Human Rights Conditionality and International Economic Relations: A Chinese Lawyer's Perspective

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The conditionality of human rights is a very provoking issue in international economic relations. It should be applied under the guidelines of legitimacy, legality, credibility, and proportionality. The EU is enthusiastic about human rights conditionality. However, it is hard to say that the EU's program of human rights conditionality has worked well in practice. Some main multilateral economic institutions, which had been criticized for disregarding human rights concerns, have remained shy to human rights conditionality. As an increasingly emerging economic giant, China will be expected to have some sort of obligation to better respect, better protect and better promote international human rights. China can accept human rights conditionality in a moderate way.

I. Introduction

We are entering into an era in which everything seemingly can be linked with human rights. Although the kind of linkage has made only moderate progress at the multilateral level, it has been common in bilateral and regional economic arrangements that are dominated by some of the developed states. Human rights conditionality in international economic relations is actually a kind of linkage, i.e., human rights are

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linked with economic relations. Among various kinds of linkages, human rights conditionality can be considered as the most controversial one since the human rights issue itself is always a very troubling issue in the international community.

It is widely recognized that the existing practice of human rights conditionality has been proclaimed and enhanced mainly by the European Union (EU) and the U.S., and the activities of some multilateral economic institutions have been under the pressure of human rights concerns. The fact that the EU and the U.S. are enthusiastic about human rights conditionality is not only because they are the most active vanguards of human rights, but also because they are economic superpowers. With its rapid economic development, the question of how to deal with human rights is expected to be a provoking issue in China's international economic relations. Undoubtedly, the experiences of other states and multilateral economic institutions are of important reference to China. From a Chinese lawyer's perspective, the author, in this article, aims to exhibit his own view of human rights conditionality and international economic relations, especially the poassible choices available for China, which was traditionally passive to the human rights discourse. Besides the "Introduction," this article has four parts. In "Part II," the author examines the practice of human rights conditionality by the EU and some multilateral economic institutions, e.g., the IMF, World Bank, and WTO. In "Part III," the author analyzes the basic contexts in which China deals with human rights conditionality in international economic relations, including an economic context, a human rights context, and a diplomatic context. In "Part IV," the author discusses the current situation and possible choices for China, in particular, making policy suggestions for the Chinese Government. In the final part, "Part V," the author makes a brief conclusion.

It is not an easy job to provide a conclusive and universally acceptable definition of human rights conditionality. From the perspective of the EU's human rights conditionality, it is considered to include two forms: positive conditionality and negative conditionality. Under the former one, "the recipient country should meet the conditions to get benefits" and, thus, it can be considered as "a policy of incentives."[1] The latter one "involves the reduction or suspension of benefits should the recipient not comply with the conditions."[2]

1 Elena Fierro, The EU's Approach to Human Rights Conditionality in Practice, 100 (2003).

2 *Id*.

II. Human Rights Conditionality in International Economic Relations: The EU and Multilateral Economic Institutions

A. The EU

1. Basic Experience

Until the mid-1970s, human rights issues did not arise in the foreign policy of the European Economic Community (EEC), including foreign economic policy. That situation was created (1) partly because of the EEC's conception towards the relationship between human rights and development at that time-which was regarded as the prerequisite to respect of human rights, rather than *vice versa*; (2) partly because the human rights agenda was still a marginal issue in the integration of Europe. What the EEC was concerned about was economic recovery and integration, while political integration was beyond the reach of European leaders at the time; and (3) partly because human rights were not even paid attention to in the international community.

It was said that the gross violations of human rights that took place in Uganda in early 1977 prompted the EEC to reconsider its traditional conception towards the relationship between human rights and development. In the same year, the EEC Council issued a famous statement, termed the Uganda Guidelines.[3] In accordance with the Uganda Guidelines, the EEC Council promised to take measures "within the framework of its relationship with Uganda under the Lomé Convention"[4] to ensure that any assistance provided to Uganda under the Lomé I Convention "has as its effect a reinforcement or prolongation of the denial of basic human rights to its people."[5] In the end, the EEC delayed and cut back the allocation of funds, under the European Development Fund (EDF), to Uganda. Since then, the EEC has taken several similar actions toward the African, Caribbean, and Pacific Countries (ACP countries).[6]

However, the EEC, in practice, has been reluctant to take consistent economic action based on human rights violations. It was not only the fact that the Lomé I Convention could not provide the EEC with the international legality to take these kinds of actions,

3 Council Declaration on the situation in Uganda, adopted on 21 June, 1977 (Bull EC-6-1977).

4 The Lome Convention is an international aid and trade agreement between the ACP (African Caribbean and Pacific Countries) group and the EEC, aimed at supporting the ACP states' efforts to achieve comprehensive, self reliant and self-sustained development. The first *Convention* (Lomé I Convention) was signed on February 28, 1975 and came into effect on 1 April 1976.

5 *Id.* para. 2.2.59.

6 Guinea(1978), Equatorial Guinea(1979) and the Central African Empire(1979).

which resulted in inaction of the EEC in several cases,[7] but also because non-human rights factors sometimes affected the EEC's decision-making.[8]

Obviously, the EEC was aware of the absence of international legality to take economic action based on human rights violations. Thus, in negotiating the Lomé II Convention in 1978, the EEC proposed to refer to Articles 3 and 5 of the Universal Declaration of Human Rights (UDHR).[9] However, the final text of the Lomé II Convention, which was signed on October 31, 1979, and entered into force on January 1, 1981, mentioned nothing about human rights because controversies regarding human rights conditionality arose among the EEC's member states and also because some ACP countries were strongly opposed to including human rights issues in any way. Due to increased pressure from the European Parliament (EP) and ACP countrie increasingly open to the human rights issue, The EEC made little progress in human rights conditionality in the Lomé III Convention, signed on December 8, 1984, and that entered into force on May 1, 1986, the Lomé III Convention contained several non-operative provisions concerning human rights.[10] The Lomé IV Convention, which was signed on December 15, 1989, and entered into force on March 1, 1990, witnessed much more progress in this regard. For the first time, reference to the respect of human rights was included. In particular, Article 5, paragraph 3 of the Lomé IV Convention states that "at the request of the ACP States, financial resources may be allocated, in accordance with the rules governing development finance cooperation, to the promotion of human rights in the ACP States through specific schemes... and resources may also be given to support the establishment of structure to promote human rights." This provision provided the EEC with the international legality to implement positive human rights conditionality. However, the Lomé IV Convention still neither included any provision for making human rights an essential element of the agreement,[11] nor did it allow

7 For example, in the Zaire Case (1979), the EEC Commission stressed the treaty commitments arising from the Lomé I Convention and refused to take any other action "outside the scope of the Lomé Convention." Written Question No. 1079/79 by Mr. Gendebien to the Commission of the European Commission on Human Rights in Zaire in OJ C49/27 of 27. 2.1980. *See* Fierro, *supra* note 1, at 46. In the Ethiopia Case (1977) and the Sierra Leone Case (1977), the EEC also did nothing regarding the poor human rights situation in these two ACP countries.

8 For example, though the human rights situation deteriorated in the Central African Republic in 1977, France, the former colonial power of that country, did not think so. Under the influence of France, the EEC Commission considered, in July 1978, that the human rights situation was not serious enough to suspend the Lomé I Convention. [1978] OJ C199/27.

9 Article 3 reads: "Everyone has the right to life, liberty and the security of person." Article 5 reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

10 *See* e.g. Lomé Ⅲ Convention, Preamble.

11 According to Article 60, paragraphs 1, 2 of the Vienna Convention on the Law of Treaties(hereinafter, "VCLT"), the "material breach" of a treaty can lead to the termination of the treaty or suspension of its

suspension of the Convention based upon the grounds of human rights ("non-executive clauses"). Therefore, the EEC still could not implement negative human rights conditionality.

With the end of the Cold War and the acceleration of the political integration of the European Union starting in the 1990s, the EU authorities issued several important documents concerning human rights conditionality.[12] In 1992, the first bilateral agreements[13], which contained provisions for making human rights an essential element, came into being. These provisions are the so-called Baltic Clauses. The Baltic Clauses state that "the parties reverse the right to suspend the Agreement in whole or in part with immediate effect if a serious violation occurs of the essential provisions of the present agreement."[14] The Baltic Clauses made it internationally legal for the EU to implement negative conditionality. Being aware of possible legal problems arising from the Baltic Clauses,[15] the EU then adopted relatively moderate expressions, which began with the associate agreement concluded between the EU and Bulgaria in 1994 accordingly named the Bulgaria Clauses.[16] In the Bulgaria Clauses "appropriate measures" was substituted for "suspend," notification and consultation mechanisms were established, and the term "with immediate effect" was abandoned.[17]

operation in whole or in part. As stipulated by paragraph 3, the "material breach" consists of "(a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision *essential* to the accomplishment of the object or purpose of the treaty."

12 *See*, e.g., Commission Communication on human rights, democracy and development cooperation, SEC(91)61; Commission Communication on the European Union and the external dimension of human rights policy: from Rome to Maastricht and beyond, COM(95)567; Commission Communication on the European Union's role in promoting the improving human rights and democratization in third countries, COM(2001)252; Commission Communication on developing countries, international trade and sustainable development: the function of the Community's generalized system of preferences(GSP) for the ten-year period from 2006 to 2015, COM(2004)461.

13 These agreements include agreements on trade, and commercial and economic cooperation between the EEC and Latvia, Lithuania, Estonia and Albania.

14 *See* Agreement between the European Economic Community and the Republic of Albania on Trade and Commercial and Economic Cooperation, art. 21 (OJ L343/2 of 25 Nov. 1992).

15 It was considered that the implementation of the Baltic Clauses would not only make the EU in conflict with the principle, *pacta sunt servanda*, but also that immediate suspension would bypass the procedure of the VCLT on suspension. *See* Fierro, *supra* note 1 at 221. However, these considerations are only partly justified because the first consideration only applies to already existing agreements, but not to those to be concluded. As to the second consideration, since the procedural rule concerning suspension, stipulated in Article 65 of VCLT, does not have the effect of *jus cogens*, it cannot argue that the expression of "with immediate effect" in the Baltic Clauses is "null and void."

16 Europe Agreement establishing an association between the European Communities and their member States, of the one part, and the Republic of Bulgaria, of the other part, OJ L358/3 of 31.12(1994).

17 Article 118 of the Agreement between the EU and Bulgaria reads: "If either party considers that the other party has failed to fulfill an obligation under the Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency it shall supply the association council with all relevant information

In May 1995, the EU Commission issued a far-reaching Communication with the aim of including human rights conditionality rules in all agreements which are to be concluded with non-EU member countries.[18] However, the Communication failed in practice, partly because the EU did not include human rights rules in sectoral trade agreements with any third country; partly because developed countries, e.g., Australia and New Zealand, firmly rejected the inclusion of human rights clauses in the cooperation agreements concluded with the EU;[19] and because some developing countries also succeeded in rejecting the inclusion of a human rights clause, e.g. Mexico.[20]

As mentioned above, there are two kinds of human rights conditionality: negative and positive. The application of negative conditionality, in many cases, is not helpful in improving human rights situations and actually deteriorates such situations in these states, especially when it comes to economic, social, and cultural rights (ESCR). Thus, the EU has strictly limited negative conditionality, in practice.[21] On the contrary, the EU has often applied positive conditionality, especially in the Generalized System of Preferences (GSP). The EU's GSP with positive conditionality is called "GSP +."[22]

required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. In the selection of measures, priority must be given to those which least disturb the function of the Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultation within the Association Council if the other party so requests."

18 Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM(95)216 of 23 May 1995.

19 *See* Fierro, *supra* note 1, at 287-294.

20 Agreement between the European Economic Community and the Republic of Argentina on ... Community and the United Mexican States, OJ L 340/1 (11 Dec. 1991).

21 *See* Fierro, *supra* note 1, at 101.

22 *See* Council regulation (EC) No. 3281/94 of December 19, 1994, on applying a four year scheme on generalized preferences in respect of certain industrial products originating in developing countries, OJ L348 of 31.12.1994; Council regulation (EC) No. 1256/96 of June 20, 1996, on applying a three year scheme of generalized preferences regarding certain agricultural products originating in developing countries, OJ L160 of 29.06.1996; Council Regulation (EC) No. 2501/2001 of December 10, 2001, on applying a scheme of generalized tariff preferences for the period from January 1, 2002, to December 31, 2004, OJ L346/1. On December 21, 2005, the EU Commission declared to grant "GSP +" to an additional 15 developing states. In order to benefit from "GSP +," countries must have "ratified and implemented key international conventions. 23 of the most important international conventions relating to core political, human and labor rights must have been ratified, including: the elimination of discrimination against women, the prohibition of torture, the right to strike, the banning of child labor, the environment, good governance, and the fight against drug production and trafficking, must have been ratified by the end of October 2005. The remaining conventions must be ratified within the lifetime of the regulations, i.e., by December 2008. These conventions include the Kyoto Protocol, the Convention on International Trade in Endangered Species and the UN Convention against Corruption." *See* EU Commission, Generalised System of Preferences: EU "GSP+" granted to an additional 15 developing countries(Brussels, 21 December 2005), available at http://ec.europa.eu/trade/issues/global/gsp/ pr211205_en.htm (last visited Dec. 12 2007).

2. Some Comments

In the past several decades, the EU has continuously sought to establish international legality for its efforts in human rights conditionality. Nowadays, it should be admitted that it, to a large extent, has succeeded in doing its job both at a bilateral and regional level. More than 100 developing states and transition states have accepted human rights conditionality from a normative perspective, at least.[23] However, it does not mean that these states have wholeheartedly accepted human rights conditionality. In some sense, the intention to seek international political support from the EU probably served as an important consideration for those transition states to accept human rights conditionality. Furthermore, the "Effect of Sheep Flock" can also partly explain some developing states' acceptance of human rights conditionality. As observed by Elena Fierro, Argentina's conclusion of the agreement containing human rights conditionality with the EEC was immediately followed with similar actions by Chile, Uruguay, and Brazil.[24]

Interestingly, though the 1995 Communication seemingly aimed to include human rights in "all kinds of agreements," All agreements containing human rights conditionality with non-member countries were actually "comprehensive" ones (general cooperation agreements, association agreements, partnership and cooperation agreements, etc.), while sectoral trade agreements were excluded from the inclusion of human rights conditionality. Since the EU has given neither an explanation of its exclusion of sectoral trade agreements, nor has it defined the definite scope of these specific fields, there is obviously a great loophole for the operation of human rights conditionality.[25] More importantly, the fact that human rights conditionality is treated differently in different agreements (between comprehensive ones and sectoral ones)

23 Association agreements, and partnership and cooperation agreements, which include "essential elements" or both "essential elements" and "non-executive clauses," consist of cooperation agreements with Brazil(1992), Mongolia(1992), India(1993), Sri Lanka(1994) and Vietnam(1995),which include only "essential elements"; association agreements with Romania and Bulgaria (both in 1993), ten Euro-Mediterranean association agreements (1995-2004), two stabilization and association agreement with Croatia and Fyrom (both in 2001), the agreement with Mexico (1997), the association agreements with South Africa (1999) and Chile (2005), the twelve partnership and cooperation agreements with the countries of the former Soviet Union(1994-2004), the cooperation agreements with the Mercosur countries (1995), the Central American (1993 and 2003, respectively) and Andean Pact countries(1993;2003), and the Cotonou Agreement (2000); and cooperation agreements with Albania (1992), Korea (1996), Cambodia (1997), Laos (1997), Yemen (1997), Nepal (1995), Bangladesh (2000) and Pakistan (2001). *See* Lordand Bartels, *Human Rights and Democracy Clauses in the EU's International Agreements, European Parliament*, DGExPl/B/PolDep/Study/2005/06, 29/09/2005, at 33.

24 *See* Fierro, *supra* note 1, at 215.

25 Theoretically, any third country can choose to conclude more narrow "sectoral" agreements rather than more "comprehensive" agreements to govern mutual economic relations.

26 In some sense, human rights conditionality cannot be regarded as "conditionality" in "comprehensive" agreements because these agreements themselves can include a human rights agenda.

shows that the EU appears to be not very confident of the legitimacy of human rights conditionality.[26] At the same time, the differentiation may make the EU fall into a dilemma. The EU has to, with great caution, avoid committing breaches of obligations under specific sectoral agreements when it takes measures based on human rights considerations in accordance with specific association and/or cooperation agreements.

Similarly, although the 1995 Communication aimed to include human rights conditionality in the relevant agreements concluded with "all third countries," all third countries that have accepted human rights conditionality in mutual/regional agreements are developing states and transition states. Admittedly, developed states, generally speaking, have better human rights records than developing states. Therefore, it is a greater necessity to include human rights conditionality in agreements concluded with developing states and transition states rather than those concluded with other developed states. However, this bias actually negates the universalism of human rights that the EU and other developed states have always been proclaiming in the past decades. From a moral perspective, developed states cannot argue with arrogance that they, under no circumstance, can keep clean human rights records. Therefore, developed states cannot have the privilege to be exempt from human rights conditionality.

Furthermore, the implementation mechanism of the EU's human rights conditionality is not perfect. As provided in the standard wording of the 1995 Communication and in the relevant agreements concluded between the EU and the third countries, the Association Council, established by a specific agreement, shall be supplied with the relevant information when a Party to the agreement will take measures in order that the Associate Council makes "thorough examination of the situation" and then seeks "a solution acceptable to the Parties."[27] On the one hand, the Associate Council shall be notified immediately of the measures taken while on the other hand, it shall serve as a forum for consultation on these measures. Unfortunately, neither is the legal nature of the Associate Council clear, nor is the operative mechanism of the Associate Council perfect. From the perspective of legal text, the Associate Council tends not to be a judicial or semi-judicial body, but only a political body or political forum. Obviously, it is not in a position to make a binding legal decision and it is not even a suitable forum to reach political consensus. As a result, perhaps it is unilateral political decisions of the EU that ultimately decide legal rights and obligations of developing states under a specific agreement, while no legal mechanism is available for developing states to seek remedies. From the perspective of legal jurisprudence, the

27 If "a special urgency" exists, the information providing process can be omitted. *See* 1995 Communication, Annex 1.

practice of the EU' human rights conditionality is probably in conflict with the long established principle of *nemo debet esse judex in propria causa*.

Finally, it is hard to assess the real effect of human right conditionality. From the perspective of negative conditionality, it was impossible to significantly promote and protect human rights situation in some third countries because it was seldom used in practice. From the perspective of positive conditionality, though the EU Commission declared that developing countries' share in total EU imports under the EU's GSP grew from 33% to 40% between 1999 and 2003,[28] it is not clear what percentage out of the 40% was attained under the "GSP+." Perhaps, the main effect of human rights conditionality is to respect human rights.

B. Multilateral Economic Institutions: the IMF, the World Bank, and the WTO

Although developed states can dominate many bilateral or regional economic arrangements and thereby succeed in establishing international legality for human rights conditionality, however, they find it uncomfortable to do so in multilateral economic institutions, such as the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (the World Bank), and the General Agreement on Tariffs and Trade (GATT)/the World Trade Organization (WTO).

The reasons are mainly twofold. From a historical perspective, firstly these multilateral arrangements, established more than half a century ago, did not directly touch on human rights issues, suggesting that they did not want to be involved in human rights.[29] Secondly, and maybe more importantly, from a modern perspective, developing states, as a whole, can effectively influence the operation of many multilateral arrangements, including preventing developed states from including a human rights agenda.

However, since the mid-1990s, the attitudes of multilateral economic institutions towards human rights have undergone subtle changes because some developed states and international civil society have criticized institutions for always turning a blind eye to human rights concerns. Since these multilateral economic institutions are multilateral

[28] EU Commission, Generalized System of Preferences: EU "GSP+" granted to an additional 15 developing countries(Brussels, 21 Dec. 2005), *available at* http://ec.europa.eu/trade/issues/global/gsp/pr211205_en.htm (last visited on 12 Dec. 2007).

[29] In the 1960's, the World Bank ignored several U.N. resolutions calling on international financial institutions not to grant assistance to certain states based on human rights considerations. *See* Genoveva Hernandez Uriz, *To Lend or Not to Lend: Oil, Human Rights, and the World Bank's Internal Contradictions*, 14 HARV. HUM. RTS. J. 197, 202 (2001)

and sectoral, rather than bilateral or regional, it is particularly worthy to pay more attention to these institutions.

1. The IMF and the World Bank

"Conditionality" is not a new word to the IMF. In the past decades, the IMF utilized conditionality when it decided to provide Member States with financial support. Although the IMF conditionality was concerned with the economic policy of the host state only, great controversies often arose from it.[30] However, the IMF is always passive to human rights conditionality in its operation. From a legal perspective, the reason is that neither the IMF Agreement,[31] nor the cooperation agreement between the IMF and the UN,[32] provides any human legal rights obligation for the IMF. In August 2001, Grant B. Taplin, an assistant director at the IMF's Geneva office, stated, once again, before the United Nations Subcommission for the Promotion and Protection of Human Rights, that neither does the IMF, in a strict sense, have a mandate to promote human rights, nor is the IMF bound by various human rights declarations and conventions. Most independent experts serving on the Subcommission were frustrated with Taplin's statement.[33] From a practical perspective, the reason is that the IMF itself is neither in a position (e.g., lack of human resources) to evaluate the human rights situations in its member states, nor are the current international human rights mechanisms such as the former UN Commission on Human Rights (the Human Rights Council), the UN Security Council reliable because they are notoriously manipulated by major world powers out of consideration for their own national interests and competing ideologies.

In the view of Erik Denters, human rights conditionality in the activities of the IMF is accepted on the condition that the current international human rights mechanisms are substantially improved in order to be capable of making independent and impartial judgments on human rights in all UN members.[34] However, the preconditions that he set seem impossible to be realized in the near future.

30 For example, the IMF has provided various conditions when some states, e.g., Korea, Indonesia, Thailand and Mexico, which were struck by financial crisis in the mid-1990's, sought for financial support from the IMF.

31 According to Article 1 of the Agreement of the International Monetary Fund, the purposes of the IMF are to promote international monetary cooperation, exchanging stability, and orderly exchange arrangements; foster economic growth and high levels of employment; and provide temporary financial assistance to countries to help ease balance of payments adjustment.

32 Article 6 of the Cooperation Agreement (Nov. 15, 1947) only stipulates that the IMF "take note of" its members' obligation to abide by the UN Security Council's resolution, and that it will have "due regard" for the decisions of the Security Council under Articles 41 and 42 of the United Nations Charter. It means that the IMF has great discretions in its relationship with the UN.

33 Gustavo Capdevila, *IMF Not Taking into Account Human Rights Issues*, *available at* http://www.globalpolicy.org/socecon/bwi-wto/imf/2001/0813hr.htm (last visited on 12 Dec. 2007).

34 Erik Denters, LAW AND POLICY OF IMF CONDITIONALITY, 179 (1996).

The World Bank has a similar experience as the IMF towards human rights concerns because neither the agreement establishing the World Bank,[35] nor the cooperation agreement with the UN, touches human rights. In the view of the World Bank, the provision of loans to developing states is, in itself, helpful to promote human rights situations in these states, while the canceling of loans based on human rights grounds is in conflict with its efforts to promote human rights situation, especially the ESCR.[36] In general terms, the argument of the World Bank is sound. However, we should bear in mind that human rights issues can affect the full realization of the World Bank's mandate because, though helping to promote human rights in some aspects (e.g., eliminate poverty), the World Bank's loans could be used improperly to violate and deteriorate human rights (e.g., environmental damage).[37]

In response to criticisms of disregard of human rights, starting in the 1990s, the World Bank has been more and more sensitive to human rights issues. In October 1991, in order to promote ESCR in a more comprehensive way, the World Bank decided to conduct environmental evaluations towards its financed projects.[38] In 1994, the World Bank Executive Board established the Inspection Panel, an appeal mechanism that receives claims from citizens who believe they have been directly harmed by World Bank projects.[39] The World Bank also required that the loans-receiving states take various legislative and administrative measures (e.g., pass the Revenue Management Law) to ensure that the loans and revenue are used properly. Furthermore, the World Bank could take more serious actions based on human rights grounds, including canceling loans. For example, in the wake of the Tiananmen Square incident in Beijing, China, in 1989, the World Bank terminated some scheduled loans to China. Although this response was obviously inspired by human rights considerations, the official explanation by the World Bank for its cancellation was "economic uncertainty" in China. This explanation was considered to be unconvincing.[40]

35 The International Bank for Reconstruction and Development (IBRD) Articles of Agreement. art. 1.

36 *See* Ibrahim F.I. Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issue and the Record of Achievements*, 17 DEN. J. INT'L & POL'Y 39, 116-117(1988).

37 According to an independent review (The Morse Commission) of Sardar Sarovar, there was a history of systematic violations of World Bank policies and loan agreements, particularly those relating to environment and resettlement of people. *See Lori Udall, World Bank Inspection Panel, at 1 available at* http://www.dams.org/docs/kbase/contrib/ins208.pdf (last visited on 12 Dec. 2007).

38 WORLD BANK, OPERATIONAL DIRECTIVE, 4.01 (OCT. 1991).

39 Gerhard Loibl, *The World Bank Group and Sustainable Development*, in Friedl Weiss, ERIK DENTERS & PAUL DE WAART eds., INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE, 526-7 (1998).

40 *See* Hernandez Uriz, *supra* note 29, at 211.

2. WTO: EC-Tariff Preference Case

Among all multilateral economic institutions, the WTO is perhaps the most fiercely criticized institution in terms of human rights because it intrudes on the internal affairs and individual lives of its members deeply and extensively. In particular, the Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement) was criticized for its serious violation of the right to public health in some developing states. In response to this criticism, the WTO adopted the Doha Declaration on Public Health.[41] Many commentators have been appealing that human rights should be linked with WTO activities.[42] Similar to the IMF and the World Bank, however, the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement) does not directly mention human rights.[43]

Possible legal grounds for WTO Members to take trade measures based on human rights lies in Article XX (general exceptions) of the 1994 GATT. According to Article XX, paragraphs (a) and (b), the WTO members can take necessary measures to protect "public morals" and "human, animal or plant life or health." However, taking into account the restrictive case law of the WTO's Dispute Settlement Body (DSB) and the draft history of Article XX, two commentators argued that Article XX could not provide the international legality for a trade restriction by a GATT/WTO Member based upon human rights violations.[44]

41 *See* WTO, *Declaration on the TRIPS Agreement and Public Health,* adopted on Nov. 14, 2001, WT/MIN(01)/DEC/2.

42 *See* Petersmann, *From "Negative" to Positive "Integration" in the WTO: Time for "Mainstreaming Human Rights" into WTO Law?*, 37 CMLR 1363 (2000); *The WTO Constitution and Human Rights,* 3 JIEL 19 (2000); *Human Rights and International Economic Law in the 21st Century,* 4 JIEL 3 (2001); *Time for Integrating Human Rights into the Law of World-wide Organisations*, Jean Monnet Working Paper of New York University School of Law (Jan. 7, 2001)

43 Of course, the preambles of the WTO Agreement include non-operative rules having human rights implications: "Members of the WTO recognize to allow for the optimal use of the world's resources in accordance with the objective of sustainable development and seek both to protect and preserve the environment..." The WTO Agreement Preamble, para. 1.

44 Diego J. Linan Nogueras and Luis M. Hinojosa Martinez, *Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems,* 7 COLUM. J. EUR. L. 307, 329-331(2001).

45 WTO Panel Report, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries, Dec. 1, 2003, WT/DS246//R(hereinafter referred to Panel Report); WTO Appellate Body Report on European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (Apr. 7, 2004), WT/DS246/AB/R(hereinafter referred to "Appellate Report.")

46 GSP was established in accordance with a decision to waiver MFN obligations under GATT 1947 by Contracting Parties with the aim to provide tariff preferences on products from developing countries (BISD 185/24). According to the decision, the GSP is "generalized, non-reciprocal and non-discriminatory preferences." In 1979, the GATT Contracting Parties adopted the Decision on Differential and More Favorable Treatment, Reciprocity, and Full Participation of Developing Countries, which permanently legalized the GSP under the multilateral trade system. The decision is called the Enabling Clause.

Although it is practically impossible for the WTO to adopt human rights conditionality through multilateral trade negotiation in the near future, the ruling of the DSB in the EC Tariff Preference Case seemingly opened a small window of opportunity.[45] The case is concerned with the legality of conditions provided by the EC's GSP[46] system. According to the GSP system,[47] the EC commits to provide additional preferences on products from that positive actions have been taken to combat drug production and trafficking.[48] Although many GSP beneficiary countries have complained that this "GSP+" system has resulted in the differentiation of treatment among them, they have not resorted to the GATT/WTO for a long time. India challenged it for the first time under the WTO system. In March 2002, India requested consultation with the EC about the legality of the "GSP+" incentives and, ultimately, a Panel was established. In the Panel Report, the Panel noted that, "[It] requires that identical preferences under GSP schemes be provided to all developing countries without differentiation....." [49] The Appellate Body, however, decided that, since paragraph 3(c) of the Enabling Clause authorizes preference-granting countries to "respond positively" to the developing countries' developmental, financial, and trade "needs," which are of course diverse among different developing countries, differential treatment is justified.[50] Some GSP beneficiary countries criticized that, "what the Appellate Body did, ..., might be constructed, if taken without qualifications, as legalizing the GSP as a tool of foreign policy of developed countries." [51] These criticisms made by some GSP beneficiary countries are understandable because the scope of "development needs" is probably extended without limitations by the DSB.

Generally speaking, the differentiation of treatment under the GSP scheme should be accepted because it is helpful to realize the specific developmental needs of different beneficiary countries. However, according to the following four factors,[52] the scope of differentiation should be defined with great care.

3. Some Comments

The IMF, the World Bank, and the WTO have been increasingly criticized for their traditional policy of isolating their activities from human rights. In response to these

47 Council Regulation (EC) No. 2501/2001(December 10, 2001) on applying a scheme of generalized preferences for the period from January 1, 2002, to December 31, 2004, [2001]OJL 346/1.

48 Similarly, the EC will grant additional preferences to beneficiary countries provided that they apply the relevant international labor standards established by the International Labor Organization.

49 Panel Report, para.7.161.

50 Appellate Report, para.161.

51 THOMAS COTTIER, JOST PAUWELYN, & ELISABETH B. BONANOMI eds., HUMAN RIGHTS AND INTERNATIONAL TRADE, 501 (2005)

52 *See infra* Part II(C).

criticisms, they began to take some cautious responses. However, since both the constitutions of multilateral institutions were formed half a century ago (the IMF, the Word Bank) and those formed just a decade ago (WTO) do not directly touch on human rights, the present responses of multilateral economic institutions towards human rights are uncertain.

C. Human Rights Conditionality in International Economic Relations: Legitimacy, Legality, Creditability, and Proportionality

In order to deal with human rights conditionality in international economic relations, one must first analyze the international community in which the human rights conditionality issue has been brought about. Two salient features of the current international community have profound implications for human rights conditionality.

First, although the universalism of individual-centered human rights, generally speaking, has been accepted in the international community, there are many questions concerning the universalism of human rights, e.g., whether the universalism of human rights necessarily leads to human rights-centered international legal order and, if so, what the exact meaning of "human rights-centered" is; whether the universalism of human rights is always altruistic, if it is self-interested, to what extent the universalism of human rights has been damaged by the self-interested; whether all types of human rights are universal or if some sort of cultural relativism is allowed; whether the indivisibility of different human rights such as Civil and Political Rights (CPR) and ESCR precludes giving priority to certain types of human rights in a specific period; who the creditable judges of human rights situations in a specific state are. Certainly, answering all these questions is beyond the reach of this paper, but proponents of human rights conditionality should keep in mind that the application of human rights conditionality cannot be isolated from these related issues. Unfortunately, most proponents for human rights conditionality seemingly have failed to respond to these prerequisite questions.[53]

Second, international law governing the current international relations is fragmentized.[54] One of the results of the fragmentation of international law is that one branch of international law (e.g., trade laws) is isolated from another (e.g., human rights

[53] For example, in THE EU'S APPROACH TO HUMAN RIGHTS CONDITIONALITY IN PRACTICE (2003), Elena Fierro hardly touch these issues, neither did in the HUMAN RIGHTS CONDITIONALITY IN THE EU'S INTERNATIONAL AGREEMENT by Lorand Bartels(2005).

[54] *See* generally *United Nations International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* A/CN.4/L.682 (13 Apr. 2006).

laws). As understood by the United Nations International Law Commission (ILC), the fragmentation of international law has both positive and negative sides. On the one hand, the fragmentation allows the possibility of conflicting and incompatible rules, principles, rule-systems and institutional practices; on the other hand, it reflects the rapid expansion of international legal activity and diversification of its objects and techniques.[55] As a matter of fact, the fragmentation not only reflects, but also, in some sense, is prerequisite to, or at least helpful to, this rapid expansion because the simplicity that is brought about by fragmentation actually makes international legal activity more efficient. Obviously, the negative side is considered an important reason to justify human rights conditionality and thereby make different branches of international law more coherent; the positive side is regarded as an important reason to reject human rights conditionality in order to make different branches of international law more efficient. It should be noted that both arguments are only partly convincing. For proponents of human rights conditionality, an important question is whether human rights conditionality is always a helpful way to resolve the fragmentation between human rights laws and trade laws, investment laws, etc., and keep them coherent. My answer to this question is no because specific branches of international law can, in many cases, express their human rights concerns within their own legal frameworks. For opponents of human rights conditionality, an important question is whether human rights can serve as the core and ultimate legal value of international legal orders. My answer to this question is yes because human wellbeing is the fundamental and ultimate aim of all legal orders, including the international legal order.

Furthermore, four factors should be taken into account in evaluating whether or not to apply human rights conditionality: legitimacy, legality, creditability, and proportionality.

First, since human rights have been established as the core and ultimate value in international legal orders, all branches of international law should have a mandate to respect, promote and protect international human rights. In this sense, human rights conditionality is legitimate. Such an abstract judgment, however, is of little value for the application of human rights conditionality in practice. A main reason is that different human rights conflict with each other. Therefore, the actions taken with an aim to promote certain human rights might undermine other human rights. In these circumstances, the legitimacy of human rights conditionality must be questioned. Perhaps this is why the EU seldom applied negative human rights conditionality. Here, I would like to suggest that legitimacy, generally speaking, be measured by the Principle of Most Significant Relationship, a term borrowed from private international

[55] *Id.* at 14.

law. According to this principle, the application of human rights conditionality should be confined to those cases where the most significant relationship exists between human rights concerns and economic activities.

Second, since the human rights issue always raises great controversies among various states, especially between developed states and developing states, human rights conditionality shall be applied on the condition that the relevant texts support such an action with legal grounds. Accordingly, it is not desirable for multilateral economic institutions whose constitutions have not mentioned human rights to apply human rights conditionality.

Third, human rights conditionality should be applied creditably. As mentioned above, the decisions made in human rights situations in targeted states under a bilateral framework risk being in conflict with the principle of *nemo debet esse judex in propria causa.* Multilateral economic institutions are also not in a position to make creditable decisions regarding human rights situation in targeted states. Therefore, it is imperative to improve the current mechanisms for making human rights determinations to ensure provision of adequate authoritative justifications for the relevant states that want to apply human rights conditionality. Furthermore, in the absence of specific international human rights mechanisms, the states that will resort to human rights conditionality shall comply with the existing international human rights laws in good faith and provide the targeted states with full opportunities to participate in the process by which the decisions of human rights conditionality will be made.

Fourth, human rights can be respected and promoted with various means, and conditionality is only one of the means. Furthermore, the application of human rights conditionality, especially negative conditionality, often does not improve, but deteriorates the human rights situation in targeted states. Therefore, human rights conditionality should be used proportionately. In particular, where the relevant international human rights instruments do not impose definite legal obligations, nor provide the developing states with special preferences, the states that will apply human rights conditionality shall give sympathetic considerations. In other words, human rights conditionality should be the last resort.

III. Human Rights Conditionality in Chinese International Economic Relations: Basic Contexts

A. Economic Context

During the Cold War, human rights issues were submerged by endless political struggles between the Eastern and Western blocks, and economic intercourses played only a minor role in international relations. The end of the Cold War not only enhanced the universalism of human rights and accelerated economic globalization, but also linked human rights with international economic relations. This linkage has two facets. The first is that international economic relations can lead to the violation of human rights; the second is that international economic relations should have some sort of mandate to promote and protect human rights. This partly explains why, until the 1990s, the EU enthusiastically appealed human rights conditionality and an increasing number of developing states accepted human rights conditionality. Accordingly, economic powers, and not only the traditional ones (e.g., the EU, the U.S.), but also newly emerging ones (e.g., China, India), will probably be expected to bear some sort of obligation to better respect, promote and protect international human rights.

China has successfully maintained rapid economic growth since it adopted its policy of reform, leading the world with an average annual GDP growth rate of more than 8%.[56] By the end of 2007, China's Gross Domestic Product (GDP) reached RMB 24,660 billion, the fourth largest in the world.[57] By the end of 2006, China's foreign exchange reserves hit US $1,066.3 billion, the largest in the world. Since 1998, Chinese Outward Foreign Direct Investment (OFDI) has expanded significantly. In 2006, the Chinese OFDI (non-financial sectors) amounted to US $21.16 billion and the OFDI stock reached US $90.6 billion, which made China the thirteenth largest investor in the world.[58] From 2002 to 2007, China's export and import volume rose from US $620.8 billion to US $ 2173.8 billion and China has now become the third largest trader in the world.[59]

56 China's Ministry of Commerce (MOC), *Report on the Feasibility of the Establishment of China-Peru Free Trade Area at 3 available at* http://gjs.mofcom.gov.cn/aarticle/af/ak/200709/20070905072477.html (last visited on Jan. 1, 2008).

57 Wen Jiabo, *China's GDP grew to the fourth largest in the world in 2007, which was the sixth largest in 2002, available at* http://news.qq.com/a/20080305/001452.htm (last visited Mar. 5, 2008).

58 Mr. Bo Xilai, Minister of Commerce (MOC) said: "[T]he current strategy of "Going Abroad," including outward investment, is still preliminary, not corresponding to the Chinese international status as a power." *See The rank of China in outward foreign direct investment moved on available at* http://finance.people.com.cn/GB/71364/5291047.html (last visited on June 1, 2008).

59 Minister of China's Ministry of Commerce, *China's Export Volume is the second largest one in the World*

Actually, the implications of China rising as an emerging economic giant regarding international human rights have been noticed. One commentator criticized that the expanding Chinese investment in countries with bad human rights records, together with its passive international human rights policy, frustrated the U.S.'s endeavors to improve human rights situation in those countries.[60] Furthermore, some people appealed to boycott the 2008 Olympic Games to be held in Beijing, China, because they contended that China should have used its economic influence on Sudan to improve human rights situations in Darfur.[61]

Although these criticisms are unsound and unacceptable, they reminded China that, with dramatic economic development, it must adopt a serious attitude towards human rights policies in its international economic relations.

B. Human Rights Context

Until the 1980's, human rights issues were hardly touched upon in China because human rights were considered to be something particular to the Western world. Therefore, though it signed some international human rights conventions,[62] China always condemned criticisms of human rights situation in China that it received from Western states, arguing that these criticisms were an illegal interference to China's internal affairs and national sovereignty.

In the wake of the 1989 Tiananmen Square Incident in Beijing, China, the Chinese government's attitude towards human rights began to change. Partly in response to fierce criticism from Western countries, the Chinese government, in November 1991, issued its first human rights document: White Paper on Human Rights in China (1991) [63] In the White Paper, China, for the first time, explained its human rights policy.[64] The Chinese human rights policy can be summarized as follows:

available at http://finance.eastday.com/m/20080121/u1a3362088.html (last visited on Jan. 25, 2008).

60 Juan Vega, *China's Economic and Political Clout Grows in Latin America at the Expense of U.S. Interests*, 14 MINN. J. GLOBAL TRADE 377, 393 (2005).

61 *See*, e.g., Eric Reeves, *China and the 2008 Olympic Games available at* http://www.sudanreeves.org/Page-10.html (last visited on Jan. 1, 2008).

62 For examples, on July 17, 1980, the representative of the Chinese Government signed the Convention on the Elimination of All Forms of Discriminations against Women and on September 3, 1981, this Convention took effect in China.

63 *see* China's State Council Information Office, *Human Rights in China* (Oct. 1991) *available at* http://www.china.org.cn/e-white/7/index.htm (last visited on Jan. 1, 2008).

64 From then on China issued several White Papers on human rights in China, including mainly *Tibet-Its Ownership and Human Rights Situation* (1992); *The Situation Of Chinese Women* (1994); *The Progress of Human Rights in China* (1995), *The Situation of Children in China* (1996); *Progress in China's Human Rights Cause in 1996* (1997); *New Progress in Human Rights in the Tibet Autonomous Region* (1998); *National Minorities Policy and Its Practice in China* (1999); *Fifty Years of Progress in China's Human Rights*(2000);

First, "the right to subsistence is the most important of all human rights, without which, the other rights are out of the question."[65] As stated in the 1991 White Paper, the right to subsistence for Chinese people has been guaranteed since the People's Republic of China (the PRC) was founded in 1949.[66] However, an important thing to note is that national independence and national sovereignty are defined by the Chinese government to be prerequisites to the realization and maintenance of the right to subsistence.[67] Therefore, the right to subsistence has often been proclaimed by the Chinese government to deny human rights condemnations from the outside world. From a historical perspective, closely linking the right to subsistence with national independence and national sovereignty is understandable because some Western powers, including some current member states of the EU, dominated China in the 19th century. Nowadays, however, these kinds of sentiments, based upon emotionally bitter historical memories, do not serve as a sound justification to deny such condemnations from the outside world because China is strong enough to defend its national independence.

Second, human rights are culturally relative.[68] The relativism of human rights has often been criticized by many Western lawyers. In the view of a Western commentator, if relativism is acceptable, the realization of the UNHR may seem "naive or even imperialist."[69] Indeed, great controversies still remain about the universalism and relativism of human rights.[70] Although I am not in a position to implore this issue here,

Progress in China's Human Rights Cause in 2000 (2001); *Labor and Social Security in China* (2002); *Progress in China's Human Rights Cause in 2003* (2004); *China's Progress in Human Rights in 2004* (2005). They can be *available at* http://english.gov.cn/official/2005-08/17/content_24165.htm#1991 (last visited on Dec. 1, 2007).

65 The 1991 White Paper, Part Ⅰ, para.1.

66 *Id*. para.14.

67 *Id*. paras.2-7.

68 As to this point, the 1991 White Paper provides: "The evolution of the situation in regard to human rights is circumscribed by the historical, social, economic and cultural conditions of various nations, and involves a process of historical development. Owing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights. From their different situations, they have taken different attitudes towards the relevant UN conventions. Despite its international aspect, the issue of human rights falls by and large within the sovereignty of each country. Therefore, a country's human rights situation should not be judged in total disregard of its history and national conditions, nor can it be evaluated according to a preconceived model or the conditions of another country or region. Such is the practical attitude, the attitude of seeking truth from facts." *See id*. Preamble, para.3.

69 *See* e.g., STEPHEN C. ANGLE, HUMAN RIGHTS AND CHINESE THOUGHT, 1 (2002).

70 *See* generally, Richard Klein, *Cultural Relativism, Economic Development and International Human Rights in the Asian Context*, 9 TOURO INT'L L. REV., 1(2001); Sharon K. Hom, *Re-Positioning Human Rights Discourse on "ASIAN" Perspectives*, 3 BUFF. JOUR. INT'L L. 209(1996); Melanne Andromecca Civic, *A Comparative Analysis of International and Chinese Human Rights Law-Universality Versus Cultural Relativism*, 2 BUFF. JOUR. INT'L L. 285(1995).

I am willing to briefly, but directly, argue that the traditional dichotomy between universalism and relativism is of limited value to reconcile the competing conceptions of human rights. The pros of universalism have failed to demonstrate whether all kinds of human rights are universal, especially whether the universalism of human rights itself is tantamount to the universalism of the process of realization of human rights. The pros of relativism, however, have also failed to answer whether all kinds of human rights are relative.

Third, human rights include not only the "right to substance and the civil and political rights," but also "economic, cultural and social rights."[71] In an important diplomatic document issued in 2005, the Chinese government argued that "equal importance" should be given to the CPR and ESCR, and "emphasis on one category of human rights to the neglect of the other should be redressed."[72] Here, the Chinese government did not clarify the relationship between the CPR and ESCR or where they are in conflict. In practice, priority has been given to the latter rather than the former. The differential treatment towards different human rights has been always criticized by many Western states and international lawyers because they consider human rights indivisible. Unfortunately, it cannot be inferred from the "indivisibility" of human rights itself that *all* human rights should be realized "simultaneously." Therefore, differentiation in the realization of different human rights cannot be tolerated "in a reasonably transitional period." Nevertheless, all human rights should be realized in the *long run* to ensure the indivisibility of human rights. Furthermore, when we compare the International Covenant on Civil and Political Rights (the Civil Covenant) with the International Covenant on Economic, Social and Cultural Rights (the Economic Covenant) and the UDHR, we find it difficult to say that all CPR are a higher priority to ESCR because the Civil Covenant was not defined to be superior to the Economic Covenant. Therefore, the indivisibility of human rights does not inhibit the differentiation of human rights, in the short run, but also requires the full realization of different human rights in the long run.

Fourth, human rights should not be politicized and the universally recognized principles of respecting each country's sovereignty and non-interference in internal affairs should also be applicable to human rights.[73] Although the Chinese government,

71 The 1991 White Paper, Part Ⅲ(para.1).

72 China's Ministry of Foreign Affairs, *Position Paper of the People's Republic of China on the United Nations Reforms* (2005) , Part Ⅲ.4 *available at* http://www.fmprc.gov.cn/eng/zxxx/t199318.htm (last visited on Jan 1, 2008).

73 The 1991 White Paper, Part Ⅹ, para.9. It provides: "[T]his basic tone had been set by the former leader Deng Xiaoping. Mr. Deng argued that "in the real sense, national sovereignty is much more than human rights. National sovereignty of the poor countries, the Third World countries was often infringed by them [Western

in the 1991 White Paper, was quite passive to negative international responses concerning human rights records in China, the Chinese government did not deny that human rights are an international issue.[74] However, the important question is to what *extent* the human rights issue is of an international nature because being a fully international issue would negate the principle of non-interference. Unfortunately, the Chinese government was silent on this aspect in the 1991 White Paper. This question was partly answered in the Position Paper of the People's Republic of China on the United Nations Reforms issued in 2005 (hereinafter referred to "the 2005 Position Paper.") In this document, the Chinese government declared "when a massive humanitarian crisis occurs, it is the legitimate concern of the international community to ease and defuse the crisis."[75] This declaration showed that the Chinese government no longer insisted that the principle of non-interference be applied without exception. As to the relationship between national sovereignty and human rights, some distinguished Chinese international lawyers have expressed their opinions. Although these lawyers, based upon an examination of the drafting history of the Charter of United Nations, argued that the principle of non-interference in internal affairs applies to the human rights issue,[76] they also supported the idea that the principle of non-interference in internal affairs should not apply to the States that have joined international human rights treaties, nor to the extent that violations of human rights be inhibited by customary international law.[77]

Since the mid-1990's, the Chinese government has become increasingly open to the human rights issue, not only at an international level, but also at a national level. On October 27, 1997, and February 28, 2001, the Chinese government signed and ratified, respectively, the Economic Covenant.[78] According to the review by the United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee) on the implementation Report submitted by China in 2005, China should try to realize the

countries]. Human rights, freedom, and democracy proclaimed by them aimed to protect the interests of big powers and rich powers, and protect the interests of hegemonic countries and great powers." DENG XIAOPING, SELECTED WORKS OF DENG XIAOPING, VOL.3, 345 (1993).

74 "Despite its international aspect, the issue of human rights falls, by and large, within the sovereignty of each country." The 1991 White Paper, Preamble, para.3.

75 China's Ministry of Foreign Affairs, *Position Paper of the People's Republic of China on the United Nations Reforms* (June 7, 2005) , Part II(1)*available at* http://www.fmprc.gov.cn/eng/zxxx/t199318.htm (last visited on Jan. 1, 2008).

76 *See* BAI GUIMEI et. als., HUMAN RIGHTS IN INTERNATIONAL LAW, 265 (1996).

77 *Id*. at 285-6. Those violations covered by customary international law include: genocide, racial apartheid and radical discrimination, slave trade, torture, and other continued and gross violations of human rights. Id. at 287.

78 China made a reservation toward Article 8.1(a) of the Economic Covenant. According to Article 8.1(a), China shall ensure "the right of everyone to form trade unions and join the trade union of his choice."

justiciability of ESCR.[79] On October 5, 1998, the Chinese government signed the Civil Covenant. However, even now, the Civil Covenant has not been ratified by China's NPC. According to some Chinese commentators, the main reason is that the current Chinese legislations, in many aspects are still far from the standards put forth in the Civil Covenant.[80] The conclusion of the two Covenants not only made China implement international legal obligations arising from the two Covenants, but, more importantly, demonstrated that China had accepted, at least in part, the universalism and inherence of human rights,[81] which had been obviously neglected in the 1991 White Paper. Since the Civil Covenant and Economic Covenant, together with the UDHR, constitute the International Bill of Human Rights, the conclusion of the two Covenants can be considered as a landmark accomplishment in Chinese international human rights policy. To date, China has signed more than 60 international human rights treaties and other international treaties concerning human rights.[82] Moreover, China has taken a more positive part in various human rights dialogues. [83]

At a national level, various measures have been taken to improve human rights situations, including revising Criminal Justice in 1996.[84] In particular, on March 14, 2004, the Tenth National People's Congress (NPC) approved the new Constitution. The 2004 Constitution, for the first time in China's history, mentioned human rights. Article 33(3) of the 2004 Constitution says, "the State respects and safeguards human rights." The 2004 Constitution was regarded as a great landmark in the history of human rights in China. Of course, the human rights situation in China still is far from satisfactory, which is partly explained by the fact that the Chinese NPC has not ratified the Covenant yet.

79 Consideration of Report's Submitted by State Parties Under Articles 16, 17 of the Covenant: Concluding Observations for the Committee on Economic, Social and Cultural Rights: People's Republic of China (Including Hong Kong and Macao), May 13, 2005, U.N. ESCOR, 34th Sess., U.N. Doc.E/C.12/1/Add.107(2005), para.42. *See* in detail Leila Choukroune, Justiciability of Economic, Social and Cultural Rights: The UN Committee on Economic, *Social and Cultural Rights' Review of China's First Periodic Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 19 COLUM. J. ASIAN L. 30 (2005).

80 *See*, e.g., Xiangjun, *International Human Rights Treaties and Perfection of Chinese Legislation*, 6 JOURNAL OF UNIVERSITY OF INTERNATIONAL RELATIONS 19, 21-22(2005).

81 "Considering that..., recognition of inherent dignity and of the equal and inalienable right of all members of the human family..., Recognizing that these rights derive from the inherent dignity of the human person." *See* Preambles of the Civil Covenant, Economic Covenant.

82 *See* XU XIANMING ed., INTERNATIONAL HUMAN RIGHTS LAW, ANNEX 1 (2004).

83 *See* Information Office of the State (China), *China's Progress in Human Rights in 2004*, Part Ⅶ *available at* http://www.cinfo.com.cn/en/en_last/white_p/wp010e8.htm (last visited on Jan. 1, 2008).

84 *See* The 1996 Criminal Justice, arts. 2, 43, 60 & 92.

C. Diplomatic Context

Since China has always defined itself as a developing state that needs supports from other developing states in various issues, especially the Taiwan secession movement, it has always tried to keep in line with other developing states in most important international affairs, including human rights. From the perspective of diplomatic discourse, in the past decades, the "Five Principles of Peaceful Coexistence," namely, mutual respect for territorial integrity and sovereignty, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence, have been firmly established as the most fundamental guideline for Chinese foreign policy.[85] It seems that this traditional diplomatic strategy will not change dramatically in the near future.

D. Summary

With its rapid economic development, China will be expected to bear some sort of moral and legal obligation to better respect, promote and protect international human right. However, China's current conception of human rights, the current human rights situation, and diplomatic considerations regarding human rights make it difficult for China to be a vanguard of human rights like some Western states or as expected by these Western states. It can be predicted that the more rapidly the Chinese economy grows, the more pressure will be imposed upon China from the outside world regarding the role that China must play in the international human rights movement. Thus, China is in a very complicated position in dealing with human rights conditionality.

[85] For example, in the China's first foreign policy document issued in 2005 — China's Africa Policy, China declared: "[I]t adheres to the Five Principles of Peaceful Coexistence, respects African countries' independent choice of the road of development." *see* China's Ministry of Foreign Affairs(MFA), *China's Africa Policy* (January 2006) , Part Ⅲ *available at* http://english.peopledaily.com.cn/200601/12/eng20060112_234894.html (last visited on Dec. 12, 2007).

IV. Human Rights Conditionality in Chinese International Economic Relations: Current Attitude and Future Choices

A. Current Situation

The linkage between economic relations and human rights is not new to China. It is notoriously known that, in the 1980's and 1990's, the U.S. often linked trade issues and human rights issues in Sino-U.S bilateral economic relationships. When the U.S. government was deciding whether the most-favored nation (MFN) treatment or the Permanent Normal Trade Relations (PNTR) status should be granted to China, human rights situations in China played an important factor. China argued that this linkage constituted a rampant interference in China's internal affairs and infringed China's national sovereignty.[86] The 1991 White Paper also pointed out that "principles of respect for each country's sovereignty and non-interference in internal affairs are also applicable to human rights."[87] In reality, all international economic agreements signed by China do not touch human rights conditionality. However, environmental issues and labor issues have been included in ongoing Sino-U.S. negotiations, which aim to conclude the bilateral investment treaty, because the 2004 Model Bilateral Investment Treaty of the U.S. includes environmental and labor rules.[88] It is not clear as to what position the Chinese government will take regarding these rules that have never been covered in Sino-foreign bilateral investment treaties.

As mentioned above, according to the 2005 Position Paper, it seems that China will accept human rights conditionality in limited cases. In the 2005 Position Paper, the Chinese Government note:

86 Han Yunchuang, HUMAN RIGHTS: US. VERSUS CHINA, 44-52 (2003).

87 The principles of respect for each country's sovereignty and non-interference in internal affairs are also applicable to human rights. *See* The 1991 White Paper, Part X, para.9.

88 "Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights" (Preamble 6). *See* also Article 12 [Investment and Environment] and Article 13 [Investment and labor] of U.S. 2004 Model BIT, which appeal the Contracting Parties not to encourage investment by weakening or reducing the protections afforded in domestic environmental laws or labor laws. However, these rules do not impose any real legal obligations on Contracting Parties because they only provide that, "if a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement." The U.S. 2004 Model BIT, http://ita.law.uvic.ca/investmenttreaties.htm (last visited on Jan. 1, 2008).

> When a massive humanitarian crisis occurs, it is the legitimate concern of the international community to ease and defuse the crisis. Any response to such a crisis should strictly conform to the UN Charter and the opinions of the country and the regional organization concerned should be respected. It falls on the Security Council to make the decision in the frame of UN in light of specific circumstances which should lead to a peaceful solution as far as possible....[89]

This declaration has two main points. First, when "a massive humanitarian crisis" occurs in one State, it is legitimate for the other State to take action. The application of human rights conditionality is one of these actions. Second, the Security Council shall make the determination of humanitarian situations.

Interestingly, China began to link trade and human rights in China's own enterprises. For example, according to a Notice jointly issued by China's Ministry of Commerce (MOC) and State Environmental Protection Administration (SEPA) in October 2007, those exporters failing to comply with environmental law will be punished.[90]

B. Future Choices

1. Choice 1: Reject human rights conditionality totally.

This choice is the most probable for China to choose. There are three main considerations. First, the human rights situation in China cannot meet international standards in the near future. Second, human rights conditionality is still considered by China as a form of interference in another state's internal affairs and infringement of another state's national sovereignty. Third, human rights are still considered by China as a separate issue, not relevant to economic issues.

All three considerations are not convincing. As to the first one, the only thing that China can do is to improve the human rights situation in China as soon as possible. As to the second consideration, human rights conditionality does not necessarily result in interference in another State's internal affairs or the infringement of another State's national sovereignty because any State must bear international obligations arising from human rights treaties that it has joined. As to the third one, since human rights are the core and ultimate common value of international legal order, economic relations should

89 China's Ministry of Commerce (MOC) and State Environmental Protection Administration (SEPA), Notice on the Strengthening Environmental Regulation towards Exporting Business *available at* http://www.mofcom.gov.cn/aarticle/h/redht/200710/20071005158356.html (last visited on Jan. 1, 2008).

90 *See* China's Ministry of Foreign Affairs, *Position Paper of the People's Republic of China on the United Nations Reforms* (June 7, 2005) , Part Ⅲ(1) *available at* http://www.fmprc.gov.cn/eng/zxxx/t199318.htm (last visited on Jan. 1, 2007).

be conducted to respect, promote and protect human rights.

2. Choice 2: Copy human rights conditionality of the EU completely.
Choice 2 is reckless. There are two main reasons for opposition of this choice. First, although the relevant agreements concluded between the EU and third countries included non-executive clauses, the application of these clauses not only profoundly affects the international legal rights of targeted states, but also is of little value to promote the human rights situation in such states. Furthermore, the current implementation mechanisms cannot guarantee the creditable application of non-executive clauses. Considering these risks, these non-executive clauses, in practice, are seldom used. Second, it is obvious that the EU's human rights conditionality mainly aims to promote CPR, rather than ESCR. However, economic relations are obviously more related to ESCR, rather than CPR.

3. Choice 3: Apply human rights conditionality with Chinese characteristics.
According to the four factors mentioned above, i.e., legitimacy, legality, creditability, and proportionality, the third choice is seemingly advisable. On the one hand, with its rapid economic development, China has an obligation to better respect, promote and protect international human rights. On the other hand, the experience of the EU in dealing with human rights conditionality has shown that the real positive effects of human rights conditionality are open to doubt, especially in terms of promotion and protection of human rights. Therefore, China should design its own program of human rights conditionality. I suggest that this program include the following main points:

First, although human rights concerns should be embedded in all international relations, the conditionality of human rights is absolutely not the sole means-let alone the sole appropriate means-to respect, promote and protect human rights. Human rights concerns do not necessitate human rights conditionality. Therefore, human rights conditionality should not be regarded by China as the panacea to respect, promote and protect human rights.

Second, since economic relations are most strongly relevant to ESCR, human rights conditionality should be applied with the primary aim to improve ESCR, rather than CPR, in targeted states. China can resort to CPR conditionality only if the international human rights bodies, especially the UN Security Council, find the occurrence of gross violations of CPR and require the UN member states to take actions. Furthermore,

human rights conditionality should only be applied to those ESCR that have the most significant relationship with economic activities.

Third, since negative conditionality often brings about many complicated legal issues and often deteriorates human rights situation in targeted states, it should be strictly limited to cases where the UN Security Council affirmatively determines the occurrence of gross violations of human rights and explicitly requires UN member states to take economic actions. Thus, it is not necessary to include non-executive clauses in the relevant international agreements.

Fourth, China should, together with other states, seek to improve current international human rights mechanisms, especially the UN Security Council, to make more independent, more impartial, and more efficient determinations concerning human rights situations in a specific state, or authorize a mandate for the UN Human Rights Council to make such determinations. [91]

V. Conclusions

Since human rights have been established as the core and ultimate value of the international legal orders, the fragmentation of international law should not be a shelter to reject human rights conditionality forever. The application of human rights conditionality, however, is a provoking issue that not only affects the rights and interests of specific states and individuals, but reconstructs current international legal orders. Also, the fact that human rights have been established as the core and ultimate value of international legal orders does not mean that human rights conditionality is the panacea to better respect, promote and protect human rights. The application of human rights conditionality should take into account the four factors of legitimacy, legality, creditability, and proportionality, simultaneously. Otherwise, it is hardly possible to work well in practice.

Although the EU has been enthusiastic about human rights conditionality and has concluded many bilateral and regional agreements including human rights conditionality, it is hard to say that the EU's experience has been successful. As for multilateral economic institutions, although the IMF, the World Bank and the WTO have not expressly embraced human rights conditionality, even claiming that they have

91 China gave its preliminary suggestions toward the reform of current international human bodies. *See* China's Ministry of Foreign Affairs, *Position Paper of the People's Republic of China on the United Nations Reforms* , Part Ⅲ.4 *available at* http://www.fmprc.gov.cn/eng/zxxx/t199318.htm (last visited on Jan. 1, 2008).

no mandate to promote and protect human rights, some of their responses to various events had obviously been taken based upon human rights concerns. Therefore, these multilateral economic institutions should reformulate their human rights policies, making them neither ostriches nor radicals in the field of international human rights. With its rapid economic development, China will be expected to have some sort of obligation to better respect, protect and promote international human rights. However, the fact remains that the current conception of human rights, the current human rights situation, and diplomatic considerations make it impossible for China to become a vanguard in the promotion of international human rights. Nevertheless, it is desirable for the Chinese government to accept human rights conditionality in international economic relations in a moderate way.