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Workplace Fairness Disputes in a Global Economy: Hong Kong and PCR Perspectives
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International Legal Standards for Labor and Employment Law

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Whatever our background and traditions in approaching this topic, and wherever we have developed our understanding of what conditions and laws should govern those at work, I think we all share an innate sense that although employers are entitled to a fair profit from their investment, workers are also entitled to be free of exploitation. The mutual dependence of labor and management was recognized by President Abraham Lincoln in his first State of the Union Address in 1861. He declared that “labor came first and can exist without capital, but... capital could never have existed without labor.”

The Rule of National Law

Determining how to balance those competing but interlocking interests is recognized as the function of government. In those countries with rule of law traditions, national law evolved to assure fairness in the workplace with government judicial machinery to assure compliance with those statutes, and governmental rules and regulations.

Some countries have evolved more specific legislation protecting workers than others. The United States, unfortunately, has not been as scrupulous as have other nations in providing workplace protections. We have legislation protecting against discrimination based on race, gender, age, disability, and assuring health and safety at the workplace, the protection of whistle blowers, the right to unionize, the payment of minimum wages and

setting maximum hours, but we do not have legislation providing universal health care, or for severance pay or for paid holidays and vacations. In part workplace protection is left to negotiation between the workers and management through collective and individual contracts enforceable in courts. However only 8% of the private sector workforce is unionized and eligible to negotiate additional benefits through collective bargaining. Such negotiated workplace benefits and protections are no more static than are national laws or judicial holdings. And management or capital is not bound forever to provide work, let alone workplace protections, and remains free to move to those locations where they are closer to markets, closer to needed raw materials and launch their factories in environments where the laws, and conditions enable them to maximize their profits. Automobile companies from Japan, Austria and Germany open factories in southern US where they are relieved of the higher operating costs of their home countries and able to produce vehicles at lower cost. Textile and garment companies move from the US to South east Asia and China for the same reason. The facility with which such moves occur in the present day is a reflection of increased mechanization of the means of production which permits sophisticated manufacture using levels of skill that were far less than required in the earlier days of auto and garment manufacture. And increasingly the jobs go to the lower wage areas of the world. Globalization is with us and expanding, and employers either set up factories in new areas or contract with other factories to produce the items sold under their logos.

It would certainly be preferable if the highest level of workplace protection followed those factories so workers in the developing world would secure the benefits of those who had earlier made those products. Indeed it might even stem the flow of such jobs. But that is not the nature of our global society or the goal of the transnational corporations. Their goal is clear: increased profit while producing at lower cost.

The concern of society should be to assure that those increased profits are not achieved by exploitation of workers. Defining exploitation is a complicated task. Paying a worker \$70 a month would be clear exploitation in the US or Europe where such income would be inadequate to provide food clothing or shelter. But in Southeast Asia such a wage

would be above many national average incomes, and in countries where housing accommodations are provided by workers would even be sufficient to allow workers to remit some of those earnings to their families in rural areas.

The Dearth of International Law

Since national laws of the countries from which the jobs had fled, can hardly be expected to provide a definition or standard for determining exploitation in other countries where living conditions, laws, and even traditions may call for much less, how are we to assess workplace fairness in a global economy. Certainly there is no international law, and even treaties and fair trade agreements do not provide such guidelines (at best calling for compliance with the laws of the country to which a firm might move). What should be the governing standards?

International Workplace Standards as a Proxy for Law

The answer lies with the standards of workplace protection provided by the ILO, a former agency of the League of Nations which since 1919 has provided the norms for fair workplace protection developed by tripartite confirmation of labor management and government representatives from its member nations. The ILO structure provides continual monitoring of what the tripartite membership considers to constitute the appropriate international guidance to what nations and corporations should provide as fair working conditions. In its first tripartite Convention, the ILO set the standard for a fair workweek at 48 hours, a far cry from the 40 hour work week that is increasingly viewed as the norm.

The ILO conventions, now numbering nearly 200, have become the standard of fairness embraced throughout the world, regardless of whether they have been incorporated 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 considered by the ILO to be the Core labor standards, the Fundamental Right 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 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.

In addition the Universal Declaration of Human Rights adopted in 1948 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.

Monitoring

Some enterprises seek to avoid these norms in a cruel effort to maximize profits regardless of the exploitation they impose, the so called race to the bottom. Some enterprises undertake to meet or exceed these minima in the belief that workers and as a result the enterprise itself benefits from taking the high road. But many enterprises

undertake to conform to the standards because of the adverse consequences that may befall for failure to do so. In the garment, sportswear, game and shoe industries student and consumer protest over widespread reporting of unfair work practices led to their development of codes of conduct in which they proclaim their adherence to these basic norms, with procedures for monitoring and assuring the public and consumers that they are sincere or at least thorough in assuring their subcontracting factories live up to their requirements. Individual companies and whole industries have come on board in trying to provide a level playing field for those with whom they compete, not only because of sensitivity to the risks of consumer backlash from failure to do so, but also out of concern for the growing body of investors who want to make sure the enterprises in which they invest are playing by the rules. Too often in developing countries the laws, the local government officials and the trade unions may be missing, lacking in qualification or susceptible to bribes and corruption nullifying any credibility from relying on local national institutions for enforcement of local law as the appropriate or effective measures for workplace protection. Among the industry wide and multi employer groups joining the effort have been the Electronics Industry Code of Conduct, the Ethical Trading Initiative, the Fair Labor Association, Social Accountability International, the International Council of Toy Industries, and Worldwide Responsible Apparel Production

As hopeful and helpful as may be these expressions of good intent and high ideals, they cover a miniscule component of international trade (garments being estimated at 5% of world trade) and there is legitimate concern over the extent to which they are being implemented.

Thus, assuming the ILO Core conventions reflect the preferred standards for universal adoption in factories increasingly fabricating the preponderance of manufacturing output, the question before us is how to achieve their implementation.

Some companies will comply willingly. Some will comply under international consumer and investor pressure. Indeed some will comply out of fear that when caught violating the

codes or conventions they may have their contracts summarily terminated posing a whole new range of deprivations for their factory workers.

Cross Border Enforcement

The brands in the spotlight are alert to the consequences of being found in code violation. Many undertake seriously their efforts to make sure their suppliers adhere to their Code requirements. But the sheer enormity of their international supply chain makes that difficult. Disney for example has a \$5 billion business in logo products, manufactured in some 13,500 plants in more than 50 countries. GAP with 7500 suppliers and a clear commitment to Code Compliance has a comparable monitoring burden, No matter how many hundreds of investigators and monitors they assign to the task, adequate scrutiny is impossible, particularly as their subcontractors also farm out their own manufacturing. Presumably even beyond awareness of the brand itself. And for brands which seek the protection of announcing monitoring without a serious commitment thereto, such slippage is readily tolerated. One can see the benefits thereof if the claimed violation is a local factory suppression of Conventions 87 (the right to organize) and 98 (the right to collective bargaining) which might have a severe adverse impact on their freedom of operations. Other brands, while proclaiming adherence to Conventions 87 and 98, might be confronted with being accused of violating national statutes prohibiting private trade unions if they allowed factory employees to organize or if they engaged in collective bargaining in countries such as Vietnam or China where private sector trade unions are prohibited.

Even if the brands seek diligently to assure their factories' compliance with codes the enormity and cost of such efforts make enforcement problematic at best. Investigation of alleged violation is costly and time consuming. Even if they were to add additional protections such as provision of mediation or arbitration of unresolved challenges to their code adherence, the absence of effective government institutions to provide mediation and arbitration within countries of operation make such procedures elusive. I have elsewhere proposed that the brands and factories develop such procedures in manufacturing countries but the determination to bring them into being may well be

lacking. Host countries might look to the example of Cambodia where the ILO has established its Better Factories Cambodia program with ILO rather than brand monitoring, much to the satisfaction of the factories which are relieved of the burden of excessive individual brand monitoring when the ILO does periodic monitoring of local garment factories with a check list of 500 items of inquiry. Lamentably no other country has undertaken such a comprehensive effort to regularize inspections, and equally lamentably the ILO has neither the personnel nor funding to replicate that project in other countries. But it is the best of models, and one which, given the will and resources, could constitute a worldwide effort to bring code and convention compliance.

The need is there. The need is increasing with the expansion of international trade. Greater ILO and national efforts to assume the monitoring role would constitute the most effective and pervasive process for assuring that workers who are increasingly bearing the day to day burdens of worldwide manufacturing are extended the protections that the world has so widely asserted are the prerequisites of a fair workplace. If not now, when?

