

# **A Modest Proposal for Mediating Code of Conduct Challenges**

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Globalization has brought many changes in workplace job protection. One has been increased attention paid to the fact that many jobs which had been performed by workers with statutory and collective bargaining protections in industrialized nations are now being performed by workers in countries which fail to provide comparable levels of workplace protection. The urge of local factories to maximize their profits has often outpaced their willingness to adhere to generally accepted levels of workplace fairness. This is facilitated in many countries by the unwillingness, disinterest, or incompetence of the officials of such host countries to fully implement their own laws or even the international labor standards accepted as norms by promulgation of ILO conventions.

Many of the brand name companies which have taken advantage of the subcontracting and outsourcing opportunities in developing countries have developed Codes of Conduct as commitments to investors and consumers that they will assure compliance with fair labor conditions in the factories which produce for their markets. Most of these Codes provide internal or external monitoring to assure compliance with their proclaimed standards.

This paper suggests the adoption of a complaint procedure culminating in mediation as a preferred procedure for

1. Enhancing factory adherence to codes,
2. Increasing consumer and investor confidence in the Brands' pursuit of code compliance
3. Reassuring local workers that the factories in which they work will be held to compliance with Code standards
4. Assuring local communities of the sincerity of the brand providers in protecting local workers
5. Encouraging a sense within the local communities of the importance of fair working conditions, even in the absence of diligent local law enforcement
6. Initiating the local development of a team of respected mediators to resolve disputes over code compliance
7. Empowering local universities and NGOs charged with the establishment of such a mediation facility
- 8.. Promoting local rule of law by providing a greater measurement of enforcement for standards of workplace fairness.
- 9.. Furthering the development of private voluntary dispute resolution in localities and countries where existing statutes and legal process are suspect, corrupt or ineffective.

10. Setting an example of private dispute resolution machinery with potential applicability to other arenas of conflict such as statutory enforcement or resolution of commercial disputes

Let us look to the role and impact of present Codes of Conduct and how this concept might enhance their effectiveness for the brand, the factory the workers and the society in which they live.

### **Evolution of Codes**

Codes have evolved in the past couple of decades in the legal vacuum created by globalization. In 2002 the ILO identified 240 codes addressing labor standards from 209 organizations<sup>1</sup>. The number has swelled since then. The national laws of the consuming countries apply to operations within their boundaries, but have very limited reach to protect the workers making those brand products once the factories in the consuming countries have closed down with production moved off shore often to factories which are mere contractors or subcontractors filling the production and inventory needs of the brands at lower cost in countries with lower wages and often lower levels of worker protection. Indeed the natural quest to enhance profits which often triggered the desire of the Brand to move its production to developing countries, had as a natural corollary the desire of the contracting factory under price pressure from the brand, to further reduce its own costs to maximize its own profits as well. Too often, with the factories located in countries with minimal, lax, or even corrupt, enforcement of statutory worker protection, such profits could even more readily be enhanced by exploitation of the workers through withholding wages, using child labor, and by denying access to protections and safeguards provided routinely in industrialized countries.

The absence of worker protection in these new factories by either the national laws of the brand or consumer country, or the laws of the countries where the products were now being made, raised legitimate questions of what law or rules should apply to workers caught in the throes of globalization. Certainly there was no available international law to which to turn, and the international regulatory agencies such as WTO, the world and regional banks and even Free Trade Agreements ignored such issues or failed to exercise the positive impact they could have in ensuring workplace fairness by requiring the social clauses in undertaking with the governments which were beneficiaries of their grants and funding. The nature of those potential international protections was well known. The ILO for nearly a century, since its creation in 1919 had set forth nearly 200 International Conventions crafted and endorsed by governments and management and worker representatives of its member countries. The Universal Declaration of Human Rights in 1948 set forth a similar standard of international conduct. And in 1999 UN Secretary Kofi Annan announced a Global Compact<sup>2</sup> urging business leaders to adopt and support fair standards principles in the area of human rights, labor and the environment. The OECD had likewise promulgated similar standards of workplace fairness.

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<sup>1</sup> ILO Codes of Conduct for Multinational enterprises CD-ROM(2002)

<sup>2</sup> For information on the Global Compact see <http://www.unglobalcompact.org>. As of 2007 the Global Social compact has over 3800 participants including over 2900 businesses in over 100 countries.

That failure of any external governments or international agency having the authority to require factories to provide standards of workplace fairness paved the way for the race to the bottom with maximization of profits becoming the overriding mandate for products now being manufactured beyond the reach of countries which required workplace fairness by punishing those manufacturers in violation of worker protective legislation.

But such exploiters failed to reckon with the power of the students and consumers. In response to complaints on campuses against Colleges and Universities purchasing logo clothing made in the Brands' exploiting overseas shops, there developed a virtual cottage industry of brands' developing Codes of Conduct in which they pledged to assure that the factories from which they purchased for the consumer market would conform to fair work practices. Codes of Conduct were thus established to advise employees, consumers, investors, suppliers and the public as to asserted company values, and to proclaim a commitment to conform to laws, and generally accepted standards of conduct. They of course may also reduce the risk of legal liability for alleged violation of law by shifting responsibility for adherence to their contracting partners. The Codes tend to embrace adherence to various protective labor, safety, health, environmental and anti-corruption standards prevailing within the enterprise, or the communities in which they operate.

### **Standards of Conduct Covered by Codes**

In the absence of meaningful national law compliance to assure enforcement of workplace fairness, many of the codes proclaim adherence to international standards as promulgated by the ILO or the EEOC. The ILO has sought to focus international concern for workplace fairness on its 1998 Fundamental Principles and Rights at Work<sup>3</sup>, cited as the Core Eight, seeking implementation of the Conventions against child labor (Nos. 138 and 182), forced labor (Nos. 29 and 105) and workplace discrimination (Nos. 100 and 111) and in support of freedom of association (No. 87) and collective bargaining (No98) The OECD after a year of negotiation among governments and representatives of employers, labor environmental and civil society groups has promulgated a similar set of standards to encourage fair workplace practices in its 2000 Guidelines endorsing the core labor standards<sup>4</sup>

### **Monitoring and Reporting**

Most codes go beyond a mere proclamation of good intentions by providing a system of monitoring and reporting on compliance with the Codes. Some do the monitoring on their own, but given the breadth of overseas contractors, self monitoring is a constant, if not logistically overwhelming process. The Disney Corporation for example has to monitor its 13,500 suppliers in some 52 countries if only to assure its consumers and patrons that its logo products are not manufactured by child or forced labor. The Gap Corporation reported in 2006 having conducted 4316 inspections in 2053 garment factories in a

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<sup>3</sup> ILO, Declaration on Fundamental Principles and Rights of Work, <http://ilo.org/declaration>

<sup>4</sup> OECD Guidelines for Multinational Enterprises 16 Revised 2000, <http://www.oecd.org/daf/investment/guidelines/mnetext.htm>

similar number of countries.<sup>5</sup> Other companies use external monitors hired to periodically inspect their subcontractors to assure code compliance. A number of industry wide organizations have developed Codes of Conduct as in the retail, toy and electronics industry. Other multi-stakeholder institutions composed of corporations, trade unions and independent NGOs have emerged to facilitate the efforts of the brands to secure credibility and compliance with their Code goals. Social Accountability International<sup>6</sup> has undertaken to develop a unified voluntary global code called SA8000 which has provision for investigation of claims of code violation. The Fair Labor Association<sup>7</sup> provides monitoring primarily in the apparel industry. The Worker Rights Consortium<sup>8</sup> and United Students Against Sweatshops<sup>9</sup> are organizations of students, labor rights and community activists which seek to hold Code participants to enforcement of their Code commitments.

### **Enforcement of Code Conduct**

Despite the noble intent of most Codes of Conduct, and their efforts at monitoring and reporting, questions remain as to their ultimate impact. To date Codes and corporate efforts to assure their implementation, have appeared largely in the fields where the corporate activities have been watched and subject to scrutiny by students and consumers. This public oversight has been largely confined to garments, toys and sportswear, a large spectrum of overseas manufacture and subcontracting but in fact a relatively small spectrum of factory production, estimated by some at a mere 5% of international trade. There seems to be little public sentiment to police the subcontractors in developing countries which manufacture the great bulk of what we in the industrialized world routinely consume or use. Despite the increasing production of automobiles, computers, household goods, medicines and the like in developing countries, comparable consumer interest and outrage is lacking, or is at least unorganized. Yet many brands are increasingly concerned about the tarnished public image that may result from unfair work practices among their subcontractors. And increasingly there is concern within such subcontracting enterprises of the impact that exploitative practices might have not only on their public image but also on the perceptions of their corporate investors. There appears to be little public or investor concern over the workplace conditions of those who make shipping containers or other industrial products that may be beyond the direct line of local factory production to consumer use. Yet increasingly corporations which utilize such local factory output have become concerned with the conditions of workers which make, or mine commodities in the developing countries. Those activities are too often beyond the reach or concern of the industrialized world and its consumers, yet the corporate recipients of such production are becoming alert to the risks they run by being identified with unfair workplace practices in those foreign enterprises.

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<sup>5</sup> United Nations Global Compact p.30 (2007) reported by Alan R. Berkowitz, Corporate Social Responsibility 101, presented at the International Labor Law Committee Midyear Meeting Beijing China April 13-17, 2008

<sup>6</sup> Social Accountability International ( <http://www.sa-intl.org> )

<sup>7</sup> Fair Labor Association ( <http://www.fairlabor.org> ) as of 2007 had 20 participating companies, over 190 universities and the companies licensed to produce their logo wear and civil society organizationa

<sup>8</sup> Worker Rights Consortium ( <http://www.workerrights.org> )

<sup>9</sup> USAS ( <http://www.usasnet.org> )

This increasing awareness of the benefits of assuring workplace fairness in countries where workplace exploitation occurs beyond the reach of local or national law enforcement, points to the need for a more comprehensive system of assuring that workers in such factories, mines and enterprises are not exploited in the universal quest for maximized profits, if only to assure that the conscientious brands and consuming companies in the industrialized world are able to compete with the protection of a more level playing field, to minimize unfair market competition.

With those higher principles as a guide, it might be time to establish more robust procedures for assuring compliance with fair working conditions in countries where local law enforcement is missing or inadequate. Given the pervasive corruption and disinterest of law enforcement resources prevalent in many of the countries where the manufacturing and mining occurs, there may be no way to guarantee compliance with codes of social responsibility, or codes of fair practice, except through the good offices of those companies. Perhaps it is time to strengthen the Codes by introducing more effective procedures to assure code compliance. Local government law enforcement agencies may not be up to the task, and monitoring efforts paid by the corporations themselves may be suspect because of the potential conflict of interest involved. Thus strict and meaningful code enforcement may be but wishful thinking. Nonetheless, in an effort to enhance the prospect of code compliance, I suggest that the addition of a complaint or grievance procedure culminating in mediation, or in some cases even arbitration might enhance the prospects of greater code compliance, greater freedom from local suspicions of the self interest of brand funded monitors, and the insertion of a dispute settlement procedure which could help bring finality to claims of code violation that present internal code procedures fail to put to rest.

### **The need for procedures to resolve lingering or unaddressed claims of code violations**

If current internal code procedures for monitoring and reporting result in satisfying the concerns of the local complainants, there is no need for further examination of such claims. That resolution is made even more likely when the code procedure calls for internal or external investigation and a issuance of a report which answers the complaints at issue. But what if the complaint is not resolved to the satisfaction of the complainant, or what if the monitoring or investigating body is viewed as biased in favor of the brand or code and the initial complaint remains a source of continued concern? Unquestionably such issues remain a tinderbox capable of explosion or exploitation through public protest within the enterprise, and within the community where the subcontracting occurs, or perhaps within the consumer marketplace. In an era of instant and public communication through immediate internet postings, email, blogs, and the like the brand is always subject to attack if not exposure. The Brand is always a potential victim of organized protest, now so readily achievable in our era of global communication. Provision of an additional effort to peacefully resolve such lingering conflict through mediation may be an attainable process for diluting such protest if not for putting such lingering disputes to rest.

### **A modest proposal for mediation of unresolved claims of code violation**

There is at present no simple way of resolving a dispute if a brand denies a claim, even if an internal or external investigation results in the issuance of a report that a claim is denied or rebuffed. Even a finding that a claimed violation is trivial or specious might be insufficient to quell the potential unrest that might result.

I offer no guarantee that any procedure will satisfy all who have had their claim denied, but I suggest that making available a mediation procedure will in some way co-opt the factory and the disgruntled employee or group by bringing them to the table for discussion and persuasion as a more effective mechanism for ending such dispute than a mere corporate denial of a claim. A strength of such a system would lie in advising and training the Brand, and factory owners of the risk of being subjected to such a process, as a goad to encourage them to fulfill their obligations under the codes.

### **Neutral Administrative Facility**

I propose the development of a protest mechanism where a dissatisfied claimant could turn in the event of an unacceptable decision by the brand, the monitor or the administrating agency. Participating Codes would append an appeal procedure where such claimant could within say 30 days of a claim denial, invoke mediation by a mediator of their choice to bring finality to their protest. In some countries mere resort to the existing mediation facilities of the local Ministry of Labor might be sufficient to meet this need. But in countries where government mediators are viewed with suspicion by the factory, the brand or the complainant there should be provided a facility to handle such complaints, to identify and weed out the frivolous complaints and to provide access to a qualified mediator to help resolve the lingering dispute. Ideally that facility should be a neutral entity, housed at an acceptable NGO, or at a cooperating law school or university, or even in a separate independent, local entity provided by perhaps the ILO or the Permanent Court of Arbitration. The Code would identify the neutral institution and its commitment to abide by the latter's rules and procedures. It might also empower the institution to determine which claims for mediation have merit and to dismiss those claims it deems frivolous. In order to protect complainants from retaliation for filing their claims some measure of security and assurance of brand protection should be provided by the facility

### **Roster of Mediators**

The designated facility would have responsibility for recruiting and training a cadre of mediators to constitute its roster. Professionals with established careers in the law, economics, academics and clergy have proven a useful source for developing rosters of mediators. They would hopefully have independence of judgment, sensitivity, acceptability and prestige so helpful in the mediation role, and be sufficiently financially independent as to be beyond the too often reach of corruption in too many of the developing countries. A committee of employers, agents of the brands, NGOs and worker agencies could help to select and vet the group, which would then be provided a

minimum of 40 hours training in the Codes of Conduct, the underlying international standards, the pertinent local laws, and the process and techniques of mediation.

### **Selection of Mediator**

When a dispute arose the administering agency would then secure the assent of the disputant to its rules and administration, and then designate a panel of 3, 5 or 7 names from its roster, providing the claimant the opportunity to select from that approved list or alternatively for both parties to alternately strike from the list until a mutually designated mediator is agreed upon. In the event that the whole panel is deemed unacceptable, the rules would provide for the administering agency to appoint the mediator. Clearly the role of the mediator is, as is the tradition, to try to bring the parties to their mutually acceptable resolution of the dispute. But the rules of the agency might also empower the mediator to make a recommendation if mediation fails or if the parties so request. The result of the process should be mutual agreement, an agreement which both disputants recognize as bringing finality to their dispute. It is feasible and possible that the Governing Code might even go a step further to offer final and binding arbitration by an arbitrator from a separate arbitration roster if the laws of the country so permit.

### **Funding**

Such an undertaking would entail more time and more money than a procedure ending with a report even if following an investigation.. The Brand, factory or code administrator might assume the costs involved. However it must be recognized that the credibility of such a mediation procedure would be enhanced by the administering agency and the mediator being free of the potential interest and bias that might result from employer funding. Mediators at the outset might serve pro bono, and the administering agency might be funded by external resources provided perhaps by some international agency such as ILO or PCA, or even the World or Regional bank, OECD or foundation. If the mediators themselves are, at the outset at least, willing to serve pro bono, there should be less concern as to the source of funding for the administrative agency.

### **Conclusion**

Mediation is a tested and accepted procedure for a independent facilitator to help bring the disputants together to a mutually acceptable resolution of their dispute. While we may look at it in the context of our industrialized world, mediation is a universal in all societies and is used throughout the world to resolve interpersonal disputes whether or not based on workplace conflict. It provides both parties with control over the outcome of their conflict and thus brings a transparency and sense of participation which sets a good example for all involved. There is no need to recite again the benefits of introducing the mediation process into Codes of Conduct, as listed at the beginning of this paper.

It is a tried and effective procedure for reducing conflict and assuring fairness, and since that is presumably the underlying justification for setting forth Codes of Conduct and

proclaiming the standards of Corporate Social Responsibility, I suggest it be tried to equitably and fairly put such disputes to rest.