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## Using the WTO for the Protection of Human Rights in China?

PHIL CW CHAN\*

### Abstract

The question of the conflict and commensurability between human rights and trade has received an abundance of scholarly attention (and mass protests) in the past two decades. Many human rights advocates believe that liberalisation of trade regulations causes and contributes to human rights abuses and violations, whilst trade advocates believe that enhanced international trade provides benefits and opportunities and a generally higher standard of living especially in developing countries. With China's accession to the World Trade Organisation in December 2001, the significance and immediacy of the relationship between human rights and trade has become ever more pronounced, as the human rights situation in China continues to be unfavourable. This article examines the notion and development of human rights in China, whether the WTO is legally capable of impacting the development and enforcement of human rights in China through its compulsory dispute resolution and enforcement mechanisms and its provision for trade sanctions and whether it is indeed desirable for the WTO to do so.

The question of the conflict and commensurability between human rights and trade has received an abundance of scholarly attention (and mass protests) in the past two decades. On one hand, many human rights advocates believe that liberalisation of trade regulations causes or contributes to human rights abuses and violations,

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including exploitation of labour, especially child labour, unemployment and substantial reductions in wages and salaries caused by competition as well as a general deterioration of living conditions for the poor, and they are further troubled by the apparent lack of democracy, equity and transparency within institutions such as the World Trade Organisation (WTO). On the other hand, trade advocates believe that enhanced international trade provides access to previously unexplored or under-explored markets, increased economic incentives and employment opportunities caused by competition leading to a generally higher standard of living especially in developing countries, increased awareness of human rights and enhanced scrutiny against their violations, and increased understanding and interdependence between and amongst countries and regions which in turn reduces the desirability and probability of military confrontation. As the United States de-linked human rights and trade in its relations with China by extending it unconditional most-favoured nation status (or permanent normal trade relations)<sup>1</sup> in September 2000 and thereby removing after almost fifteen years of negotiations the final hurdle in China's accession to the WTO, which ultimately took place on 11 December 2001, the significance and immediacy of the relationship between human rights and trade has become ever more pronounced, as the human rights situation in China continues to be unfavourable. Whilst 'human rights' are not explicitly mentioned in the 1994 Marrakesh Agreement Establishing the World Trade Organisation,<sup>2</sup> the contracting parties in the first preambular paragraph of the Agreement recognise that:

their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...<sup>3</sup>

There are, of course, other factors and issues in addition to human rights that one ought to take into account when examining multilateral or bilateral trade with China, depending on the particular country and region concerned. In this article, I will examine the notion and development of human rights in China. I will then

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<sup>1</sup> Public Law 106-286: US-China Relations Act of 2000, s 101; see also Executive Order: Normal Trade Relations Treatment, proclaimed by President George W Bush on 27 December 2001.

<sup>2</sup> General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, done at Marrakesh on 15 April 1994, 33 ILM 1125 (1994), Agreement Establishing the World Trade Organisation.

<sup>3</sup> *Ibid*, first preambular paragraph.

discuss whether the WTO is legally capable of impacting the development and enforcement of human rights in China through its compulsory dispute resolution and enforcement mechanisms and its provision for trade sanctions, and whether it is indeed desirable for the WTO to do so.

### **I. Human Rights: The Chinese Perspective and Approach**

Maxime Tardu argues that for a State and its government to be pressured into improving the human rights situation within its jurisdiction:

The many factors at work included, first and foremost, an awareness of their dignity by the persons concerned, under the influence of national human rights defence groups; international pressure exerted by NGOs; bilateral inter-state deterrence, in varying forms and degrees; diplomatic representations, measures of cultural and political isolation, withdrawal of economic and technical assistance, commercial boycott; the positions adopted by churches and religious groups; the implementation of complaints procedures at regional level (Council of Europe, the Organization of American States (OAS)) and within the sectoral framework of the specialised agencies of the United Nations, in particular ILO; and lastly, the activities of the United Nations.<sup>4</sup>

With millennia of cultural heritage, an analysis on human rights in China, including this one, must therefore be informed with an understanding of the cultural values pertaining to China and Chinese society, in order to examine whether the population is supportive, ambivalent or in fact hostile to human rights development, and Shalom Schwartz maintains that '[t]he commonalities in the intentional and unintentional value socialization to which different members of society are exposed reflect the cultural emphases that support and maintain the social, economic, and political system of the society.'<sup>5</sup> At the same time, however, it must be kept in mind that it is invariably the case that 'powerful individuals and groups tend to monopolize the interpretation of cultural norms and manipulate them to their own advantage.'<sup>6</sup>

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<sup>4</sup> Maxime Tardu, "The Effectiveness of United Nations Methods and Mechanisms in the Field of Human Rights: A Critical Overview" in *Status Preparatory of Publications, Studies and Documents for the World Conference: Report of the Secretary General* (11 April 1993), World Conference on Human Rights Preparatory Committee, 4<sup>th</sup> Session, Provisional Agenda Item 5, 37, U.N. Doc.A/CONF.157/PC/60/Add.5.

<sup>5</sup> Shalom H Schwartz, "Cultural Dimensions of Values: Toward an Understanding of National Differences" in Uichol Kim, Harry C Triandis, Cigdem Kagitcibasi, Sang-Chin Choi, and Gene Yoon (eds), *Individualism and Collectivism: Theory, Method, and Application* (Thousand Oaks, California: Sage, 1994), p 85, 92.

<sup>6</sup> Abdullahi Ahmed An-Na'im, "Toward a Cross-Cultural Approach to Defining International Stand-

Whilst not a religion as such and indeed 'thoroughly secular',<sup>7</sup> Confucianism, embodying the teachings of Confucius, as a philosophy of life is pervasive in the social, political, moral and juristic fabrics of society and governance in East Asia, and especially amongst the Chinese. William Gabrenya and Kwang-Kuo Hwang note that 'Confucian concepts are employed both in an analytical, abstract, philosophical sense and as a useful heuristic for describing the professed values of Chinese people.'<sup>8</sup>

In particular, the institution of family is central to Confucianism, with the notion of filial piety controlling all social thoughts and interactions as well as providing moral guidance. In his famous 1994 interview in *Foreign Affairs*,<sup>9</sup> Lee Kuan Yew, then Senior Minister and now Minister Mentor of Singapore, declared that 'the tested norm is the family unit. It is the building brick of society.'<sup>10</sup> Although obedience and deference to authority is similarly expected of in other cultures, filial piety, social psychologist David Ho finds, 'surpasses all other ethics in its historical continuity, the proportion of humanity under its governance, and the encompassing and imperative nature of its precepts. The attributes of intergenerational relationships governed by filial piety are structural, enduring, and invariable across situations within Chinese culture.'<sup>11</sup> Thus, filial piety constitutes 'a guiding principle governing generational Chinese patterns of socialization, as well as specific rules of intergenerational conduct, applicable throughout the length of one's life span',<sup>12</sup> and disregard for or violation of one's filial obligations entails the only form of sin, and attendant condemnation, in the Chinese culture.

Not only do these filial obligations guide familial interactions, but they also provide and constitute the framework against which authority in all generalities and circumstances is to be understood and observed, and the institution of the family has always been viewed by the Chinese as the microscopic state. The relationship and obligations between father and son are closely analogous to that between ruler and the ruled, save that one's obligations to the state take precedence over those to one's father in the event of a conflict. Respect for authority is expected of those in inferior positions without exception, by their superiors in the respective hierarchies for whose positions they must simultaneously, quietly and conscientiously strive, and individuals are culturally engrained to regard as their ultimate purpose not serving their own aims and ideals but those of their parents and, above all, the

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ards of Human Rights" in Abdullahi Ahmed An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992), pp 19, 27-28.

<sup>7</sup> William K Gabrenya, Jr, and Kwang-Kuo Hwang, "Chinese Social Interaction: Harmony and Hierarchy on the Good Earth", in Michael Harris Bond (ed), *The Handbook of Chinese Psychology* (Hong Kong: Oxford University Press, 1996), 309, 310.

<sup>8</sup> *Ibid*, 309.

<sup>9</sup> Fareed Zakaria, "Culture Is Destiny: A Conversation with Lee Kuan Yew" (1994) 73(2) *Foreign Affairs*, 109.

<sup>10</sup> *Ibid*, 113.

<sup>11</sup> David YF Ho, "Filial Piety and Its Psychological Consequences" in Bond, *supra* n 7, 155, 155.

<sup>12</sup> *Ibid*.

state. As Henry Rosemont observes, '[f]or the early Confucians there can be no *me* in isolation, to be considered abstractly; I am the totality of roles I live in relation to specific others. I do not play or perform these roles; I am these roles. When they have all been specified I have been defined uniquely, fully, and altogether, with no remainder with which to piece together a free, autonomous self.'<sup>13</sup> It is this difference of the relationship between the individual and the state that has given rise to the mutual incomprehension and unease between China and Western countries, where individual rights and freedoms hold sway.

The notion of human rights, with its inherent individualistic, legalistic and confrontational nature, is thus traditionally viewed by the Chinese people, and not just the government, as hedonistic and suspicious, and to insist upon or advocate their legal recognition and enforcement is to be uncomprehended and abhorred, for the reason that 'Confucianism emphasizes that a genuine community is not composed of mutually disinterested egoistic individuals, but is composed of virtuous members thinking of shared goals and values over one's own. ... In this ideal community, the highest moral virtue is *jen [ren]* (benevolence) when expressed in an active form; "overcoming one's selfishness" in a passive form.'<sup>14</sup> Such insistence upon harmony and respect also extends to the business setting, where *guanxi*, ie, amicable relationship, and *mianzi*, ie, face, are omnipotent, and those alien to the Confucian culture and engrained in their own culture of strict legalism are invariably surprised as they find out that business transactions with the Chinese are not and cannot be perceived as one-off contractual instances but must be premised upon long-term trust and amicability, even if the Westerner harbours contrary feelings which then must be concealed.

It is therefore not surprising that in a survey of seven hundred Beijing residents in December 1995, more than 95 per cent of the respondents either agreed or strongly agreed with the statement that they 'would rather live in an orderly society than in a freer society which is prone to disruptions'.<sup>15</sup> Analysis of the same survey also pointed to wide support for the current regime in China.<sup>16</sup> Together with the enculturation in Confucianism which regards rights as not inherent in humanity but '[flowing] from the state in the form of a gratuitous grant that can be subjected to conditions or abrogation by the unilateral decision of the state',<sup>17</sup> it is

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<sup>13</sup> Henry Rosemont, Jr, "Why Take Rights Seriously? A Confucian Critique" in Leroy Rouner (ed), *Human Rights and the World's Religions* (Notre Dame, Indiana: University of Notre Dame Press, 1988), pp 167, 177.

<sup>14</sup> Lee Seung-hwan, "Was There a Concept of Rights in Confucian Virtue-Based Morality?" (1992) 19 *Journal of Chinese Philosophy* 241, 252.

<sup>15</sup> Yang Zhong, Jie Chen, and John M Scheb, II, "Political Views from Below: A Survey of Beijing Residents" (1997) 30 *PS: Political Science and Politics* 474, 476. The response rate was 97 per cent.

<sup>16</sup> Jie Chen, Yang Zhong, and Jan William Hillard, "The Level and Sources of Popular Support for China's Current Political Regime" (1997) 30 *Communist and Post-Communist Studies* 45.

<sup>17</sup> R Randle Edwards, "Civil and Social Rights: Theory and Practice in Chinese Law Today" in R Randle Edwards, Louis Henkin, and Andrew J Nathan (eds), *Human Rights in Contemporary China* (New York: Columbia University Press, 1986), pp 41, 44-45.

fair to infer that the economic progress and benefits brought to the Chinese population by China's increased trade with other countries and the additional political prestige by its accession to the WTO have augmented the general contentment of the Chinese population with its leaders. Thus, when seeking to foster the development and enforcement of human rights in China, one must heed Ann Kent's caution that '[i]n pitting the sovereignty and national prestige of one state against another they may have the counter-productive effect of mobilizing the very citizenry whose human rights are being abused in support of the abusing state.'<sup>18</sup>

Nonetheless, as the Chinese government continues to justify its leadership by claiming a morally superior status, the Chinese population as it becomes more affluent and aware has begun to take note of its repressive rule. Furthermore, as Joseph Chan argues convincingly, '[h]uman rights does not depend on the notion that human beings are egoistic, totally unconcerned with the well-being of others. Human rights protect legitimate interests of individuals. We must distinguish between "self-interest" and "selfish interests". For example, people have a self-interest in not being tortured or raped, but this interest is obviously not selfish.'<sup>19</sup>

Indeed, China does not deny the validity of international human rights norms, particularly as it realises that mechanisms are lacking for their effective enforcement. Rather, China denies that it has violated human rights or committed human rights abuses, relies on the principles of state sovereignty and non-intervention and refers to the human rights abuses and violations that occur in Western countries vocal in their critique of the human rights situation in China, in particular the United States, as evidencing their hypocrisy and attempt at frustrating China's ascendancy to leading power status. By insisting that it respects human rights, China portrays itself as a great power that abides by international law, including international human rights law.

At the same time, however, seeing itself as spokesperson for developing countries, China challenges human rights' claim of universality, especially in their application, and the bias in international human rights discourse in favour of civil and political rights over economic, social and cultural rights at the expense of and neglecting the peculiar needs of developing countries. In its 1991 White Paper 'Human Rights in China',<sup>20</sup> the Chinese government maintained:

China is in favor of strengthening international cooperation in the realm of human rights on the basis of mutual understanding and seeking a common ground while reserving differences. However, no country in its effort to real-

<sup>18</sup> Ann Kent, "China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989–1994" (1995) 17 *Human Rights Quarterly* 1.

<sup>19</sup> Joseph Chan, "A Confucian Perspective on Human Rights for Contemporary China" in Joanne R Bauer and Daniel A Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), at 212, 219.

<sup>20</sup> Information Office of the State Council of the People's Republic of China, November 1991, full text available at <http://www.china.org.cn/e-white/7/index.htm> (last accessed at 3 March 2008).



ize and protect human rights can take a route that is divorced from its history and its economic, political and cultural realities. ... It is also noted in the resolution of the 46<sup>th</sup> conference on human rights that no single mode of development is applicable to all cultures and peoples. It is neither proper nor feasible for any country to judge other countries by the yardstick of its own mode or to impose its own mode on others. Therefore, the purpose of international protection of human rights and related activities should be to promote normal cooperation in the international field of human rights and international harmony, mutual understanding and mutual respect. Consideration should be given to the differing views on human rights held by countries with different political, economic and social systems, as well as different historical, religious and cultural backgrounds. International human rights activities should be carried on in the spirit of seeking common ground while reserving differences, mutual respect, and the promotion of understanding and cooperation.<sup>21</sup>

China's claims, however, are fraught with contradictions. First of all, for Beijing to make such a public pronouncement that it is in favour of human rights notwithstanding its simultaneous reservations demonstrates that Beijing is aware that the reality must be otherwise, and in denying rather than justifying its human rights abuses and violations, Beijing is failing 'according not to alien western principles but to China's own standards'.<sup>22</sup> In dismissing human rights as Western-oriented by relying on state sovereignty as justification for its human rights 'shortcomings', Beijing is also asserting a principle founded in the 1648 Treaty of Westphalia, a Western treaty peculiar to Western nation-states. In the process, Beijing overlooks the historical fact that the notion of state sovereignty was foreign to imperial China as the Middle Kingdom with all neighbouring countries under its tutelage. Its claim of entitlement to the right to self-determination, which it simultaneously denies Hong Kong<sup>23</sup> amongst others, also relies on a Western right premised upon self and autonomy and fundamentally adverse to Confucianism, a right that originated from Woodrow Wilson which was eventually recognised as *erga omnes* by the International Court of Justice<sup>24</sup> to whose compulsory jurisdiction China does not submit.<sup>25</sup>

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<sup>21</sup> *Ibid*, X. Active Participation in International Human Rights Activities.

<sup>22</sup> RP Peerenboom, "What's Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics" (1993) 6 Harvard Human Rights Journal 29, 52.

<sup>23</sup> For a discussion on Hong Kong's political autonomy and its continuing struggle for universal suffrage, see Phil CW Chan, "Hong Kong's Political Autonomy and its Continuing Struggle for Universal Suffrage" [2006] Singapore Journal of Legal Studies 285.

<sup>24</sup> *Case concerning East Timor (Portugal v Australia)*, ICJ Reports 1995, 90, 102.

<sup>25</sup> Statute of the International Court of Justice, Art 36(2). Nevertheless, the International Court of Justice did point out in *East Timor, ibid*, that 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.'

Last but not least, China has voluntarily committed itself to the principles and ideals of major United Nations human rights treaties and resolutions, including the United Nations Charter,<sup>26</sup> the Universal Declaration of Human Rights,<sup>27</sup> the International Bill of Rights,<sup>28</sup> and the United Nations Convention on the Elimination of Discrimination Against Women,<sup>29</sup> and the fact that other (Western) countries have also disregarded or violated the human rights of their own citizens is not sufficient or satisfactory justification for China's poor human rights record, especially given China's staunch advocacy for cultural relativism and its claim to cultural superiority.

In its human rights dialogues with other (Western) countries and in multilateral fora, China invariably maintains that as a developing country it must first and foremost further and fulfil its citizens' right to subsistence in priority over their civil and political rights. In particular, China relies on Article 2(1) of the International Covenant on Economic, Social and Cultural Rights in arguing that it must be allowed sufficient time and latitude in developing the general living conditions—which, we note, encompass economic, social, cultural, civil and political rights—in China through economic development. The provision states that '[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'<sup>30</sup> In its General Comment No 3 on the nature of States parties' obligations under the Covenant,<sup>31</sup> the United Nations Committee on Economic, Social and Cultural Rights states:

The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant

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<sup>26</sup> Signed at San Francisco on 26 June 1945 and entered into force on 24 October 1945.

<sup>27</sup> Adopted and proclaimed by UN GA Res 217A(III) of 10 December 1948.

<sup>28</sup> International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by UN GA Res 2200A(XXI) of 16 December 1966 and entered into force on 23 March 1976; International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by UN GA Res 2200A(XXI) of 16 December 1966 and entered into force on 3 January 1976.

<sup>29</sup> Adopted and opened for signature, ratification and accession by UN GA Res 34/180 of 18 December 1979 and entered into force on 3 September 1981.

<sup>30</sup> International Covenant on Economic, Social and Cultural Rights, Art 2(1).

<sup>31</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties Obligations (Art 2 para 1)* (14 December 1990), UN Doc.E/1991/23.

should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être* of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.<sup>32</sup>

Here, China is not alone in arguing that human rights discourse has been biased in favour of civil and political rights to the detriment of economic, social and cultural rights. In its statement to the World Conference on Human Rights held in Vienna in 1993, the Committee on Economic, Social and Cultural Rights stated that '[t]he shocking reality ... is that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights.<sup>33</sup> Whilst the eventual 1993 Vienna Declaration and Programme of Action<sup>34</sup> reaffirmed that '[a]ll human rights are universal, indivisible and interdependent and interrelated',<sup>35</sup> Audrey Chapman points out that issues relating to the progressive realisation of economic, social and cultural rights were left unaddressed in almost the entire rest of the Declaration and Programme.<sup>36</sup>

However, it has not been substantiated that economic, social and cultural rights and civil and political rights are mutually exclusive or that economic, social and cultural rights will be realised if civil and political rights are to be ignored. The universality, indivisibility, interdependence and inter-relatedness of all human

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<sup>32</sup> *Ibid*, para 9.

<sup>33</sup> United Nations Committee on Economic, Social and Cultural Rights, *Report on its Seventh Session* (23 November–11 December 1992), UN Doc.E/1993/22, Annex III: Statement to the World Conference on Human Rights on Behalf of the Committee on Economic, Social and Cultural Rights, para 5.

<sup>34</sup> United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, adopted by acclamation on 25 June 1993, UN Doc.A/CONF.157/24 (Part I), 32 ILM 1661 (1993).

<sup>35</sup> *Ibid*, para 5.

<sup>36</sup> Audrey R Chapman, "A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights" (1996) 18 Human Rights Quarterly 23, 24–25, note 3.

rights indicated in the Vienna Declaration and Programme may now be taken as a norm of customary international law binding on all States. Speaking in the context of the European Convention on Human Rights,<sup>37</sup> the European Court of Human Rights in *Airey v Ireland*<sup>38</sup> stated that even '[w]hilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers ... that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.'<sup>39</sup> The 2000 *Human Development Report* comprehensively explained the close correlations both between human development and human rights and between economic, social and cultural rights and civil and political rights, and China's handling of the severe acute respiratory syndrome between its outbreak in its territory in 2002 and its spread to Hong Kong and other countries in 2003 vividly demonstrated the importance of civil and political rights including the freedom of the press in the protection of all human rights including the right to health.

Illustrating the commensurability between civil and political rights and economic development in East Asia, Inoue Tatsuo refers to Japan's post-World War II democracy and economic development and maintains that the argument put forward by China and developing countries in Asia, that on account of their relative dearth of wealth and their more urgent need for economic development they should not be held to developed countries' human rights standards, is self-defeating in their quest for equal respect on the global stage as it 'suppresses or rationalizes abominable Western practices past and present, such as colonialism, slavery, racism, fascism, anticommunist crusades (McCarthyism, Vietnam War), and so on.'<sup>40</sup> With human rights starting to develop in Western countries only after World War II, the Orientalist dualism inherent in the argument by China and other like-minded Asian countries thus 'traps the West as well as Asia in a distorted perception of self-identity'<sup>41</sup> which stereotypes Asia as fundamentally inferior to the West and which only serves as 'an epistemological device for guaranteeing Western hegemony over Asia'.<sup>42</sup>

Furthermore, the existence of admitted bias in human rights discourse in favour of civil and political rights to the detriment of economic, social and cultural rights

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<sup>37</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome and opened for signature on 4 November 1950 and entered into force on 3 September 1953. The Convention was subsequently amended by Protocol No 11, done at Strasbourg and opened for signature on 11 May 1994 and entered into force on 1 November 1998, to the effect the then supervisory mechanism, consisting of a European Court of Human Rights and a European Commission of Human Rights, be restructured and replaced with a single and permanent European Court of Human Rights.

<sup>38</sup> (1979) 2 EHRR 305.

<sup>39</sup> *Ibid*, para 26.

<sup>40</sup> Inoue Tatsuo, "Liberal Democracy and Asian Orientalism", in Bauer and Bell, *supra* n 19, 27, 41.

<sup>41</sup> *Ibid*, 42.

<sup>42</sup> *Ibid*, 39.

does *not* mean that China protects economic, social and cultural rights. With law in China 'being conceived of as an instrument of the ruler',<sup>43</sup> it has been pointed out that although China has improved its legal system, in particular with a plethora of legislation, 'the over-arching principle is still legal instrumentalism. It is fair to argue that the feature of this legalism is the use of liberal language, rhetoric, and the ritual of law to pursue distinctly illiberal political and social objectives; it is the rule through law rather than the rule of law.'<sup>44</sup> It is not surprising that China possesses similar attitudes towards international law: instead of being normative and principles- and rules-based, international law should serve China's foreign policy goals and interests as well as be compatible with its domestic concerns and policies (although, it must be added, all other states see international law from the same lens). Beijing's approach also stems from and reflects China's historical experience with international law which, with the numerous unequal treaties forced upon China, the foreign partitioning of Chinese territory and the capitulation of Chinese sovereignty through concessions to foreign demands for extra-territorial jurisdiction, can only have been negative.

Embedded in Confucianism, China's insistence on the importance of its economic development and its argument that (Western) insistence on civil and political rights is meant to dilute China's comparative advantage in external trade from low-wage employment also casts human life as a means to an end rather than as an end in itself and deprives human rights of their intrinsicity. The Committee on Economic, Social and Cultural Rights has indicated that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential food-stuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would largely be deprived of its *raison d'être*.'<sup>45</sup> However, despite the rapid economic development and the accumulation of remarkable wealth in major cities and particular households in China, the vast majority of the Chinese population continue to live below the poverty line with no access to any of the welfare and benefits the Committee on Economic, Social and Cultural Rights has indicated. In fact, the effects of Confucianism, in particular the omnipotence of *guanxi* and *mianzi* in business and personal relationships, bureaucratic interference, and general ignorance of public policies and one's contractual rights and obligations, have all contributed to and perpetuated the undermining of property and contractual rights in China. Together with these factors, the Chinese judi-

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<sup>43</sup> Qingjiang Kong, "China's WTO Accession: Commitments and Implications" (2000) 3 *Journal of International Economic Law* 655, 683–84.

<sup>44</sup> *Ibid*, 684.

<sup>45</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 3*, *supra* n 31, para 10.

ciary's traditional concern with penal and not civil matters and its emphasis on substantive laws rather than procedures leads to civil judgments frequently unexecuted.<sup>46</sup>

Meanwhile, as Virginia Leary points out, workers' rights in a country are a good indicator of the level of protection of human rights in general,<sup>47</sup> as workers constitute the bedrock of a society and if their rights are not recognised and protected in a particular country then it is improbable that human rights in general are recognised and protected in that country. In her study on labour standards and human rights under China's market socialism, Anita Chan has demonstrated that the labour rights of tens of millions of Chinese workers are systematically ignored, undermined or violated,<sup>48</sup> often physically through forced and bonded labour, control of bodily functions including toileting, corporal punishment, and violence.<sup>49</sup> Violations of labour rights and standards are particularly acute for those citizens who seek to take part in China's economic development by moving to China's major cities such as Beijing, Shanghai and Guangzhou, as they are subjected to 'immigration' controls under China's household registration system and are viewed by the bureaucracy and the existing urban populations as both a threat to stability and a source of criminality and diseases. In addition, it was the injustice and corruption of their managers which many workers in China felt to resemble the state bureaucracy that led them to find resonance with and join a student movement which culminated in the tragic Tiananmen Square suppression,<sup>50</sup> and Leary notes that the Chinese government was in fact more alarmed at workers' demand for the right to organise and participate in labour unions than at the students' call for democracy *per se*.<sup>51</sup>

Last but not least, although traditionally aligned with civil and political rights, the principle of equality and non-discrimination, from which all human rights derive and evolve, have 'always had pertinence to economic, social and cultural rights'.<sup>52</sup> Unfortunately, patriarchal attitudes towards women and children, based on the precept of filial piety, continue to pervade Chinese laws and society, and China's penal one-child policy has led to innumerable children, particularly female children, being denied birth registration, causing their official non-existence which

<sup>46</sup> See Donald C Clarke, "The Execution of Civil Judgments in China" (1995) 141 *China Quarterly: Special Issue on China's Legal Reforms* 65, 69–70.

<sup>47</sup> Virginia A Leary, "The Paradox of Workers' Rights as Human Rights" in Lance A Compa and Stephen F Diamond (eds), *Human Rights, Labor Rights, and International Trade* (Philadelphia: University of Pennsylvania Press, 1996), at 21, 22.

<sup>48</sup> Anita Chan, "Labor Standards and Human Rights: The Case of Chinese Workers under Market Socialism" (1998) 20 *Human Rights Quarterly* 886.

<sup>49</sup> *Ibid.*, 890–91 and 894–97.

<sup>50</sup> Andrew G Walder, "Workers, Managers and the State: The Reform Era and the Political Crisis of 1989" (1991) 127 *China Quarterly: Special Issue on The Individual and State in China* 467.

<sup>51</sup> Leary, *supra* n 47, 23.

<sup>52</sup> Scott Leckie, "Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights" (1998) 20 *Human Rights Quarterly* 81, 104–05.

entails their complete lack of access to any state welfare and benefits including education, access to health facilities and protection from crimes including infanticide and forced prostitution.

## II. Protection of Human Rights in China through the WTO and its Trade Sanctions?

As Louis Henkin observes, '[e]nforcement has always been seen as the weak link in the international legal system, and it is surely the weak link of international human rights law.'<sup>53</sup> Although Article 41 of the United Nations Charter provides that the United Nations Security Council may impose non-military sanctions for the implementation of its decisions,<sup>54</sup> it is improbable that as a Permanent Member of the Council with veto power China will ever face its sanctions. Many therefore believe that the WTO with its compulsory dispute settlement and enforcement mechanisms may be able to exert pressures on China for the observance of international human rights law, as it is surmised that China cares about its economic development and trade relations with other countries. In particular, trade sanctions may be invoked against China under the framework of the WTO if labour rights and standards have been disregarded in the production in its territory of a good that another WTO Member may import, such as through the exploitation of child labour.

Ernst-Ulrich Petersmann argues that '[h]uman rights law offers WTO rules moral, constitutional, and democratic legitimacy far beyond the traditional economic and utilitarian justifications.'<sup>55</sup> The WTO possesses an international legal personality of its own<sup>56</sup> and Article III(2) of the Marrakesh Agreement expressly provides that the Organisation 'shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement [and] may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the result of such negotiations, as may be decided by the Ministerial Conference.'<sup>57</sup> In his report to the fifty-fifth

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<sup>53</sup> Louis Henkin, "Human Rights and State "Sovereignty"" (1996) 25 Georgia Journal of International and Comparative Law 31, 41.

<sup>54</sup> Article 41 of the United Nations Charter states that '[t]he Security Council may decide what measures not involving the use of armed forces are to be employed to give effects to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'

<sup>55</sup> Ernst-Ulrich Petersmann, "The WTO Constitution and Human Rights" (2000) 3 Journal of International Economic Law 19, 24.

<sup>56</sup> Marrakesh Agreement Establishing the World Trade Organisation, Art VIII(1).

<sup>57</sup> *Ibid*, Art III(2).

session of the United Nations General Assembly, United Nations Secretary-General Kofi Annan stated that:

The goals and principles of the WTO Agreements and those of human rights do therefore share much in common. Goals of economic growth, increasing living standards, full employment and the optimal use of the world's resources are conducive to the promotion of human rights, in particular the right to development. Parallels can also be drawn between the principles of fair competition and non-discrimination under trade law and equality and non-discrimination under human rights law. Further, the special and differential treatment offered to developing countries under the WTO rules reflects notions of affirmative action under human rights law.<sup>58</sup>

Under Article XX of the 1947 General Agreement on Tariffs and Trade<sup>59</sup> as incorporated into the 1994 General Agreement on Tariffs and Trade,<sup>60</sup> '[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; ... (e) relating to the products of child labour...'<sup>61</sup> Article XIV(a) of the 1994 General Agreement on Trade in Services<sup>62</sup> likewise permits a contracting party to adopt or enforce measures in the necessary protection of public morals or maintenance of public order.<sup>63</sup>

Whilst the term 'trade sanctions' is not used in the WTO Agreement, Article 22(2) of the Dispute Settlement Understanding<sup>64</sup> states that in the event of a failure of a Member to bring the measure found to be inconsistent with a WTO rule into conformity or to comply with the recommendations and rulings by the WTO Panel or Appellate Body within a reasonable period of time, then that Member shall

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<sup>58</sup> *Globalization and its Impact on the Full Employment of All Human Rights: Preliminary Report of the Secretary-General* (31 August 2000), 55<sup>th</sup> Session, UN Doc.A/55/342, 4.

<sup>59</sup> General Agreement on Tariffs and Trade, adopted on 30 October 1947 at the conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment at Havana and entered into force on 1 January 1948.

<sup>60</sup> 1994 General Agreement on Tariffs and Trade, *supra* n 2, Annex 1A: General Agreement on Tariffs and Trade, paras 1(a) and 1(b).

<sup>61</sup> 1947 General Agreement on Tariffs and Trade, Art XX.

<sup>62</sup> 1994 General Agreement on Tariffs and Trade, *supra* n 2, Annex 1B: General Agreement on Trade in Services.

<sup>63</sup> Nevertheless, in a footnote to Article XIV(a) it is immediately clarified that '[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.'

<sup>64</sup> 1994 General Agreement on Tariffs and Trade, *supra* n 2, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes.



‘enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation’, failing which ‘any party having invoked the dispute settlement procedures may request authorization from the Dispute Settlement Body to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.’<sup>65</sup> The WTO Appellate Body has indicated that ‘a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulatory in deciding whether any such action would be “fruitful”.’<sup>66</sup>

An examination of the WTO Agreement, however, reveals that it will not be lawful for the WTO to enlarge its own jurisdiction by taking into account or enforcing principles, rules and obligations established outside the framework of the WTO in its dispute settlement and enforcement mechanisms. Seeking to strengthen the multilateral trading system, Article 23(1) of the Dispute Settlement Understanding stipulates that ‘[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.’<sup>67</sup> Article 23(2) requires that ‘[i]n such cases, Members shall:

- (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the [Dispute Settlement Body] or an arbitration award rendered under this Understanding;
- (b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and
- (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.<sup>68</sup>

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<sup>65</sup> *Ibid*, Art 22(2).

<sup>66</sup> *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Report of the Appellate Body* (9 September 1997), WTO Doc.WT/DS27/AB/R, para 135.

<sup>67</sup> Dispute Settlement Understanding, Art 23(1).

<sup>68</sup> *Ibid*, Art 23(2).

Article 19(1) of the Dispute Settlement Understanding indicates that '[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.'<sup>69</sup> Article 19(2), however, points out that '[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.'<sup>70</sup>

However, whilst the WTO Agreement must not be read 'in clinical isolation from public international law',<sup>71</sup> it remains the case, as Gabrielle Marceau points out, that:

The WTO adjudicating bodies are not courts of general jurisdiction and they cannot interpret and apply all treaties involving WTO Members, as states. Otherwise, WTO adjudicating bodies would end up 'interpreting' human rights treaties. ... The covered agreements are explicitly listed, and it cannot be presumed that members wanted to provide the WTO remedial system to enforce obligations and rights other than those listed in the WTO treaty. WTO adjudicating bodies cannot give direct effect to human rights in any way that would set aside or amend a WTO provision. If they were to allow a non-WTO provision on human rights to supersede and set aside a WTO provision and therefore to give a legal effect to and enforce a non-WTO provision in superseding a WTO provision, they would be adding to or diminishing the WTO covered agreements (or amending them).<sup>72</sup>

It is important, nevertheless, to keep in mind that the lack of jurisdiction for the WTO to take into account and enforce human rights norms in its dispute settlement and enforcement mechanisms does not absolve its Members from their general and continuing obligation to guarantee and protect international human rights norms including those to which they have agreed by treaty. In the light of the jurisdictional limitation on the WTO, it has been suggested that the International Labour Organisation (ILO), a specialised agency of the United Nations and a tripartite organisation of governments, employers and union representatives, may be suitable for the development and enforcement of human rights in China, an organisation which Daniel Ehrenberg regards as the principal international organisation with

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<sup>69</sup> *Ibid*, Art 19(1).

<sup>70</sup> *Ibid*, Art 19(2).

<sup>71</sup> *United States—Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body* (29 April 1996), WTO Doc.WT/DS2/AB/R, 17.

<sup>72</sup> Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *European Journal of International Law* 753, 777–78.

expertise in labour issues.<sup>73</sup> Acknowledging that the ILO nonetheless lacks effective enforcement mechanisms that may bind States Parties to their treaty obligations under its numerous labour conventions,<sup>74</sup> Ehrenberg proposes that the ILO and the WTO, with the latter's compulsory disputes settlement and enforcement mechanisms, should be merged such that adherence to international human rights and labour rights and standards may be sought and assured in respect of the production of such goods as another WTO Member may import. Believing that such 'synergistic' collaboration furthermore 'could be used as a model to demonstrate how cooperation between multilateral organizations can be effectively utilized to effectuate international human rights and labor rights policies, and optimize world public order',<sup>75</sup> the author provides detailed guidelines as to how this collaboration may proceed.<sup>76</sup> In its Singapore Ministerial Declaration, the WTO acknowledges likewise the ILO's competence in the field of labour rights and standards and asserts its complementariness with the role and functions of the ILO.<sup>77</sup>

However, only 21 of the 186 ILO conventions are legally binding on China.<sup>78</sup> China's realist and instrumental attitudes towards international law, its suppression

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<sup>73</sup> Daniel S Ehrenberg, "From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights" in Compa and Diamond, *supra* n 47, pp 163, 163–64.

<sup>74</sup> *Ibid*, 164.

<sup>75</sup> *Ibid*, 165.

<sup>76</sup> *Ibid*, 165–75.

<sup>77</sup> World Trade Organisation Singapore Ministerial Declaration, adopted on 13 December 1996, at the Ministerial Conference held in Singapore, 36 ILM 218 (1997), states that the WTO '[renews] our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and the ILO Secretariats will continue their existing collaboration' (para 4).

<sup>78</sup> International Labour Organisation Convention No 11 on Right of Association (Agriculture), 1921, ratified by China on 27 April 1934; Convention No 14 on Weekly Rest (Industry), 1921, ratified by China on 17 May 1934; Convention No 16 on Medical Examination of Young Persons (Sea), 1921, ratified by China on 2 December 1936; Convention No 19 on Equality of Treatment (Accident Compensation), 1925, ratified by China on 27 April 1934; Convention No 22 on Seamen's Articles of Agreement, 1926, ratified by China on 2 December 1936; Convention No 23 on Repatriation of Seamen, 1926, ratified by China on 2 December 1936; Convention No 26 on Minimum Wage-Fixing Machinery, 1928, ratified by China on 5 May 1930; Convention No 27 on Marking of Weight (Packages Transported by Vessels), 1929, ratified by China on 24 June 1931; Convention No 32 (Revised) on Protection against Accidents (Dockers), 1932, ratified by China on 30 November 1935; Convention No 45 on Underground Work (Women), 1935, ratified by China on 2 December 1936; Convention No 80 on Final Articles Revision, 1946, ratified by China on 4 August 1947; Convention No 100 on Equal Remuneration, 1951, ratified by China on 2 November 1990; Convention No 111 on Discrimination (Employment and Occupation), 1958, ratified by China on 12 January 2006; Convention No 122 on Employment Policy, 1964, ratified by China on 17 December 1997; Convention No 138 on Minimum Age, 1973, ratified by China on 28 April 1999 with obligatory declaration of minimum age at 16 years; Convention No 144 on

of an individual's right of association and, above all, of his or her empowerment let alone through a compulsory international enforcement mechanism, as well as the fact that the proposed joint enforcement mechanism will require the consent of all of the contracting parties to both the WTO and the ILO, all render Ehrenberg's attractive project a definite impossibility. Indeed, Michael Trebilcock and Robert Howse warn that 'the attachment of economic sanctions to the powers of the ILO may destabilize the organization, causing states to withdraw from membership or to withhold ratification of its Conventions to an even greater extent than is the case at present.'<sup>79</sup>

On the basis of the ILO Declaration on Fundamental Principles and Rights at Work<sup>80</sup> which states that all Members of the ILO, 'even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions',<sup>81</sup> Petersmann, nevertheless, argues that 'UN membership entails legal obligations to respect core human rights'<sup>82</sup> and that the rules and principles which ILO conventions and 'other modern human rights instruments'<sup>83</sup> have laid down illustrate that there are certain human rights that have reached the status of *erga omnes* obligations of States and intergovernmental organisations,<sup>84</sup> including the WTO.

As has been explained, unless and until the Dispute Settlement Understanding is amended, the WTO is legally incapable of taking into account let alone enforcing rules and principles laid down outside the framework of the Organisation in its dispute settlement and enforcement mechanisms. Petersmann's argument fails to address the cardinal principle of international law that the consent of the State must have been obtained before a particular treaty obligation may be imposed on that State, and membership in an intergovernmental organisation such as the United

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Tripartite Consultation (International Labour Standards), 1976, ratified by China on 2 November 1990; Convention No 150 on Labour Administration, 1978, ratified by China on 7 March 2002; Convention No 159 on Vocational Rehabilitation and Employment (Disabled Persons), 1983, ratified by China on 2 February 1988; Convention No 167 on Safety and Health in Construction, 1988, ratified by China on 7 March 2002; Convention No 170 on Chemicals, 1990, ratified by China on 11 January 1995; Convention No 182 on Worst Forms of Child Labour, 1999, ratified by China on 8 August 2002.

<sup>79</sup> Michael J Trebilcock and Robert Howse, "Trade Policy & Labor Standards" (2005) 14 *Minnesota Journal of Global Trade* 261, 284.

<sup>80</sup> International Labour Organisation Declaration on Fundamental Principles and Rights at Work and Annex, adopted by the International Labour Organisation General Conference at Geneva on 18 June 1998, 37 *ILM* 1233 (1998).

<sup>81</sup> *Ibid*, para 2.

<sup>82</sup> Ernst-Ulrich Petersmann, "The "Human Rights Approach" Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is It Relevant for WTO Law and Policy?" (2004) 7 *Journal of International Economic Law* 605, 634.

<sup>83</sup> *Ibid*, 617.

<sup>84</sup> *Ibid*.

Nations or the ILO does not in itself constitute such requisite consent to be bound by the particular treaties or declarations adopted under the framework of the particular organisation. In fact, the Annex to the above Declaration specifically states that the Declaration 'is of a strictly promotional nature'.<sup>85</sup> Petersmann refers to the United Nations Convention on the Rights of the Child,<sup>86</sup> the Vienna Declaration and Programme of Action, and '[m]any recent studies'<sup>87</sup> as the 'other modern human rights instruments' evidencing that human rights and their underlying values, including 'respect for human dignity, life, freedom, equality, property, rule of law, procedural justice', exist 'in all major cultures and religions'.<sup>88</sup> However, despite the fact that 190 States have ratified the Convention on the Rights of the Child, our discussion on Confucianism and the general human rights situation in China, together with the United States' continual refusal to ratify the treaty as well as the forbearance of many States Parties including Canada, New Zealand and the United Kingdom of corporal punishment, should be sufficient to demonstrate that the rights of the child have not received universal affirmation. Our discussion on Confucianism should also reveal that freedom, equality and the rule of law are alien to the Chinese culture. As only States can be Members of the United Nations,<sup>89</sup> an intergovernmental organisation such as the WTO, which does not form part of the structure of the United Nations, is as such also not bound by the United Nations Charter to respect human rights or to take into account and enforce these human rights in its activities governed by and under its own framework, such as through, in Philip Alston's words, 'the merger and acquisition of human rights by trade law'.<sup>90</sup>

Meanwhile, human rights advocates ought to give due consideration as to whether trade sanctions, which the WTO Panel has described as 'essentially retaliatory in nature',<sup>91</sup> are an appropriate, effective or even lawful means to improving the human rights situation in China. It has been noted that in many respects economic sanctions are 'the modern version of siege warfare: each involves the systematic deprivation of a whole city or nation of economic resources'.<sup>92</sup> The goal of siege 'is surrender, not by defeat of the enemy army, but by the fearful spectacle

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<sup>85</sup> International Labour Organisation Declaration on Fundamental Principles and Rights at Work and Annex, *supra* n 80, Annex: Follow-up to the Declaration, para 2.

<sup>86</sup> Adopted and opened for signature, ratification and accession by UN GA Res 44/25 of 20 November 1989 and entered into force on 2 September 1990.

<sup>87</sup> Petersmann, *supra* n 82, 617, note 35.

<sup>88</sup> *Ibid.*

<sup>89</sup> United Nations Charter, Art 4(1).

<sup>90</sup> Philip Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann" (2002) 13 *European Journal of International Law* 815, 829–30.

<sup>91</sup> *United States–Import Measures on Certain Products from the European Communities, Report of the Panel* (17 July 2000), WTO Doc.WT/DS165/R, para 6.23.

<sup>92</sup> Joy Gordon, "A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions" (1999) 13 *Ethics & International Affairs* 123, 124.

of the civilian dead.<sup>93</sup> The imposition of economic sanctions purportedly aiming at improving the human rights situation in a country also entails that in the process various human rights are undermined or directly violated. As the Committee on Economic, Social and Cultural Rights in its General Comment No 8 on the relationship between economic sanctions and respect for economic, social and cultural rights<sup>94</sup> has emphasised:

the inhabitants of a given country do not forfeit their basic economic, social and cultural rights by virtue of any determination that their leaders have violated norms relating to international peace and security. The aim is not to give support or encouragement to such leaders, nor is it to undermine the legitimate interests of the international community in enforcing respect for the provisions of the Charter of the United Nations and the general principles of international law. Rather, it is to insist that lawlessness of one kind should not be met by lawlessness of another kind which pays no heed to the fundamental rights that underlie and give legitimacy to any such collective action.<sup>95</sup>

Borrowing from Judge Weeramantry's dissenting opinion in the International Court of Justice's advisory opinion on the legality of threat or use of nuclear weapons,<sup>96</sup> the underlying rationale behind the imposition of economic sanctions, such as to prevent or punish human rights abuses and violations or to improve the general human rights situation in a particular country, is immaterial:

It is not to the point that [paraphrase: the harmful results of economic sanctions] are not directly intended, but are 'by-products' or 'collateral damage' caused by [economic sanctions]. Such results are known to be the necessary consequences of the use of the weapon. The author of the act causing these consequences cannot in any coherent legal system avoid legal responsibility for causing them, any less than a man careering in a motor vehicle at a hundred and fifty kilometres per hour through a crowded market street can avoid responsibility for the resulting deaths on the ground that he did not intend to kill the particular persons who died.<sup>97</sup>

One may argue, nevertheless, that economic sanctions may still be necessary as they send a message that human rights abuses and violations are unacceptable to

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<sup>93</sup> Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), p 161.

<sup>94</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights* (12 December 1997), UN Doc.E/C.12/1997/8.

<sup>95</sup> *Ibid*, para 16.

<sup>96</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Reports 1996, Vol 1, 226.

<sup>97</sup> *Ibid*, per Judge Weeramantry, 491 (diss op).

the international community to such an extent as to warrant sanctions. The argument, however, suffers moral acceptability as it uses the civilian masses to dissuade a government from its objectionable policies and treats them as objects and a means to an end rather than as an end in itself, in much similar manner as the Chinese government does in relation to its population in pursuit of rapid economic development and political prestige. Just as it is illegitimate for China to rely on human rights abuses and violations that occur in other countries as justification for its poor human rights record, it is equally unconvincing for another country or an international organisation such as the WTO to rely on China's poor human rights record as justification for the imposition of economic or trade sanctions that essentially punish civilians. As Joy Gordon points out:

the existence of wrongdoing does not somehow 'make' sanctions come about in a way that vitiates the moral agency of institutions imposing them. Nations violate international norms quite often; sometimes the international community responds to international wrongdoing by military action, diplomatic protest, sanctions, or other measures. Sometimes it does nothing. The situation itself does not *compel* any particular response. Indeed, a superpower can violate international norms with considerable impunity. For this reason, the nation or institution imposing sanctions is still the nation or institution that has imposed the deprivation—with choice, with intent, and in the face of other options, ranging from protest to inaction to military invasion.<sup>98</sup>

Elias Davidsson also argues that in addition to economic, social and cultural rights as well as the right to life and freedom from cruel, inhuman or degrading treatment, '[e]conomic sanctions, unless specifically requested by the population, prevent a people from exercising their right to self-determination, the right to freely dispose of their natural wealth and resources and the right to development. ... Individuals living in sanctioned countries are thus singled out for persecution by reason of being where they are.'<sup>99</sup> A State that imposes economic or trade sanctions with a view to improving the human rights situation in China may therefore itself contravene the law of State responsibility, which indicates that countermeasures must not affect or derogate from obligations for the protection of fundamental human rights.<sup>100</sup>

The use of sanctions by the WTO with a view to preventing or punishing human rights abuses and violations or to improving the general human rights situation in a particular Member presents further difficulties. Whilst it is unlikely that China

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<sup>98</sup> Gordon, *supra* n 92, 132–33.

<sup>99</sup> Elias Davidsson, "Legal Boundaries to UN Sanctions" (2003) 7 *International Journal of Human Rights* 1, 41.

<sup>100</sup> International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts as annexed to UN GA Res 56/83 of 28 January 2002, Art 50(1)(b).

will ever face sanctions by the Security Council in respect of its poor human rights record, it is equally improbable that the international community, and certainly the five Security Council Permanent Members with veto power, will endow yet another international body with sanctioning power. In addition, the fact that the WTO Agreement 'is not to be read in clinical isolation from public international law'<sup>101</sup> does not mean that the WTO is required to allow the imposition of trade sanctions on a particular Member with a view to improving the general human rights situation within that Member's jurisdiction. No major human rights treaties demand the imposition of economic or trade sanctions in order to have an offending State Party's human rights protected or improved, and subject to the Security Council's enforcement powers under Chapter VII, the United Nations Charter specifically prohibits intervention by the foremost international organisation in the domestic affairs of its Members.<sup>102</sup>

Indeed, Steve Charnovitz questions the rationale of trade sanctions by the WTO, arguing that:

it is people who trade, not states. If states did all the trading, then there would be no normative problem in approving a state's request for a trade sanction under DSU Article 22 in response to a violation by a trading partner. When it is individuals who trade, however, a WTO approval of a trade sanction interferes with voluntary consensual arrangements of individuals on both sides of the transaction who may want to complete an exchange without regard to whether their governments are obeying WTO rules. Such an action by the WTO stands apart from everything else the WTO does and from its focus on mutually gainful trade.<sup>103</sup>

Whilst Charnovitz's reasoning is discerning, it ought to be noted that there are an abundance of state-owned and -controlled corporations that are capable of affecting the world market and the general conditions of living in goods- and/or services-importing countries (as illustrated in Russia's apparent political pressures on Ukraine against further alignment with the European Union and the United States through cessation in January 2006 of its state-owned and -controlled gas monopoly Gazprom's gas supplies on which Ukraine relies). Nevertheless, the incident in that gloomy European winter precisely reminds us that it is important that the multilateral trading system as embodied in the WTO be steadily maintained, for compliance with its agreements and decisions is grounded only in its Members' mutual understanding that their respective compliance will be reciprocated; non-

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<sup>101</sup> *United States—Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body* (29 April 1996), WTO Doc.WT/DS2/AB/R, 17.

<sup>102</sup> United Nations Charter, Art 2(7).

<sup>103</sup> Steve Charnovitz, "Rethinking WTO Trade Sanctions" (2001) 95 *American Journal of International Law* 792, 811.



compliance brings and breeds non-compliance leading ultimately to the undermining if not disintegration of the entire system.

Accordingly, as State non-compliance with international human rights norms has led us to question their utility and effectiveness, which makes the WTO dispute settlement and enforcement mechanisms seemingly so attractive for the development and enforcement of human rights because States, it is surmised, care about trade, we ought not hastily enlarge the jurisdiction of the WTO with a mandate to develop or enforce international human rights norms through the use of its dispute settlement and enforcement mechanisms intended solely within the existing framework and rationale of the Organisation, that is, trade, with the end result that neither human rights nor trade norms would be respected or enforced.

### III. Conclusion

Joost Pauwelyn discerns that ‘in a sense, a “two-class society” does exist, between rules of international law that can be judicially enforced before a court with compulsory jurisdiction and those that cannot.’<sup>104</sup> Such fragmentation of international institutions and international law thus leads us to search for ‘synergistic’ collaboration between international institutions and between sub-systems of international law such as has Ehrenberg suggested for the ILO and the WTO. Our last attention should, thus, be drawn to this: Is it in fact desirable for the WTO to take into account and enforcing international human rights norms in its dispute resolution and enforcement mechanisms?

Article 8(1) of the Dispute Settlement Understanding stipulates that only individuals who are well-qualified in international trade law or policy shall be appointed in the composition of WTO Panels, whilst Article 17(3) indicates that only individuals of recognised authority, with demonstrated expertise in law, international trade and the subject-matter of the WTO Agreement generally shall be appointed to the WTO Appellate Body. It is fair to assume that the prime concern of these individuals must be with the liberalisation of trade regulations and the steady functioning of the multilateral trading system, and it is not at all assured that these individuals will be equally qualified in or concerned about international human rights law and its vast jurisprudence and discourse. Assuming *arguendo* that the WTO Panels and Appellate Body were legally not incapable under the WTO Agreement of taking into account and enforcing human rights established outside the framework of the WTO, their interpretations of and decisions on these human rights will necessarily be based on their members’ understanding of international human rights law in the context of their expertise in international trade law or policy and of the WTO Agreement, and plausibly may fail to take into account and enforce the context and substance of international human rights law. The end result will inevita-

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<sup>104</sup> Joost Pauwelyn, “The Role of Public International Law in the WTO: How Far Can We Go?” (2001) 95 *American Journal of International Law* 490, 553.

bly be that both the sub-systems of international human rights law and of international trade law are lobotomised.

Furthermore, human rights abuses and violations continue to occur despite numerous multilateral treaties and resolutions mandating human rights protection and development. Indeed, the prohibition of the use of force continues to be ignored despite Article 2(4) of the United Nations Charter and the United Nations Security Council's sanctioning and enforcement powers under Article 41 and Chapter VII, as we saw in the United States' invasion of Iraq in 2003 and Israel's armed hostility with Lebanon in 2006, and it has not been advocated that the Security Council and the United Nations, both of which the United States regards as ineffective and irrelevant if the perceived security and interests of the United States are threatened, ought therefore to be ignored. At a guest seminar I presented at the Fairbank Center for East Asian Research at Harvard University in March 2007, Merle Goldman pointed out that although human rights norms can in fact be found *within* the legal framework of the WTO, such as the prohibition against child labour in the 1994 General Agreement on Tariffs and Trade, they were never resorted to against China or any other offending WTO Member. This, to Goldman, proved that human rights norms within the WTO framework itself were ineffective if not irrelevant.

However, whilst human rights treaties may be weak in their enforcement mechanisms, their enforcement mechanisms nonetheless exist and should be used at all times, if only so that through such use they will be strengthened and empowered. The fact that China justifies instead of denies its violations of human rights treaties demonstrates that the enforcement mechanisms in these human rights treaties are still effective and that the validity of international human rights law is recognised and preserved. Meanwhile, the fact that human rights norms within the WTO framework itself have never been resorted to, as Goldman pointed out, should not be held to be a failing of the WTO mechanisms either, as it is up to individual WTO Members to invoke the WTO dispute settlement and enforcement mechanisms which the WTO cannot invoke on its own motion. We ought to keep in mind that by acceding to the WTO, China has voluntarily agreed to, and reinforced, the binding force and legitimacy of the human rights norms established within the legal framework of the Organisation.

On the other hand, to rely on the WTO with a view to developing or enforcing human rights norms established outside the framework of the Organisation will only nullify the enormous international, multilateral and bilateral efforts in the past six decades in establishing human rights as valid and authoritative in their own right, as international human rights law will in the process be positioned as subsidiary and subject to international trade law. Insistence on the use of the WTO, an international organisation founded upon a multilateral treaty in need of enforcement itself, as a device through which human rights treaties and resolutions may be enforced is therefore at once both wishful thinking and self-defeating, and we must continue, through recourse to international human rights law and international human rights bodies, to uphold and strengthen their functions, effectiveness, and values *in se*.

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