

Fifth Asian Regional Congress of the International Industrial Relations Association

*Dynamics and Diversity: Employment Relations in the Asian-Pacific Region*

## **Conciliation of Disputes Over International Labor Standards**

by

Arnold M. Zack, Labor and Worklife Program at Harvard Law School (USA)

In the decades between the Second World War and the current era of globalization and free trade, those of us in the labor relations world functioned nationally within our borders working with a prescribed set of laws and practices, which we viewed as difficult enough without having to add an international dimension to that mix. Despite the fact that the International Labor Organization since 1919 has promulgated 184 International Conventions on a wide range of workplace inequities, most countries have operated with scant regard for, let alone adoption of those Conventions. In each of our countries we have applied our own domestic mix of law and practice to channel union, management, employment disputes into established procedures which were able to achieve resolution of those disputes whether through the use of law and the judicial system, or special labor courts, or through private dispute resolution systems. Even though none of our systems of dispute resolution has been perfect, they have usually been successful in forestalling greater conflict and unrest over unresolved claims of worker rights or workplace justice. We have had a distinct roster of players, a prescribed legal structure for resolving

anticipated disputes and players who were usually committed to the resolution of their disputes and the continued operation of the economy in which they worked.

In the United States the dispute resolution system does not include works councils, industry councils, labor courts or multiple unionism. Rather we have a system, which provides trade union representation to a scant 12 % of the work force. The remainder of our 125,000,000 workers operates under the doctrine of termination at the employers' option, with resort to the traditional legal and judicial system only on issues involving allegations of statutory violation. The parties traditionally use mediation and arbitration as the standard procedures for bringing resolution to collective bargaining disputes. Non-unionized employers often develop their own internal mediation and arbitration structures for resolving employee complaints with or without employee option on access to the courts. Nevertheless, in our system as in yours, the established metes and bounds of our formal and informal structures have generally minimized industrial unrest and conflict, hopefully with an eye to protecting fairness in the workplace. Throughout this period we had little more than perhaps academic concern as to work practices in other nations,

### **The National Bounds of Labor Relations are Disappearing**

The elimination of tariffs, the expansion of free trade, and the sudden burst of globalization have changed all that. Industries have become multinational. Trade and manufacturing have become international. Jobs have moved from one country to another

as marketing, manufacturing and labor costs become matters of global rather than national concern. And as the jobs move we learn of more worker exploitation.

Wouldn't it be wonderful if we could resolve all those disputes involving fleeing corporations, young children working twelve-hour days, overworked labor inspectors ignoring local labor laws, employees locked in their factories and deprived of toilet breaks? Or those disputes concerning workers losing their sixty-cent per hour jobs because the employer moved the factory to a neighboring country with even lower wages, or peasants who had to forage for food on drought-stricken land because consumer protest in some far off country pressured a potential factory owner to shutdown or relocate a sweatshop?

We have all read the newspaper accounts of deplorable working conditions in too many developing countries providing "unfair" competition to unionized workers or of politically astute consumers in industrialized countries boycotting retailers contacting to factories which exploit workers. Certainly, we would prefer a world in which there was no such exploitation and where workers were not played off against one another. It would indeed be wonderful to have a world in which employers voluntarily made provision for fairness at the workplace, where the conventions of the ILO and codes of conduct were all upheld, where misdeeds were willingly corrected when discovered, and such relationships were all happily and effectively self-monitored.

But such is obviously not the case. Conflict is rife, protests are increasingly evident, meetings of international bodies dealing with trade issues have to be cloistered in remote areas beyond the reach of protestors, and too many employees throughout the developing world continue to be exploited.

### **Can we do anything about it?**

Is there a way in which we can mitigate some of the evils resulting from capital exploitation of the most defenseless workers in the employment chain?

The scope of the problems of free trade, international labor standards, and the combative roles of governments, unions, employers and nongovernmental organizations (“NGOs”) create seemingly insurmountable obstacles obstructing any effort to adapt conventional dispute resolution systems to such a vast, constantly changing arena.

With increased mechanization and automation of manufacturing, permitting assembly by unskilled workers and reduced costs of transportation, and with the unleashing of capital mobility, it has become possible for factories to be viable in virtually any community in the world, and profitable wherever they are able to find ever-cheaper sources of unskilled labor to replace what used to be skilled labor assembly in industrialized nations. For example, the US shoe industry rapidly moved from labor-intensive cordwaining in New England to mass-production shoe manufacture to the Midwest – closer to the self contained central U.S. market – and thence overseas, where shoes and sneakers are

machine-made and assembled by local unskilled labor and then imported to the US for sale.. The same has occurred in the U.S. apparel industry, which evolved from being labor-intensive with highly skilled sewers and cutters, to overseas fabric manufacture utilizing unskilled assemblers. It is estimated that in 1997, sixty percent of U.S. consumer apparel was assembled overseas,<sup>1</sup> while socks, which are entirely machine-made and require no low-cost labor assembly, continue to be made totally within the United States.

But with the trend to maximizing profits and minimizing costs (particularly labor costs through globalization), so too has come the growing awareness of the exploitive working conditions in that previously quiescent third world work force, through the revolution of rising expectations. These expectations have evolved from workers seeking short-term employment to purchase bicycles and radios, whereas they now desire televisions and computers that increasingly link them to the internet and alert them to the inequities of the international labor market. They have also become the focus of trade unions and other NGOs which seek improved wages, better health and safety protection, and restrictions on the exploitation of child labor and women in the workforce, and strive to enhance the workers' share of the productivity pie – all of which have the effect of raising labor costs and enticing mobile employers to move to yet cheaper labor markets. Local governments too often ally themselves with the employers in their effort to retain them for the tax revenue, jobs and other economic benefits they provide to the community or to the country. In their efforts to improve the lot of the local workers, these NGOs (and even trade unions) often find themselves in

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<sup>1</sup> Bob Hepple, A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct, 20 COMP LAB. L. & POLICY J. p. 355 (1999). In 1961, only 4% of clothes sold in the U.S. were imported

direct opposition to comparable institutions (including trade unions) in industrialized and market economies which are seeking to preserve jobs and the way of life of workers in countries from which industries have already fled.

Through NGO and worker protest, the world has taken greater notice of the plight of the workers in these developing countries, as well as the protests of workers in industrialized countries who see globalization and capital flight as a threat to their long-enjoyed benefits<sup>2</sup>. The effort must be viewed not only in the context of the self-interest of workers from industrialized countries who see their jobs moving overseas, but also in the context of those workers in overseas factories who see their newly-acquired employment jeopardized by the prospect of future flight by employers to even less developed economies. This fluid movement of capital must further be viewed in the context of the ILO conventions, the codes of conduct and fair practice espoused by employers to assuage the protest groups in the industrialized nations, the local laws and enforcement standards, and the diverse agendas of NGOs dedicated to child protection, the ecology and a variety of other priorities. In this muddled scenario, what can be done to reduce the tension at international economic gatherings, to ensure fairness for workers in both industrialized and developing nations, and to fulfill society's commitments to fairness and justice in the workplace?

### **Does International Law Help?**

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<sup>2</sup> See Kimberley Elliott and Richard Freeman, *Can Labor Standards Improve Under Globalization*, Institute for International Economics 2003 referring to the protesters as "The guerillas in the public arena"

It obviously would be most appropriate if there were a legal framework for challenging unfair working conditions. But before there can be any prospect of legal rights being enforced, such an illusory legal system presupposes the existence of a body of enforceable international law establishing workplace rights; the existence of legislation ensuring specific workplace rights; the existence of an international legal and judicial system for processing claims of violation of such international laws; the standing of non-governmental disputants to utilize such a system; and the willingness and ability of disputants to navigate their way through such a system. The great difficulties that were faced by the international society, for example, in establishing such a legal system for monitoring and enforcing international war crimes, and the years spent in seeking to develop an international judiciary for internal justice within the European Union, testifies to the difficulties inherent in crafting such a system of international law for the widespread problems of workplace fairness and justice.

Even the North American Free Trade Agreement (“NAFTA”),<sup>3</sup> while successful in developing a vehicle to rein in workplace excesses within its jurisdiction, gives no right of challenge to deprived individuals or groups, but restricts protest to those disputes initiated solely by governments – and then only to the extent that the challenge concerns the enforcement by another member state of its own internal statutes, which is a far cry from any commonly understood concept of individual legal rights.<sup>4</sup>

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<sup>3</sup> . North American Free Trade Agreement, Washington, Dec. 17, 1992, entry into force Jan. 1, 1994, U.S.-Can.-Mex., 32 I.L.M. p. 605.

<sup>4</sup> North American Agreement on Labor Cooperation between the Governments of Canada,

## **Does National Law Help?**

The role of government as the provider of workplace fairness varies from country to country. In the US and Canada, that role includes setting basic labor conditions such as wage and hour legislation, laws protecting against various forms of discrimination, assuring access to unemployment insurance, ERISA, and the like. US and Canadian governments also routinely monitor procedures for unionization and recognition and standards for fair collective bargaining under which unionized employees and employers negotiate a broad range of other conditions into enforceable collective bargaining agreements. In most other industrialized countries, the role of government extends even further to legislating vacation entitlement, protection against unfair dismissal, provisions for severance pay and other benefits, which we in the US accept as matters for union-management negotiations<sup>5</sup>. Moreover, in the US and Canada, as in most industrialized countries, the administrative agencies and the courts enforce the employers' compliance with the law and implement the decisions of arbitrators.

The rule of law, which we rely on to enforce labor standards in industrialized countries, is missing, inadequate, or unenforced, in developing countries. There the norm seems to be the greater the denial of fair labor standards, the greater the potential for profit and the greater the inducement for companies to move their operations to countries where wages

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the United Mexican States and the United States of America, 32 I.L.M. p. 1499 (1993), art. 27,

<sup>5</sup> With private sector union membership hovering around 8-9%, or as high as 12% including government employees, it must be remembered that there are more than 100,000,000 workers in the US without unions to provide them negotiated benefits of just cause determination of dismissals, severance pay and the like.

are lower. Then, if challenged by authorities in those countries they move elsewhere where wages are still lower and any job is viewed as better than no job.

Certainly, individuals and groups may bring legal action against corporations and citizens within a state to secure adherence to the laws of that state. But the reach of such challenge is confined to the laws of that state as enforcer, and it rarely extends beyond those laws to international norms, standards or conventions.

### **Codes of Conduct ?**

Some companies, particularly retailers of consumer products, have adopted Codes of Conduct, in order to provide assurance that their workplace practices meet certain standards. These Codes are not legally binding, and in many instances are mere proclamations of intent to do good. As these Codes are drafted by the companies, they may only address certain workplace issues and not others, and generally contain no mechanism for enforcement, dispute settlement, or even verification of company compliance. Although some companies employ verifiers to examine their compliance with their own Codes, these verifiers may have an interest in not being overly critical of the enterprises that fund their monitoring. Some independent monitoring groups, like the Fair Labor Association and Social Accountability International, do provide impartial assessment, but they are a rarity in the expanding world of free trade and international movement of commerce.

Given the ineffectiveness of national law enforcement, the elusiveness of enforcement machinery or procedures under international law, and the very restrictive retail and

consumer sensitive application of Company Codes of Conduct (even if they had machinery to assure their implementation), what is the solution? What recourse is available to move enterprises toward compliance with international labor standards?

### **How about Arbitration?**

If international and national laws are ineffective vehicles for enforcing international standards of fairness, how about doing it through arbitration? I am certainly a proponent of arbitration, which has, after all, been my basic day job for more than four decades. In arbitration, unlike litigation, the adversaries can contract to adhere to international labor standards even if they are not so bound by national or international law. Under arbitration, they have the right to select their own decision maker, and have access to arbitrators who are knowledgeable of the subject matter. They in effect create their own enforceable law and select their own judge. Arbitration is more expeditious than litigation, particularly when the parties have selected a neutral who is familiar with the issues in dispute. It avoids the delays of extensive pre-litigation discovery and depositions, and the potential for extended litigation that stems from the availability of countless appeals. In focusing on the dispute at the

hearing, and by doing away with pre- and post-litigation wrangles, the process is also less expensive, and with arbitrator expertise it will usually result in fewer hearing days, with resulting savings in both time and money.<sup>6</sup> But although arbitration may escape the legal

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<sup>6</sup> Henry H. Drummond, *Transnational Small and Emerging Business in a World of Nike and Microsoft*, 4(2) *J. SMALL & EMERGING BUS. L.* p. 300 (2000), . recommending adopting as an international standard the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, Task Force on Alternative Dispute Resolution in Employment, National Academy of Arbitrators (1995), available at <http://www.naarb.org/protocol.html> (visited March 2003). As the initiator of the Protocol, I would welcome its adoption for international

and institutional problems associated with enforcement of international law and is far more flexible than resort to litigation, it nonetheless requires the legal underpinning of contract law for the judgment of the arbitrator to be enforced. And, just as there is no body of enforceable law for international workplace disputes, there is likewise no body of enforceable law for contract disputes. International arbitration between civil parties or states requires a mechanism for enforcement which is usually achieved by the agreement of disputants to be bound by the laws of a specific legal entity, usually the rules of an arbitration administrator who is in turn bound by the national law of a particular country.

Undertaking to develop a structure for arbitration of international labor standards issues, in the absence of a pre-existing body or structure or institution of international law, thus requires that the parties to the arbitration agreement voluntarily negotiate and commit themselves to their own body of law or enforceable labor standards within their arbitration agreement. And when one considers the problems of international labor standards and the multiple players, the difficulty of securing a broad agreement among all the potential players to adhere to a negotiated standard of fairness or justice underscores the improbability of such a forum being effected.

It is unlikely that any employers, unions, NGOs or governments would commit in advance to adhere to any code of fairness or justice, and be willing to set forth the standards for adherence and to submit any challenges to violation thereof to arbitration, and then be bound by the decisions of the arbitrator to whom they would need to cede

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labor standards issues, but I believe that the absence of any international neutral judiciary to push its adoption would make the effort futile.

their final and binding authority over the outcome of their dispute. It is probably even less likely that these disputants would agree to arbitrate such a dispute once it has arisen, when positions are entrenched and the risks of winning or losing in arbitration are obviously greater or lesser for the various participants. The absence of any positive arbitration forum for prospective (let alone existing) disputes underscores the unwillingness of players in the employment field to subject themselves to a binding decision by some arbitrator, even if mutually selected. And once a dispute has arisen, the prospects of achieving agreement on a mutually acceptable arbitrator becomes even more problematic.

There is a perception from the successful experience of labor-management arbitration in the United States and Canada that workplace arbitration provides an expeditious, routinized process for resolving disputes arising over issues under fairness or workplace justice. That has been true of collective bargaining agreements which universally provide for a grievance and arbitration system to resolve disputes arising out of the interpretation or application of the parties' agreements and over questions of the just cause of employer-imposed discipline and discharge. But the underlying contractual relationship between union and management that spawns appeal to arbitration is usually lacking in employment relationships outside those countries. Collective bargaining arbitration works because the union and management parties to the collective agreement have a greater stake in the preservation and continuity of their relationship, and willingly cede to their choice of outside arbitrator the right to dispose of any individual dispute which might otherwise impede the smooth continuity of that ongoing collective relationship.

That tends to be very different from the types of disputes with which we are concerned in the international non-collective bargaining world, where protestors other than the employees' union challenge an employer's, or a government's, actions, and where their efforts are focused on triumphing in that individual dispute rather than on the perpetuation of the collective bargaining relationship between the employer and the designated union of its employees. Indeed, for some of the protestors, the escalation of the dispute to a broader venue than the employment relationship, rather than its resolution, may be the primary goal of their involvement.

### **Is Conciliation the Answer?**

The evidence shows that, for the present at least, disputes over workplace fairness and justice have failed to stimulate the international community to develop binding legal standards to protect workers at work, let alone the legal machinery to ensure that those legal standards are complied with. The evidence also shows that, in the absence of an enforceable contractual relationship establishing enforceable standards of workplace fairness among those involved in employment issues, there is little prospect of negotiating a contractual relationship which would empower arbitration as a device for final and binding resolution of disputes arising out of a claimed violation of those standards. Does that mean we should give up our effort to bring dispute resolution to such troubled workplaces? Or that we should accept without comment the self-righteous and too often unenforceable proclamations of international enterprises that they provide fair and just workplaces? Or that they willingly and voluntarily conform to ILO conventions or pertinent national labor protective legislation? Or that we should stand by and watch

escalating conflicts and violence at international meetings that drive international business and government leaders into increasingly policed meeting venues? The preferred course for achieving workplace fairness, I suggest, is through persuasion and conciliation/mediation.<sup>7</sup> In the absence of any legal structure for enforcing adherence to fair standards, and in the light of the broadening and escalating nature of disputes on these issues, I think the time is ripe for evolving a structure and system which will encourage the various disputants to minimize their blustering rhetoric in preference for a mechanism which would seek resolution of their conflicting claims and actually achieve progress toward their proclaimed goals of helping to assure workplace fairness and justice. Although perhaps unenforceable through existing legal or contractual processes, the standards of fairness are recognized and accepted, and constitute the basis for discussions as to whether or not they are being lived up to. But what is lacking at present is a mechanism that can bridge the gap between the proclaimed standards and the complaints of those who challenge their implementation. That mechanism could be conciliation/mediation. The objective now is to establish a credible institution which educates the world community, the international organizations, states, local governments, unions, employers, NGOs and potential disputants about the futility of continuing and ever-escalating conflicts and about the potential benefits that can result from having mutually acceptable mediators help to resolve these pervasive conflicts.

Conciliation/mediation is neither mandatory nor binding but does provide an opportunity for resolution of conflict when two or more disputants are unsuccessful in trying to

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<sup>7</sup> . Although conciliation and mediation are not identical processes, the two terms are used interchangeably for the purposes of this paper.

resolve their conflicts by direct negotiation or confrontation. It makes available a third party to help them when they so request, or when they can be encouraged to use conciliation/mediation to further or resume negotiations, to transmit messages, to come up with new ideas, and above all to urge the disputants to rethink their confrontational positions and seek accommodation in the effort to resolve their conflict. Conciliation and mediation are old and respected tools for resolving disputes used successfully in a myriad of relationships and disputes. Conciliators or mediators in the employment field, as in other commercial or legal fields, would be individuals with experience in the issues in dispute, with respected reputations in helping parties reduce their conflicts, and who gain the confidence and trust of the disputants. Conciliation and mediation are voluntary, entered into voluntarily, and continued only for as long as the disputing parties believe the process is helping them reduce the gap and conflict between them. A mediator has no power or authority to impose any resolution on the disputants, bearing only the power of mutual persuasion with which the disputants have appointed him or her. There is no guarantee that conciliation/mediation will work, or indeed that all disputants will even enter into such procedures, if their agenda is escalating rather than reducing conflict.

But for those committed to minimizing conflict or resolving disputes, conciliation/mediation is a valuable, if not essential, tool. It is a tool not currently “on tap,” although in a particular dispute it might be created. It is created at present only when those in conflict jointly undertake to initiate or create the process. How much better it would be to have an ongoing institution to which a single protesting party might turn for help in order to persuade another party or parties to meet, discuss, and hopefully

negotiate their differences to resolution! The ready availability of such an institution would encourage routinization of appeals for conciliation/mediation and hopefully make the process an accepted venue for resolving international workplace disputes.

And now would be an ideal time to initiate such an effort, as globalization takes its ever greater toll on employees and workplace working conditions, as greater international attention and visibility fuels greater group protest over the unfairness of inadequate workplace conditions, and as more and more people in the developing world find themselves pulled from the failing agricultural sector into the burgeoning industrialized sector.

### **A Role for the ILO?**

For decades, the ILO has proclaimed universal standards of workplace conduct through its conventions and more recently, through its Freedom of Association Committee and its Declaration of Fundamental Principles and Rights at Work (“Declaration of Principles”).<sup>8</sup> Despite its efforts to expose violations of the conventions and to provide acceptable workplace practices, too many of the issues to which it alerts the world have remained intractable and unresolved. Those nations which stand in violation of the ILO conventions are often called to task for violations of the rights contained therein through resort to the Committee of Experts, but without a readily available procedure for

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<sup>8</sup> ILO Declaration of Fundamental Principles and Rights at Work, adopted by the International Labour Conference, 86th Session, Geneva, June 1998. Memorandum Update on ILO Core Labor Standards Declaration, ABA Labor and Employment Law Section, International Law Committee, Nov. 1999.

mediating such conflicts in lieu of formal and often unacceptable recommendations on such violations.

In matters brought before the tripartite Freedom of Association Committee concerning trade union rights, the several thousand claims which have been investigated in recent years and on which Recommendations have been made often remain unresolved. On child labor issues, despite member state ratification of the Forced Labor Convention,<sup>9</sup> numerous examples of violations continue to arise, all too often without closure.

With the adoption of the Declaration of Principles, there is now a vehicle for bringing to light violations of the core standards of the ILO conventions, regardless of whether the subject conventions have been adopted. The procedures for investigation, reports and debates within the ILO have a long tradition of delay, to the detriment of the very workers whom the procedures were designed to help, and to the ILO itself as an agency expected to eradicate such unacceptable wrongdoing efficiently.

On November 6, 2001, the ILO Director-General Juan Somavia announced the creation of the World Commission on the Social Dimensions of Globalization, to be chaired jointly by President Tarja Halonen of Finland and President Benjamin Mkapa of Tanzania, to “examine ways in which all international organizations can contribute to a more inclusive globalization process that is acceptable and fair to all.”<sup>10</sup> In its charge, the

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<sup>9</sup> Convention concerning Forced or Compulsory Labor (No. 29), June 28, 1930, entry into force May 1, 1932.

<sup>10</sup> Enhancing the Action of the Working Party on the Social Dimension of Globalization: Next Steps, Working Party on the Social Dimension of Globalization, WP/SDG, Geneva,

Commission will “analyze the impact of globalization on employment, decent work, poverty reduction, economic growth and development,” and seek to “forge a broad consensus on the issues, including the involvement of all interested international organizations as well as governments and organizations representing workers and employers, and launch a process for addressing the key issues posed by the global economy to make globalization sustainable and promote the fair sharing of its benefits.”<sup>11</sup>

The initiative to bring to the table world leaders and world organizations to address the growing crisis of the international workplace is certainly commendable. But it portends more high-level research, investigation and studies, and while the “forging of a broad consensus” of international leaders and their institutions is desirable, more is needed than mere hortatory proclamations of commitment to do good. The problems of workplace fairness and justice, sweatshop exploitation, denial of access to toilets, failure to provide health and safety protection, and flight of employers to ever-cheaper wage sites is continuing daily and is beyond the ken of heads of state and institutions meeting at international conferences. The workplace violations of fairness continue to grow, and the missing link is the availability of an institution which can apply the laudatory international standards to those workplaces. The achievement of the goals of the World Commission would be more readily applicable to those workplaces where the violations occur if there was available machinery to achieve that “broad consensus” on a local level, by bringing together, in the spirit of fair working standards, the local players who too often ignore (if not deliberately) and violate international norms. Achievement of local

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Nov. 2001.

<sup>11</sup> . ILO Tackles Social Consequences of Globalization, ILO Press Release, Nov. 6, 2001

workplace consensus at the worksites of the developing world, among employers, workers, governments and NGOs, would not only reduce daily workplace conflict where it is most oppressive and permit access to the proclaimed international standards, but it would also put a practical face on the high-minded rhetoric of the participants in the Commission's work. And, most importantly, it would provide on-going models of how cooperation and consensus at the local level can lead to the achievement of the Commission's objectives at an international level.

### **What can be done on the ground?**

When originally asked by ILO Director-General Somavia to lay out my proposal to him for an international conciliation/mediation mechanism, I had suggested its inclusion as a component of the ILO structure akin to the investigatory functions of their International Body of Experts. But the tripartite structure of the ILO did not embrace all the struggling players at the workplace level, which excluded important NGOs and minimized many of the conflicts which often occur between national and local government authorities in dealing with employers and worker groups. I had suggested the possibility of establishing an external freestanding institution to administer such a conciliation/mediation service. Certainly Persuasion and application of the concepts of conciliation and mediation are likely to be more fruitful and productive and more hopeful in moving towards the international goals of the World Commission.

### **Conciliation of these Disputes over Labor Standards?**

Although arbitration is utilized by some states to resolve domestic disputes involving collective bargaining agreements, this only works when national courts hold the parties bound by the terms of the agreements. In states where no such legislation exists, it would be difficult to get parties to voluntarily agree to submit their dispute to binding arbitration. In addition, the nature of workplace conflicts and their multiple participants including unions, managements, NGOs and perhaps governments, make the prospect of agreement to submit such labor standards disputes to voluntary final and binding arbitration most unlikely even if forums were available to enforce compliance with any resultant arbitration awards.

Conciliation, on the other hand promotes participation of all concerned parties, invites impartial neutrals to facilitate reaching a fair settlement based on common interests, and provides for the possibility of flexible immediate and prospective solutions.

In fact, conciliation may be the most effective process in the quest for fair labor standards. While participation of a conciliator in any conflict does not guarantee resolution of the pending dispute, it may be effective in reducing the areas of conflict, in helping the parties to develop procedures for monitoring their future relations and potential conflicts and perhaps even securing agreement on using arbitration as an agreed upon monitoring vehicle.

## Promoting Dialogue

Promoting dialogue among the parties to a labor dispute is the only effective means of achieving durable, long-term solutions to workplace disruptions. It is thus vital to bring all the parties together in a neutral environment so that they can work towards mutually beneficial solutions. A neutral facilitator is best able to achieve this.

## Party Control

Conciliation is voluntary both in that disputants agree to enter into the proceedings and also in their continued use of it for as long as they believe it beneficial. Above all, it is voluntary in its result, with the participants voluntarily reaching a mutually acceptable solution.

Perhaps more importantly, conciliation focuses on the interests of the parties in designing a resolution to their conflict, which includes not only solutions to their prior problems but also a prescription for their future relationship. This can allow parties to work towards mutually acceptable solutions, which lessens the likelihood of repeat confrontations.

Unlike litigation or even arbitration, where the participants cede control of the outcome to the judge or arbitrator and are legally bound to adhere to any imposed decision, in conciliation the parties retain control of the outcome throughout the process even in crafting any final agreement.

### Multi-party Use

As employment disputes are usually multilateral – involving interlocking and often conflicting interests that can include local and international trade unions, host governments, multiple employers and concerned NGOs – such diversity underscores the need for a neutral third party to facilitate negotiations. Conciliation would be particularly effective as a means of monitoring challenges to the application of Codes of Conduct.

The legal or contractual structure of litigation and arbitration restrict access to those parties with the legal or contractual right to participate. Conciliation opens the dispute resolution process more broadly to other affected parties, providing the opportunity for more creative and problem avoiding solutions for future relations, and making the outcome more acceptable and constructive for all players.

### Transparency

Heeding the call for increasing transparency in the global market, resort to conciliation and the resolution of conflict through its use would provide the world with a window not only into unfair working conditions, but also promote the view that conflicts over such conditions can be effectively addressed to the mutual satisfaction of the various parties involved.

### **A Conciliation Institution as an International Answer?**

Many countries have come to rely on alternative dispute resolution (“ADR”) mechanisms, administered either by judicial or administrative bodies, to resolve labor standards disputes. Unfortunately, when conciliation is administered by government agencies, these benefits may not be maximized. Governments may be seen as stakeholders in labor disputes, and hence may lack credibility in the eyes of the disputing parties. If the parties do not trust the conciliation process, it won’t work, and further protest may ensue.

At the moment, there is no widespread awareness of the benefits of conciliation for international labor standards disputes, or institution maintaining an established roster of multilingual conciliators specializing in labor disputes, or qualified to train conciliators in pertinent labor laws and standards.

Although a number of international organizations share an interest in resolving disputes concerning international workplace standards, no single international organization has the reach or resources to establish such a facility within its existing structure. There is a clear need for a conciliation institution to be established, that could take on these tasks.

For increased effectiveness, such an institution should operate as an independent entity with the guidance and endorsement of all those parties sharing its objectives. In particular, it would be expected to work most closely with the ILO in order to ensure that it did not duplicate, but supplemented that organization’s work. The WTO, the World Bank (and regional banks) are also foreseen as playing a role. The institution would seek their

endorsement and support in encouraging their member states to adopt national policies promoting enterprises to utilize conciliation to resolve disputes involving labor standards.

A most important role would be to conciliate disputes concerning compliance to Codes of Conduct, as well as act as an independent monitor and verifier of these Codes.

The independent status of the institution would enhance its credibility, ensuring that it would not be perceived as an instrument of government or corporate power.

### **Example of Possible Disputes**

One could foresee a dispute arising over child labor or forced labor issues raised by a protesting NGO or trade union and/or retailer where the local or multinational manufacturer could be encouraged to attempt conciliation to avoid work stoppages, consumer boycott, contract termination, flight elsewhere or even adverse publicity.

Although the primary focus of the institution should be on conciliation at the request of disputing parties, it could readily extend its jurisdiction to voluntary arbitration for willing parties, serving as designating agency and providing a panel of arbitrators qualified in the substantive matters in dispute in a final and binding resolution of their conflict.

## **Areas of Activity**

The main goal of the institution would be to support universal workplace implementation of international labor standards by promoting the use of conciliation to resolve workplace disputes. The institution would seek to work with the ILO, in order not to duplicate, but to supplement its work in this field.

## **Education and Awareness Raising**

The institutionalization of international workplace conciliation will require initial investment and effort to achieve credibility and acceptability. At the outset, it will require extensive outreach to the various international organizations working in this area for acceptance and endorsement together with an educational effort to advise potential non-governmental users of the benefits of conciliation.

Efforts to gain support and affiliation with national governments must be an integral part of the educational awareness effort. Such approaches to those countries already possessing conciliation services will be essential to gain access to their conciliators for their potential participation in developing the international conciliation roster. For those countries which are host to enterprises involved in international trade but which may lack conciliation services, outreach is likewise important to recruit potential conciliators for training and to alert such national agencies to the availability of the institution's services

should such international disputes arise involving enterprises or institutions under their jurisdiction.

### **Panel of Conciliators Specializing in Labor Disputes**

The creation of a panel must include qualified conciliators competent in the process of conciliation, knowledgeable in the applicable international workplace standards and able to function within the language proficiency of the disputants.

In order to assure the competence of its services the institution must establish standards of qualification for conciliators both as to process skills and as to substantive knowledge of the disputed areas. As such, it is vital to assure that existing conciliators who join its ranks meet those standards while providing training and education for those who do not.

### **Training of Conciliators**

It should also provide full training for those it selects for its roster. Included in those efforts must be an undertaking to include conciliators with proficiency in the diverse languages in which disputants may be working. Continuing education and evaluation for the institution's efforts are also essential for inclusion in its program planning.

When fully developed its training programs could help to promote a uniform standard of qualification for various national conciliation services while helping to develop such conciliation services for countries previously lacking them.

Although the details of a particular conciliation might at the request of the participants be kept private, an important role of the institution will be to provide reports of its activities, including the nature of the disputes resolved, and by those reports advise potential users of the benefits of embracing the conciliation mode.

### **Designating Agency Procedures**

Beyond creating such a global or regional panel is the need to develop procedures for initiating the conciliation, selecting the conciliator, monitoring the process and evaluating the handling of the case and its outcome. Disputes might come to the attention of the institution by joint submission of all the disputants, or by only one or some of the potential parties invoking the services of the Institution to encourage the other crucial and perhaps reluctant parties to join in the effort. Complaints and requests for conciliation may come from governments, NGOs, unions, vendors, manufacturers or even international organizations. Since the process is voluntary and requires the participation of all the disputants, it may be necessary for the Institution to negotiate with relevant parties to attempt to get them to participate

Disputes may also be forwarded by state conciliation agencies lacking the jurisdiction over some of the employers when the locus of the conflict is beyond its borders or when there is need for greater conciliation expertise than available within the conciliation services of the country involved. In cases involving Codes of Conduct the referral to the institution might come from one of the disputants or even from the Code Administrator or its monitoring facility.

Referral of the dispute to the institution would logically trigger a series of events. Among these might be solicitation of all parties to participate in the conciliation, agreement to adhere to the institution's administrative rules and procedures, designation of the conciliator acceptable to the parties, determination of the locus and schedule of the conciliation, determination of the allocation of costs for providing the service, procedures for monitoring the progress of the conciliation, and procedures to be followed in the event of the breakdown of the conciliation or achievement of resolution and certification of that result. Evaluation procedures would likewise need to be developed and implemented throughout the conciliation including assessment by the participants of the role of the conciliator and the institution's role in the process.

Much of the foregoing may be implemented through the early development of an accessible web site setting forth a description of the process and the substantive standards, the procedures for utilizing the procedures, a listing with supportive biographical material of those on the panel and evaluation materials to be used in an effort to enhance future effectiveness.

## **Structure of the Conciliation Institution**

The Conciliation Institution would be an independent entity operating under the guidance and with the cooperation of supportive international organizations. The ILO would be foremost in that role with the PCA offering its administrative and organizational support. The World Bank, Regional Banks and WTO might also be responsive to inclusion among these institutions. In addition, it is hoped that interested institutions such as trade unions, NGOs, employer groups, manufacturer groups and perhaps consumer groups would likewise undertake to participate in the efforts of the organization.

With such a diverse cross section of participating organizations, development of an effective and durable governing body might lead to considerable problems and potential conflicts. To avoid the difficulty which might stem from institutional membership, a Governing Board composed of individuals designated by participating international organizations and as representatives of the various sectors (such as employers, trade unions, NGOs etc.) should be considered with rotating, or fixed terms, assuming on going participation of the several main players.

The Governing Board would handle large policy and direction issues with the administration of the operation entrusted to a professional staff, seconded perhaps from participating organizations or established on a permanent basis as a separate international organization or as an affiliate within an existing international organization.

Locus should be determined by the need for integrated services with such supporting institutions presumably with an initial central institution, which might later develop with regional subsidiary institutions in those geographic areas where the source of the institution's activities emanate.

Funding such an undertaking and structure is obviously a challenge. It comes on the scene at a time when all the main players, particularly international organizations, are already under substantial economic pressure in fulfilling their existing obligations. Eventually, it is envisioned that the institution will support itself from fees charged for its services. However, this may take time and there is need for initial funding of seed money to support the start up activities and early outreach phases, including training and continuing education. Even thereafter, one can foresee the need for subsidizing some disputants who may lack the resources to pay their share of any fee for services provided.

## **Conclusion**

If the above-described structure were developed, and if it proved to be effective in resolving workplace disputes in its pilot project areas, one could foresee that disputants (at least those seeking to resolve conflicts for the benefit of workers in such areas) would turn to such an institution as a helpful tool for helping to resolve their conflicts, rather than taking to the streets in demonstration at international meetings. Indeed, the

international organizations responsible for investment and participation in the economic lives of such countries could well make adherence to the conciliation concept and the conciliation institution a prerequisite for the provision of economic support for the countries and their economic institutions.

The proposal for establishing an international institution for conciliating workplace disputes in the context of conformity to international labor standards is new, challenging and promising. It provides an important link between, on the one hand, proclamations of achieving the standards and, on the other hand, their actual implementation at the workplace. The proposal separates protestors intent on challenging the continuing rush to globalization from those sincerely interested in improving the working conditions of its victims. As such, I suggest the proposal is timely and worthy of more investigation and support..