § 6, at 16.

54. *The Trade Reform Act of 1973: Hearings on H.R. 10710 Before the Senate Comm. on Finance*, 93d Cong. 454-78, 714-975 (1974) [hereinafter *Hearings on H.R. 10710*]. Some argued that the trade-emigration linkage would damage both trade and human rights. *Id.* at 454-57 (statement of Henry A. Kissinger, Secretary of State).

emigration objective.<sup>55</sup> The Soviet government and other Eastern European countries were likely to relinquish trade favors offered by the United States but they would not relinquish control over their internal policies.<sup>56</sup> The communist regimes could even tighten emigration to show that they would not be dictated by the United States on their domestic matters.<sup>57</sup> Furthermore, the Amendment would hurt U.S. commercial interests which the Trade Act was meant to protect in the new Eastern Europe market because other U.S. allies would not restrict their trade in this new market as a "political maneuver."<sup>58</sup> Nevertheless, supporters of the Amendment justified this intervention in Soviet internal affairs with their humanitarian purpose and the fact that the United States had upheld similar trade restrictions for over 100 years.<sup>59</sup> With the addition of the presidential waiver provision (subsection (c)), the Amendment was signed into law by President Ford on January 3, 1975 after winning a majority of both Houses of Congress.<sup>60</sup> Nevertheless, history seems to prove that Secretary of

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55. *Id.* at 455-56, 463-65, 474 (statement of Henry A. Kissinger).

56. Beasley et al., *supra* note 51, at 196-97. The Eastern European countries might pass trade opportunities so that they would not appear feeble on a domestic matter in front of the U. S. demand, even though they might have an emigration policy permissible at the U. S. standard. *Id.* at 197. The Soviet Union later indicated that it renounced the trade agreement with the United States because it was unwilling to base its domestic policies on American demands. *Id.* at 196.

57. *Id.* at 197. Secretary of State Kissinger told the Congress that "[t]he Amendment, if adopted, will almost certainly prove counterproductive: It will not enhance emigration. It may stop it altogether." *Hearings on H.R. 10710, supra* note 54, at 456 (statement of Henry A. Kissinger).

58. Beasley et al., *supra* note 51, at 196-97. The business community argued that increased trade with the new East Europe market should not be jeopardized by a "purely political maneuver, even in the form of a humanitarian gesture." *Id.* at 197. They also argued that an expansion of trade was not more advantageous to nonmarket countries than it was to the U.S. economy so that the United States could use trade sanctions as a lever to reach other political goals. *Hearings on H.R. 10710, supra* note 54, at 935-36 (statement of G. W. Fincher, Senior Vice President of General Tire International and Member of the East-West Trade Council). "[T]his idea that because we [the United States] are trading with them [the Soviet Union and the East European bloc countries], we are doing them a favor is ridiculous. We are doing ourselves a favor. We need that trade." *Id.* (citing Ambassador Averell Harriman, at a Washington, D.C. symposium on National Policy Trends in East-West Trade).

59. Beasley et al., *supra* note 51, at 196, 198. Proponents of the amendment announced that it was time to "place our highest human values ahead of the trade dollar." *Id.* at 196 (citing Senator Jackson at a Washington, D.C., meeting of Jewish leaders). In addition, the tradition of support for human rights was demonstrated as early as 1913, when the U.S. abrogated an 80-year-old Soviet-U.S. commercial treaty to oppose the Czarist government's horrible treatment of its Jewish minority. *Id.* at 198.

60. The Senate approved the Amendment report with a vote of 72-4. 120 CONG. REC. S22,522 (daily ed. Dec. 20, 1974). The House approved it at 323-

State Kissinger was more prophetic than either the Senate or the House of Representatives.

*C. The Jackson-Vanik Amendment Was Counterproductive in the Soviet Union*

The Amendment attempted to use trade privileges as a weapon to bring about policy changes in another country, but was not very successful.<sup>61</sup> This piece of legislation worsened the emigration conditions in the Soviet Union and damaged the relationship between Americans and the Soviets.<sup>62</sup> A few days after the Amendment became law, on January 14, 1975, the Soviet Union renounced its 1972 Trade Agreement which had established a normal U.S.-Soviet trade relationship in the spirit of détente.<sup>63</sup> In addition, the Soviets reimposed a strict emigration policy and treated the trade-emigration linkage as revocation of the U.S. commitments to end "discriminatory [trade] legislation against the Soviet Union."<sup>64</sup> As a result, Jewish emigration from the Soviet Union dropped to less than half of the number it had obtained in 1973 when a trade relationship existed between the United States and the Soviet Union.<sup>65</sup> Thus, the use of trade leverage against the Soviets not only failed to reach its humanitarian goal but marred U.S.-Soviet economic relations for years afterwards.<sup>66</sup>

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36. 120 CONG. REC. H12,583-84 (daily ed. Dec. 20, 1974).

61. W. Gary Vause, *Perestroika and Market Socialism: The Effects of Communism's Slow Thaw on East-West Economic Relations*, 9 NW. J. INT'L L. BUS. 213, 263-64 (1988). Many observers believe that the Jackson-Vanik amendment has been, on balance, "counterproductive" as it represents U. S. policies. *Id.* at 263. In addition to the Soviet noncompliance to the requirements of the Amendment, the rulers of Cuba, Nicaragua and Poland, among other countries, continued their repressive policies in spite of U.S. economic sanctions. *Id.* at 264.

62. Gabor, *supra* note 50, at 853-54.

63. Beasley et al., *supra* note 51, at 200. The Soviet renunciation of the Trade Agreement with the U.S. was declared 11 days after the Jackson-Vanik Amendment was signed by President Ford. *Id.* at 200 & n.47.

64. *Id.* The Soviet Union considered the requirements of the Amendment intrusions in its domestic matters and regarded limitations on trade as damaging only to the U.S. since the Soviets could get better terms from other countries. *Id.* at 200-01.

65. Robert H. Brumley, *Jackson-Vanik: Hard Facts, Bad Law?*, 8 B.U. INT'L L.J. 363, 366 (1990). Jewish emigration from the Soviet Union numbered 229 individuals in 1968. *Id.* This number increased to 34,733 in 1973 when the U.S. had a trade agreement with the Soviet Union, and then dropped to 13,221 individuals in 1975 after passage of the Jackson-Vanik Amendment. *Id.* Although emigration figures from the Soviet Union continued to fluctuate later in the 1980's, the enforcement of the Jackson-Vanik Amendment was not the decisive factor in causing increases in the Soviet emigration. *Id.* See Gabor, *supra* note 50, at 854 (stating that economic and political sanctions from the U.S. did not seem to affect the Soviet restriction on freedom of emigration).

66. Vause, *supra* note 61, at 221-22.

By using trade as a lever to demand policy changes, Congress seemed to "seriously miscalculate" the importance the Soviet government placed on its control over its domestic affairs, the penalties it would rather endure in order to prevent other states from interfering with its internal policies, and the economic leverage that the United States had over the Soviet Union.<sup>67</sup> Since the trade sanctions dictated in the Jackson-Vanik Amendment are "counterproductive" and "ineffective" at bringing a powerful communist nation into order,<sup>68</sup> Congress should not broadly apply the Amendment to other countries.<sup>69</sup> Nevertheless, in the past twenty years the Amendment has guided the U.S. trade relations with a variety of nations such as Romania, China, Cuba, and Vietnam.<sup>70</sup> Additionally, by deciding whether to grant MFN status to a given country, Congress has reviewed that country's national policies beyond emigration in areas such as discrimination, political expression and prison labor.<sup>71</sup> China is a prominent

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67. Beasley et al., *supra* note 51, at 220. The Soviets seemed to fear that their compliance with the emigration issue would invite further U.S. demands using trade as leverage. *Id.* "They say, 'the maintenance of our system in all its essentials is more important than [sic] East-West detente.' In other words, if the Kremlin is pushed to a choice, there is no doubt which choice it will make." David K. Shieler, *The Dissidents Speak As Much to the West As to the Kremlin*, N.Y. TIMES, Nov. 16, 1975, § 4, at 4, col. 4.

68. Vause, *supra* note 61, at 263-65.

69. *Id.* at 264. Economic leverage is not likely to work for a "large, powerful, and relatively self-sufficient nation" because such a nation can turn to other countries to satisfy its needs, and ignore the U.S. demands. *Id.* Congress should impose economic sanctions "selective[ly] and infrequently" to render them effective. *Id.*

70. See Beasley et al., *supra* note 51, at 201-08, 218 (demonstrating how Romania obtained MFN status after satisfying the Amendment's substantive and procedural requirements and how the application of the Amendment may affect China's MFN pursuit); Maria L. Pagan, *U.S. Legal Requirements Affecting Trade With Cuba*, 2 TULSA J. COMP. & INT'L L. 289, 309-10 (1995) (noting that the Jackson-Vanik Amendment affects trade between the U.S. and Cuba); Davis Frye, *Vietnam's Contemporary Battle With the United States: Vying for Most Favored Nation Trading Status*, 29 VAND. J. TRANSNAT'L L. 777 (1996) (analyzing conditions in the Jackson-Vanik Amendment that must be satisfied before Vietnam can obtain MFN status from the U.S.).

71. Lucille A. Barale, *U.S. MFN Renewal for China: The Jackson-Vanik Amendment*, 12 EAST ASIAN EXEC. REP. 9, 10 (1990). In 1988 when the United States was preparing to evaluate Romania's MFN status, it considered not only Romania's emigration policies but also its treatment of citizens on racial, religious, and political grounds. *Id.* Congress has also applied the Amendment to China even though China does not rigidly restrict the emigration of its citizens. *Id.* at 11. In 1990, Congressman Stephen Solarz proposed a bill that would allow MFN extension to China only if China satisfies conditions such as releasing "significant numbers" of political prisoners and terminating two Chinese political figures' refuge in the U.S. Embassy in China according to terms requested by them. *United States-PRC Trade Relations: Hearings Before the Subcomm. on Trade of the House Comm.*

example of the United States' modern use of the Amendment.

## II. CHINA'S MFN STATUS UNDER THE JACKSON-VANIK AMENDMENT

The Amendment became relevant to China in 1980 when China first obtained the MFN status from the United States.<sup>72</sup> Since then, the United States has evaluated China annually regarding China's MFN renewal.<sup>73</sup> The renewals in recent years have evoked many debates in the United States as well as reactions from China. This Part examines the application of the Amendment to China. In addition, this Part demonstrates political and economic developments within China that suggest the Amendment is inapplicable and counter-productive to the current China.

### A. *China's MFN Status Under the Jackson-Vanik Amendment*

The renewal of China's MFN status had not evoked much controversy until 1989 when the Chinese government engaged the military to end the Tiananmen Square student demonstration.<sup>74</sup> After the Tiananmen Square incident, China's MFN renewal became a "battle" in Congress.<sup>75</sup> Many members of Congress considered China's MFN renewal a human rights issue, while some members suggested revocation of China's MFN simply to reduce the trade deficit with China.<sup>76</sup> In contrast, the business community strongly argued for MFN renewal.<sup>77</sup> According to business representatives at all levels, trade with China supported numerous U.S. consumers and businesses and would contribute to improved human rights conditions in China by exposing it to Western influences.<sup>78</sup>

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on *Ways and Means*, 101st Cong. 256 (1990) (statement of Stephen J. Solarz).

72. H.R. Con. Res. 204, 96th Cong. (1980).

73. See Administration Voices, *supra* note 3, at 1057 (reporting generally China's MFN status).

74. Gretchen Harders-Chen, *CHINA MFN: A Reaffirmation of Tradition or Regulatory Reform?*, 5 MINN. J. GLOBAL TRADE 381, 403 (1996).

75. Barale, *supra* note 71, at 11.

76. *Id.* at 12. U.S. producers, threatened by the competition of low cost goods from China, may also attempt to secure protection by seeking the revocation of China's MFN treatment. Green, *supra* note 14, at 621.

77. Daniel C. Turack, *The Clinton Administration's Response to China's Human Rights Record: At the Half-Way Point*, 3 TULSA J. COMP. & INT'L L. 1, 6 (1995).

78. 1997 MFN Hearings, *supra* note 3 (statement of Robert Hall). Members of the U.S. Chamber of Commerce "have been, and will continue to be, forces for positive change in China" by keeping up with a democratic working and managing standard during their operation in China. *Id.* (statement of John Howard). American trade with China "strengthens China's private sector and weakens Beijing's authoritarian regime." *Id.* (statement of Robert P. O'Quinn, Policy Analyst for International Economics

In 1993, President Clinton issued an Executive Order in response to the continued debate on China's MFN status.<sup>79</sup> This Order sets out the conditions China must meet in order to maintain MFN status.<sup>80</sup> In addition to complying with "the freedom of emigration objectives" of the Jackson-Vanik Amendment, the Order requires China to make "significant progress" in fulfilling human rights obligations such as adherence to the Universal Declaration of Human Rights, release of political prisoners, protection of the cultural and religious heritage of Tibet, and permission to allow international broadcasts into China.<sup>81</sup>

One year after President Clinton linked China's MFN status to human rights concerns by issuance of the Executive Order, the President announced on May 26, 1994, that he would "delink" human rights from the annual MFN evaluation regarding China.<sup>82</sup> The President believed that renewal of China's MFN status offers "the best opportunity to lay the basis for long-term sustainable progress in human rights and for the advancement of . . . other [U.S.] interests with China."<sup>83</sup> Delinking human rights from China's MFN status, however, has not made the annual Congressional debate any easier. Congress continues to balance the concerns over the trade deficit with China<sup>84</sup> and human rights in China, against the economic, political and cultural benefits of normal trade relations.

### B. China's Reaction to the American Debate

China's reaction to the U.S. threat of terminating its MFN status is "emotionally charged."<sup>85</sup> The Chinese government has described the threat of MFN revocation as "bullying" by the United States<sup>86</sup> and the Chinese people have wondered "why President

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and Trade, Asian Studies Center, The Heritage Foundation). Ordinary Chinese people can receive democratic ideas from Americans through trade relationships. *Id.*

79. Exec. Order No. 12,850, 3 C.F.R. 606 (1993).

80. *Id.*

81. *Id.*

82. Marian Nash, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L. L. 745, 745 (1994). At a press conference in Washington, the President stated that he moved to delink human rights from China's MFN annual extension because that policy was at the end of its usefulness. *Id.* at 745-46. The President believed that his move would provide "the best chance of success on all fronts. . . ." *Id.*

83. *Id.*

84. China Presses, *supra* note 6, at 945. China's world trade surplus is predicted to grow to record exports of \$ 158.4 billion. *Id.* The U.S. trade deficit with China totaled \$ 39.5 billion in 1996. *Id.*

85. Green, *supra* note 14, at 621.

86. China Presses, *supra* note 6, at 945. China's federal Cabinet stated: "Bullying, forcing unacceptable demands on the other through constant threats of trade sanctions, and even imposing sanctions will not help solve



Clinton dislikes China."<sup>87</sup> One may understand these reactions to the MFN issue within the historical context of China's trade relations with the West.<sup>88</sup> With a history of Western hegemony in the 19th and early 20th century, China is suspicious of any foreign influence on its domestic policies.<sup>89</sup>

More than a century ago, Great Britain first used opium and troops to open the Chinese market when merchants from the West, eager to trade with China, did not have many goods to offer in exchange.<sup>90</sup> "Outright bullying" by way of Western military operations forced China to open her ports to foreign trade, fix a single rate of duty on imports, and cede Hong Kong to Great Britain.<sup>91</sup> Within ten years of the British invasion, other countries such as the United States and France also signed unequal treaties with China.<sup>92</sup> These treaties created extraterritoriality that allowed foreign law and foreign police in areas of China, established fixed tariffs decided by foreign powers on all goods imported to China, and prohibited China from organizing commercial activities to obtain equivalent trade terms from the treaty country.<sup>93</sup> Since the foreign policies toward China were

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problems but could cause damage to the interests of both sides." *Id.*

87. John Head, *A Fulbright Lecturer's Experience Teaching International Law in China*, ASIL NEWSLETTER, Sept. 1994, available in LEXIS, Intlaw Library, ASIL File.

88. Green, *supra* note 14, at 622.

89. *Id.* at 621-22. The average Chinese person is still "painfully aware" of the force the Western powers imposed on China a century ago to control the Chinese market. *Id.*

90. J. M. ROBERTS, *A CONCISE HISTORY OF THE WORLD* 433-34 (Oxford University Press 1995) (1993). Since Europe had very few goods which the Chinese wanted, European traders had to pay for the tea and other Chinese goods with silver bullion - the cash used in China. *Id.* at 433. The British finally found its best selling product, opium, which was favored by many Chinese and could be grown in the British colony, India. *Id.* Opium is addictive and reduces people to an inactive, drowsy state. *Id.* Chinese officials were infuriated by the evil of opium and told Queen Victoria in a letter: "Suppose there were people from another country who carried opium for sale to England and seduced your people into buying and smoking it; certainly your honorable rule would deeply hate it and be bitterly aroused." W. ALFORD, *COMPARATIVE LAWS: CHINA* 278-80 (1990). This letter obviously did not change the fate of China, and after Chinese officials burned a large quantity of opium in Canton in 1839, British officials opened hostilities by sending troops to occupy Chinese land and starting the "Opium War." ROBERTS, *supra*, at 434.

91. ROBERTS, *supra* note 90, at 434.

92. *Id.* After the British demonstrated their commitment to keep open the Chinese market in the Opium War, the British-French alliance fought China 15 years later and forced it to accept their diplomats and traders. Green, *supra* note 14, at 622 n.71. Until the early part of this century, China had ceded its land and signed a number of "unequal treaties" to grant MFN to countries from the west, such as Great Britain, the U.S., and France. Harders-Chen, *supra* note 74, at 388-90.

93. Harders-Chen, *supra* note 74, at 390. Although China signed a treaty

based on "power and self-interest" rather than "equity and justice," China considered itself a recipient of the least favored nation status from the unequal treaties with the West.<sup>94</sup>

It has taken nearly a century for the Chinese people to abolish the inequitable terms embodied in the early treaties with foreign countries.<sup>95</sup> In the new era of interaction with the West, China remembers its history and, as a result, emphasizes reciprocity and mutual benefit in its trade relations with other nations.<sup>96</sup> Based on its reciprocal principle in international trade, China is likely to retaliate rather than obey the list of conditions set forth by the U.S. government in the event that the United States were to terminate China's MFN.<sup>97</sup> Like the United States, which uses trade relationships to reach its political goals,<sup>98</sup> China "include[s] political decisions in their trade."<sup>99</sup> Such mutual

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to grant MFN to Great Britain, "China did not receive any equivalent grant of MFN from Great Britain. *Id.* Hence, the unequal treaties required China to impose tariffs fixed by treaty obligations without any equivalent tariff concessions." *Id.* Similarly, the U.S. demanded MFN from China in 1844 but did not offer the same to the imperial government. Kuo, *supra* note 21, at 95 (citing TSUNG-YU SZE, CHINA AND THE MOST-FAVORED-NATION CLAUSE 32-33, 36 (1925)). The unequal treaties, established against China's interests, greatly damaged the internal structure of China. Harders-Chen, *supra* note 74, at 392.

94. Harders-Chen, *supra* note 74, at 392 & n.83. The treaties with the Western countries severely and negatively affected China, "both psychologically and materially." *Id.* at 392 (citing WILLIAM L. TUNG, CHINA AND THE FOREIGN POWERS: THE IMPACT OF AND REACTION TO UNEQUAL TREATIES 9 (1970)).

95. *Id.* at n.83. See Anthony Neoh, *Hong Kong's Future: The View of a Hong Kong Lawyer*, 22 CAL. WEST. INT'L L.J. 309, 318-23 (demonstrating China's effort and "deep sense of historical mission" to invalidate unequal treaties and bring Hong Kong back to China).

96. Harders-Chen, *supra* note 74, at 406-07. China's 1994 Foreign Trade Law embodies a general principle of equality and mutual reciprocity. *Id.* "The Peoples' Republic of China grants Most Favored Nation treatment or national treatment in the field of foreign trade to opposite concluding or acceding parties in accordance with international treaties or agreements concluded or acceded to, or on the basis of the principles of mutual benefit and reciprocity." Foreign Trade Law of the Peoples' Republic of China, art. 6, Act of May 12, 1994, 8 CHINA L. & PRAC. 20, 20 (1994).

97. China Presses, *supra* note 6, at 944. The chief spokesman of Beijing's Foreign Ministry stated that the U.S., as well as China, would be hurt if China's MFN status were revoked. *Id.* In addition, China would keep "developing relations with other countries" with or without MFN from the U.S. *Id.*

98. Kuo, *supra* note 21, at 101.

99. U.S. Concerned Over 'Politicization' of Trade Decisions in China, Official Says, 14 Int'l Trade Rep. (BNA) 1099, 1099 (June 25, 1997). According to Executives with the Boeing Company, the U.S.-China relationship contributed to Beijing's choice of the European consortium Airbus Industrie rather than Boeing as a business development partner. *Id.* China spent about \$1.5 billion on purchases from Airbus in 1996. *Id.*

reactions deem a negative political manipulation, such as the Amendment, to be damaging to trade and politics for both countries.

### C. Time To Delink The Amendment From China

This section examines the damaging result of subjecting China's MFN status to annual reviews and the applicability of the Amendment to China. Almost twenty years ago, Senator Jackson was surprised by the linkage of the Jackson-Vanik Amendment to China.<sup>100</sup> Today, when the United States and China have become top trading partners,<sup>101</sup> such connection is even more surprising considering that President Clinton delinked human rights from China's MFN renewal,<sup>102</sup> Chinese emigration has not been a relevant issue,<sup>103</sup> and the fast economic reform in China has been driving it irreversibly to a market economy.

#### 1. Annual Review of China's MFN Status Impedes U.S. Commerce

Title IV of the Trade Act, into which Congress added the Jackson-Vanik Amendment, was originally intended to "open up market opportunities for U.S. commerce in nonmarket countries."<sup>104</sup> An MFN clause, based on its principle of respect for national sovereignty and reciprocity, enhances international commerce through nondiscriminatory trade practices.<sup>105</sup> However, imposing an annual review of the MFN status of an important trading partner, with its implicit yearly threat of revocation, only reduces market opportunities and impedes commerce.

China now is the tenth largest trading nation in the world, with one of the fastest growing economies and an average growth

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100. Kuo, *supra* note 21, at 104. When China's MFN issue arose, some said that Senator Jackson himself was "startled to find out that people thought Jackson-Vanik applied to China. [It] never crossed his mind." *Id.*

101. See China Presses, *supra* note 6, at 944 (reporting that the U.S. was China's second-largest trading partner in 1996); *1997 MFN Hearings, supra* note 3 (testimony of Charlene Barshefsky) (stating China is the fifth largest trading partner of the U.S. and remains a major purchaser of many U.S. agricultural products); *Id.* (testimony of John Howard, Director of International Policy and Programs, the U.S. Chamber of Commerce) (testifying that China is the sixth largest export market for American farmers).

102. See Nash, *supra* note 82, at 745-49 (citing part of President Clinton's statement to delink human rights from review of China's MFN status).

103. Kuo, *supra* note 21, at 110.

104. 19 U.S.C. § 2102(5).

105. Kuo, *supra* note 21, at 90-93. The MFN principle had "at its heart a view toward harmonious relations among states." *Id.* at 93. Under the MFN clause, competing nations can trade equally and peacefully under reciprocal obligations. *Id.*

rate of about ten percent in recent years.<sup>106</sup> While the United States has become China's largest export market, U.S. exports to China have also quadrupled over the past decade.<sup>107</sup> Although a large trade deficit exists, most current Chinese exports are "low end" goods.<sup>108</sup> U.S. firms are confident about their opportunities in a growing Chinese market that has a huge potential for high technology demands.<sup>109</sup> According to the U.S. Chamber of Commerce, "expanding U.S.-China trade is in America's national interest."<sup>110</sup> However, the possible termination of these trade relations every twelve months hinders both commerce and this national interest.<sup>111</sup> Most businesses need more than one year to plan and establish communal relationships.<sup>112</sup> Given the uncertainty of the continuance of a normal trade relationship, many business people, both American and Chinese, may decide not

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106. *1997 MFN Hearings, supra* note 3 (testimony of Charlene Barshefsky, Trade Representative). China may possess the world's largest economy in the next century because of its fast growth rate and large population. *Id.*

107. *Id.* U.S. imports from China were nearly \$51.5 billion in 1996, which were close to 25 percent of China's exports to the world. *Id.* In 1996, U.S. exports to China reached \$12 billion, including over \$1.9 billion U.S. agricultural products. *1997 MFN Hearings, supra* note 3 (testimony of John Howard).

108. *1997 MFN Hearings, supra* note 3 (testimony of Stuart Eizenstat, Under Secretary for Economic Affairs). Many exports from China are low technology goods, therefore, termination of a normal trading relationship with China would especially hurt lower-income Americans who rely on "low end" consumer goods. *Id.* According to a statement from the U.S. Chamber of Commerce, which represents the world's largest business federation with a membership of more than three million businesses and organizations of every size, sector, and region, withholding MFN status from China would have a "disastrous impact on small and medium-size American companies who sell consumer goods in such areas as men's trousers, sweaters, silk blouses or tops, footwear, radio/tape players, toys, and electric hair dryers." *1997 MFN Hearings, supra* note 3 (testimony of John Howard).

109. *See 1997 MFN Hearings, supra* note 3 (testimony of John Howard) (predicting that China will need to buy high technology products in areas in which American companies are "very competitive"). According to World Bank estimates, China must invest over \$745 billion in infrastructure development over the next decade. *Id.* China will be an important market for U.S. exports of high technology equipment, aerospace, telecommunications, petroleum technology, agricultural products and consumer goods. *Id.* Also, jobs based on product exports, on average, pay 13 to 16 percent more than non-export related jobs. *1997 MFN Hearings, supra* note 3 (testimony of Charlene Barshefsky). A soured U.S.-China relationship will only help U.S. competitors, such as Japan and Europe, to obtain these export opportunities and jobs. *Id.*

110. *1997 MFN Hearings, supra* note 3 (testimony of John Howard).

111. *1997 MFN Hearings, supra* note 3 (testimony of Jim Williams).

112. Lansing & Rose, *supra* note 20, at 345-46. In order to establish a stable business relationship in a foreign state, business people need time to negotiate and understand the structure of the foreign economy. *Id.*

to invest in such a risky commercial relationship.<sup>113</sup> In addition, the yearly MFN review results in direct loss to businesses and consumers because during the time when China's MFN status is uncertain, companies delay orders for needed goods, and cargo ships lose business.<sup>114</sup> When the United States decides to continue China's MFN status, those ships become overloaded with both current and previously delayed orders.<sup>115</sup> As a result, freight rates increase and consumers end up paying more for goods.<sup>116</sup> Thus, the uncertainty caused by the annual review of China's MFN status hinders business development and commercial exchanges as well as consumer interests.

The annual reentry of China's MFN status curtails the nondiscriminatory principle behind MFN. China, as one of America's top trading partners, is one of the very few least favored nations to be annually scrutinized by the United States and China does not have more policy differences with the United States than some of the countries that enjoy unquestioned MFN status.<sup>117</sup> But, Congress did not intend to dedicate the Jackson-Vanik Amendment to international commerce, but rather to human rights.<sup>118</sup> Nevertheless, today, the application of the Amendment to China does not even serve its fundamental goal in human rights.

## *2. Human Rights Were Delinked From China's MFN and Emigration Is "Not An Issue of Concern with China"<sup>119</sup>*

The clear language of the Amendment and the legislative history both indicate that the human right affecting a country's MFN status is the freedom of emigration.<sup>120</sup> Although China's MFN status was linked in 1993 to issues not related to emigration,

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113. See *1997 MFN Hearings*, *supra* note 3 (testimony of John Howard) (noting that the U.S.-China relationship "was cited as a key factor in the confidence of companies to do business in China").

114. *1997 MFN Hearings*, *supra* note 3 (testimony of Jim Williams).

115. *Id.*

116. See *id.* (stating that "[V]irtually everybody loses" from the uncertainty regarding China's MFN status).

117. See *1997 MFN Hearings*, *supra* note 3 (testimony of Stuart Eizenstat) (noting that China should not be included with "a tiny handful" of "mostly pariah" states that do not have MFN from the U.S.); See also *1997 MFN Hearings*, *supra* note 3 (testimony of John Howard) (stating that many of the over 100 countries that enjoy the "routine, nondiscriminatory" MFN treatment have policy differences with the U.S. at the same level as China does).

118. See *supra* note 59 and accompanying text for the humanitarian goal of the Amendment.

119. Bereuter Urges China MFN Renewal; Recommends Repeal of Jackson-Vanik, 13 *Int'l Trade Rep.* (BNA) 868, 868 (May 29, 1996).

120. See 19 U.S.C. § 2432(a) (listing only the emigration policies that would prevent a country from receiving MFN treatment from the U.S.).

such as prisoners' rights and the freedom of international broadcasts in China,<sup>121</sup> President Clinton subsequently delinked these rights from China's MFN renewal.<sup>122</sup>

Emigration from China has not been, at least practically, a concern of Congress and will probably not become one for decades to come because of China's large population and its willingness to allow "millions" of émigrés to leave the country.<sup>123</sup> To avoid hypocrisy, some critics have questioned China's emigration application process, rather than the actual number of émigrés, in spite of the tightened immigration policy of the United States in recent years.<sup>124</sup> However, the emigration application patterns did not change even in the years of 1989 and 1990 during the political backlash against the Tiananmen Square demonstration.<sup>125</sup> Indeed, the remaining question is not how many Chinese can leave, but rather how many Chinese immigrants other countries are willing or able to take.<sup>126</sup> One can easily understand the gravity of the question by observing the daily long lines of visa applicants in front of the U.S. embassy in Beijing.

### 3. *A New China - the "Evil Capitalist Place"<sup>127</sup> That Does Not Fall In the Scope of Regulation By the Amendment*

The Jackson-Vanik Amendment applies only to a nonmarket economy (NME) country,<sup>128</sup> which Congress statutorily defined in 1988 as "any foreign country that the administering authority determines does not operate on market principles or cost or pricing

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121. Exec. Order No. 12,850.

122. See *supra* note 82 for part of President Clinton's statement to delink human rights from review of China's MFN status.

123. Vause, *supra* note 61, at 265. It could have resulted in "disaster" for the United States if there had been free emigration from China under the U.S. insistence in exchange for MFN status. *Id.* "President Carter apparently was taken aback when Deng Xiaoping told him that, 'If you want me to release ten million Chinese to come to the United States, I'd be glad to do so.'" *Id.* (citing J. CARTER, KEEPING FAITH: MEMOIRS OF A PRESIDENT 209 (1982)).

124. Kuo, *supra* note 21, at 107-10.

125. Barale, *supra* note 71, at 10. In early 1990, visa applications were about 300 more each month than applications in the same month of the preceding year. *Id.* Beginning in 1990, college students were required to pay \$400 for each year of higher education they received in China, unless they worked in China for five years after graduation. *Id.* Considering that Chinese universities provided every student with free board, tuition, and services, \$400 a year is a small price to pay for most college students in other parts of the world.

126. *Continuation of Waiver Authority: Communication from the President of the United States*, H.R. Doc. No. 97, 103d Cong. 5 (1993).

127. See Jasper Becker, *A Nightmare Lurking on the Opposite Shore*, SOUTH CHINA MORNING POST, Oct. 1, 1997, at 13 (citing a former North Korean schoolteacher).

128. See 19 U.S.C. § 2432(a) for the limited application of the Amendment.

structures, so that the sales of merchandise in such a country do not reflect the fair value of the merchandise."<sup>129</sup> Congress has provided criteria for evaluating NME status including the convertibility of currency, the existence of free bargaining between labor and management, the prevalence of joint ventures, the extent of government ownership or control over the means of production, and the extent of government control over the allocation of resources and over the price and output decisions of enterprises.<sup>130</sup> The Commerce Department has discretion to invoke or revoke a NME status at any time.<sup>131</sup> This subsection demonstrates that China can no longer be accurately defined as a nonmarket economy. In addition to its successful economic reforms over the past decades, two of the newest developments are bringing a market economy even closer home to China: the return of Hong Kong to China and China's Congressional resolution to sell shares of state-owned enterprises to the public.

a. China - A Communist Country "Embark[ing] on the Road Toward Capitalism"<sup>132</sup>

More than twenty years ago, China had its doors shut to both the Western capitalists and the Soviet-bloc countries while its own people were fighting for political elevation in a poor economic situation.<sup>133</sup> President Nixon's visit to China in 1972 helped open those doors and led to a new stage in the world economy that began with the U.S.-China Trade Agreement in 1979.<sup>134</sup> Since 1979, China enacted many new laws to accommodate economic development and relations with foreign businesses such as the Joint Venture Law, Foreign Trade Law,<sup>135</sup> and laws concerning Enterprises with Sole Foreign Investment and Sino-foreign Co-

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129. 19 U.S.C. § 1677(18)(A).

130. *Id.*

131. *Id.* § 1677(18)(C). Section (C) proscribes that the administering authority may decide on the NME status of any foreign country at any time. *Id.*

132. Kevin Platt, *Stone's Throw Away, Worlds Apart*, CHRISTIAN SCI. MONITOR, Sep. 30, 1997, Int'l, at 1 (citing local Chinese who were explaining the tension between China and North Korea).

133. See Vause, *supra* note 61, at 223 (describing the "disastrous decade" of China's Cultural Revolution from 1966 to 1976).

134. Agreement on Trade Relations Between the United States of America and the People's Republic of China, July 7, 1979, 31 U.S.T. 4651.

135. Jacques Delisle, *Of Chinese Walls, Battering Rams, and Building Permits: Five Lessons About International Economic Law From Sino-U.S. Trade and Investment Relations*, 17 U. PA. J. INT'L ECON. L. 513, 520-21 & n.13 (1996). The new Chinese laws on trade include the Law of the P.R.C. on Chinese-Foreign Joint Ventures (1979), the Foreign Economic Contract Law of the P.R.C. (1985), the Law of the P.R.C. Concerning Foreign-Owned Enterprises (1986), and the Foreign Trade Law of the P.R.C. (1994). *Id.*

operative Enterprises.<sup>136</sup> These new laws contain terms familiar to Western businesses and grant autonomy and legal protection to trading enterprises regardless of whether they are state- or privately-owned.<sup>137</sup> For example, the Foreign Economic Contract Law contains many provisions that are in conformity with international business practices and American contract law.<sup>138</sup> China has also adopted a series of other domestic laws that move toward private ownership and rely on concepts "more Western than Eastern."<sup>139</sup>

China has had a successful open-door market reform experiment in the Special Economic Zones (SEZs) which were the first areas to establish privately-owned enterprises and welcome direct foreign investment.<sup>140</sup> These SEZs now help drive the fastest growing economy among industrialized nations.<sup>141</sup> Based on the SEZs' success, China has opened more areas including the entire Pacific basin for foreign businesses and direct investment.<sup>142</sup> According to an International Monetary Fund (IMF) official, China

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136. 1 China Laws for Foreign Business, § 13-506 at 16651 & § 6-100 at 7551.

137. Delisle, *supra* note 135, at 522-23. China's recent legislation on foreign trade laws contain terms that "U.S. and other foreign businesses find relatively familiar and fairly comfortable." *Id.* at 522. Under some of the laws, Chinese enterprises, whether state- or privately-owned, are "legal persons" who have the freedom to make their own business and management decisions. *Id.* Such freedom is protected from arbitrary government interference, and disputes arising from international commercial contracts can be addressed in courts or by international arbitration. *Id.* at 523. On the other hand, China does not forgo all state control and discretion in this "foreigner-friendly and market-oriented" legal regime. *Id.*

138. Jacques L. DeLisle, Recent Development, *Foreign Investment: Foreign Economic Contract Law - The Foreign Economic Contract Law of the People's Republic of China*, 27 HARV. INT'L L.J. 275, 280-81 (1986). The Foreign Economic Contract Law generally provides "enhanced access and greater certainty" for foreign investors to establish commercial relationships with China. *Id.* at 280. The Law and its more detailed specifications (the Regulations) are more "liberal" than the regulations of the Shenzhen "Special Economic Zone," which were once thought radical. *Id.* at 281.

139. Vause, *supra* note 61, at 225-26.

140. Donna Deese Skeen, Comment, *Can Capitalism Survive Under Communist Rule? The Effect of Hong Kong's Reversion To the People's Republic of China in 1997*, 29 INT'L LAW. 175, 204 (1995). The original four SEZs were Shenzhen, Zhuhai, and Shantou, all of which are located in Guangdong province, Xiamen in Fujian province. *Id.* at 204 n.312. Hainan Island was later added as the fifth SEZ. *Id.* China has provided SEZs special business incentives to promote its development through trade and foreign investment. *Id.*

141. *Id.* at 204. China's SEZs have become the "manufacturing centre for the world." *Id.*

142. Jong H. Park, *Impact of China's Open-Door Policy on Pacific Rim Trade and Investment*, BUS. ECON., Oct. 1993, at 51. China opened up 14 cities for foreign direct investment and technology in 1984 and opened three large delta areas in 1985. *Id.*



has absorbed half of the world's direct foreign investment and has established the second largest foreign reserves in the world.<sup>143</sup> Moving steadily towards a free and open market economy, China has not only established numerous private enterprises and joint ventures,<sup>144</sup> but has also set up successful stock exchanges.<sup>145</sup> Scholars have attributed China's economic achievement to decreased central control, material incentives to promote individual productivity, freer market mechanisms and economic relations, and preference for private ownership.<sup>146</sup>

b. Adding Hong Kong to China

China regained control of Hong Kong on July 1, 1997 after 155 years of British rule.<sup>147</sup> Under the Joint Declaration, a treaty between China and Great Britain, China has the obligation to keep Hong Kong's capitalist system for fifty years after 1997.<sup>148</sup> China will also maintain Hong Kong's present economic and political systems.<sup>149</sup>

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143. *IMF Chief Commends China's Party Congress for Dealing with State Firms*, AGENCE FRANCE PRESSE, Sep. 18, 1997. IMF managing director Michel Camdessus commended China's efforts for market reform and economic development as "an extraordinary phenomenon," which has attracted a steady flow of foreign investment. *Id.*

144. Kuo, *supra* note 21, at 104. Even in 1990, it was estimated that state-controlled enterprises produced less than forty percent of China's national income. *Id.*

145. Two Chinese stock exchanges at Shanghai and Shenzhen represent about 24 percent of China's gross domestic product (GDP). *China's Jinzhou Harbour to be Listed on Shanghai Stock Exchange*, AGENCE FRANCE PRESSE, Sep. 30, 1997.

146. Vause, *supra* note 61, at 226-27.

147. Neoh, *supra* note 95, at 310.

148. The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Sept. 26, 1984 (reproduced from the White Paper published by Her Majesty's Government in London on Sep. 26, 1984, as reproduced by the Government Printer in Hong Kong) [hereinafter Joint Declaration]. See Patricia Homan Palumbo, Comments, *Analysis of the Sino-British Joint Declaration and the Basic Law of Hong Kong: What Do They Guarantee the People of Hong Kong After 1997?*, 6 CONN. J. INT'L L. 667, 692 (1991) (analyzing the legal duty the Joint Declaration created for China).

149. Joint Declaration, *supra* note 148. Under the Joint Declaration between China and the United Kingdom, Hong Kong "shall enjoy a high degree of autonomy; . . . except for foreign and defense matters, Hong Kong will have executive, legislative, and independent judicial power, including that of final adjudication; . . . Hong Kong shall maintain the capitalist economic and trade systems . . . and shall decide economic and trade policies on its own." *Id.* See Skeen, *supra* note 140, at 180 (analyzing provisions of the Joint Declaration). "China will allow Hong Kong to maintain virtually all systems currently in place. In some respects, Hong Kong is actually granted more authority [under Chinese rule] than the colony had under British rule." *Id.* However, there may be no absolute autonomy since some requirements in the

Hong Kong is the second largest financial center in the Pacific region, with 76 of its 165 banks among the top 100 banks in the world.<sup>150</sup> It is a city of open competition and free markets, where the government does not distinguish local companies from foreign ones.<sup>151</sup> It is also the best gateway to China.<sup>152</sup> Almost every Chinese province conducts business in Hong Kong.<sup>153</sup> Hong Kong has poured approximately \$110 billion worth of investments into the Chinese mainland.<sup>154</sup> It keeps twenty percent of its banknotes circulating in Guangdong province, and employs three million workers in 25,000 factories within the mainland borders.<sup>155</sup> Hong Kong handles more than fifty percent of U.S.-China trade.<sup>156</sup> As Hong Kong prospers in the trade with the mainland, China will be continuously drawn closer to a free market until the economic boundaries between the two systems become non-existent.<sup>157</sup>

c. China's New Resolution to Become A Market Economy - Selling State-Owned Enterprises

While one may still be pondering whether Hong Kong would become China or China would become Hong Kong, about two thousand delegates from all corners of China voted to "speed the pace of capitalist-style reforms" at the fifteenth congress of the Communist Party in September 1997.<sup>158</sup> Among many other goals, the Chinese congress resolved to reconstruct state-owned

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Joint Declaration are qualified with words such as "high degree." *Id.* at 181.

150. David Stamp, *HK to Lose Financial Status under China*, REUTER ASIA-PAC. BUS. REP., June 24, 1993, available in LEXIS, World Library, Reuapb File.

151. Skeen, *supra* note 140, at 191-92.

152. *Id.* Hong Kong attracts foreign investors because of its large, liquid market, and also because its stock market has more listed companies involved in China than any other stock market in the world. *Id.*

153. Lena H. Sun, *Governor of Hong Kong Takes on China's Leaders, Moves Toward Democracy in Enclave Irk Beijing*, WASH. POST, Nov. 13, 1992, at A16.

154. *China: Mainland-HK Trade to Hit \$ 40b*, CHINA DAILY, Sep. 28, 1997, at 1.

155. Paul S.P. Hsu, *Taiwan, Hong Kong, and China: The Chinese Productivity Triangle*, 27 INT'L LAW. 523, 528 (1993).

156. *1997 MFN Hearings*, *supra* note 3 (testimony of Charlene Barshefsky).

157. Skeen, *supra* note 140, at 204.

158. *Delegates Vote for Change in China's Communist Party*, DEUTSCHE PRESSE-AGENTUR, Sep. 18, 1997. Delegates of the 15th congress of the Communist Party approved a new leadership line-up and a "speedier" reform of state-controlled sectors. *Id.* See Robert J. Saiget, *Chinese Party Vows Continued Economic Reforms*, JAPAN ECONOMIC NEWSWIRE, Sep. 18, 1997 (transmitting President and Communist Party Chief Jiang Zemin's congress report that centered on a continuation of pragmatic economic development); Ching Cheong, *Jiang Brings China Closer to the World: Qian and Albright Upbeat about Summit*, SINGAPORE STRAITS TIMES, Sep. 25, 1997 (demonstrating China's "rational track of economic development" that will allow it to become a civil society as part of the international community).

enterprises<sup>159</sup> through a share-holding system that "can be used both under capitalism and under socialism."<sup>160</sup> To achieve the reconstruction, China would "encourage the merger of enterprises, standardize bankruptcy procedures, divert laid-off workers, increase efficiency by reducing staff and encourage reemployment projects so as to form a competitive mechanism selecting the superior and eliminating the inferior."<sup>161</sup>

Although China may not become a capitalist country with a face most Westerners are familiar with, it is on its way to a free market economy and its leaders have shown their political will and determination to bring about these changes.<sup>162</sup> In Los Angeles, top managers from China's state-owned enterprises, which are often not productive and profit-making, will be studying capitalist business management.<sup>163</sup> Meanwhile, in Hong Kong, the Chinese Vice-Premier not only reaffirmed Hong Kong's high degree of autonomy, but also announced to the world that "[r]eform and opening as required by China's own development have whole-hearted support from the entire population and is irreversible."<sup>164</sup>

### III. THE FAVORS FOR THE "MOST FAVORED NATION"

The Jackson-Vanik Amendment bears the historical mark of America's discriminatory practice of the MFN status as well as its political fear of Communist "penetration."<sup>165</sup> Although referred to

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159. China's state-controlled corporations, for the most part, are not profit makers but depend on bank loans, and, as a result, are considered a target of the party's continued capitalist-style reforms. Saiget, *supra* note 158.

160. *Id.* Establishment of "share-holding cooperatives" can further legitimize the fast development of China's two stock exchanges and the capital pooled from small firms all over China. *Id.*

161. *Id.* (citing congressional report of President and party chief Jiang Zemin).

162. The Guang-zhou Special Shaped Steel Factory, a large State-owned enterprise scheduled for public auction, attracted bidders from more than 12 domestic and overseas companies, and would take its chance in the market economy after a new owner took over. *China: Guangzhou Steel Factory Ready for Public Auction*, CHINA DAILY, Sep. 17, 1997, at 3. The government of Sichuan, a province with the country's second-largest number of State-owned firms, has determined to adapt state firms to a market economy and introduce competition into the market after a successful trial implementation of a share-holding system in smaller State-owned enterprises. *China: Joint-Stock System Endorsed*, CHINA DAILY, Sep. 16, 1997, at 2.

163. Tom Plate, *View from Abroad; A Capitalist Helping Hand*, KOREA HERALD, Sep. 29, 1997. Some of China's brightest managers have studied at UCLA's Andersen Graduate School of Management in the past few years. *Id.* Now, the school is going to enroll top Chinese executives from state-owned industries such as railways, airlines, telecommunications companies, shipbuilders and chemical and energy companies. *Id.*

164. *China: Mainland-HK Trade to Hit \$40b*, CHINA DAILY, Sep. 28, 1997, at 1.

165. Kuo, *supra* note 21, at 93-95, 100. "[T]he United States has historically

as the most-favored nation clause, the MFN provision guarantees that there is no single most-favored nation and that all trading partners are treated equally in receiving favorable trade terms.<sup>166</sup> Thus, the Amendment, which targets only communist countries by using MFN revocation to induce their domestic policy changes, violates the fundamental principles of a MFN clause as a nondiscriminatory mechanism for multinational trade cooperation. In addition, Congress enacted the Amendment as part of the Trade Act, which has a purpose to "open up market opportunities for United States commerce in nonmarket economies."<sup>167</sup> For the above reasons, Congress should apply the Amendment narrowly to justify the cost of its implementation if it does not nullify or modify the Amendment.<sup>168</sup>

The United States has been using the "wrong vehicle" to effectuate a communist nation's domestic changes when it links trade relations with that nation's emigration, or any other set of human rights conditions.<sup>169</sup> Favorable trade relation with the United States is not a necessity for a communist country. The former Soviet Union did not submit its domestic policies for the sake of preferential treatment by the United States.<sup>170</sup> The U.S.-Soviet breakup after the enactment of the Amendment demonstrated that the U.S. belief that its trade policies can dictate the domestic behaviors of a foreign sovereign is not likely to prevail.

Congress should not broadly apply the Amendment to China, if it does not modify the current version of the Amendment, because such application neither complies with the scope and meaning of the Amendment nor serves the purported purpose of

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failed to appreciate [MFN's] full spirit and purpose - that is, the MFN principle's role in stabilizing world trade and the importance of reciprocal obligation." *Id.* In the Trade Expansion Act of 1962, Congress set different tariffs to separate communist countries from other U.S. trading nations for the purpose of "prevent[ing] Communist economic penetration." *Id.* at 100. The Amendment is "the culmination of a long history of misguided U.S. MFN policy, which has been generally nonreciprocal, short-sighted, and politically motivated." *Id.* at 115.

166. See *supra* note 24 and accompanying text for the meaning of a MFN clause.

167. 19 U.S.C. § 2102(5).

168. See Brumley, *supra* note 65, at 363 (concluding that the Jackson-Vanik Amendment has been a barrier to bilateral trade and democratization of some nations).

169. *Hearings on H.R. 10710, supra* note 54, at 454 (statement of Henry A. Kissinger). In arguing against the adoption of the Amendment, Secretary of State Kissinger believed that using trade sanction to press the Soviet reform was "the wrong vehicle and the wrong context." *Id.*

170. See *supra* notes 63-64, 67 and accompanying text for Soviets' renunciation of its trade agreement for fear of the U.S. influence on its domestic policies.

the Amendment. The Amendment was enacted to change emigration conditions in a communist country.<sup>171</sup> However, China's emigration policies have not been a relevant issue and the United States has been more concerned with immigration reduction than increase in recent years.<sup>172</sup> Thus, the Amendment, when applied to China, is not only the "wrong vehicle" but also an empty vehicle. The Amendment justifies its emigration-based limitation on international trade with Americans' dedication to human rights.<sup>173</sup> Although the U.S. government has expanded the justification language by linking rights other than emigration to a communist country's MFN status, President Clinton delinked these expanded rights from China's MFN status for the very purpose of promoting China's human rights.<sup>174</sup>

The Amendment does not apply to China also because China is no longer a complete nonmarket economy and important parts of China are now run with vigorous free market mechanisms. For almost twenty years, China has been steadily improving its economic structures facilitated by newly enacted laws. China's 1997 resolution to sell all state-owned businesses to the public will help speed up its progress toward a more complete market economy. This resolution also renders it impossible to apply the Amendment only to state-owned enterprises as members of the U.S. Congress once attempted to separate state-owned Chinese businesses from others.<sup>175</sup> More importantly, continued application of the Amendment to China damages the proclaimed ideal of the United States to encourage and welcome free market economies. Finally, the economic and political uncertainty created by the annual MFN renewal policy is against the "strong [U.S.] interest

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171. See 19 U.S.C. § 2432(a), *supra* notes 49-60 and accompanying text for the Amendment's purpose to facilitate emigration.

172. See Robert Pear, *House G.O.P. Moves to Cut Immigration*, N.Y. TIMES, June 22, 1995, § A, at 19, Col. 1 (demonstrating legislative effort to change U.S. immigration policies). The proposed bill would reduce the number of both legal and illegal immigrants settling in the United States. *Id.* The bill would allow the United States to cut the number of refugees by half and impose new procedures to speed up the deportation of illegal aliens. See also Robert Pear, *Clinton Embraces a Proposal to Cut Immigration by a Third*, N.Y. TIMES, June 8, 1995, § B, at 10, Col. 5 (reporting the White House's favorable reaction to a Federal advisory panel's recommendation to reduce legal immigration by one-third); *INS Toughens Rules on Sponsoring Immigrants*, LOS ANGELES TIMES, Oct. 21, 1997, Part A, at 1 (reporting the new rules of the Immigration and Naturalization Services to use financial screening to prevent new immigrants from relying on U.S. public aids).

173. 19 U.S.C. § 2432(a).

174. See *supra* note 82 and accompanying text for President Clinton's move to delink human rights from China's MFN status.

175. Kuo, *supra* note 21, at 105. The attempt to limit economic sanctions to a state-controlled economy is almost impossible considering the vast number of enterprises involved and the complex economic structure in China. *Id.*

in the continued vitality, prosperity, and stability of Hong Kong" as the United States pledged in the U.S.-Hong Kong Policy Act of 1992.<sup>176</sup> Hong Kong and mainland China are financially interdependent and Hong Kong's prosperity is inseparable from the U.S.-China relationship.<sup>177</sup> Considering that Hong Kong, an active capitalist market, is part of China and that China is on an irreversible path to a free market economy, the application of the Amendment becomes increasingly oblivious and obstructive to U.S.-China relations and the economic progress in both countries.

### CONCLUSION

The Jackson-Vanik Amendment conditions a nonmarket economy country's MFN status on that country's emigration conditions. Application of the Amendment to China, which requires annual MFN renewal by Congress, disrupts trade relations between the United State and China without advancing its purported humanitarian goals. Secretary of State Kissinger said more than twenty years ago, "[MFN status] is not a privilege; it is the removal of a discriminatory aspect of our policy without which we cannot claim to be moving toward more normal trading relations with these countries."<sup>178</sup> It is time for the United States to eliminate a discriminatory trade policy and adopt more positive procedures that will not overturn its noble intentions.

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176. United States-Hong Kong Policy Act of 1992, 22 U.S.C. § 5701 (1992).

177. 1997 MFN Hearings, *supra* note 3 (testimony of Robert P. O'Quinn). Termination of favorable trade relationship between U.S. and China would decrease Hong Kong's trade volume by 6 to 8 percent, reduce Hong Kong's gross domestic product by 2.0 to 2.8 percent, and cause 61,000 to 86,000 workers to lose their jobs. *Id.*

178. Hearings on H.R. 10710, *supra* note 54, at 455 (statement of Henry A. Kissinger).

