

**DEBATING HUMAN RIGHTS AND THE RULE OF LAW IN CHINA:
INTERNATIONAL ACTORS' ROLE IN UPHOLDING BASIC STANDARDS**

by

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ABSTRACT

The question of linking China's accession to international organizations such as the World Trade Organization (WTO) and its acceptance of internationally recognized standards has taken on increased visibility as China's economic development climbs at the scale of developed countries. Although globalization has brought about important benefits to some, China's situation differs in that the policies on human rights, including labour standards, have not been addressed successfully with its rapid transition to a market-driven economy. The purpose of this thesis is to determine the best approach to help promote internationally recognized human rights in a country that arguably does not have a rule of law system. While most see the clash between the role of civil society activists and the presence of supranational corporations in countries such as China, this thesis suggests that there is mutual complicity among those international actors.

I have grouped China's unique position internationally and its particular context in the global economy into six chapters which I have identified as the Rule of Law (Chapter 1), China's Evolution Towards Capitalism (Chapter 2), Human Rights in China (Chapter 3), Selective Adaptation (Chapter 4), Civil Society (Chapter 5) and Corporate Social Responsibility (Chapter 6). Each Chapter is independent and discusses the various perspectives from a Western and Chinese context.

Chapter 1 introduces the notion of the rule of law, as this is a fundamental concept by which liberal democracies can govern legitimately. Respect for the law and its institutions provide protection to individual citizens against the State. This concept has been obscured by China's central government control.

Chapter 2 provides an overview of China's cultural, political, ideological and historical context which is essential in order to understand its current interest in adopting capitalist elements into their system and its long feat to join the WTO.

Chapter 3 discusses internationally recognized human rights as promoted by the United Nations and China's position on human rights, which emphasizes the right to subsistence and economic development over individual human rights. This thesis criticizes arguments of cultural relativity which support China's position on its human rights discourse.

Chapter 4 introduces the theory of 'Selective Adaptation' whereby a country assimilates foreign institutional norms into its local culture. I will first analyze the issues of GATT/WTO concepts of transparency and the rule of law (perception). I will then draw a hypothesis on China's development of an international rule of law system (complementarity). Finally, I will discuss the origins of the WTO as an international body regulating trade (legitimacy).

Chapter 5 analyzes the role of civil society activists. This chapter will show that there is actual complicity in some regards between civil society activists, corporations and governments to respect social issues, including human rights and labour standards.

Chapter 6 discusses the particular role of the corporation in social responsibility. Methods by which corporations impose obligations on themselves are legitimized by the corporations preoccupation with its own corporate image. International institutions also target corporations to uphold basic standards.

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When I think about the numerous opportunities I've had in life, it is always painful to think of others who do not have the same opportunities. I am very grateful. This is what prompted me to study the particular context of China, a country of 1.3 billion people whose lives are touched by poverty, limited access to health care and education and conversely, a country who is on the verge of dominating the world scene.

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CHAPTER 1 – THE RULE OF LAW

1.1 Understanding the rule of law

Defining rule of law has proven to be a difficult exercise, as the term has been debated by many. Its meaning has become more flexible based on the various interpretations it was given. Generally, rule of law refers to the notion of “how a government should act.”¹ Its historical emergence can be traced back to philosophers such as Plato and Aristotle who tried to determine what would be the best form of government.²

The idea that no one should be above the law, not even the government, emerged in the West after a long period of political struggle, plagued by civil war, violence and revolutions.³ As David Clark illustrates:

If one had to hazard a generalisation about this process it would be that the political and legal culture that gives rise to, and sustains the rule of law involved the considerable cultural shift in Europe from feudalism to modernity, and that therefore cultures are not static; nor can they be simply manufactured or contrived at the demand of the government. Even the American case suggests that there is both a considerable background to a constitutional document and also that there is often a long period of evolution after the constitution is made before the full emergence of constitutional government takes hold in the society at large.⁴

But what of a country that arguably does not have rule of law such as China? Will the Chinese system adapt their commitments to the global trading rules now that they have acceded to the World Trade Organization (WTO)? Will – and how will – China’s internal system adapt to

¹David Clarke, “The many meanings of the rule of law” in Kanishka Jayasuriya, ed., *Law, Capitalism and Power in Asia* (New York: Routledge, 1998) at c.2., online :

<<http://www.lfip.org/lawe506/documents/lawe506davidclarke.pdf>>

²*Ibid.*

³*Ibid.*

⁴*Ibid.*

the required WTO measures and standards and will rule of law develop? Will this improve other areas not related to economic development such as human rights, more particularly labour standards which are affected by trade? The latter questions will be explored throughout this thesis. In an attempt to define the Rule of Law, we will first explore the meaning of the term according to the standards set under the General Agreement on Tariffs and Trade (GATT) and WTO, as well as the various scholarly positions on the principle.

1.2 Rule of law in GATT

By way of international treaty, under the GATT, members are required to promote transparency. GATT's Article X (1947) contains the WTO's publication and administration of trade regulations, which calls for the general transparency of rules to allow traders and government to be acquainted with them.⁵ This requirement would include the publication of laws, rules and administrative regulations, as well as the establishment of adjudicative means to review and correct matters relating to customs regulations. The article also requires that tribunals or procedures be established to enforce these rules.

Transparency is paramount in the multilateral system. Without it, trade rules and policies, as well as other trade principals such as that of non-discrimination, proportionality and special and differential treatment are simply words on paper designed to improve trading conduct theoretically and not practically.⁶ The transparency and predictability requirements are so important that it was a subject discussed during the Doha rounds of negotiation which focused on development. As a testament to its fundamental nature, the following was iterated by the European community:

⁵ General Agreement on Tariffs and Trade, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27 (entered into force 1 January 1948) [GATT], online: <http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm>.

⁶ EC, *Trade Facilitation: Article X of GATT on the Publication and Administration of Trade Regulations* (2003), online: Europa <http://trade.ec.europa.eu/doclib/docs/2003/june/tradoc_113131.pdf> at 1.

The Doha Declaration mandates Members to "review and, as appropriate, clarify and improve", by the fifth ministerial conference, relevant aspects of GATT Article X on the Publication and Administration of Trade Regulations. This Article has stood unchanged since the 1940's, but some of its concepts – concerning for example transparency, advance notice of proposed trade rules, and right of appeal against administrative decisions have since been developed further in the national regimes of some Members, in specific Marrakech Agreements on trade in goods, or in other international instruments. Modern principles of sound and transparent public administration have, in other words, overtaken GATT Article X since it was first negotiated.⁷

This is enforced in order to allow Members' to take full advantage of the trading system and to provide some sense of certainty in commitments made by each individual Member country. Information must be complete and available. Transparency also ensures that governments take some accountability which allows businesses to flourish under these trade policies and minimizes conflict altogether.⁸ In the quest to promote the economic development of a country, trading rules are a crucial tool and respect for them is highly regarded. However, the transparency standards set are not detailed in the GATT. They merely impose a general obligation to respect the principle of transparency. As such, many of China's commitments were negotiated during the lengthy accession process.

1.3 China's commitments to the WTO/GATT

China's long battle to enter the WTO amounted to a number of trade liberalizing commitments. China undertook the Working Party Report as a means to establish these commitments in order to gain entry in the WTO. The purpose of the WTO accession Working

⁷ *Ibid.*

⁸ *Ibid.*

Report was to draft and negotiate a Protocol of Accession, which includes the binding terms of accession as a WTO Member.⁹

Among these commitments, three were related to transparency. Paragraph 334 of the Working Party Report states that China must make laws, regulations and other measures available no less than 90 days following implementation. Paragraph 336 of the Working Party Report states that China will designate enquiry points where you can gain access to information about laws, regulations and measures and, finally, paragraph I.2.C.3 of the Accession Protocol states that an individual, company or WTO member can request information about any measure required to be published under the Accession Protocol at an enquiry point and that a response will be given within 30-45 days.¹⁰ Interestingly, there is also a rule of law requirement under paragraph 2.A.2. of the Accession Protocol which states that :

China shall apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub-national level (collectively referred to as "laws, regulations and other measures") *pertaining to or affecting* trade in goods, services, trade-related aspects of intellectual property rights ("TRIPS") or the control of foreign exchange.

Trade is seen to affect a multitude of areas, including human rights, development and the environment. The notion that the laws and regulations should be applied to areas *pertaining to or affecting trade* opens the debate to include rule of law in other domains. Whether rule of law will spill over into other domains in practice is subject to debate. This thesis will look at the example

⁹ James M. Zimmerman, *China Law Deskbook : A Legal Guide for Foreign Invested Enterprises*, 2d ed. (Chicago: American Bar Association, 2005) at 5, online:

<<http://books.google.ca/books?id=uyEVfMR6xaEC&pg=PA5&lpg=PA5&dq=china+working+party+report+trade&source=web&ots=Q9HGX0jvVP&sig=Zlvz4nPQYOACLZLGZoc1sufN8Y&hl=en>>.

¹⁰ Donald C. Clarke, "China's Legal System and the WTO: Prospects for Compliance" (2003) 2 Wash. U. Global Stud. L. Rev. 97.

of labour standards as a substantive human rights area affected by trade more particularly. Today, three million Chinese workers are employed in 8,000 factories under appalling conditions even though labour laws are as stringent as the West.¹¹

The Report of the Working Party, included in the Protocol of Accession, addresses how China will amend and create laws, regulations and rules in order to conform to WTO requirements and rules. Law reform in China was crucial in order to implement WTO commitments. Further, the Asian Development Bank made comments on the process related to China's legal reform and noted that they had assisted China in its effort to accede the WTO and to comply with its requirements. They noted that the experience should serve as a "tool kit" which will help other lawyers and professionals in their quest to help other regions. This is so because China was seen as unique due to its transition from a centrally-planned economy to a market-driven economy.

The Asian Development Bank's objectives were to:

- Help the Government make its foreign-trade laws and regulations compatible with WTO principles, rules, and obligations.
- Help the Government determine the institutional framework for regulating foreign trade and investment.
- Support the Government's efforts : (a) to increase transparency by making legal information public and; (b) to clarify laws and regulations on foreign-trade and investment.
- Assist the Government in deepening its understanding of the issues in Doha Agenda and regional trade arrangements.
- Support enforcement of WTO rules by the judicial system.¹²

¹¹ Shelley Page, "Death by Toy: Many of the playthings that stock North American shelves are made by Chinese workers under appalling conditions", *The Vancouver Sun* (11 December 2007) A11. The example of labour rights will be introduced throughout this thesis as those are the rights generally affected by trade and for which western countries have a greater impact to effect change.

¹² ADB, *Implementing WTO Rules: The Importance of Law Reform*, Remarks of Arthur M. Mitchell, General Counsel (2004), online: <<http://www.adb.org/Documents/Speeches/2004/sp2004050.asp>>.

The Asian Development Bank also stated that “A new member of the WTO faces three tasks in incorporating WTO commitments and rules into its administrative and legal systems”:

- Meeting the market liberalization commitments;
- Incorporating the WTO rules into domestic law; and
- Making changes to the existing administrative and judicial system or establishing organs, function or procedure in the administrative and judicial system to comply with WTO requirements.¹³

Given the lack of clarity on the GATT’s rule of law requirement, we must call upon international institutions to provide us with guidance. This is possibly what the Asian Development Bank has attempted to do in the Chinese context, as there is no general obligation under the WTO agreement to have a fair and well functioning legal system. Simply stated, a Member country must meet the GATT, GATS, TRIPs agreement tests of fairness and transparency.

1.4 The rule of law : diverging concepts

Many scholars have attempted to formulate definitions of the rule of law. Generally, they have differing views of this concept because definitions, such as that in the GATT, are flexible. Thus defining rule of law has proven to be a difficult task.

Dicey’s formulation of the concept was widely accepted in the Western legal community but it also underwent intense scrutiny.¹⁴ Although the Diceyan theory was applauded and criticized at the same time, it also founded much of the basis for the modern view on the subject. Essentially, Dicey believed in three (3) major tenets:¹⁵

- (i) The establishment of laws over arbitrary power. This meant that no one could be punished unless there was an established law denouncing the act. It also meant that there was a proper procedure to follow, which he

¹³ *Ibid.*

¹⁴ *Supra* note 1.

¹⁵ Brain Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) at 64.

stated was by way of litigation in ordinary courts. Further, his theory meant that exercise of discretionary power over individuals by government officials went against the very concept of the Rule of Law;

- (ii) Equality before the law. Dicey fundamentally believed in the importance of this concept, but made exception to the Monarch who must retain certain immunities and privileges to govern properly. Dicey's main concern was to ensure that government officials, like any other citizen, were held accountable for their conduct by ordinary private actions in ordinary courts of justice; and,
- (iii) The incorporation of Constitutional principles to determine the rights of persons. This aspect of his theory describes the source of the Rule of Law as being the precedent-building exercise found in common law, which occurs in ordinary courts of justice who have jurisdiction to decide matters. For Dicey, the Constitution is the product of ordinary law.

Western notions about law and Constitutionalism largely draw from the Diceyan theory. Countries like China have long been criticized for lacking fundamental rule of law based on western standards. Stanley Lubman's work considers the rule of law issues that arise in China in his book "Bird in a Cage."¹⁶ Lubman, a contemporary scholar, contends that the issue of using a western perspective of rule of law, which includes "the creation of rights and the use of formal legal institutions to vindicate rights,"¹⁷ to study China is problematic. He states that "[l]egal institutions are...so rooted in local cultural values, that Western scholars and policy-makers often assume their universality and use them as standards in understanding non-Western legal institutions."¹⁸

Randall Peerenboom advocates a "thin" rule of law theory which he argues "permits political, social, and cultural pluralism...[and] facilitates focused and productive discussion of

¹⁶ Stanley B. Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford: Stanford University Press, 2002) at c.2.

¹⁷ *Ibid.*

¹⁸ *Ibid* at 12.

certain legal issues among persons of different political persuasions.”¹⁹ Although his view on cultural pluralism should be commended, he took it a step further when he formulated his definitions on the rule of law.

Pereenboom described the liberal democratic version of the ‘rule of law’ as follows:

[T]he liberal democratic version of rule of law incorporates free market capitalism (subject to qualifications that would allow various degrees of ‘legitimate’ government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government, and a liberal interpretation of human rights that gives priority to civil and political rights over economic, social, cultural and collective or group rights.²⁰

Pereenboom suggests that a socialist rule of law, as in the case of China, may incorporate:

[A]n increasingly market-based economy but one in which public ownership still plays a somewhat larger role than in other such economies; a non-democratic system in which the Party plays a leading role; and an interpretation of rights that emphasizes stability, collective rights over individual rights and sustenance as the basic right as opposed to civil and political rights.²¹

Pereenboom’s perspective was the subject of debate as his socialist definition of the rule of law, which places central government control over individual freedom and autonomy, ignores the very idea that no one should be above the law. Instead, Pereenboom advocates that China has developed a rule of law system, albeit not one necessarily identical to Europe or North America.²²

¹⁹ Graham Mayeda “Appreciate the Difference: The Role of Different Domestic Norms in Law and Development Reform; Lessons from China and Japan” (2006) 51 McGill L.J. 547-598 at para. 16.

²⁰ Randall Peerenboom, “Competing Conceptions of Rule of Law in China” in Arthur Rosett, Lucie Cheng and Margaret Y.K. Woo, eds., *East-Asian Law – Universal Norms and Local Legal Culture* (London : RoutledgeCurzon, 2003) at 52.

²¹ Randall Peerenboom, “China and the Rule of Law – Part I” (no date) 1 Perspective 5, online: <http://www.oycf.org/perspectives/5_043000/china_and_the_rule_of_law.htm>.

²² Pitman Potter “Legal Reform in China: Institutions, Culture, and Selective Adaptation” (Spring 2004) 29 Law & Soc. Inquiry 2.

Graham Mayeda's idea of the rule of law incorporates the "thin" law model, as does Pereenboom, but does not go as far as accepting his socialist rule of law definition. Mayeda explores the underlying assumptions "in order to understand how to adapt the thin model of rule of law reform to capture the importance of fit between proposed reforms and existing domestic social, political, cultural and legal institutions."²³ He believes that there are three (3) underlying assumptions, which are that:

- (i) "Institutions Are Intrinsically Normative": For Mayeda, the norms and ideologies of an institution are more important than its mere existence or absence. As such, the presence of a judiciary system is not sufficient. It must also be free of corruption, independent and effective.
- (ii) "Law is embedded in a Social, Cultural and Economic Context": Simply stated, Mayeda argues that the "social, cultural, historical and political contexts are essential to the design of legal institutions suited to a particular developing country" (para 20). He believes that the evolution of legal and social institutions is circular, meaning that sometimes the context influences legal institutions and other times legal institutions drive social change.
- (iii) "Formal Dispute Resolution Mechanisms Are Not Necessarily More Effective than Informal Ones": To illustrate this point, Mayeda notes the effectiveness of self-regulation such as informal norms and contractual relations in corporate governance as opposed to centrally determined corporate governance rules. In terms of certainty for economic success, Mayeda believes that the informal process is as embedded in the culture and therefore provides the same kind of certainty as the formal process.

²³ *Supra* note 19 at para 16.

The correct rule of law interpretation should be that no one, including the state, should be above the law as proposed by the Diceyan theory on the subject. Adopting a thin rule of law version of the term, as do Mayeda and Preenboom, would give it a meaning other than the traditional rule of law definition because the State has complete control over its interpretation in theory.

1.5 Rule of law or rule by law

Enforcement of legal obligations and respect for the rule of law during China's accession to the WTO were raised, as practically speaking China did not place much importance on law and legal institutions historically. This is why China made considerable concessions to accede the WTO.

As mentioned by Pitman Potter, views ranged from optimistic to cynical when it came to China's legal system.²⁴ Potter states that optimistic views suggest:

The government has also voiced its commitment to strengthening the rule of law and to throwing off remnants of the old-style "rule by man". In all, major reform of all aspects of Chinese governance has been set in motion, at least with the potential to alter the relationship between the state and its citizens. (United Nations Development Program 2002)

Conversely, the cynical view is that:

[China's] disregard for the rule of law hinders compliance with WTO commitments...The current legal structure is plagued by Party intervention, glaring corruption, and arbitrariness...The Chinese legal system is characterized by the rule *by* law, where the state employs law as a vehicle to exercise power when convenient or necessary for its own ends. (United States – China Security Review Commission 2002)

China seems to have adopted the term 'rule of law' in its White papers, its Constitution and other official documents as a means to gain legitimacy on the international front; however, as its practical application is limited by State control, China lacks a certain credibility. Lubman

²⁴ *Supra* note 22 at 468.

goes as far as saying that “Communist Party dominance constrains the role of law to such an extent that China cannot be said to have a legal system.”²⁵ Both Lubman and Pereenboom offer diverging perspectives which are drawn from the role of law in society and its underlying social norms and practices. Understanding China’s particular ideological context can help us shape our views on this issue.

²⁵ *Ibid* at 468.

CHAPTER 2: CHINA'S EVOLUTION TOWARDS "CAPITALISM"

2.1 China's political and ideological context

Understanding the political and ideological context within China can help clarify our own ideas, perception and opinions about this particular culture. China is a unique context in the world and much thought must be given to its cultural, political, ideological and historical background to draw valuable insight on its future development. China's communist regime derives its tradition from the philosophy of Confucianism, Marxism, Leninism and Maoism. Marx, Lenin and Mao Zedong are still the prominent political icons within the Chinese Communist Party.

2.2 Confucianism

Confucianism "postulated the existence of a harmony extending throughout heaven and earth, which manifested itself in a hierarchical order that began with the emperor and extended downward to the lower level of society."²⁶ This structure reinforced Chinese society's goal to preserve a natural harmony in the hierarchy and was conducted by those with the highest morals and ethics. Personal moral integrity was an important value in Confucianism. The dominant force of Confucianism believes in the avoidance of conflict and the adoption of peaceful resolution, a social hierarchy that places value on the concepts of status and patriarchy, a reliance on wise leadership that is protected from the abuse of power in the moral commitment of its leaders as opposed to the political institutions.²⁷ Law had a secondary place in the system and was resorted to when other means failed as a mechanism to deter wrongdoing, but law was not as fundamental as the principles of nature, heavenly reason, religious canons, ethics, and rules of

²⁶ *Supra* note 16 at 13.

²⁷ Ying Zhu, "Chinese TV Dramas: Will Confucius Save the Day?" Asia Media (7 February 2006), online: <<http://www.asiamedia.ucla.edu/article.asp?parentid=38580>>. Although China was against the U.S. invasion of Iraq, its commitment to peaceful resolution is arguable as we consider its relationship with Taiwan.

propriety²⁸. The hierarchical structure – characterized by authoritarianism – meant that rights were typically granted by the State based on evaluations of an individual's status in society and his relationship with others. The Confucius belief-system is currently making a comeback in China feeding into the education system.²⁹

This Confucius comeback has also infiltrated the media. In 2005, President Hu Jintao noted in Confucius' terms that "harmony is something to be cherished."³⁰ Months later, he urged his government to "build a harmonious society" which could be achieved by promoting unity and honesty and by building a deeper relationship with its people.³¹ A year later, he expanded on his thoughts "to build a harmonious international community which features long-lasting peace and common development."³² To the latter effect, President Hu Jintao announced to the participants of the 22nd national congress on the Law of the World that "the rule of law is needed in maintaining harmony between people, nature and countries."³³

2.3 Maoism

Mao Zedong wrote the "Analysis of Classes in Chinese Society" in 1926 in which he designated the proletariat as the "leading force" in the Chinese revolution. He concluded that:

A revolutionary party is the guide of the masses, and no revolution ever succeeds when the revolutionary party leads them astray. To ensure that we will definitely achieve success in our revolution and will not lead the masses astray, we must pay attention to uniting with our real friends in order to attack our real enemies. To distinguish real friends from real enemies, we must make a general analysis of the economic status of the

²⁸ *Supra* note 16 at 14.

²⁹ Joseph Chan, "A Confucian Perspective on Human Rights for Contemporary China" in Joanne Bauer & Daniel Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999) at c.9.

³⁰ Daniel Bell, "China's Leaders Rediscover Confucianism" International Herald Tribune (14 September 2006), online: <<http://www.iht.com/articles/2006/09/14/opinion/edbell.php>>.

³¹ *Ibid.*

³² Embassy of the People's Republic of China in Australia, Commonwealth (Austl.), *Hu Jintao appeals to promote int'l harmony, vowing to enhance democracy, rule of law* (6 September 2005), online: <<http://au.china-embassy.org/eng/xw/t210509.htm>>.

³³ *Ibid.*

various classes in Chinese society and of their respective attitudes towards the revolution.³⁴

In 1949, the People's Republic of China was formally established with Beijing as its national capital and Mao Zedong as head of the party. Mao seized mainland China from the Kuomintang after the Sino-Japanese war when Chiang Kai-Shek fled to the island of Taiwan to establish his government in Taipei.

Although Chiang claimed to represent mainland China, the matter was subsequently 'resolved' in 1971 when the United Nations adopted resolution 2758 (XXVI) which recognized the People's Republic of China and the 'One China' policy at the detriment of the Kuomintang³⁵. Thus, China regained her seat at the UN table and Mao was seen as the legitimate political and ideological leader of the Chinese Communist Party.

For Mao, the chief targets of the revolution were to fight imperialism (especially from the Japanese) and feudalism, both of which were deemed as oppressors in Chinese society.³⁶ Mao did not contemplate a peaceful resolution. He indicated that:

³⁴ Mao Tse-Tung, *Analysis of Classes in Chinese Society* (Selected Works of Mao Tse-Tung, 1926), online: <http://www.marxists.org/reference/archive/mao/selected-works/volume-1/mswv1_1.htm>.

³⁵ Res. AG 2758 (XXVI), Doc Off. AG NU, 26e sess., Doc NU A/L.630 et Add.1&2 (1971). The Resolution states: "The General Assembly, *Recalling* the principles of the Charter of the United Nations, *Considering* the restoration of the lawful rights of the People's Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that the United Nations must serve under the Charter. *Recognizing* that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council, *Decides* to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it".

³⁶ Mao Tse-Tung, *The Chinese Revolution and the Chinese Communist Party* (Selected Work of Mao Tse-Tung, 1939) at c. 2, online : <http://www.marxists.org/reference/archive/mao/selected-works/volume-2/mswv2_23.htm>. *The Chinese Revolution and the Chinese Communist Party* is a textbook which was written jointly by Comrade Mao Tse-tung and several other comrades in Yenan.

In the face of such enemies, the principal means or form of the Chinese revolution must be armed struggle, not peaceful struggle. For our enemies have made peaceful activity impossible for the Chinese people and have deprived them of all political freedom and democratic rights. Stalin says, "In China the armed revolution is fighting the armed counter-revolutionary. That is one of the specific features and one of the advantages of the Chinese revolution." This formulation is perfectly correct. Therefore, it is wrong to belittle armed struggle, revolutionary war, guerrilla war and army work.³⁷

The Cultural Revolution in China, which spanned for 10 years beginning in 1966, was marked by the struggle for power within the Chinese Communist Party and led to social, economic and political chaos. The death of Mao Zedong in 1976, which marked the end of the Cultural Revolution, also left the country in an impoverished state.

2.4 Deng Xiaoping: the “open door policy”

To counter the effect of the Cultural Revolution, Mao’s successor, Deng Xiaoping, introduced elements of capitalism to the regime with a new “open door policy” in 1978, which was defined as “socialism with Chinese characteristics.”³⁸ Deng tapped into the ideologies of Marxism and Leninism which are supported by the four basic principles.

The Marxist view of the world is that the economic determination of social classes, characterized by the struggle between the dominant and exploited classes, will lead to a progressive shift from feudalism to capitalism, capitalism to socialism, and socialism to

³⁷ *Ibid.*

³⁸ For more information on the Open Door policy, see Qingjiang Kong, “China’s WTO Accession: Commitments and Implications” (2000) 3 J. Int’l Econ. L. 655 at 2, where it states: “The old Open Door policy set a pattern for China and the West in dealing with each other in the twentieth century. However, when the People’s Republic of China was founded in 1949, the old Open Door policy that had been forced upon China by the West experienced a backlash, inaugurating an era of self-isolation and poverty. With the failure of orthodox communism that prevailed in the three decades following the establishment of the new China, the realist-minded Chinese leadership, with Deng Xiaoping as its core, felt the pressure to re-introduce the Open Door policy. The new Open Door policy was not just a repetition of the old one. It differed from it in that this time the Chinese government was no longer forced by western powers to open its doors, but motivated by its anxiety for prosperity [...]. China’s decision to join the GATT, and later the WTO, was a result of this policy”.

communism (the perfect egalitarian society).³⁹ This Marxist view was coined ‘dialectical materialism’ which is characterized by the notion that history is the product of class struggles. Marx believed that it was the “role of the oppressed class to overthrow by revolutionary means the class which oppresses them and thereby to advance the course of historical development.”⁴⁰ In this light, the proletariat had an important and unique historical role to play.

Like the Marxists, the Leninists believe that the proletariat in socialism will win its power by a proletarian revolution which is characterized by its violence, since the bourgeoisie would never hand over their power by electoral means, hence the class struggle.⁴¹ This dialectical materialism is defined by class struggle. Lenin – and more generally the Russian Marxists – believed that ‘dialectical materialism’ was more than a theory, but was a form of revolutionary action. Lenin adopted ideas from the Marxist theory to advance socialism from a pragmatic view. Lenin’s view that only the Party and State structure could improve people’s lives influenced Deng Xiaoping.

Moving away from Maoism, Deng’s leadership believed that China must develop “the commercial, financial, technological and labor markets of a capitalist society” as China was seen to be in its “primary stage of socialism.”⁴² From a tightly controlled trading regime, and one which was nearly inexistent during the Cultural Revolution, to an open door regime which allowed foreign direct investment, the international business community was now seeking improved conditions for business relations.

³⁹ Ralph H. Folsom & John H. Minan, eds., *Law in the People’s Republic of China: Commentary, Readings and Materials* (London: Kluwer Academic Publishers Group, 1989).

⁴⁰ John Bryan Starr, “Marxism and the Legacy of Mao Tse-Tung” (1976-77) 32 Int’l J. 128 at 11.

⁴¹ John McCarthy, Formal Reasoning Group on Marxism (Stanford University, undated), online: <<http://www-formal.stanford.edu/jmc/progress/marxism.html>>.

⁴² Winberg Chai, “The Ideological Paradigm Shifts of China’s World Views” (September 2003) *Asian Affairs: an American Review* at 168.

The foreign trade law of the People's Republic of China established the authority of the central government to regulate trade and provide guidance to businesses on the various roles of government and non-government trade organizations.⁴³ This was considered flawed by liberal economic policies and law that ensure minimal State intervention in economic life and which has aimed to establish market systems supported by private laws and institutions. As the WTO and GATT provided much of the framework for the developing norms on trade and investment worldwide, China was seen as lagging behind.

2.5 Views on China's membership to the WTO

International cooperation and competition has driven local economies to integrate with the global economy. The world has become increasingly interdependent and so has the Chinese economy, as it targeted the developed world to draw benefits from trade and investment. Thus, it is worth noting that the Chinese government attached great importance to multilateral cooperation and to membership to international organizations such as the WTO.⁴⁴ The international business community also viewed China's membership to the WTO as a way to rid the market of its discretionary administrative interference, unfair trade practices, trade barriers, discriminatory regulatory processes and lack of transparency. WTO members saw it as an opportunity to subject China to western influence and the rule of law.

2.6 China's accession to the WTO

In 1986, China requested the resumption of her status as a founding member of the GATT. However, events which delayed her entry included the crackdown on pro-democratic protestors during the 1989 Tiananmen Square incident, which brought negotiations to a halt until

⁴³ Pitman B. Potter, *Chinese Legal System: Globalization and Local Legal Culture* (New York: RoutledgeCurzon, 2001) at c.6.

⁴⁴ Qingjiang Kong, "China's WTO Accession: Commitments and Implications" (2000) 3 J. Int'l Econ. L. 655.

1992. The WTO which replaced GATT in 1995 assumed leadership of the Working Party for China's accession and was led by the United States.

2.6.1 The Sino-U.S. negotiations

Negotiations were primarily conducted with the United States, Japan, Canada and the European Union; however, the Sino-U.S. negotiations dominated the agenda. The United States' domestic law was an important factor leading up to China's WTO accession because it affected bilateral and multilateral negotiations alike. Since the 1980s in the United States, the decision to grant Most Favored Nation (MFN) status to China was dominating U.S.-China economic relations. Up until the 1989 Tiananmen Square protest, China faced less difficulty in securing MFN status, but the United States' foreign policy toward China received much attention following Tiananmen Square and led the U.S. Congress to exert pressure for China to reform not only its economic policies, but also its human rights policies beyond the question of emigration as required by the U.S. Jackson-Vanik amendment.⁴⁵ Any proposed legislation by Congress failed to pass much to the approval of the business community.

In 1992, during the U.S. Presidential campaign, Bill Clinton had vowed that he would link the country's decision to grant MFN status with China's progress on human rights. Clinton also condoned the use of trade sanctions in the name of human rights. This had rewarded him with much support at the polls; however, the view from the international community was that it would unnecessarily increase tensions with China. When time came to extend MFN status the following year, Clinton decided to afford China MFN following extreme pressure from the

⁴⁵ Ka Zeng, *Trade Threats, Trade Wars: Bargaining, Retaliation, and American Coercive Diplomacy* (Michigan: University of Michigan Press, 2004) at c.4. See also Sylvia A. Rhodes & John H. Jackson, "United States Law and China's WTO Accession Process" (1999) 2 J. Int'l Econo. L. 497 at FN 59 where it is stated that "Although the Jackson-Vanik amendment concerns emigration issues, it contains language which allows the United States to link normal trade relations with human rights issues: 'To assure the continued dedication of the United States to fundamental human rights,...products from any nonmarket economy country shall not be eligible to receive non-discriminatory treatment (normal trade relations),...' Trade Act of 1974 at s. 402(a)".

business community to do so.⁴⁶ By 1994, the question of linking China's human rights record to the MFN treatment in the United States was abolished.

In November 1999, when the United States came to a bilateral agreement on China's accession⁴⁷, other countries were prompted to follow suit. After a U.S. Congressional decision in late 1999, China was finally granted Permanent Normal Trade Relations (PNTR) which helped pave the way to WTO membership.⁴⁸

2.6.2 China's concessions for entry in the WTO

In November 2001, China acceded to the WTO after fifteen years of negotiation and made considerable concessions for her entry⁴⁹. A number of important factors framed China's negotiation for entry to the WTO. In many respects, China is still considered a developing country with a GDP, in most regions, which is below 1,000\$. This prompted Chinese representatives to ask for special and differential treatment typically afforded to developing countries.

Under the WTO, developing countries adjust to global competition through less demanding standards and greater time to implement trade liberalization commitments. The rapid transition from a centrally-planned economy, in which more than 300,000 State-owned enterprises (SOEs) accounting for more than "one-third of the country's GDP, and [...] the

⁴⁶ Thomas L. Friedman, "Clinton's Foreign Policy Agenda Reaches Across Broad Spectrum" New York Times (4 October, 1992) A1; Daniel Southerland, "Business Leaders to Urge Clinton to Reverse Stance on China Trade" Washington Post (23 October, 1992) B1.

⁴⁷ U.S., The White House Office of Public Liaison, *Briefing on the Clinton Administration Agenda for the World Trade Organization Material: Summary of U.S.-China Bilateral Agreement* (Washington, D.C.: The Office of Public Liaison, 1999), online: <<http://www.uschina.org/public/991115a.html>>.

⁴⁸ This required that Congress modify the 1974 Jackson-Vanik legislation which provided that Communist countries be granted Most Favoured Nation (MFN) on a yearly basis subject to Congressional veto each time. Granting Permanent MFN status was the only means in which the U.S. could cash in on the market-opening concessions made by China.

⁴⁹ For more information, see Sylvia Ostry, Alan S. Alexandroff & Raphael Gomez, eds., *China and the Long March to Global Trade: The Accession of China to the World Trade Organization* (New York and London: Routledge, 2002). See also Deborah Cass, Brett Williams & George Barker, *China and the World Trading System* (Cambridge: Cambridge University Press, 2003).

provider of livelihood and social welfare for over 200 million employees, pensioners and their families,”⁵⁰ to a market economy would cause much social stress and dislocation. In 1997, China had already laid off 11.5 million workers in the SOE downsizing process.⁵¹ Thus, there was a strong case to grant China special treatment.

However, since its open door policy in 1979, foreign direct investment has brought about important economic change in China. Prior to WTO accession, China had already reached the rank of “the second largest recipient of foreign direct investment worldwide”, after the United States, and “the largest host country among developing countries”. Between 1979 and 1999, foreign direct investment amounted to US\$306 billion which translates to 10 per cent of worldwide investments and 30 per cent of investments for all developing countries put together.

The period in which economic transformation was most pronounced spanned between 1992 and 1999, a time during which Deng Xiaoping succeeded in instilling the confidence of investors by emphasizing China’s commitment to the open door policy and market-oriented economic reform.⁵² As China was already an important export competitor, western countries felt that admitting China as a developing country would disrupt their own domestic markets. China’s unique context prompted the WTO to consider a novel approach where unparalleled concessions were made for China’s membership admission in the organization.⁵³ More specifically, China agreed to over 685 trade regime commitments, many of which are to be phased in over a fourteen year period, but where most commitments were aimed for the year 2006.

⁵⁰ David M. Blumental, “Applying GATT to Marketizing Economies: The Dilemma of WTO Accession and Reform of China’s State-Owned Enterprises (SOEs)” (1999) 2 J. Int’l Econ. L. 113 at 3.

⁵¹ Ann Kent, *China, the United Nations and Human Rights* (Philadelphia: University of Pennsylvania Press, 1999) at c.7.

⁵² OECD, Directorate for Financial, Fiscal and Enterprise Affairs, *Main Determinants and Impacts of Foreign Direct Investment on China’s Economy* (2000), online: <<http://www.oecd.org/dataoecd/57/23/1922648.pdf>>.

⁵³ The key documents which mark the accession of China to the WTO are the Working Party Report, the Protocol of Accession, and the schedules containing the new member’s specific liberalization commitments.

2.7 WTO accession process and human rights implications

Many human rights activists and scholars adopted the idea that the WTO process should be used to push for human rights improvements.⁵⁴ Although those attempts have been fruitless, many others saw the potential for legal reform in China as a viable way to enhance human rights protection through the rule of law⁵⁵. WTO requirements on transparency, non-discrimination, independent review of administrative actions and uniform and impartial application of laws and regulations call for a greater commitment to the rule of law in China. This thesis does not support the idea that greater commitment to the rule of law in trade and investment will transcend to better human rights protection overall. Rather, the thought that China's accession to the WTO would enhance the rule of law in China may have underestimated the strong political, social and cultural forces entrenched in Chinese society. Chapter 3 will discuss the relationship between the rule of law and human rights generally, as well as the Chinese position on human rights.

⁵⁴ See Patricia Stirling, "The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization" (1996) 11 Am. U. J. Int'l L. & Pol'y 1; Randal Green, "Human Rights and MFN Tariff Rates for Products from the People's Republic of China" (1994) 17 U. Puget L.Rev. 611; Diane Orentlicher & Timothy Gelatt, "Public Law, Private Actors: The Impact of Human Rights on Business Investors in China" (1993) 14 Nw. J. Int'l L & Bus. 66; Jennifer Morris, "Human Rights Violations During the Tiananmen Square Massacre and the Precedents Obliging United States Response" (1991) 13 Cardozo L. Rev. 1375.

⁵⁵ Pitman B. Potter, "Are Human Rights on China's WTO Agenda?" (2002) China Rights Forum 1 at 9.

CHAPTER 3 – HUMAN RIGHTS IN CHINA

3.1 Relationship between the rule of law and human rights

Randall Preenboom has written on the various explanations for the international human rights movement's interest in the rule of law.⁵⁶ Even though the human rights movement has encountered conceptual, normative and political challenges, Preenboom states, as de Mello suggested, that “rule of law will be a ‘fruitful principle to guide us toward agreement and results’ and ‘a touchstone for us in spreading the culture of human rights.’”⁵⁷ He believes that in the wake of human rights violations around the globe, the rule of law will directly help shape the implementation of rights and indirectly help promote better economic development which is related to rights' performance in those countries.

Although his article underlines the necessity of a rule of law for democracy and good governance, which is not the current political system in China, any attempts by China to democratize without institutions to promote the rule of law would lead to social disorder based on Preenboom. He continues by stating that rule of law and democracy are normally intertwined; however, they need not be. He believes that rule of law is possible in non-democratic States, and conversely, in democratic but non-liberal States.

Although his definition on the rule of law is not widely accepted, there is consensus that rule of law is desirable and instrumental in promoting human rights although insufficient to do so by itself without the proper institutions and political will. Rule of law and human rights merely complement each other as a precondition for democratic consolidation.

⁵⁶ Randall Preenboom, “Human Rights and rule of Law: What’s the Relationship?” (2005) UCLA Public Law Series.

⁵⁷ *Ibid* at 1.

As such, despite the lack of clarity on the causality of rule of law and human rights, one cannot disassociate the concept of rule of law from the human rights discourse, as respect for the rule of law places restraint on state actors in order to maintain a functional system of laws, regardless of whether the legal system is part of a democratic or non-democratic society. The tradition of the rule of law laid the basis for constitutionalism and the protection of human rights against the exercise of arbitrary power.

Rule of law is generally meant to enhance stability by providing predictable and non-arbitrary means of governing. Hence, the rule of law “must ideally transcend economics, politics and culture and serve as a force that can simultaneously represent and also bind competing interests and duties of actors in these areas.”⁵⁸

In liberal democracies, ‘rights’ are based on independent moral principles which are said to override interests. Thus ‘rights’ impose limits on the ‘interests’ of others, the good of society and the will of the majority in the western world. Broadly stated by Jeremy Waldron in his collection of essays, liberal notions of rights leaves us believing that we live in a society:

comprising men and women of high spirit and high ideals, each living life on his or her own terms, none of them worrying too much about each others’ embarrassment or disapproval as they exercise their powers of practical reason autonomously, creatively and provocatively. The society envisaged in this brand of liberalism has its radicals, its heretics, its blasphemers, and its deracinated apostates. It does not ask dissenters to closet themselves smoldering in some cautiously constructed private realm; on the contrary, it expects dissent to blaze out in public to challenge and disconcert those who are taking things on faith or fashion. It tolerates all this, not just because it expects society to progress thereby, but because it takes seriously the truism that the world we all share is the world in which each of us must make his or her life. We are social

⁵⁸ Patricia Blazey & Paul Govind, “The ‘Song Remains the Same’ – The Status of the Rule of Law in China at the 5th Year Anniversary of WTO Membership” (2006) 3 Macquarie J. Bus. L. 48.

beings, we individuals, and the lives we have to lead must be lived in the light of day, not hidden away to cosset each others' sensibilities.⁵⁹

Although China's rights discourse would differ from the liberal notion of rights as described by Waldron, this thesis has provided examples of where civil and political rights in democratic countries can be used to exert pressure on home States and corporations to deal with countries who deny basic rights and freedoms to their people. The prime example, although it was met with failure, was the Sino-US negotiations in which China was granted MFN status after much consideration by the United States given the countries poor human rights record, as discussed in Chapter 2. The focus of this Chapter is on human rights generally and encompasses civil and political rights, as well as social, economic and cultural rights.

3.2 Key instruments on human rights

Human rights discourse was included in the Preamble and Article 1 of the United Nations Charter with the adoption of the Universal Declaration on Human Rights on December 10, 1948, often referred to as the International Bill of Human Rights, by the United Nations General Assembly.

As a testament to the fundamental importance of rights in the global world, the United Nations, along with its organizations, who are primarily responsible for the promotion of human rights have enacted two other key documents which form the foundation of human rights principles: The International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights.⁶⁰

⁵⁹ Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1999) at 2.

⁶⁰ The International Bill of Human Rights, which includes both Covenants, recognizes the rights to: Equality of rights without discrimination; Life; Liberty and Security of person; Protection against slavery; Protection against torture and cruel and inhumane punishment; Recognition as a person before law; Equal protection of the law; Access

The Vienna Declaration and Programme of Action provides certain basic parameters in the manner in which those documents should be interpreted:

All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national or regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁶¹

As such, the Vienna Declaration and Programme of Action, asserts that the universal nature of these rights and freedoms is beyond question. Simply stated, the conceptual framework of this view is that:

human rights, following the manifest literal sense of the term, are ordinarily understood to be the rights that one has simply because one is human. As such, they are equal rights, because we either are or are not human beings, equally. Human rights are also inalienable rights, because being or not being human usually is seen as an inalterable fact of nature, not something that is either earned or can be lost. Human rights are thus “universal” rights in the sense that they are held “universally” by all human beings.⁶²

to legal remedies for rights violations; Protection against arbitrary arrest or detention; Hearing before an independent and impartial judiciary; Presumption of innocence; Protection against ex post facto laws; Protection of privacy, family and home; Freedom of movement and residence; Seek asylum from persecution; Nationality; Marry and found a family; Own property; Freedom of thought, conscience and religion; Freedom of opinion, expression, and the press; Freedom of assembly and association; Political participation; Social security; Work, under favourable conditions; Free trade unions; Rest and leisure; Food, clothing and housing; Health care and social services; Special protections for children; Education; Participation in cultural life; A social and international order needed to realize rights; Self-determination; Humane treatment when detained or imprisoned; Protection against debtor's prison; Protection against arbitrary expulsion of aliens; Protection against advocacy of racial or religious hatred; and, Protection of minority culture.

⁶¹ *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/24 (Part I) (1993) at article 5, online: <[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)>.

⁶² Jack Donnelly, “Relative Universality of Human Rights” (2007) forthcoming, *Hum. Rts. Q.*, online: <mysite.du.edu/~jdonnell/papers/relative%20universality%20hrq%20rev1.doc>.

However, as there is debate on the universality of human rights, universality itself has been rendered relative by some countries who contend that the internationally recognized human rights documents does not apply to them.⁶³ Jack Donnelly explains that there are different meanings for the definitions of both “universal” and “relative”. Despite the different meanings, he believes that “universal human rights, properly understood, leave considerable space for national, regional, cultural particularity and other forms of diversity and relativity.”⁶⁴ However, he largely rejects the Asian arguments as he argues that international human rights standards can and should be applied directly and in their entirety to Asian countries.⁶⁵ We will explore what this means for the particular context of China in the Asian values section below.

3.3 Asian values

Scholars such as Joanne Bauer and Daniel Bell have adequately compiled articles explaining the East Asian challenge for human rights.⁶⁶ Their question is whether or not the Western system of human rights is flexible enough to accommodate the needs of non-Western countries, particularly in East Asia. They further explain that the concept of ‘universal’ human rights is the central contention of this challenge.

Confucian philosophy in China dictates that rights are earned (and thus can be lost). As such, in China you do not have a right by the fact that you are human, so your ‘rights’ and not ‘human rights’ as the term is conventionally used today. Broadly speaking, your rights involve the relationship between yourself and the State; it involves the status, claims and duties of the

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Jack Donnelly, “Human Rights and Asian Values: A Defense of “Western” Universalism” in Joanne Bauer & Daniel Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999) at c.2.

⁶⁶ Joanne Bauer & Daniel Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999).

individual vis-à-vis the State. The goal was not to protect the individual against the State, but to allow him to carry out his duties which strengthened the State.

The process of modernization of China has not westernized this part of the world. As in the last stages of the Ch'ing dynasty, the mentality is to adopt concepts from the west – and practical learning – while embracing China's central values, practices and institutions. Considering East Asia's rapid rate of economic development, which started in Japan in the 1950s and spread to the Four Tigers (Hong Kong, Taiwan, South Korea, Singapore) and subsequently to China, Malaysia, Thailand, Indonesia, Phillipines, India and Vietnam, combined efforts to resist westernization can be achieved without much political penalty. The balance of power between the West and Asia has generated more self-confidence and assertiveness in this region.⁶⁷ An example of this is the signing of the 1993 Bangkok Declaration which argues against the international human rights system and cites it as being western-biased.

Although the traditional human rights discourse focuses on universal values and moral principles, the Asian perspective is that human rights must come from within a particular cultural perspective.⁶⁸ Joseph Chan examined the Confucian perspective on human rights for contemporary China.⁶⁹ He is of the view that Confucian thought is regarded as a cultural perspective, which is embodied in the Chinese way of life and practices and acts as a main source for values and cultural regeneration in China. He contends that Confucianism has replaced the Marxist ideology which has lost its international flare with the end of the Cold War. He believes that this philosophy has found its way into the education system, notably incorporated in the curriculum and behaviour guidelines for secondary and primary school

⁶⁷ Samuel P. Huntington, *The Clash of Civilizations: Remaking of World Order* (New York: Touchstone, 1996).

⁶⁸ Joseph Chan, "A Confucian Perspective on Human Rights for Contemporary China" in Joanne Bauer & Daniel Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999).

⁶⁹ *Ibid.*

students, as well as promoted by academics and politicians at the provincial level. Confucianism is, based on Chan, a way to build up the Chinese national identity. For these reasons, Chan has analyzed the compatibility of this system of thought with the current human rights theories. Chan argues that the Confucian philosophy is compatible with the human rights discourse, even though the contrary argument is more common view.

Although this thesis does not reject the notion that Confucianism may be compatible with the idea of human rights on some level, more particularly for social, economic and cultural rights, it does reject the notion that the Confucian philosophy will serve to enhance individual human rights typically found in western liberal democracies. To that effect, Daniel Bell wrote on the issue of moving beyond the liberal democracy to adapt to the East Asian context. He believes that concepts of hierarchy in the Confucius regime combined with the socialist philosophy which serves the 'disadvantaged people' could be beneficial to the Chinese in its transition to a "higher and superior form of socialism."⁷⁰ Bell supports the government's fixation on economic liberalization and states that "the only remotely plausible justification for the current system of economic liberalization combined with tight political control is that it is a temporary necessity given the need to provide social order during the disruptive period of economic development."⁷¹

Bell contends that in the human rights discourse, one size doesn't fit all. He challenges the view of American legal theorist Ronald Dworkin who argued that the human rights discourse, although uniquely Western, is built on normative worth of human rights. Dworkin further argues that "if the concept of human rights is morally defensible, then the uniquely Western history of

⁷⁰ Daniel Bell, "From Marx to Confucius: Changing Discourses on China's Political Future" (Spring 2007), *Dissent Magazine*, online: <<http://dissentmagazine.org/article/?article=767>>.

⁷¹ *Ibid.*

human rights should not be used as an excuse to prevent its application in non-Western contexts, including China.”⁷² Finally, he believes that the Asian values discourse cannot justify violations of civil and political rights. Bell, on the contrary, would seem to be in favour of adapting internationally recognized human rights standards to accommodate East Asia.

Bell’s position, in my view, would undermine the very foundational basis of human rights which is that of universality as cited in the Vienna Declaration and Programme of Action. What some scholars see as the potential for inclusion of cultural relativism as a concept in the human rights discourse may not stretch as far as including the Asian values system of human rights in a practical sense. In fact, in contrast to universal human rights, the Asian values discourse places collective rights ahead of individual rights which obscures the line of simple cultural inclusiveness. The Asian values theorists advance the notion that “[o]ne cannot have a right as an abstract individual. Rather, one has a right as a member of a particular group and tradition within a given context.”⁷³ This goes against the very basic principles of “human” rights.

As Dworkin illustrated, there is a growing consensus in the West that human rights must transcend culture. This goes beyond the abstract philosophical questions of thinkers who advocated the universal application on international human rights. In fact the question is raised in concrete situations where globally various international actors advocate universal human rights: countries have listed human rights on their political agenda and have intervened in war-torn areas; civil society champions the cause of human rights to rectify injustices. For these concrete reasons, we must continue to exert pressure on East Asia to adapt in a way which would allow

⁷² Daniel Bell, *Beyond Liberal Democracy: Political Thinking for an East Asian Context* (Princeton: Princeton University Press, 2006) at 1.

⁷³ Lucie Cheng, Margaret Y. K. Woo & Arthur Rosett, “Finding a Role of Law in Asian Development” in Arthur Rosett, Lucie Cheng & Margaret Y.K. Woo, *East-Asian Law – Universal norms and local legal culture* (London: RoutledgeCurzon, 2003) at c.1.

their culture to flourish, but without limiting the application of international human rights, including civil and political rights. Broadly stated, the argument should not be between Western and Asian philosophies, but it should instead focus on the balance to be struck between civil and political rights and social, economic and cultural rights.

This thesis does not support the idea that traditional notions of human rights should be adapted to suit any particular culture, but rather that various cultures should adapt in a way that respects the international standards in place. Whether in practicality this could be done in China, a country of 1.3 billion people, is difficult to answer in a few pages. Nonetheless, universal human rights which would require the State to provide certain protections, goods, services, and opportunities to every citizen should be the long-term objective of this country and meaningful ways of attaining this objective should be on the Chinese government's agenda.

3.4 China's official position on human rights

China's enforcement of human rights is at best selective. As stated by Pitman Potter, "China has embraced the implications of what the Bangkok Declaration refers to as a 'dynamic and evolving process of international norm-setting' as an opportunity to articulate and justify new standards for human rights that comport with its own policy priorities. Despite criticisms of the so-called 'Asian values' discourse, such alternative views on human rights have come to challenge liberal rights models"⁷⁴.

It is often argued that systematic infringement of internationally recognized human rights is necessary, justifiable or desirable, to achieve rapid economic development. The latter would advance the economic and social rights of the country while the trade-off is lesser or no civil and

⁷⁴ Pitman B. Potter, "China and the International Legal System: Challenges of Participation" (2007) *China Quarterly* 191 at 699.

political rights for individuals in that country. Whether this is a permissible argument or not, this trade-off is however supposed to be temporary.⁷⁵ China does not seem to be embracing western notions of human rights even though it has achieved a comfortable level of economic development.

In practice, China's compliance to basic human rights principles is particularly challenging because of its rising status as a superpower, its economic strength and also its position as a Permanent Member of the Security Council in the United Nation.⁷⁶ Accession to the WTO has only served to exacerbate tensions in China between the rural and urban workers. The opening of competition in the agricultural sector has displaced millions of farmers. The reform of State-Owned Enterprises has led to massive lay-offs of employees who are now competing with migrant workers for jobs. As will be discussed, it is plausible that China's human rights position favoring economic development, the right to subsistence and the right to work will be further prioritized and largely supported by central government control.

3.4.1 White papers on human rights

The series of White Papers on human rights highlight the official position of the government of China. Given China's current level of development and large population, emphasis is placed on "subsistence" as the most fundamental right.

In 1991, the government expressly stated that the "right to subsistence" superseded all other human rights and established that the guarantee of the "right to work" is an essential condition for the right to subsistence. In 1995, the focus shifted to the "right to development", which emphasized the primary importance of both the economy and the nation's stability to individual human rights. In the following years, China's White Papers on human rights topics

⁷⁵ *Supra* note 65 at c.2.

⁷⁶ For more information, see Ann Kent, *China, the United Nations and Human Rights* (Philadelphia: University of Pennsylvania Press, 1999) at c.7.

continued to put both the rights to subsistence and to development at the top of its agenda. The 1997 White Paper stated that China “should spare no effort to develop the economy, enhance the comprehensive national strength and improve the people's access to subsistence and development”. The human rights White Paper of 2000 again linked human rights to development and subsistence. Finally, the 2004 White Paper integrated the themes of subsistence with international discourses on the right to development. China also published a National Human Rights Action Plan in 2009 issued by the Information Office of the State Council or Cabinet.

3.4.2 Chinese Constitution

Confucianism, a central Chinese philosophy, supports the notion that rights are not universal, but are typically *granted* by the State through instruments such as the Constitution. The Constitution has the supreme legal authority, and no laws, administrative regulations, local regulations, autonomous regulations, separate regulations, or rules may contravene the Constitution.

The People's Republic of China adopted its first Constitution in 1954. The last version of the Constitution was adopted in 1982 and reiterates many of the socialist principles found in the former Constitution. The 1982 version underwent four revisions and, in 1993, introduced the concept that China had become a “socialist market economy” (article 15) in its “primary stage of socialism” (preamble), thus indicating that the country is in transition. The 1999 revision introduced the “rule of law” to the Constitution, but does not define the concept.⁷⁷ In 2004, the Constitution was amended to provide expressly that “the state respects and safeguards human rights.”⁷⁸

⁷⁷ “China Enlarging Role of Capitalism in its Constitution”, *CNN* (30 January 1999), online: <<http://www.cnn.com/WORLD/asiapcf/9901/30/china.econ/>>.

⁷⁸ Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (Oxford: Oxford University Press, 2007) at c.3.

In general terms, many of the fundamental rights typically found in the West have also been entrenched domestically in the Chinese Constitution, including civil and political rights as well as social and economic rights, but have historically been undermined by Article 51 of the Constitution.⁷⁹

3.4.3 China's international involvement with respect to human rights

China is a signatory of over twenty human rights treaties, including the Covenant on Economic, Social and Cultural Rights (signed on October 27, 1998 and ratified) and the Covenant on Civil and Political Rights (signed on October 5, 1998, but not ratified).⁸⁰ It was said that the decision to sign those documents, after a decade of consideration and pressure, was an attempt to raise China's human rights profile and to stem international criticism.⁸¹

Ann Kent suggests that:

signature in itself merely signalled 'a good faith intention to review the treaty with a view to ratification in due course and...a weak obligation not to do anything in the meantime which is clearly incompatible with the treaty'. However, in a broader sense, signature also represented China's acceptance in principle of the international community's right to monitor the overall condition of its human rights.⁸²

China has participated in various aspects of the international human rights regime, "submitting reports, participating in the drafting of new instruments, engaging in numerous multilateral, regional, and bilateral dialogues on rights issues, and hosting a number of important regional and global human rights meetings."⁸³ China was a strong supporter of the 1986

⁷⁹ Article 51 states that "[t]he exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens".

⁸⁰ *Supra* note 75 at c.3. China has also ratified the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, the Convention on the Rights of the Child (and its optional protocols).

⁸¹ *Supra* note 76 at c.7.

⁸² *Ibid* at 195.

⁸³ *Supra* note 78 at c.3.

Declaration on the Right to Development, which is rooted in the UN Charter's goals, the Universal Declaration of Human Rights and its two main Covenants. Since 1981, Chinese representatives offered their view on the topic of development during the meetings of the Government Expert Working Groups of the Commission on Human Rights which ultimately resulted in the drafting of the Declaration. The Declaration states:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.⁸⁴

China takes the position that the economic goal linked to the right to development cannot be separated from other human rights.⁸⁵ However, as a signatory of the 1993 Bangkok Declaration on Human Rights,⁸⁶ China effectively emphasizes the “right to development” *over* other human rights.⁸⁷ Many ideas expressed in the Bangkok Declaration advocate in favor of “cultural relativism”, supporting instead a right to favor cultural, economic and political circumstances of a particular country at a particular time.⁸⁸ More generally, the Bangkok Declaration challenges the universality of human rights and criticized the international human

⁸⁴ Declaration on the Right to Development, GA Res.41/128, Annex, UN GAOR, Supp. No. 53, Un Doc A/41/53 (1986) at Article 1, online: <<http://www.unhchr.ch/html/menu3/b/74.htm>>. See also the UN's background information on the Declaration, which states: “An important step towards the recognition of the right to development was General Assembly resolution 1161 (XII). In this resolution the General Assembly expressed the view “that a balanced and integrated economic and social development would contribute towards the promotion and maintenance of peace and security, social progress and better standards of living, and the observance of and respect for human rights and fundamental freedoms”, online:<<http://www.unhchr.ch/development/right-01.html>>.

⁸⁵ Liu Xinseng, “The People's Republic of China and the United Nations Commission on Human Rights” in Errol P. Mendes & Anne-Marie Traeholt, eds., *Human Rights: Chinese and Canadian Perspectives* (Ottawa: Human Rights Research and Education Centre, University of Ottawa, 1997).

⁸⁶ Report of the Regional Meeting for Asia of the World Conference on Human Rights, U.N. GAOR World Conf. On Hum. Rts., at 2, U.N. Doc. A/CONF.157/PC/59 (1993) [Bangkok Declaration].

⁸⁷ Pitman B. Potter, *Chinese Legal System: Globalization and Local Legal Culture* (New York: Routledge, 2001) at c.5.

⁸⁸ Amy J. McMaster, “Human rights at the Crossroads: When East Meets West” (2004-05) 29 Vt. L. Rev. 109.

rights movement for being Western-biased.⁸⁹ China's firm stance opens up the discussion on the process of China's selective adaptation, a theory developed by Pitman Potter, which will be discussed in the following Chapter.

⁸⁹ From March 29 to April 2, 1993, the 49 States who attended the Asian Regional Conference on Human Rights in Bangkok in preparation for the Second World Conference on Human Rights planned for June, 1993 (where the UN adopted the Vienna Declaration and Programme of Action) adopted the Bangkok Declaration on Human Rights. Some sections of the Declaration made certain commitments to human rights by signatory states a subjective matter. For example, the Bangkok Declaration:

1. Stressed the urgent need to democratize the United Nations system, to eliminate selectivity, to improve procedures and mechanisms in order to strengthen international co-operation based on principles of equality and mutual respect, and to ensure a positive, well-balanced, and non-confrontational approach in addressing and realizing all aspects of human rights;
2. Discourages any attempt to use human rights as a conditionality for extending development assistance;
3. Emphasized the principles of respect for national sovereignty and territorial integrity, as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure;
4. Recognized that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, and bearing in mind the significance of national and regional particularities and various historical, cultural, and religious backgrounds; and,
5. Reaffirmed the interdependence and indivisibility of economic, social, cultural, civil, and political rights, and the need to give equal emphasis to all categories of human rights.

CHAPTER 4 – THE THEORY OF SELECTIVE ADAPTATION

4.1 An overview of the theory

The disparity between recognized international institutional requirements and the various conceptions of the rule of law and legal systems opens the door to the dynamic process of “selective adaptation”. Developed by Pitman B. Potter, this theory touches the issues of perception, complementarity and legitimacy.

As stated by Potter:

Perception influences understanding about foreign and local norms and practices.

Complementarity describes a circumstance by which apparently contradictory phenomena are combined in ways that preserve their essential characteristics and yet allow them to operate together in a mutually reinforcing and effective manner.

Legitimacy concerns the extent to which members of local communities support the purposes and consequences of selective adaptation.⁹⁰

Interpreting norms of trade liberalization into the Chinese community “will depend on the extent to which interpretive communities – comprising government officials, socio-economic and professional elites, and other privileged groups exercising authority borne of political and/or professional position, specialized knowledge, and/or socio-economic status – assimilate norms of trade liberalization.”⁹¹ Norms can be imposed by global institutions, but are confronted by the powerful Chinese local culture. Potter argues that new norms may emerge when local norms are

⁹⁰ Pitman B. Potter, “handouts for class presentation” (Faculty of Law, University of British Columbia, 27 March 2008) [unpublished]. For more information, see Pitman B. Potter, “China and the International Legal System: Challenges of Participation” (September 2007) *China L. Q.* 191 at 699.

⁹¹ Pitman B. Potter, “China and the International Legal System: Challenges of Participation” (September 2007) *China L. Q.* 191 at 699.

ineffective to manage the totality of changing social and economic conditions.⁹² But only when these norms are accepted based on local conditions, can these norms be successfully imported to replace traditional ones.

The integration of foreign norms into Chinese culture is the focus of this Chapter. Analyzing China's commitments to the trade regime and the underlying norms imported from the WTO by contrast with China's lack of commitment to internationally recognized human rights, more particularly labour rights which are affected by trade, are the central themes of this Chapter. I have chosen labour standards as an example, principally because this is an area of human rights which is affected by trade and for which respect for the rule of law would serve to enhance working people's lives in China. As China's human rights policy focuses on the right to subsistence, I thought labour rights would be a good starting point. This said, there are other areas that are affected by trade, such as the environment, but the effect on individual lives is not as obvious as for those of the everyday working man or woman.

4.2 Perception of GATT, article X

Perceptions of GATT article X tie into the greater respect for concepts of transparency and of the rule of law. Traditionally, law did not occupy much importance in China mainly due to the Confucian philosophy of hierarchical rights-based status. The economic reform since 1978 has propelled China in drafting new legislation and revamping old ones relating to their corporate commercial endeavors.

The central government has also published more information on the rule of law trying to instill the confidence of the international community and to stem criticism, but enforcement of laws is still at issue. While WTO accession has brought about new legislation and regulations,

⁹² *Supra* note 22.

any perceived attempt to develop a transparent system based on rule of law in China has not spilled over to protect human rights. We will look at how foreign and local norms and practices interact in this section.

4.2.1 WTO-related law reform

Prior to WTO accession, China reviewed over 1400 laws and regulations. During the year of accession in 2001, China had reviewed 2300 laws and regulations, (830 of which were repealed and 325 revised).⁹³ The Company Law came into being in 1994 (amended in 1999 and 2005) and governs the limited liability company and the company limited by shares which are established on Chinese territory. Most companies were governed by the laws for state-owned enterprises at that time. In 1999, the Sole Proprietorship Enterprise Law was adopted. The downsizing of state-owned enterprises in 1995 should have pushed the Chinese government to draft a law concerning the joint stock co-operative enterprises in order to facilitate the reform, but only guiding opinions by the State Commission of Economic System Restructuring (1997) regulate this area.⁹⁴ More importantly, for foreign funded enterprises, China has adopted three laws on Wholly Foreign-Owned Enterprises, Sino-Foreign Contractual Joint Ventures and Sino-Foreign Equity Joint Ventures in order to attract foreign investment. Contract law is also part of the economic life and in 1999, a new unified Contract law was enacted to suit the needs of investors and the international community.⁹⁵

⁹³ *Supra* note 10.

⁹⁴ Zou Keyuan, *Towards the Rule of law* (Boston: Martinus Nijhoff Publishers, 2006) at 6.

⁹⁵ The former three laws were seen as inadequate (The Law on Economic Contract, the Law on Sino-Foreign Economic Contract, and the Law on Contract Technology).

4.2.2 Implementation of WTO commitments

So far, China's implementation of its WTO commitments have been decidedly mixed. Although some of its commitments were to be phased in within a fourteen year period, most commitments were aimed for the year 2006.

The United States Trade Representative's 2006 Report to Congress on China's WTO compliance⁹⁶ indicates that China has taken important steps to reform its economy since WTO accession in 2001 and also lists a number of shortcomings. The report states that: "Each year, China has made annual reductions in its tariff rates, eliminated non-tariff barriers, expanded market access for foreign services providers and improved transparency."⁹⁷

However, China's enforcement of laws is problematic. The report indicates that "China's shortcomings in enforcing laws in areas where detailed WTO disciplines apply, such as intellectual property rights (IPR), have also created serious problems for the United States and its other trading partners". The report cites that government intervention in the economy is a reflection of the transition from a centrally-planned economy to a market-driven economy governed by the rule of law.

Overall though, China has made *significant progress* in its WTO commitments. Problems lie in the fact that China had not yet fully institutionalized key WTO principles, which includes transparency. The report also noted that there was a lack of consensus within China's government and its priorities "including differences in views and approaches among China's

⁹⁶U.S., "2006 Report to Congress on China's WTO Compliance" United States Trade Representative (11 December 2006) at 4, online:

<http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/asset_upload_file688_10223.pdf>.

⁹⁷ *Ibid.*

central, provincial and local governments,”⁹⁸ which has reduced the momentum for economic reform in 2006 and has created systemic rule of law problems.

4.2.3 Rule of law commitments

In order to gain legitimacy in its modernization efforts, China issued a White paper on the rule of law on February 28, 2008. China has vowed over the years to establish “a socialist legal framework with Chinese characteristics...with the Constitution at the core”. Under the Constitution, “The people of all ethnic groups, all state organs, the armed forces, all political parties and public organizations and all enterprises and public institutions in the country must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation”. This duty, identified at Article 33 of the Constitution, includes upholding the 4 basic principles of the Constitution and basic rights are further limited by Articles 51 to 55 which place the State at the center of control.⁹⁹

Based on the White paper on the rule of law, the focus on human rights is that of ‘subsistence’ and ‘development’ through economic and social development which are supposed to be enforced by the judicial system and other mechanisms for safeguarding rights and interests.

⁹⁸ *Ibid.*

⁹⁹ Article 51. The exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens; Article 52. It is the duty of citizens of the People's Republic of China to safeguard the unity of the country and the unity of all its nationalities; Article 53. Citizens of the People's Republic of China must abide by the constitution and the law, keep state secrets, protect public property and observe labour discipline and public order and respect social ethics; Article 54. It is the duty of citizens of the People's Republic of China to safeguard the security, honour and interests of the motherland; they must not commit acts detrimental to the security, honour and interests of the motherland; Article 55. It is the sacred obligation of every citizen of the People's Republic of China to defend the motherland and resist aggression. It is the honourable duty of citizens of the People's Republic of China to perform military service and join the militia in accordance with the law.

Human rights and rule of law are also concepts that are mentioned in the Constitution.¹⁰⁰ China claims that “[t]he undertaking to protect human rights has been developing in a sound way, and citizens' political, economic, social and cultural rights are now fully respected and guaranteed in all aspects.”¹⁰¹

In reality though, not much weight has been given to civil and political rights as China is a signatory of the Bangkok Declaration, which emphasizes the collective rights of groups and the “Asian values” discourse over universal and individual rights. Given China’s current position in the world economy, she has taken on a firmer stance. The Bangkok Declaration is but one example of this ability. To compound matters, internal affairs have driven China to justify central government control in the wake of pro-independence movements in Tibet and Taiwan. Although drafting legislation to protect human rights is a common activity in China, enforcement of these rights are unusual.

4.2.4 Rule of law implementation: example of labour standards

As an example, labourers are not protected in China despite the signing of important covenants on human rights and core labour standards. This question was not an obstacle to membership in the WTO, although issues of human rights surfaced during the lengthy negotiation process. Since 1989 - the Tiananmen Square student protest - opponents of China’s

¹⁰⁰ Article 5 introduced the Rule of Law in 1999 and states that (1) The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law; (2) The state upholds the uniformity and dignity of the socialist legal system; (3) No law or administrative or local rules and regulations shall contravene the Constitution; (4) All state organs, the armed forces, all political parties and public organizations, and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be looked into; (5) No organization or individual may enjoy the privilege of being above the Constitution and the law; Article 33 introduced Human Rights in 2004 and states that “The State respects and preserves human rights”.

¹⁰¹ “White paper: China’s Efforts and Achievements in Promoting the Rule of Law”, China View (28 February 2008), online: <http://news.xinhuanet.com/english/2008-02/28/content_7687418.htm>.

accession to the GATT/WTO often voiced concerns over China's poor human rights record in order to deny her entry.¹⁰²

Many human rights groups adopted the idea that the WTO process should be used to push for human rights improvements. Those attempts were fruitless. Member States could have used the WTO as leverage to negotiate on human rights issues, particularly those related to labour standards which are generally affected by trade, the issues were simply not on the WTO agenda.

Despite efforts, enforcement of Chinese workers' rights within the country is not clear-cut. There is a severe disconnect with the ideology supporting greater rights for workers and the State's ultimate focus on economic development and subsistence which requires greater control of workers. This control has been exhibited in numerous ways. For instance, independent unions are forbidden. One must remember that it is currently illegal to organise independent unions and to strike, and efforts to do so are severely suppressed. The All-China Federation of Trade Unions is the only national trade union federation of the People's Republic of China. Having approximately 135 million members, it is the largest trade union in the world, but it is severely criticised for being a component part of the party and state power structure in China and not a voice for the workers.¹⁰³

Although Chinese labour law provides strong protection for workers' rights, these rights are not effectively enforced. Violations of workers' rights, such as forced and bonded labour, child labour, excessive overtime, substandard wages and poor working conditions prevail in Chinese society. Simply said, instruments for human rights are one step in the right direction, but

¹⁰²*Supra* note 73.

¹⁰³Anita Chan, "China and the International Labour Movement" (undated: Issue 19), online: Great Britain China Centre <http://www.gbcc.org.uk/iss19_1.htm>.

are not sufficient to ensure basic protection without the proper institutions and political will. China stated in its White paper on the rule of law that “The precondition for building a socialist country under the rule of law is that there must be laws to go by”. There is no lack of laws in China, but respect for the laws is at question as the judicial system is critical in implementing and enforcing laws and regulations.

Our perception of what China is doing to become more transparent and introduce the rule of law to justify its legitimacy in the world economy by enacting new legislation and introducing the words “rule of law” in formal instruments may indeed, as demonstrated, be obscured by local culture and a lack of appreciation for those concepts in China.

4.3 Complementarity

As defined by Pitman Potter, Complementarity describes a circumstance by which apparently contradictory phenomena are combined in ways that preserve their essential characteristics and yet allow them to operate together in a mutually reinforcing and effective manner. The WTO accession process fuelled China’s judicial reform. As a local response to international criticism, China undertook to revise its laws and has regarded such a reform as a necessary step towards the rule of law.¹⁰⁴ The purpose of the following analysis of Singapore’s transition to a market economy will serve as an example of how a country’s effort to implement foreign norms and practices can develop, yet not fully institutionalize itself based on purely western standards.

Like Singapore, China’s effort to implement transparency and rule of law may give rise to a system where for commercial private dealings, higher standards may be achieved. I take the

¹⁰⁴ *Supra* note 94.

position that this will not spill over to a better protection of human rights, but will ultimately be focused on commerce and trade.

4.3.1 The Singapore example

Singapore had undergone much of the same transition as China with regards to its transformation to a modern economy: it had also suffered from Japanese imperialism during the Battle of Singapore in 1942. Singapore subsequently reverted to the British rule in 1945 and became a self-governing State within the British Empire in 1959. It then declared independence in 1963. What distinguishes Singapore from China are its market-driven economy and democratic regime, although experts have cited that Singapore is an authoritarian State (led by Mentor Minister Lee Kuan Yew, his family and close associates) and that democracy is an illusion. In Singapore it is the executive, not the law, that is supreme. This is the opposite of what is required by the rule of law.¹⁰⁵

In an Ontario case,¹⁰⁶ a Canadian company sought to adjudicate in a legal system that guarantees a trial before an independent and impartial judiciary and a jurisdiction that operates under the rule of law under Canadian constitutional standards. An expert on corruption in the world in this case stated that:

If the government is authoritarian, if parliament is ineffective, and if the media is "tamed", the conduct of judges will not be subjected to public scrutiny, and they will begin to consider themselves accountable to no one or accountable only to the government. The government, in turn, will then be able to develop a system of patronage (whether through the chief justice or selected judges), which will enable the government to draw on

¹⁰⁵ Statement of the Appellant, *Oakwell Engineering v. Enernorth Industries Inc. (formerly known as Energy Power Systems Limited, Engineering Power Systems Group Inc. And Engineering Power Systems Limited)* [2004] (Ont. C.A.).

¹⁰⁶ *Ibid.*

the support of the judges whenever it becomes necessary to do so. This is, of course, corruption.

In fact, it is recognized that the definition of corruption now commonly used is: "the misuse of public power for private profit". Another expert testified that:

The judicial branch of the Government of Singapore is not independent from the executive branch because "all aspects of the governance of Singapore, including the judiciary, are carefully manipulated and ultimately controlled by a core executive of individuals who use their powers to maintain their own power and further their own political, economic, social and familial interests.

The Court of Appeal did not comment on corruption in Singapore; however, they concluded that "the courts of Singapore have a reputation for fairness in deciding cases between private commercial Parties."¹⁰⁷ If the court were to accept the argument of general bias, it would mean that no judgments from Singapore courts would be enforceable in Ontario.

4.3.2 Application to the Chinese context

Although China's reform is broad-based and includes appointment of judges to look into the corruption of the courts, developments in the field of the legal profession, more openness in the system by allowing public hearings, regulations on the investigation of judicial officers in violation of laws relating to trials and misjudged cases and a new process for the recruitment of judges, there are still many problems in the Chinese judicial system, namely judicial corruption, interference by the Communist Party and the current financial and human resources provided to fund the court systems.¹⁰⁸

¹⁰⁷ *Oakwell Engineering v. Enernorth Industries Inc. (formerly known as Energy Power Systems Limited, Engineering Power Systems Group Inc. And Engineering Power Systems Limited)* [2004] (ON S.C.), online: <http://www.epsx.com/fin_reports/enernorth_lit_1.pdf>.

¹⁰⁸ *Supra* note 94.

As in the case of Singapore, China may develop a rule of law system for the commercial and private sector which will not transcend to other domains such as that for the enforcement of internationally recognized human rights. This is because of its focus on the right to subsistence and to economic development which does not take into account individual human rights. Optimists say that there is sincere effort on China's part to modernize in a manner which respects the rule of law principles. Examples of those are the White paper on the rule of law and the inclusion of the rule of law in the Constitution.

China's current modernization process is the subject of endless speculation. Some have cited China's turning away from socialism toward the economics of capitalism as an indicator of future development.¹⁰⁹ The trends show that China's open economy and burgeoning middle-class may lead to a capitalist society where individuals will seek economic self-interest. As BBC News has reported, "the communist government, which once despised such displays of wealth, is counting on a new middle class to help it succeed. As part of reforms first launched in 1978, it has welcomed capitalists into the ruling party and jettisoned Marxism and Maoism in favour of what it calls Socialism with Chinese Characteristics."¹¹⁰

China's middle class are members of the hardworking, skilled industrial and service sectors.¹¹¹ As stated in Asia Times: "China's nouveaux riches and the hundreds of millions of peasants, factory workers and jobless whose standard of living is plummeting in the face of wrenching economic change, a small but rapidly growing and influential middle class has sprouted in the cities of Shanghai, Beijing, Shenzhen and Guangzhou. And as China lunges

¹⁰⁹ Martin Hart-Landsberg & Paul Burkett, *China and Socialism: Market Reforms and Class Struggles* (New York : Monthly Review Press, 2005).

¹¹⁰ "China's Middle Class Revolution", *BBC News – UK Version* (11 October 2004), online: <<http://news.bbc.co.uk/1/hi/world/asia-pacific/3732914.stm>>.

¹¹¹ "Thriving in the Middle Kingdom: China's burgeoning middle class holds the key to the future of the country", *Time Asia* (undated), online: <http://www.time.com/time/asia/features/china_cul_rev/middle_class.html>.

toward modernity, it is this middle class that hundreds of millions of Chinese citizens must join if the country is to transform itself into one of the world's leading economies.”¹¹²

Internationally, this phenomenon is said to be the hallmark of an advanced economy; however, capitalism creates inequalities, poverty and environmental destruction in the process of growth. The egalitarian society that China had vowed to achieve is being replaced by a growth of riches that will ultimately not trickle down to the lower levels of society. The result is “a very rich upper stratum and a comfortable middle class, and as for the rest: poverty, insecurity, unemployment, and a decline in education and medical care.”¹¹³

Rather, China has vowed never to adopt a western-style democracy. The main argument was that China's main priority was economic growth, which required political stability. For many years, it was believed that democracy and capitalism were intertwined, but China has proven that capitalism does not require democracy as the Chinese Communist Party remains at the centre of power.

Robert B. Reich, professor at the Goldman School of Public Policy at the University of California at Berkeley, writes “[c]apitalism’s wide diffusion of economic power offers enough incentive for investors to take risks with their money. But, as China shows, capitalism doesn’t necessarily provide enough protection for individuals to take risks with their opinions.”¹¹⁴ To qualify this statement, it is important to remember that an open economy is not only associated with democracy, but also with universal rights as promoted by global institutions.¹¹⁵ China has

¹¹² *Ibid.*

¹¹³ *Supra* note 109.

¹¹⁴ Robert B. Reich, “China: Capitalism Doesn’t Require Democracy”, *China Digital Times* (11 January 2006), online: <http://chinadigitaltimes.net/2006/01/china_capitalism_doesnt_require_democracy_robert_b_reic.php>.

¹¹⁵ *Supra* note 73.

proven that a market-driven economy can be achieved without granting individual rights which found the basis for many of the human rights typically afforded by the west.

4.4 Legitimacy

Pitman Potter states that Legitimacy concerns the extent to which members of local communities support the purposes and consequences of selective adaptation.¹¹⁶ In other words, China's desire to join the WTO creates institutional and normative legitimacy. It means that China is willing to adopt practical learning from the international community and be subjected to its rules. China's feat to join the WTO was a long arduous process which lasted fifteen years and her bid to enter the WTO was a hotly debated issue.

4.4.1 China's entry into the WTO

From China's perspective, entry into the prestigious organization would give it some sense of legitimacy in the international arena. However, there was no consensus within China to join the WTO. For example, an article in the *New York Times* about China's entry into the WTO reported that:

China's top trade official, acknowledging for the first time that many lower level Chinese officials oppose the nation's proposed entry to the WTO, said in newspaper reports published on Monday that the government would begin a broad campaign to try to temper the internal discord. . . . Until now, Beijing's stance has been to pretend no opposition existed, even though many Chinese officials are known to be unhappy at the prospect of more open competition with international companies, one of the consequences of joining the trade organization.¹¹⁷

Although China's Constitution foresees greater engagement with the international community, the Constitution also expressly states that China wishes to have "an independent foreign policy as well as to the five principles of mutual respect for sovereignty and territorial

¹¹⁶ *Supra* note 90.

¹¹⁷ USCC, "China's Perceptions of the USA: The View from Open Sources", online: <http://www.uscc.gov/researchpapers/2000_2003/pdfs/chinperc.pdf>.

integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries.”¹¹⁸

From an international standpoint, China's entry would subject it to the rule of law and rid the market of its discretionary measures by enhancing transparency and predictability in the trading regime. This was seen as necessary given China's current economic development and importance in the global trading world.

4.4.2 Perceived legitimacy of the WTO

Some perceive the WTO as a new form of imperialism.¹¹⁹ Developed countries after the Second World War created global institutions, such as the World Bank (then the International Bank for Reconstruction and Development), the International Monetary Fund (IMF) and the International Trade Organization (which became the WTO) to implement the Marshall Plan for the recovery of Europe.

These institutions have taken on the role of upholding globalization and continue to shape policies for world governance but have been criticized for being western biased. China's adoption of international trading standards, including concepts like the rule of law and transparency, were thus not easy tasks.

To further explain, the creation of the WTO was linked to the United Nations' (UN) mandate¹²⁰. Under the authority of the UN, it was the Economic and Social Council of the UN on February 18, 1946, that decided to call representatives to the table on the creation of an international trade organization. The International Conference on Trade and Employment had the

¹¹⁸Constitution of the People's Republic of China (adopted on 4 December 1982) at Preamble, online: <<http://english.people.com.cn/constitution/constitution.html>>.

¹¹⁹Colin Mooers, *The New Imperialists: Ideologies of Empire* (Oxford: Oneworld Publications, 2006).

¹²⁰*Supra* note 88.

aim of promoting the expansion of the production, exchange and consumption of goods. At this conference, which was held in Havana in 1947, the drafting of the Havana Charter for an international trade organization began and was subsequently submitted to the various governments represented.¹²¹ The premise for the Havana Charter is set out in article 1 which states:

The parties to this Charter undertake in the fields of trade and employment to co-operate with one another and with the United Nations.

[and]

Realizing the aims set forth in the Charter of the United Nations, particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of that Charter.¹²²

Though the Havana Charter was never ratified, the various government representatives at this time were also conducting their first round of trade negotiations which included the creation of the General Agreement on Tariffs and Trade (GATT).¹²³ From Havana (Cuba) in 1947 to Annecy (France), Torquay (UK), Tokyo (Japan), Punta des Este (Uruguay), Montreal (Canada), Brussels (Belgium), and finally, Marrakesh (Morocco) in 1994, the GATT, which underwent eight rounds of negotiation, was the only instrument that survived the lengthy process. The final round – the Uruguay Round – ultimately resulted in the creation of the WTO.¹²⁴

¹²¹ *Final Act of the United Nations Conference on Trade and Employment, Havana Charter for an International Trade Organization*, online: World Trade Institute <<http://www.worldtradelaw.net/misc/havana.pdf>>.

¹²² *Ibid.* Article 55 of the Charter states the goal of the UN to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. This suggests that at the very onset of the creation of an international trade organization, there was an important human rights connection.

¹²³ *Supra* note 5.

¹²⁴ “Understanding the WTO – The GATT years: from Havana to Marrakesh”, online: World Trade Organization <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm>.

4.4.3 WTO mandate and human rights

A statement made in 1998 on behalf of Kofi Annan at the Geneva WTO Ministerial illustrates the UN's view of the WTO's human rights obligations:

The WTO must be seen as a partner in the overall international effort - carried out by the UN and its various agencies - aimed at the promotion of sustainable development and human rights, and pursuit of the goals of the UN Charter.¹²⁵

Although a relationship based on mutual cooperation between the UN and the WTO can be established, the extent of the WTO's role in protecting human rights is not quite clear. In 1997, the WTO's Director General, Ruggiero, painted a broad portrait of the organization's role:

Our ability to move towards the construction of a truly global system for an increasing globalised economy stands as a powerful and encouraging symbol for those seeking solutions to the many other issues which now spill across borders, jurisdictions, and cultures. Whether we are talking about environment, development, labour, human rights or other ethical values – in all these areas there are positive signs that the policy debate is moving beyond the sterile divisions and polarities of the past.¹²⁶

Ruggiero opened the door even wider in one of his last speeches as Director General in April 1999 :

From human rights, to climate change, to capital flows – our globalised world demands global solutions. *And these solutions must increasingly be based on shared agreements and rules.* [...] We can no longer treat human rights, the environment, development, trade, health, or finance as separate sectoral issues, to be addressed through separate policies and institutions [emphasis added].¹²⁷

¹²⁵ "Statement by Mr. Rubens Ricupero, Secretary-General of UNCTAD on behalf of the Secretary-General of the United Nations Tuesday, 19 May", online : World Trade Organization <http://www.wto.int/english/thewto_e/minist_e/min98_e/anniv_e/ricupero_e.htm>.

¹²⁶ A Shared Responsibility: Global Policy Coherence for our Global Age, *Speech by Renato Ruggiero to the Conference on 'Globalisation as a Challenge for German Business; export opportunities for small and medium-sized companies in the environmental field'* (9 December 1997) online: World Trade Organization <http://www.wto.org/english/news_e/sprr_e/bonn_e.htm>. See also, Alice Es Tay & Hamish Redd, "China: Trade, Law and Human Rights" (2002) 7 Int'l Trade & Bus. L. Ann. 303.

¹²⁷ "Beyond the Multilateral Trading System, Address to the 20th Seminar on International Security, Politics and Economics de l'Institut pour les Hautes Études Internationales" (12 April 1999) online: World Trade Organization

It is unclear whether the WTO's global agenda has improved the coordination between the WTO system of law and other systems of international law, such as that of human rights law. Nonetheless, human rights and trade have traditionally been linked together.

4.4.4 China's economic development and trade

China's view was to enter the WTO in order to develop its economy and to participate in the increasingly interdependent world although distribution of wealth has been tossed aside in the name of economic development. The main indicators of successful economic development are per capita GNP or GDP increases as used by economists. Negative effects on a country's labour sector are not directly factored into calculating the success of economic development. It is now widely accepted that economic development can have negative impact on real income growth, employment and working conditions.¹²⁸

Economists often use GDP as a means to calculate poverty reduction. China's annual GDP growth is at a rate above 10 per cent, which qualifies it as the fastest-growing major nation in the last twenty five years.¹²⁹ Per capita income has also grown at an annual rate of over 8 per cent over the last thirty years which has reduced poverty, but this has created rising income inequalities.¹³⁰ China's per capita income is still below \$2,000 which is considered low according the International Monetary Fund. The World Bank stated that: "Across China, there were over 400 million fewer people living in extreme poverty in 2001 than 20 years previously. By 2001, China had met the foremost of the Millenium Development Goals - to reduce the 1990

<http://www.wto.org/english/news_e/spr_e/ih_e.htm>. See also, Alice Es Tay & Hamish Redd, "China: Trade, Law and Human Rights" (2002) 7 Int'l Trade & Bus. L. Ann. 303.

¹²⁸ Werner Sengenberger, "The role of labour standards in industrial restructuring: participation, protection and promotion, International Institute for Labour Studies Discussion Papers" (1990), online: International Labour Organization, <<http://www.ilo.org/public/english/bureau/inst/papers/1990/dp19/index.htm#toc>>.

¹²⁹ "Chinese economy slows to still sizzling 11.5% growth", *USA Today* (2007), online: <http://www.usatoday.com/money/world/2007-10-25-china-gdp_N.htm>.

¹³⁰ "Reducing Inequalities in China Requires Inclusive Growth", *Asian Development Bank* (9 August 2007), online: Asian Development Bank <<http://www.adb.org/media/Articles/2007/12084-chinese-economics-growths/>>.

incidence of poverty by half — and it had done so 14 years ahead of the 2015 target date for the developing world as a whole.”¹³¹

Although trade has been said to have significantly reduced poverty in China,¹³² the number of people still living on less than 1\$ per day is alarmingly high and standards of living and distribution are not being factored into the equation when calculating economic development. As stated by Joseph Stiglitz, author of *Making Globalization Work*, “[i]f economic growth is not shared throughout society, then development has failed.”¹³³

Development must take into account standards of living. One must be reminded that the Marrakesh Agreement establishing the WTO states in its preamble that “relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living”, which suggests a duty to ensure greater policy coherence as opposed to one focused solely on trade. The WTO’s lack stance on its own international obligations makes it such that those duties do not transcend to its members. As such, China’s own position on development can remain elusive on the subject of its obligation to take into account standards of living.

This laissez-faire philosophy has sprouted an international movement which aims to raise awareness as to the effects of globalization. Civil society activists have insisted that governments and corporations take responsibility to protect human rights from the atrocities caused by globalization and memberships to international organizations such as the WTO. China’s one-track view to develop its economy without raising standards of living has given legitimacy to organizations that seek to promote internationally recognized human rights. Civil Society involvement is the focus of the next Chapter.

¹³¹ “Fighting Poverty, Findings and Lessons from China’s Success”, *World Bank*, Research, online: <<http://go.worldbank.org/QXOQI9MP30>>.

¹³² David Dollar, “Globalization, Poverty and Inequality” in Michael Weinstein, *Globalization: What’s New?* (New York: Columbia University Press, 2005) at 96.

¹³³ Joseph E. Stiglitz, *Making Globalization Work* (New York: W.W. Norton Company, 2006) at 45.

CHAPTER 5 – CIVIL SOCIETY ACTIVISTS

5.1 Civic activism: an introduction

Civil society has a long history throughout which it has assumed various meanings. Political events in Latin America, Eastern Europe and East Asia in the last few decades has revived the concept of civil society. Garry Rodan attests that despite the various meanings one can give to civil society, it “remains a crucial conceptual tool in the analysis of contemporary societies as well as an influential political ideal.”¹³⁴ Activism contests local and global power structure and offers alternatives to the politics of force. The activists themselves influence ‘mainstream’ politics over fundamental world issues, including trade.¹³⁵

Rodan contends that civil society is but one form of political space. On the one hand, it allows activist groups to shape public policy. On the other hand, it is not necessarily institutionalized or independent from the State. Civil society is not absolutely independent because it relies on the State for its enshrinement. It differs from other political spaces which are incorporated with State structure or which have adopted a co-opted relationship with the State. Civil society has garnered more independence than other organizations which allows those actors to oppose State actions and to cooperate with the State in their own interest.

The term “civil society” can be distinguished in two ways. First, civil society was seen in the late eighteenth and nineteenth century as an element juxtaposed with the State, which included market relations and the activities of corporations and businesses. Second, in the twentieth century, civil society was seen more as a sphere of associational life juxtaposed with

¹³⁴ Garry Rodan, “The Prospects for Civil Society in Southeast Asia” (1997) Eastern Asia Policy Papers No. 18, University of Toronto – York university, Joint Center for Asia Pacific Studies at 5.

¹³⁵ Wilma de Jong, Martin Shaw & Neil Stammers, eds., *Global Activism, Global Media* (London: Pluto Press, 2005).

both State and market where activities of corporations and businesses are not a part of civil society and civil society cannot be reduced to market relations. The global civil society, tied in with the factor of globalization and the policies of international institutions such as the United Nations, the World Bank and the International Monetary Fund is a more recent phenomenon. The latter is a part of developments of global economic relations. In all those cases, the State is tied in to the concept of civil society.¹³⁶

5.2 Activism defined

Activism is the notion of taking direct and militant action to achieve a political or social goal. In fact, any group, whether workers' rights activists, human rights campaigners or formed community groups, who pressure for change can be given the title of "activist group."¹³⁷ Further, "[a]ctivists, also known as pressure groups, advocacy groups, activist groups, interest groups and citizen groups, are formed when two or more people organize on behalf of a cause to exert pressure on an organization to change the way it functions."¹³⁸

Based on this explanation, activists would encompass all community opposition groups, as well as Non-Governmental Organisations (NGOs) who lobby for change. In china, there are groups of lawyers who defend the cause of human rights and are subsequently jailed, placed under house arrest or harassed¹³⁹. These groups unite in order to rectify injustices, such as the abuse of workers' rights. The reason labour rights are recurring throughout this thesis is because of the impact of the trading community on this particular area of human rights. For worker's rights activists, an organization would be at risk of activism if they are considered to be

¹³⁶ *Ibid.*

¹³⁷ Denise Deegan, *Managing Activism: a guide to deal with activists and pressure groups* (London: The Institute of Public Relations, 2000).

¹³⁸ *Ibid.*

¹³⁹ See Louisa Lim, "Rights Lawyers in China Face Growing Threats" (3 May 2009) *NPR*, online:<<http://www.npr.org/templates/story/story.php?storyId=103733164>>.

mistreating their employees anywhere in the world by employing children, offering low wages and using disciplinary measures.

In order to advance their cause, activist groups will apply direct pressure by writing letters, petitions and making telephone calls, as well as apply indirect pressure by seeking to influence public opinion. The latter is done by use of the internet, public seminars, publications in newsletters and the extensive use of media coverage.¹⁴⁰ They support their opinion with scientific facts and emotional arguments in order to sway the average person. Activism takes on many forms. It includes litigation, disseminating research, shaping popular culture, educational indoctrination, economic investing, and lastly, violence.¹⁴¹ Media appears to be increasingly globalized, as national television, press and the like, symbolized by the internet which offers social and political actors new opportunities for more direct communication.¹⁴²

It is undeniable that social movements are a major feature of contemporary societies. This has always been true and will likely be true in the future because ordinary people will always engage in claim making with the objective of asserting underrepresented interests. In the last few decades, the social movement has escalated in the wake of globalization and has mobilized activists to use an important pool of resources to protect workers' rights affected by trade liberalization.

5.3 The challenge of globalization

As the United Nations Development Programme Human Development Report (1999) argued, "Globalization is not new. Recall the early sixteenth century and the late nineteenth. But this era is different". What was meant by this caption was that there is a new market, new tools

¹⁴⁰ *Supra* note 137.

¹⁴¹ Robert Weissberg, *The Limits of Civic Activism* (New Brunswick (USA): transaction publishers, 2005) at c.3.

¹⁴² *Supra* note 135.

such as the internet, new rules and new actors, including the WTO, multinational corporations and the global networks of NGOs and other transnational groups.¹⁴³

Capitalist globalization has been challenged not only for its impact on the world's poorest peoples, but also for its impact upon organized labour. The anti-globalization entered into public consciousness in 1999 when a few thousand raucous globalization opponents shut down a WTO meeting in Seattle. Then came Genoa. Liberalization of trade and investment, condoned by the WTO, has shifted the world and the increased concentrations of power and economic resources are now in the hands of transnational corporations and global financial firms and funds. This encourages transnational corporations to carry out their business in the most profitable area of the globe by moving manufacturing jobs away from North America and Europe where wages are higher to the cheaper labour found in Asia. This has been described as the "race to the bottom".

5.4 The race to the bottom in China

In many societies, including China, there is debate on whether the attraction to low-skilled labour and low-cost production has created a "race to the bottom". Rights activists are often concerned that current trade rules encourage a "race to the bottom" in which companies cut costs by seeking the lowest possible wages and labour standards. To encourage investments, countries want labour costs to be lower than its competition, so a country can only be advantaged by undercutting competition. Proceeding in this way creates a situation where:

global multinational corporations ally with repressive developing country governments to combine high productivity manufacturing and services with cheap labour at the expense of unionized workers in developed countries.¹⁴⁴

¹⁴³ Marjorie Mayo, *Global Citizens: Social Movements & the Challenge of Globalization* (Toronto: Canadian Scholars' Press Inc., 2005).

¹⁴⁴ Stephen F. Diamond, "The "Race to the Bottom" Returns: China's Challenge to the International Labor Movement" (2003-2004) 10 U.C. Davis J. Int'l L. & Pol'y 39.

Arguably, jobs go where costs are the cheapest. This would not only affect western countries who are forced to compete with lower paid workers in Asia, but it also creates competition within the region of Asia to offer the lowest possible wages and to cut standards.

Lance Compa states that:

Absent international standards that all countries must meet, each individual country is reluctant to impose new costs on employers, and is often willing to cut standards to attract or keep large employers. As this cycle accelerates, workers will not be able to buy what they produce, leading to global stagnation instead of growth.¹⁴⁵

Ultimately, the Chinese economy supports foreign investment opportunities and offers a local market of up to 1.3 billion consumers. China's focus has been on economic development and foreign investment has played a major role. It is questionable whether the country's liberalization will serve to improve living standards through economic development because international standards are not enforced in China.

As such, the problem is not the lack of international standards. The International Labour Organisation (ILO) does in fact set standards that are recognized internationally. ILO standards dictate that "decent work" is a central concept in the development of an equitable process of economic integration. The International Labour Office issued a paper entitled "Policy Coherence Among International Organizations" which was led by the World Commission on the Social Dimension of Globalization and which argues for "decent work" principles.¹⁴⁶ Decent work was defined by the ILO Director Juan Somavia in 1999 and encompasses "the aspirations of people in

¹⁴⁵ Lance Compa, "Labor Rights and Labor Standards in International Trade" (1993-94) 25 Law & Pol'y Int'l Bus. 165.

¹⁴⁶ *Policy Coherence Among International Organization: Creating the Tools to Make it Work - A National Imperative and an International Obligation* (Issue Paper for Session 5), online : International Labour Organisation <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/meetingdocument/wcms_084241.pdf>.

their working lives – for opportunity and income; rights, voice and recognition; family stability and personal development; and fairness and gender equality.”¹⁴⁷

It is in fact the enforcement of those standards that is problematic in China. Currently in China, worker’s rights concerns are not effectively being voiced by the All-China Trade Federation, the only labour union representing Chinese workers. Also, forming an independent trade union is prohibited. Thus, the Chinese workforce is attractive to foreign investors because it is modern, much like their Western or European counterparts, due to decades of authoritarian rule. However, it offers the benefit of offering very low wages in comparison to developed economies and virtually no political voice typically afforded through strong labour movements.¹⁴⁸

As a testament of the cheap wages, we can compare China with the United States. While total hourly compensation costs for manufacturing workers increased more rapidly in China than in the United States between 2002 and 2004, hourly compensation per employee in China continued to be 3 percent of the level in the United States.¹⁴⁹ Despite the low wages, the rise of the middle class and the low cost of living have created enough incentive to work, as China is moving away from socialism and integrating elements of capitalism to their system.

5.5 Nike sweatshops : A case in point

Throughout the 1970s, Nike outsourced contracts to sweatshops for the production of its shoes to areas such as Korea and Taiwan where standards for workers were very poor. Once workers gained more freedoms to organize, Nike moved its operations to China, Indonesia and

¹⁴⁷ Report of the Director General, *Decent Work*, 87th Session of the International Labour Conference (Geneva: 1999) online: International Labour Organization <http://www.ilocarib.org.tt/oldwww/cef/initiatives/ILC87%20-%20Report%20of%20the%20DGI_%20Decent%20Work.pdf>.

¹⁴⁸ *Ibid.* This explains why so few multinational companies operate in Central Africa or Haiti where wages are the lowest in the world.

¹⁴⁹ Erin Lett & Judith Banister, “Labour costs of manufacturing employees in China: an update to 2003-4” (2006) 129 *Monthly Lab. Rev.* 40.

Vietnam where labour laws were ineffective and cheap labour was available. Although these countries continue to be the playing grounds of companies such as Nike, social activists and NGOs have put considerable amounts of pressure for companies to refrain from using the excuse that they are 'just the buyer' and forced them to take responsibility for the products they made.¹⁵⁰

Nike, a leader in the shoe industry, has a code of conduct which states that "in the area of human rights...in the communities in which we do business, we seek to do not only what is required, but what is expected of a leader". Nike was the target of a major human rights campaign in 1996 and, as a result, since 1998, it has independent compliance monitoring in its various factories, including in China, which produce its shoes.

Since 1999, Nike also announced that it would create the Global Alliance for Workers and Communities, which comprises businesses, public and non-profit organizations that would also include local NGOs in the assessment of workplace conditions via interviews, focus groups and worker surveys. Since 1998, Nike has focused on health and safety issues by using less harmful chemical compounds in the making of their shoes and better ventilation systems for the factories. There continues to be some problems and the health and safety of workers are still at risk, but Nike has vowed to bring their standards up to par with the *US Occupational Health and Safety Administration* standards.

Nike also now pays the minimum wages for workers in those countries. Other shoe companies like Reebok and Adidas have also taken on human rights initiatives and have set ethical corporate standards thus paving the way in terms of corporate social responsibility for that industry.¹⁵¹

¹⁵⁰ *Sweatfree Communities : Frequently Asked Questions*, online : Global Exchange, <<http://www.globalexchange.org/campaigns/sweatshops/nike/faq.html>>.

¹⁵¹ *Ibid.*

Although activist groups differ in their objectives, they all share the common interest of fostering change. Their campaigns have a larger effect on the people they aim to help and the organizations who are made out to be the enemy. In an increasingly globalized world, most see activism as presenting a growing threat to organizations they target, whether large or small. This case study shows that we must move beyond the “top-down” versus “bottom-up” dichotomies.¹⁵² Rather than seeing these issues as being in conflict, we could see the social movements and the corporate worlds having mutually reinforcing goals. The grassroots movement is actually strengthened by the business community’s desire to preserve their corporate integrity as a global citizen. Most transnational corporations are now more proactive in dealing with issues which give rise to human rights issues because of the image it projects onto society.

5.6 Activism and the corporate response

It is shown that companies that experience activism and learn to deal effectively with it through negotiation develop more flexible communication structures in their business generally. For example, a company that improves their environmental performance has also shown to improve their relationship with other stakeholders. In addition, those companies who learn to deal effectively with activists’ concerns are better equipped to deal with them in the future. McDonald’s libel action in 1990 against environmentalists shows us that the worst thing you can do as a company is to ignore or fight back against the activists.¹⁵³

Corporations have responded to activism and bad publicity by taking on philanthropic endeavors. This offers the opportunity for companies to creatively accomplish aims pursued by government by being engaged in politics in a non-traditional sense. The choice for activists is

¹⁵² *Supra* note 143.

¹⁵³ *Supra* note 137.

often seen as the need of pressuring governments or inviting private entities to assist in meeting targets. Charities that corporations are involved in are huge.

In June 2006, Warren Buffet, the world's second wealthiest man made a \$31 billion dollar donation through Berkshire to the Bill and Melinda Gates Foundation, creating a mega-philanthropy the likes of which the world has never seen. It represented 85% of his fortune. The Bill and Melinda Foundation aims to address problems such as AIDS, tuberculosis, malaria in developing countries and impacts lives of the poorest residents of those countries.¹⁵⁴

There is also a business and human rights component to business involvement.¹⁵⁵ Some corporations support initiatives promoting development, economic and social rights. For example, in March 2009, PepsiCo issued guidelines in support of the human right to water. Coca-Cola is also involved in water initiatives. Pfizer and Abbott, both pharmaceutical companies, promised to continue giving medicine to HIV/AIDS infected citizens in Africa.

Although some, like Buffet, may indeed enjoy giving back, corporations tend to thwart off negative criticism by being engaged in local charities and issues abroad. Thus, the corporate image is a matter of perception: it is not only what a company stands for, but it also includes the perception that the public has of that company. Marketing and public relations generally shape the corporate image from the corporation's standpoint, but the media, NGOs, environmentalists and labour unions contribute to the overall perception that the public has of a certain company. Shaping the corporation's image is an important task and helps to create socially responsible legal entities. The image has the effect of adding another variable to the purely economic

¹⁵⁴ Jay Greene, "Buffet's Mega-Gift" *Business Week* (27 June 2006), online :

<http://www.businessweek.com/investor/content/jun2006/pi20060627_586005.htm>.

¹⁵⁵ See the site for Business and Human Rights Resource Centre, online: < <http://www.business-humanrights.org/Categories/Company policysteps/Stepstopromoterightsinwidersociety/Supportforinitiativespromotin gdevelopmentandeconomicsocialrights/SupportforinitiativespromotingdevelopmenteconomicsocialrightsGeneral>>.

equation of business as it minimizes the purely 'bottom line' approach. We will discuss corporate social responsibility in Chapter 6.

CHAPTER 6 – CORPORATE SOCIAL RESPONSIBILITY

6.1 Defining Corporate Social Responsibility

Corporate social responsibility has become a catch-phrase in most organizations, be it the for-profit, non-profit, governmental or non-governmental organizations (NGOs). The concept of corporate social responsibility is ill-defined mostly because it is in part ‘voluntary’.¹⁵⁶ Jennifer A. Zerk cites the Confederation of British Industries’ (CBI) definition of corporate social responsibility as “a catch-all title referring to the activities of companies in areas where they impact on society and/or the environment, as well as on companies’ shareholders, customers, suppliers, employees and other players.”¹⁵⁷

However, the CBI distinguishes between those activities which are ‘voluntary’ and those which are required by legislation. ‘Voluntary’ activities are undertaken because they “add value to the business and build their reputation.”¹⁵⁸ Other actors, such as NGOs, focus on the non-voluntary elements of being socially responsible and take the position that companies’ must act in ways which are ethical in order to be good corporate citizens.

In practice though, there seems to be varying degrees of compliance from a legal standpoint. The World Economic Forum has defined corporate social responsibility as follows:

The contribution that a company makes in society through its core business activities, its social investment and philanthropy programmes, and its engagement in public policy. That contribution is determined by the manner in which a company manages its economic, social and environmental impacts and manages its relationships with different

¹⁵⁶Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge: Cambridge University Press, 2006)

¹⁵⁷*Ibid* at 30.

¹⁵⁸*Ibid* at 30.

stakeholders, in particular, shareholders, employees, customers, business partners, governments, communities and future generations.¹⁵⁹

Integrating elements of these definitions, Jennifer A. Zerk defines corporate social responsibility as the responsibility “to operate ethically and in accordance with [the company’s] legal obligations and to strive to minimize any adverse effects of its operations and activities on the environment, society and human health.”¹⁶⁰

6.2 Implications on human rights

The focus of this section is on labour rights which are directly affected by trade and globalization. As stated at the *World Commission on the Social Dimension of Globalization* in 2004, “The rules of the global economy should be aimed at improving the rights, livelihoods, security, and opportunities of people, families and communities around the world.”¹⁶¹ Since 1919, the International Labour Organization (ILO) has aimed to develop international labour standards which promote opportunities to obtain “decent and productive work, in conditions of freedom, equity, security and dignity”. Conventions drafted by the ILO cover an array of subjects concerning work, employment, social security and policy and related human rights.¹⁶²

6.3 Labour standards as a human right

Core labour standards advocated by the ILO are considered to be a human right. Those core labour standards are defined as:

- the Effective Abolition of Child Labor;
- the Elimination of Discrimination in Employment and Occupation;

¹⁵⁹ World Economic Forum, *Follow-up Questionnaire on the World Economic Forum CEO Statement: Global Corporate ‘Citizenship’: The Leadership Challenge for CEOs and Boards* developed by the World Economic Forum’s Global Corporate Citizenship Initiative in partnership with The Prince of Wales International Business Leaders Forum (2002), online: <http://www.weforum.org/pdf/GCCI/Findings_of_CEO_survey_on_GCCI.pdf>.

¹⁶⁰ *Supra* note 153 at 32.

¹⁶¹ *Introduction to International Labour Standards*, online: International Labour Organization, <http://www.ilo.org/global/What_we_do/InternationalLabourStandards/Introduction/lang--en/index.htm>.

¹⁶² *International Labour Standards*, online: International Labour Organization, <http://www.ilo.org/global/What_we_do/InternationalLabourStandards/lang--en/index.htm>.

- the Elimination of All Forms of Forced or Compulsory Labor; and,
- the Freedom of Association and the Effective Recognition of the Right to Collective Bargaining.¹⁶³

Furthermore, the human rights treaty bodies, particularly under the UN's International Covenant on Economic, Social and Cultural Rights draw heavily on the experience and practice of the ILO mechanisms. In fact, the Committee on Economic, Social and Cultural Rights (CESCR), has tapped into the ILO's insights on articles 6 (right to work), 7 (just and favourable conditions of work), 8 (trade union rights, including the right to strike) and 11 (provision of an adequate standard of living) to name a few.¹⁶⁴

However, treaties that discuss corporate social responsibilities do not necessarily view them as legal in nature. In fact, the CESCR argues that within the purview of the "right to work", national and multinational companies "have responsibilities regarding the realization of the right to work" – that they "have a particular role to play in job creation, hiring policies and non-discriminatory access to work". In the same statement, the Committee reiterates the traditional view that companies are not bound by the Covenant on Economic, Social and Cultural Rights.¹⁶⁵ Hence, the treaties do not address the issue of corporate social responsibility and the statements made on such treaties are ambivalent to say the least. It is however agreed upon that corporations are capable of both breaching human rights and contributing to their protection.

¹⁶³ *Asia Development Bank and ILO's handbook on Core Labour Standards* (October 2006), online: Asian Development Bank, <<http://www.adb.org/Documents/Handbooks/Core-Labor-Standards/default.asp>>.

¹⁶⁴ *Protecting Labour Rights as Human Rights : Present and Future of International Supervision*, Proceedings of the International Colloquium on the 80th Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations, Geneva, 24-25 November 2006, online : International Labour Organization <<http://www.ilo.org/public/english/standards/norm/download/resources/colloquium80ceacr.pdf>>.

¹⁶⁵ UN CESCR, 37th session, *General Comment* 18 (1989) at para 52, online: <<http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument>>.

6.4 China's labour laws

The Labour Law of the People's Republic of China, adopted in July 1994 by the Standing Committee of the Eighth National People's Congress, fully and concretely states the basic rights of labourers granted by the Constitution:

According to law, workers enjoy equal rights to employment, selection of profession, remuneration, rest and vacation, labor security and health protection, professional skill training, social insurance and welfare as well as other rights prescribed by law. The Labor Law stipulates that the state implement a minimum wage guarantee system and a paid annual vacation system, in addition to standards for work hours, labor security and health, with special protection for women workers, and standards for professional training.¹⁶⁶

In 2007, China adopted the new Labour Contract Law scheduled to come into effect on January 1, 2008. The law states that the employer must have a written agreement within one month of hiring an employee, as well as must inform the new employee of the nature of his or her employment, working conditions and compensation. It also limits the use of temporary laborers.¹⁶⁷ As is often the case with China, the question is whether or not this law will be enforced. Generally, labour laws are not effectively enforced in China as the economic development of the country requires greater control of workers. As previously stated, China has ultimately focused on the economic development of the country as a means to override individual human rights.

Absent any steps taken by the Chinese government in enforcing its own labour laws despite excessive pressure from NGOs, civil society activists, and other proponents of universal human rights and absent any willingness by the WTO to adopt measures to uphold international

¹⁶⁶ Government White Paper, *The Progress of Human Rights in China* (1995) at c.4, online: <<http://www.china.org.cn/e-white/phumanrights19/index.htm>>.

¹⁶⁷ Beijing Review, *Labour Contract Law of the People's Republic of China* (16 October 2007), online: <http://www.bjreview.com.cn/document/txt/2007-10/16/content_80896.htm>.

labour standards, the alternative approach to ensure greater compatibility with these international standards must lie with other international actors. An international trading system where social rights and labour rights are taken into account calls for more effective interventions.

In the face of globalization, there is greater pressure on business leaders and their companies to engage in wider societal values which calls for more effective management on the companies' impact on labour, the environment, poverty and a host of other interconnected issues. Also, it requires greater engagement in public-private partnerships to tackle the challenges that cannot be undertaken by a single company or the private sector.

6.5 Legal personality of the corporation

One of the most remarkable features of a company is that it possesses a legal personality. It has all of the same rights as an individual and is seen as a person in the eyes of the law. It can hold property and purchase assets. It is distinct from its president, its directors, its secretary and its majority shareholder. The company is owned by shareholders who have limited capacity to be heard and to effect change within the structure. It is different from a human in that it does not have a conscience, but relies on others for guidance.

The poem "Oklahoma Ligno and Lithograph Co." spells it out correctly:

But corporations do not weep. Frankensteinian creations of economic necessity, corporate "persons" are deficient in that concatenation of spiritual, social and political characteristics which in human personalities we call the "soul". Since individuals who manage corporations do presumably have souls, in this respect, at least, the corporation is very much less than the sum of its parts.¹⁶⁸

Since corporations do have a legal personality, they must also presumably have legal responsibilities. We will first discuss the responsibilities that the State imposes on corporations.

¹⁶⁸ Russell B. Stevenson, "Corporations and Social Responsibility: In Search of the Corporate Soul" (1973) 42 Geo. Wash. L. Rev. 709.

6.6 The State and the corporation's liability

States must also take responsibility for their failure to prevent corporate abuse or for failure to address such abuse; however this obligation is limited to their own jurisdiction. As such, within their jurisdictions, States have positive obligations for the liability of corporations and to protect human rights.¹⁶⁹ As stated by Radu Mares:

Host states (i.e. countries where subsidiaries and suppliers operate) already have obligations, under customary and treaty law, to protect human rights from business abuses within their jurisdictions.

[And]

Home states (i.e. countries where the controlling entity – parent company or buyer company – is headquartered) are currently not under an international legal obligation to regulate controlling entities operating within their jurisdiction and hold them liable for human rights abuses overseas perpetuated by their business partners.¹⁷⁰

International law is clear on the “host state’s” duty to uphold basic human rights and there are no lack of international treaties to encompass the state’s responsibility in minimizing and preventing corporate abuses. The “home state” has no such obligation. Notwithstanding the limited international obligations of a ‘home state’ in human rights abuses happening overseas, companies have taken on a greater role in corporate citizenship.

The driving force behind this role is to maintain and uphold a respectable corporate image and to increase profits on the one hand, as well as to stem international criticism from NGOs and other civil society activists on the other hand. These factors are mutually reinforcing. The State’s responsibility to prevent corporate abuses is not the main interest of this chapter, although much can be learned from how law and policies interact with corporate social responsibility at the national and international levels.

¹⁶⁹ Radu Mares, *The Dynamics of Corporate Social Responsibility* (Boston: Martinus Nijhoff Publishers, 2008).

¹⁷⁰ *Ibid* at 5.

6.7 Instruments imposing responsibilities on corporations

Whether corporations should act responsibly is a question that has somewhat been settled although there is still no consensus on the meaning and contours of this responsibility. Under international law, instruments impose indirect responsibilities on corporations which are provided under domestic law in accordance with states' international obligations. Thus, for corporations, it is more a question of "soft-law" which means that there is no legal obligation to prevent abuses, but socially acceptable norms and expectations for businesses have emerged in practice. Self-regulation mechanisms have also emerged to ensure that some basic standards are met.

6.7.1 The Corporate Code of Business Conduct

Generally, corporations recognize that they have some responsibilities and that they too are citizens of the world. Errol P. Mendes wrote on the corporation's corporate code of conduct and their impact on corporate social responsibility in 1996.¹⁷¹ He stated that among the issues corporations face, there are concerns regarding investments in countries where governments undermine basic human rights and the rule of law. He argues that companies are accountable to the international community and not only to the government (and local applicable laws) in the country in which they conduct their business. In his words:

[A] company has a certain responsibility to citizens of the host country to avoid participating in human rights abuses initiated by the rogue government. There appears to be an emerging consensus, among human rights activists and business leaders alike, that there is an argument for business to take an interest in labour standards, human rights, and the Rule of Law abroad.¹⁷²

¹⁷¹ Errol P. Mendes, *The Five Generations of Corporate Codes of Conduct and their Impact on Corporate Social Responsibility* (1996), online : University of Ottawa <<http://www.uottawa.ca/hrrec/publicat/five.html>>.

¹⁷² *Ibid.*

Thus, corporations are now more involved in global initiatives to promote socially responsible actions.

6.7.2 The United Nations' standards for business conduct

The United Nations (UN) has targeted the question of 'how' to ensure that corporations take their responsibilities seriously through the UN Global Compact.¹⁷³ The Global Compact is "one of the many private-public, local-global, municipal-extraterritorial and voluntary-obligatory initiatives that aim to define as well as promote social responsibilities of corporations."¹⁷⁴ At the World Economic Forum in Davos, Switzerland on January 31, 1999, the UN Secretary General Kofi Annan addressed business leaders and challenged them to uphold basic principles in the areas of human rights, labour and the environment.

The Global Compact was officially launched in New York on July 26, 2000. Since 2000, the Global Compact has evolved to include anti-corruption on June 24, 2004 and the fifteen-point 'Shanghai Declaration' on December 1, 2005.¹⁷⁵ The principles of the Global Compact have received 'universal consensus' and derive from the Universal Declaration on Human Rights, the ILO Declaration of Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the UN Convention against Corruption. This movement was initiated to fill the void left behind by instruments such as the voluntary codes of conduct for businesses and the regulatory regime.¹⁷⁶

The Commission on Human Rights at the United Nations Economic and Social Council has also been involved in the realm of corporate social responsibility. This Commission has called

¹⁷³ Sureya Deva, "The UN Global Compact for Responsible Corporate Citizenship" (2006) 2 Corp. Governance L. Rev. 148

¹⁷⁴ Sureya Deva, "Global Compact : A Critique of the UN's « Public-Private » Partnership for Promoting Corporate Citizenship" (2006-07) 34 Syracuse J. Int'l L. & Com. 110.

¹⁷⁵ The *Shanghai Declaration* was approved and agreed to by the various participants of the UN Global Compact Summit in Shanghai. The first five points relate to the role of business in society. The next eight points relate to actions for responsible business and the last two points relate to the role of governments.

¹⁷⁶ *Supra* note 171.

upon multinational corporations to take greater responsibility in protecting human rights. A statement issued in 2003 indicated the following in the preamble:

Recognizing that even though States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.¹⁷⁷

The preamble also referred more specifically to the International Covenant on Economic, Social and Cultural Rights and standards set by the ILO. Finally, the statement enumerated nine basic principles with respect to human rights, which included specific reference to labour rights. Articles 5 through 9 of this statement encompass the rights of workers. More specifically, these articles prohibit transnational corporations and business enterprises from using forced or compulsory labour and also seeks to ensure that the rights of children be protected from economic exploitation. The articles target the work environment and seek to ensure that the environment is safe and healthy. The articles also address the question of remuneration which must reflect an adequate standard of living for the worker and his or her family with the view towards progressive improvement in living conditions. Finally, article 9 relates to the freedom of association and effective recognition of the right to collective bargaining:

by protecting the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without distinction, previous authorization, or interference, for the protection of their employment interests and for other collective bargaining purposes.

These articles are all provided for in national legislation, international instruments and conventions of the ILO.

¹⁷⁷ *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, UN Economic and Social Council, Economic, Social and Cultural Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

6.7.3 Appointment of a Special Representative

In addition, the UN Secretary General Kofi Annan in July 2005 appointed Special Representative for business and human rights, Dr. John Ruggie, whose mandate has been to identify standards for corporate responsibility and to develop assessment tools to measure the human rights impact of business. More precisely, the mandate includes: “standards of corporate responsibility and accountability...with regard to human rights”; “the role of States in effectively regulating and adjudicating” business activities; the subject of corporate “complicity”; and identifying some prevailing if not “best” practices by states and companies.

His report entitled “Business and Human Rights: Mapping International Standards of responsibility and Accountability for Corporate Acts” is devoted to the task of mapping evolving standards, practices, gaps and trends. The report is organized in five clusters, which deal with the “State duty to protect”, “Corporate Responsibility and Accountability for International Crimes”, “Corporate Responsibility for other Human Rights Violations under International Law”, “Soft-Law Mechanisms” and “Self-Regulation”. The report indicates the various legal and non-legal mechanisms which compel corporations to adopt certain measures to uphold basic standards to protect human rights and the environment. John Ruggie’s mandate also requires him to provide a set of recommendations for consideration by the Council, materials which are not currently available.

6.8 Jumping on the bandwagon

Corporate image is of growing importance as many companies jump on the corporate social responsibility bandwagon. “Corporate Global Citizenship in the 21st century” was the subject of discussion at the World Economic Forum. Michael E. Porter, Professor at the Bishop William Lawrence University, explained that criticism of large companies and their actions by

social activists is what initially sprouted the corporate philanthropy and corporate social responsibility movements. But now, the issue goes beyond those ideas to include actions that can be leveraged into business.

As an example, a company has made some commitments in providing microfinancing which was deemed to help the poor and to boost the company's profits. It was also advancing financing for clean and renewable energy.¹⁷⁸ The fact that corporate social responsibility initiatives does not need to affect profits – and can actually boost them – is what drives companies to get involved.

The question of “how and where to get involved” was discussed at the World Economic Forum annual meeting in Davos, Switzerland. CEOs now believe that success is determined by how effectively corporations engage all stakeholders, including customers, shareholders, employees, governments and the greater community and that includes initiatives that affect more than simply the bottom line.¹⁷⁹

6.9 Creative capitalism

At the annual meeting for the Vancouver Board of Trade, Bill Gates spoke about capitalism and philanthropy as a means to encourage a “sustainable way to reduce poverty in the world” and he called it “creative capitalism.”¹⁸⁰ The Vancouver Board of Trade's article cited a number of guidelines for businesses to take into account when deciding where and how to get involved. The authors state that:

¹⁷⁸ World Economic Forum, *Corporate Global Citizenship in the 21st Century*, online :

<http://www.weforum.org/en/knowledge/KN_SESS_SUMM_22887?url=/en/knowledge/KN_SESS_SUMM_2288>

¹⁷⁹ Daniel F. Muzyka and Darcy Rezac, “Deciding where – and when – to get involved: companies can’t afford to neglect good corporate citizenship”, *The Sounding Board: Vancouver Board of Trade* (March 2008) Vol. 48 No. 3 at 5.

¹⁸⁰ *Ibid* at 5.

- Our first guideline is to build on our core capabilities. The most successful interventions by companies addressing community needs are by engaging through our products, skills and networks [...];
- Second, avoid setting up a separate entity to deal with social challenge. This is common criticism by community agencies when a new organization pops up with “new solutions”, which are well meaning but often have less impact than working with existing agencies [...];
- The third guideline involves one of the main themes from Davos [World Economic Forum in Switzerland] this year, collaborating to innovate. Try to build solutions to pressing social needs along with governments, non-governmental organizations (NGOs) or not-for-profit agencies, and other companies [...]. Don’t try to go it alone;
- The fourth guideline is that companies and their teams should try to contribute where possible to existing overarching goals. At Davos, the Millenium Development Goals – which strive to deal with some of the most pressing issues in bridging the divides between the first and third world – were often cited.

There is now consensus among business leaders that corporations, governments, NGO’s and not-for-profit agencies have mutually reinforcing goals in common where it was once considered to operate as distinct entities. These actors should be calling for more effective partnerships in order to deal with global social challenges.

6.10 Corporate Social Responsibility in China

Part of corporate social responsibility requires organizations to invest and outsource to factories that ensure decent standards for work. Factories which do not uphold minimum standards are being penalized in the process;¹⁸¹ however, there remains certain challenges around

¹⁸¹ In preparation for the Vancouver Olympics, the Vancouver Sun reported that the Vancouver Organizing Committee (Vanoc) “banned six overseas factories for failing to meet minimum social standards. Of 80 audits of factories operated by its licencees, 74 resulted in corrective action plans to remedy deficiencies”. See (No author), “Vanoc’s efforts toward social responsibility are onerous, but worthwhile”, *The Vancouver Sun* (5 April 2008) C3 [Vancouver Sun, April 5 2008].

compliance monitoring. In fact, factories in China have declined audits because they take up time and costs which interrupts operations.¹⁸² As stated in the Vancouver Sun:

[t]his is a problem that is bound to grow worse as more organizations jump on the bandwagon of corporate social responsibility. For example, Wal-Mart, Nike, Adidas, Levi-Strauss, Disney, Sears, Hallmark and Hasbro all have human rights compliance officers in China to ensure the practices of their sub-contractors don't damage the reputation of their brands.¹⁸³

There is still reluctance to impose too many onerous obligations such as to undermine their own competitiveness, but growing pressures from the international community have helped shape corporate social responsibility.

Despite the onerous obligations of compliance monitoring in China, corporate social responsibility initiatives could advance labour rights. As globalization has handed giant multinational companies as much political clout as some governments, imposing responsibilities on corporations could effectively improve labour conditions in China.

These corporations, who are seeking to take advantage of the gradual opening of market sectors in post-WTO China, make up the core of the competitive labour-intensive, export-oriented manufacturing sector in China. The data suggests that this is of importance in the post-WTO accession period if we consider that China is highly competitive in its exports of labour-intensive products (requiring unskilled workers) mostly dominated by foreign funded enterprises.¹⁸⁴

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ Jiao Wang, David Mayes & Guanghua Wan, *Income Distribution and Labour Movement in China after WTO Membership* (June 2005), United Nations University: World Institute for Development Economics Research, Research Paper 2005/38.

Increasingly, the post WTO market is providing more chances and more employment opportunities as the export market becomes more diversified, but China's comparative advantage remains the low-skilled labour market. Thus, manufactured products are a large portion of China's trading market. By allowing free trade, each country can specialize in what it produces best and gain comparative advantage in other areas. This may mean that a worker in Canada could write computer software instead of assembling computer parts. In low-wage countries, workers do not generally have the educational and practical experience to take on higher skilled jobs.¹⁸⁵

The issues that surface are primarily internal and do not generally affect foreign investment. In fact, many factors explain why China is a rising economic superpower. Its sheer size and large workforce coupled with cheap labour results in foreigners seeking to invest more into this country. Developing countries such as China are competing for foreign direct investment and internal problems arise because the Chinese government is more inclined to relax its policies and the enforcement of laws and regulations (especially with regards to labour laws) in order to attract investment.

China will do what it can to preserve or improve its economic standing and, so far, it has been effective in doing so. Economic growth in China has been rapid since the beginning of the economic reform in 1978.¹⁸⁶ On average, China's has grown at an average rate of 9.5 per cent since the last twenty years which represents "the most sustained and rapid economic transformations seen in the world economy in the past 50 years."¹⁸⁷ Prospects for China's growth are also excellent as many proclaim that it could "become the largest exporter in the world by the

¹⁸⁵ Edward L. Hudgins, *The Myth of the Race to the Bottom*, online : CATO Institute's Center for Trade Policy Studies, online: <<http://www.freetrade.org/pubs/freetotrade/chap3.html>>.

¹⁸⁶ OECD, *Economic Survey of China 2005 : Key Challenges for the Chinese Economy*, online <http://www.oecd.org/document/7/0,3343,de_2649_201185_35343687_1_1_1_1,00.html>.

¹⁸⁷ *Ibid.*

beginning of the next decade. Underlying this growth there has been profound evolution of economic policies that has transformed the efficiency of enterprises.”¹⁸⁸ Internal issues, such as labour conditions, are secondary to economic development in China despite the drafting of laws and regulations and international pressure to meet ILO standards.

Although we have seen that there are many issues surrounding China’s human rights policies and labour standards that are not effectively dealt with internally by China or internationally by the organizations set out to do so, corporations do have a role that is mutually complicit with civil society activists. In attempting to preserve their reputation while remaining competitive, corporations are mandated to take into account social responsibilities and have adopted methods of best practices in self-governance to uphold and promote internationally recognized human rights. As leaders in their fields they establish new standards by which other companies must compete with. This would seem to be a positive step in the direction of enforcing minimum standards in China.

¹⁸⁸ *Ibid.*

CHAPTER 7 – CONCLUSION

When I first began assembling ideas for this thesis, I was keen on finding solutions to China's human rights issues. I had decided to tackle this issue by finding the underlying truth. By doing so, I found that the various perspectives on what constitutes human rights were opposed by cultural, political, historical and ideological differences. But despite the differences in views from the Western perspective and the Asian values system, the central purpose of the internationally recognized human rights discourse, I found, was the promotion of the concept of human dignity. People are not a commodity. This is why I have adopted what some may view as a Western-biased idea of human rights, by placing equal importance on civil and political rights, including worker's rights which are affected by the trading regime, and social, economic and cultural rights.

The underlying premise of my thesis is that one should have the right to work in an environment with adequate standards. One should not be forced to work under inhumane conditions. One should be treated with dignity. I have largely rejected the idea that the arguments for or against universal human rights is western-biased, because despite our different histories, human dignity is more important than protecting collective group rights over other human rights under the cloak of cultural relativity. This would undermine 50 years of hard work and the very purpose of international institutions themselves.

I have found that China's membership to the WTO will not serve to improve the fundamental respect for the rule of law in areas outside of trade and private commercial dealings simply because the WTO has not taken it under its mandate. Thus, human rights will be left aside in China unless other international actors can push for its inclusion in their own mandates. As I

was set on finding some solutions to this problem, I decided to approach the issue by considering various international actors and their role. What motivated me was the story about a girl named Li Chunmei.

The problems facing Chinese workers are clear. Although stories of appalling working conditions surface occasionally, they are all too common in Chinese society but nonetheless under-documented. The Vancouver Sun's Shelley Page recalls the story of 19 year old Li Chunmei's death which was featured in the Washington Post with the headline reading "On the night she died, Li Chunmei must have been exhausted". Page cites:

Co-workers said she has been on her feet for nearly 16 hours, running back and forth inside the Bainan Toy Factory, carrying toy parts from machine to machine. When the quitting bell finally rang shortly after midnight, her young face was covered in sweat. This was the busy season, before Christmas, when orders peaked from Japan and the United States for the factory's stuffed animals. Long hours were mandatory, and at least two months passed since Li and the other workers had enjoyed even a Sunday off¹⁸⁹.

In her own words, Page continues recounting the story which detailed how Li Chunmei died of *guolaosi* (over-work death):

That night, lying in her dormitory adjacent to the toy factory in the Songgang, an industrial town in southeastern Guangdong province, the slight 19 year-old complained to her roommates she felt worn out and wanted to quit. She wanted to go home. After her roommates fell asleep, Li started coughing up blood. She was found later in the bathroom, curled up on the floor, moaning. Blood trickled from her nose and mouth. She died before an ambulance came¹⁹⁰.

Li Chunmei earned 12 cents an hour, which could amount to 65\$ per month with overtime (minus deductions for room and board and penalties for spending too much time in the bathroom or wasting food).

¹⁸⁹ Shelley Page, *Death by Toy: Many of the playthings that stock North American shelves are made by Chinese workers under appalling conditions*, Vancouver Sun (December 11, 2007) at A11.

¹⁹⁰ *Ibid.*

The chilling accounts of stories such as that of Li Chunmei resonate with the West while leaving Chinese officials virtually unmoved. Yet, an estimated 60 per cent of goods exported from China are from western-owned and operated factories while most of the remaining 40 per cent are produced by Chinese-owned and managed factories contracted by western companies to produce goods for western markets.

My thesis was focused on the important place that we have as western nations to foster positive changes in the ailing Chinese workers' rights regime. I have focused on the role of civil society and of corporations to undertake this important role and have concluded that there is mutual complicity in their objectives.

The West cannot be rest assured knowing that Chinese labour laws provide basic rights, most of which are typically found in their own home countries, because they are not effectively enforced on Chinese turf. In a world where three million Chinese work in 8,000 factories just like Li Chunmei, more effective intervention from the international community must be given priority. Although corporations must focus on their bottom line, only focusing on your bottom line is catastrophic.

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