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A Potential Roadmap toward Workplace Fairness in China

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We all expect that workers of the world will be treated fairly. We do not easily define fairly, and tend to define fairness through the egocentric experience of our own societies and national laws.

National Law

Thus, we in the US identify fair workplace treatment as including employer compliance with protective legislation such as Wage and Hours Laws, OSHA, Americans with Disabilities Act, and even protection against discrimination provided by Civil Rights Laws. We may also have an expectation that workplace protection will extend to provision of health insurance, paid holidays and vacations, and protection against unfair dismissal by employers. But as too many in the US have come to learn, health insurance is not (yet) a right, but a function of working for employers who undertake to provide such health care on their own or through negotiated collective bargaining agreements. Even protection against unfair dismissal is not a matter of right or law, but a function of protection provided through collective bargaining agreements, which usually provide for arbitration to bring finality to worker-management disputes. But our expectation of the universality of such protection is faulty, with such benefits available only to the 8% of the private sector workforce that is unionized.

The US and Canada with the initial expectation that expanding unionization would augment protective statutes with even greater negotiated workplace protections have at present significantly less workplace protection than enjoyed by workers in European countries. Indeed US and Canadian workers may have even less protection than workers in European countries and their former colonies where the law guarantees benefits such as paid holidays, severance pay, government provided health insurance, unknown in US. In addition in Europe and most other industrialized countries the creation of labor courts added another layer of assurance of workplace fairness by assuring for all workers, irrespective of union membership, final resolution of disputes over issues of workplace protection.

It would thus appear reasonable to expect that national governments throughout the world would follow either the US/Canadian or European model of workplace protection through a combination of statutory and negotiated protections. But that expectation must be tempered by realization that laws alone do not guarantee their implementation or application. Just as the statutory and negotiated protections are considered to be effective and realistic in providing workplace fairness in the industrialized countries, there is a corresponding expectation that they will be less widely embraced or adhered to in

developing countries. Even though many of the countries of the developing world, particularly in Asia and Africa had evolved from colonies and had retained on their books the statutory and administrative protections of labor codes, labor courts and the like, the political and economic realities in those “new” nations have failed to live up to expectations of a fair shake for their workers. This shortfall may be credited to the lack of private sector industrial base in the former colonies, their predominance in agricultural, their rural and impoverished circumstances, the disinterest or corruption of their officials, public and private, the desperate quest for employment under even the most deplorable working conditions, and the absence of public awareness an/or support for holding such officials to account for exploitative conditions.

Advent of Globalization

This disparity in access to workplace rights is not new. However, it has come increasingly into focus as society has entered the era of globalization. Companies which had been confined to local or regional markets took advantage of freer trade, rising consumer demand in more distant markets, cheaper and more efficient transportation and shipping. They thus offered their products for sale to that wider market, then moved on to foreign assembly and then to design and manufacture in countries with closer access to raw materials, with lower wages, potentially vast markets, and limited or lax enforcement of their local statutes and workplace protections. For governments with struggling economies, declining agricultural sectors, and ever increased migration into urban areas, the prospects of more jobs and reduced unemployment often overrode strict administration and compliance with workplace protections. For the price of lax enforcement a company might well decide to retain its local factory instead of moving it across the border to benefit from more casual wage and law enforcement and a more compliant government administration.

This upheaval in where and how jobs are performed has had a telling impact on workplace protection, once taken for granted by the laws and mores of the industrialized world and now becoming a tool for maximizing profits for highly mobile multinational enterprises. That problem becomes even more pressing as the world economies shrink and corporations seek ever more diligently to preserve their economic health, even at the expense of exploiting powerless workers. Brands manufacturing at their factories in developing countries place ever greater pressure on their managers to eke out profits, while those factories which subcontract for the brands face additional pressure to preserve profit for the brands they supply and for themselves in their own enterprise management. Those pressures, long a reality in Southeast Asia and China have become even more onerous in recent weeks as the constricting world economy has impacted so severely on production and consumption.

Globalization has had its critics, both those who object to jobs and factories having been moved abroad, as well as those who accept the reality of globalization but seek to assure a level playing field by assuring that workers in these new factories in the developing countries are provided with fair working conditions. The current world economic woes

only intensify the need for assuring fair labor standards, as the last hope for avoiding worker exploitation in increasingly perilous times.

International Law

That goal of assuring minimal workplace protections on a universal scale would be attainable if there were international law available to track conformity to labor laws to assure statutory compliance and workplace fairness. But there is no such international law to track throughout the globe those companies who elude law as there would be state officials who could track down the abusers within state boundaries.

There are, of course, treaties between countries and even international trade arrangements by which governments bind themselves to adhere to certain conditions of performance. Although the expanding number of such trade agreements are careful to assure that intellectual property rights are protected world-wide, the only trade agreement of the dozens negotiated, which binds the signatories to adhere to fair labor standards is that involving Jordan. NAFTA provides the right of a government to push another government to enforce the latter's own laws, CAFTA has set aside a sum to voluntarily spread the word on workplace protections, but the message is clear that workers in the most precarious of work situations and countries do not have any international legal protection on their side, even when national laws in the countries where they work are ignored or blatantly violated. Certainly it would be promising if international agencies such as the World Bank, the regional banks, the WTO and other multinational organizations set as a condition of their grants or assistance that at a bare minimum, employers, and multi nationals be held to strict adherence to the legal protections of the member states, but that ideal is still beyond reach.

Even if there were such international law, or realistic expectation of adherence to national law throughout the world, it is obvious that national workplace protection laws are not alike, let alone uniformly applied but rather are the product of the evolving industrial development of various countries. Those national legal variations and discrepancies raise the issue of what is meant by workplace fairness. Is there a standard thereof that is as applicable in an industrialized as in an underdeveloped country? Fortunately, there is an affirmative answer to that question embodied in the 90 year tradition and accomplishments of the International Labor Organization. Since 1919, the ILO, a former agency of the League of Nations (with China as a founding member) has provided the norms for fair workplace protection developed by tripartite composition of labor management and government representatives from its member nations. The ILO structure provides continual assessment of what its tripartite membership considers the currently appropriate international guidance as to what nations and corporations should provide as fair working conditions, even in China

The ILO conventions, now numbering nearly 200, have become the standard of fairness embraced throughout the world, regardless of whether they have been ratified into

national law. And they have been relied upon by institutions seeking to provide a worldwide norm against which to weigh corporate behavior in providing workplace protections, a guide to workplace fairness. Of all the ILO conventions eight have been acknowledged by the ILO to be the Core labor standards, the Fundamental Rights of workers throughout the world. Those eight include Convention 29 (1930) prohibiting forced labor, Convention 87 (1949) guaranteeing freedom of association and protection of the right to organize, Convention 98 (1949) Guaranteeing the right to organize and to collective bargaining, Convention 100(1951) the equal remuneration convention, Convention 105 (1957) abolition of forced labor, Convention 111 (1958) prohibiting discrimination in employment, Convention 138 (1973) protecting minimum age of employment, and Convention 182 (1959) prohibiting the worst forms of child labor. All of these Conventions have been ratified by from 144 to 168 of the 178 ILO member states. Although not all have been incorporated into national law, they have been widely hailed as the governing standards for workplace fairness. The US has ratified two: C 105 Forced Labor and C 182 Child Labor. China has ratified the two on Child labor and the two on Discrimination. Neither country has ratified Freedom of Association or the Right to Collective Bargaining. 128 Countries have ratified all 8 core conventions.

Another accepted norm of fair labor standards, is the Universal Declaration of Human Rights adopted by the United Nations in 1948 which proclaims in Article 23

1. Everyone has the right to work to free choice of employment to just and favorable conditions of work and to protection against unemployment
2. Everyone, without any discrimination, has the right to equal pay for equal work
3. Everyone who works has the right to just and favorable remuneration for himself and his family
4. Everyone has the right to form and to join trade unions for the protection of his interests

And in Article 24

> Everyone has the right to rest and leisure including reasonable limitation of working hours and periodic holidays with pay.

Thus, while there is no binding "international law", the norms set forth by the ILO and the International Declaration of Human Rights do provide guidelines for those seeking to assure voluntary compliance with widely accepted standards of workplace fairness throughout the world, and in particular where the national protective laws of North America and Europe are not universally accepted or enforced.

This vacuum has led to the development of Corporate Codes of Social Responsibility as the corporate surrogate for missing effective workplace regulation. These were initially triggered by student and consumer protests against exploitative conditions in garment factories beyond the reach of US and European workplace protections and promulgated by the brands and international groups seeking to enhance standards of workplace fairness. Most brands in the marketing of garments, sportswear, toys and shoes have

adopted such Codes of Conduct as a means of assuring their often sophisticated consumers that they are sensitive to the requirements of workplace fairness and diligent in pursuing adherence to those standards among the myriad companies to which they contract out their product manufacture. Some, like Nike, Disney and Gap have gained international plaudits for their efforts, but with some 17,000 factories producing Disney logo wear and 7,500 producing GAP products it is difficult at best to assure the constant scrutiny necessary to assure that the brands' proclaimed high ideals are met, either with the brand doing the monitoring by its own personnel or by contracting out such monitoring to organizations like the Fair Labor Association or SA8000. The number of contractors and sub-contractors, and even sub-sub-contractors is just too vast, the cost of meticulous monitoring too great, the frequency of monitoring inspections too sporadic, and the commitment of the hired monitors too subject to self-interest to assure such an endeavor's thoroughness, adequate frequency and real success. Too often the monitoring consists of a single individual making a scheduled single day factory visit with advanced notice for factory shapeup and resulting in doubtful reliability and effectiveness. For some brands, the pronouncement of CSR may be viewed as sufficient itself to escape from consumer wrath and boycott. For other brands complicity with factories with tolerated breaches and fear of loss of supply that may come from disavowing or abandoning a crucial factory supplier may be enough to result in ignoring, hiding or denying Code violations. For the monitors whether employed by the brand or working as independent agents there is likely reluctance to report "bad news" such as the brand's failure to achieve or record adherence to Code standards. Obviously that would be particularly threatening if the report called for the brand or the factory to act against its self interest in chastising the brand for failure to enforce Conventions 89 and 98, the right of workers to unionize or the encouragement of collective bargaining. The spottiness, laxity, or sheer burden of thorough monitoring raises little risk from failing to do an adequate job.

Nonetheless, in the absence of rigorous enforcement of national law by the host government, and particularly in the absence of trade union representation at the private sector factory level, the pressure of CSR and of consumers, and increasingly of corporate investors, points toward strengthening the effectiveness of such systems as the most practicable means for bringing to light objectionable and actionable workplace excesses and for achieving ever broader acceptance of the international norms, at least until domestic regulatory enforcement catches up with the workplace needs. Even though toys, garments, sportswear and shoes may account for as little of 5% of world trade, the brands selling these products are significant players in China. Reliance on their sincere efforts may provide a good role model for other factories, and hopefully galvanize communities to enhance workplace protection in other sectors. The expanding commitment of investors and of brands seeking to protect against unfair exploitative practices by their competitors creates an expanded constituency for seeking workplace fairness in factories in China and elsewhere. The repeated reports of tainted milk and medicines help to bring those industries under consumer scrutiny as well, and with industrial scrutiny is bound to come scrutiny of working conditions in such industries.. Making available a complaint procedure for NGOs, the public, consumers, workers and others would provide another vehicle for encouraging the brands to live up to their code

commitments, and thus contribute to enhancing the rule of law. Such expanded efforts would assist the Chinese government in its effort to police foreign investment and to avoid citizen exploitation, while encouraging the citizenry to look to CSR as an accepted aspect of corporate operations. This brings me to the core of this paper. What can be done to bring more pervasive adherence to fair labor practices in China and to include the involvement of the All Chinese Federation of Trade Unions (ACFTU) in such efforts?

Issue of workplace fairness in China

The current practice of encouraging multinational enterprises to adopt and enforce Corporate Codes of Responsibility as the most practicable method of helping to assure workplace fairness does not necessarily have global receptivity. In seeking to apply such a procedure to the workplaces of China, it must be reconciled with a long tradition of state ownership and operation of industry. A more innovative 'approach is in order given the turbulent evolution of employment and workplace rights since the creation of the Peoples Republic in 1949.

Although one might suggest that there is no need for worker representation or worker protection in a classless society, it is clear that in evolving its system of State Owned Enterprises the Communist Party envisioned the All Chinese Trade Union Federation as the group which would monitor and resolve any workplace disputes. From the 1970s when the government initiated the economic reforms that were to lead to the efforts to weed out inefficient enterprises and to establish and enhance relations, including commercial relations with the outside world, it was clear that the well established protections of the 'iron rice bowl" such as lifetime job tenure, housing, medical care, school access and pensions would have to give, that there would be layoffs and unemployment as the government shut down inefficient operations and as foreign private investors came in to run ailing SOEs and to open new enterprises producing for export as well as for the domestic Chinese market.

This transformation led to layoffs, increased unemployment and as a consequence, increased petition to the government for back wages, loss of pensions and medical and social security protection, as well as help in getting new jobs. Mass protests by the affected swelled from 10,000 involving 60,000 workers in 1993 to 60,000 affecting 3.07 million workers in 2006[1]. These protests taxed the government's dispute resolution system, particularly the traditional reliance on petitioning the authorities through the Complaints and Petitions Office.

The transition from the traditional planned economy to the growing number of privately owned enterprises operating with increased private sector management discretion and without the protection of the "iron rice bowl" for employees has had its greatest impact on workers and the employment relationship. "The process of labor dispute resolution is, to some extent, still catching up with these changes and periodic large scale worker

[1] Kan Wang, "A Changing Arena of Industrial Relations in China" Employee Relations vol 30, No.2, 2008, Emerald Group Publishing Limited, p 195

protest over non payment of wages or substandard working conditions are reminders that reforms are needed in the labor dispute resolution system to deal with the inevitable and increasing conflicts arising in the workplace and the burdens that attach to an unreformed labor mediation-arbitration process"[2]

Despite the recent changes in the Labor Contract Law and the Mediation and Arbitration Laws the prospect for Chinese workers under globalization is not promising. Worker exploitation is an ongoing problem, unpaid wages and overtime remains a rampant problem, and the workers are denied the full measure of right to form their own unions and to engage in collective bargaining, the prevailing standard in the industrialized world. Workers in both Chinese owned factories, and those owned by investors from abroad, continue to protest over issues of wages, termination, insurance, and work injury.

The recent Mediation and Arbitration law, while appealing in title, bears little resemblance to similarly entitled laws in the western world, where mediation and arbitration gain their vitality as procedures for adversaries to resolve their disputes. In China the absence of any legal organization of grassroots workers raises issues as to the usefulness of the terms themselves. With the ACFTU empowered by the party and government to be present in public and private enterprises, funded by a tax on the employer and often headed by a designee of the employer, worker participation is lacking. While in all western countries the workers representative, the trade union, seeks to protect, advance and champion the interests of its members, and indeed to represent the workers in mediation and arbitration, the ACFTU has no such role. Mediation and arbitration are functions provided by the government, carried out by government functionaries and, unlike in the US for example not recognized and accepted as neutrals to be mutually selected by the disputants, and in the case of arbitration mutually funded by the disputants to assure their neutrality. Certainly the new statutes improve the efficiency of preexisting procedures by extending the statute of limitations for bringing cases, by expediting the time limits for processing cases and rendering decisions, and by making the arbitration decisions legally binding and more readily enforced by civil court action. At present without the right of collective bargaining, and particularly the prohibition against creating independent grass roots unions to represent workers, the proclaimed availability of mediation and arbitration by the same government that sponsors the ACFTU is sadly wanting in terms of the adversarial preconditions for labor dispute resolution that has become the standard throughout the world. Ideally the ACFTU would assume the duties of worker representation that its name suggests. The growing number of workplace disputes in China suggests that such representation would be a worthy responsibility for the ACFTU, would give it a meaningful and more effective role in resolving worker protest in China within the expectation and aspirations of the ILO's Core Conventions. Hopefully, that role will be recognized and assumed in the near future. But for now there must be other means of reaching those goals.

Much can be done to improve the training and competence of government mediators and arbitrators, and to undertake the training and recognition of work done by private

[2] Ron Brown, "China Labor Dispute Resolution" Foundation for Law Justice and Society, Centre for Socio-Legal Studies, "University of Oxford, p.2 2008

mediators and arbitrators and to train advocates for workers and employers in the mediation and arbitration processes.. Recognition of the binding nature of mediated settlements should be accorded by the courts as is already the case for mediated settlement of commercial disputes. Legal and judicial deference should be accorded to decisions reached in arbitration making them final and binding restricting grounds for appeal to courts and eliminating de novo litigation of the same dispute.

Despite the shortcomings of the Chinese labor relations environment and the remaining legal restrictions even with the new legislation, there is still ample room for foreign enterprises to make a contribution on their own toward improving workplace fairness. Such efforts might be driven by the student/consumer pressure groups, or by acting in the face of the increasingly visible movement of shareholders for responsible management. But they may also be driven by the simple self-serving realization that forestalling conflict, providing a worker voice and meeting universal standards of workplace fairness enhance employee satisfaction and increase productivity. In the current environment with thousands of factories closing and millions of workers being thrown out of their jobs, the need for such machinery in the surviving companies is even more pressing. The environment of plant closures and rising unemployment is bound to create uncertainty and concern and disputes in the surviving factories. The development and availability of an internal system for mediating those disputes makes good corporate sense.

A possible roadmap

The effectiveness elsewhere in the developing world of voluntary systems for embracing the standards of workplace fairness provides an inducement for undertaking similar efforts for enterprises with factories in China or for enterprises which purchase from Chinese owned and managed contracting firms.

Investigation and discussion among enterprises as to their best practices, their Codes of Conduct and their most effective techniques for assuring workplace fairness as well as a procedure for handling challenges to enterprise codes and actions would be a fruitful first step. Designation of a mainland factory to serve as a pilot for an industry or community of enterprise owners would provide a manageable way of proceeding with other interested enterprises following the effort, which if successful might be adopted within their own enterprises.

Once the pilot factory or enterprise is identified, investigation of its work practices, the attitude and reactions of its employees to the management, the effectiveness and awareness of their Codes of Conduct, the nature of disputes within the enterprise as well as with outside labor and government agencies and institutions might help identify areas needing attention and improvement. In the current era of economic uncertainty, providing a platform for discussing worker concerns and fears can provide assurance to workers that their voice is heard. Discussions with local industry, government and party officials, would not only help identify problems within the enterprise but also pave the way for enrolling external support for potential improvements.

Of particular importance would be the exploration with academic faculties, particularly law as to their interest in developing programs for training mediators and even arbitrators and for establishing centers to which enterprises, the workers, and perhaps the ACFTU could refer unresolved disputes over workplace conditions. Attention should also be paid to whether local labor bureaus, government officials, the judiciary and ACFTU officials would be responsive to or even cooperate with such outreach to academics. However, even in the absence of the ACFTU participation or as a prelude to its involvement, employers could establish advisory committees of workers to represent and present worker concerns. Hopefully such committees would not be interfered with by local labor bureaus or ACFTU affiliates. Cooperation with such local government entities would be an important step toward encouraging the ACFTU into a role that is more representative of the workers.

Given the best if circumstances it is to be hoped that the enterprise would be amenable to utilizing private mediation and or arbitration to help resolve disputes with workers over matters of workplace fairness or working conditions in general. If the response is affirmative, and all the players are induced to cooperate, or at least not interfere, then efforts should be undertaken to spell out the procedures, to develop the mediator and advocate training and establish a selection procedure for the neutrals serving under such a system.

Regardless of whether the effort is successful, a failure or partially effective, the effort should be chronicled, and evaluated, and the other enterprises who were original participants in the initial meeting be reconvened to share lessons of the effort and hopefully enlist their involvement to expand the role of private dispute resolution in the ever expanding theatre of Chinese enterprise.

Most importantly present time of economic retraction and uncertainty should not be viewed as too unsettled to undertake such an effort or that it be postponed until economic conditions return to stability. I would argue that the current economic environment makes such an undertaking even more important and timely. As international economic activity is in a state of withdrawal, so too will be the situation in the enterprises in China. Any enterprise which confronts those problems, and helps to develop timely procedures for minimizing worker unrest and dissatisfaction and for handling problems of delayed wage payment or job retrenchment, in a shrinking Chinese economy will find itself in a stronger position in its internal and external dealings in an ever uncertain market.

Now, I suggest is the most appropriate time for examining that potential road for resolving workplace disputes in China, and to begin travelling it.