

**Mediation of International Labor Standards Disputes
Taking the Initial Steps**

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Increasing conflict over the deprivation of fair labor standards in our globalizing economy highlights the need for an international agency to peacefully resolve such disputes. Industries and manufacturers speedily move production to foreign facilities where they can make greater profits with less governmental scrutiny. We have come to recognize that workplace protections, which we take for granted in the US and other industrialized countries, are often denied to those working in exploitative industries in less developed countries. Indeed, avoidance of high wages and legal requirements of workplace protections may be a strong motivation for company moves from countries where high labor standards are absent or unenforced.

We have seen the fall out in the push for globalization at international meetings where free trade, low or no tariffs, capital mobility and unfettered movement of industry is heralded as the key to a better world for all. However, the quest for profit enhanced by suppressed wages and disregard of basic workplace fairness too often penalizes the new workforce in developing countries who are alleged to benefit from our expanded world economy. It also presages a worldwide race to the bottom to curb labor costs as a priority in that quest for maximized profit. Profits are enhanced if employers don't have to provide light, airy, ventilated workplaces, if they don't have to spend money on fire extinguishers or provide signs to emergency exits, if they can restrict time used going to toilets or lock workers in to prevent sly toilet access, if they can hire below age workers or pay below minimum wage compensation, if they can with impunity abuse or beat workers and if they can demand long hours of overtime without additional compensation. How much better would be a race to the top with higher workplace standards raising the level of all boats in the sea that envelops both the developing and industrialized world.¹ Protesters hit the streets in Seattle, Davos, Prague and Washington to object to government endorsed concentrations of economic power as the cure to economic development, which disregard the need for provision of fair labor standards for workers in developing countries. As Elliott and Freeman point out in their new book, *Can Labor Standards Improve Under Globalization*, the only way non-governmental organizations, trade unions and human rights activists can make their case is through public opinion and political pressure: "They are the guerillas in the public arena".² There is desperate need for some arrangement where those deprived of fundamental workplace rights can have their just complaints adjusted. The protection usually relied upon under national law, international law, or even private binding arbitration is just not available to workers seeking to bring their employers into conformity with fair labor standards. Mediation may be their best hope if access to the process can be made available.

National Law

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

¹ Bob Hepple, A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct, 20 Comparative Labor Law and Policy Journal, pp.347-363, 1999.

² Kimberly Ann Elliott and Richard B. Freeman, *Can Labor Standards Improve Under Globalization*, Institute for International Economics p8, 2003,

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 negotiations³. 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 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.

The movement of capital may be unstoppable, but is there any way to assure that workers in the countries to which these enterprises move have some measure of fair labor standards? If national law will not protect them, can international law or international arbitration provide the protections?

International Legal Rights?

In the US and Canada, if an employee claims a violation of statutory or contractual benefits it may be pursued ultimately to court litigation within the US legal system. The same may be true for the worker in the less developed country (if there is a protective law; if there is a forum for processing that complaint, and if the courts and government are committed to enforce such rights). There too, the limits of appeal are within the national legal system.

Unfortunately, each country controls its own laws, and there is no supervening legal authority to stretch benefits or entitlements beyond national legal systems. The benefits and higher labor standards of workers in plants in industrialized countries are not extended when plants flee to the new workers hired in the developing countries. Nor is there any assurance that the governments in the new locations will even enforce their local laws for the benefit of their workers. Laws and enforcement thereof are matters of national concern. Certainly, there are enforceable international contracts, which can be created between and among firms in different countries, but to be enforceable, those documents governing foreign conduct must specify the machinery or national law, which is to government enforcement. "International law" is law governing relations or treaties between countries and does not reach within countries to provide "international workplace protection" or international fair labor standards.

But what about international Conventions against forced labor, child labor, discrimination in the workplace, and the like? Aren't they enforceable? Since 1919, the International Labor Organization has promulgated 184 Conventions⁴ creating true international workplace standards, each convention endorsed by its tripartite structure of union, management and government in

³ 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.

⁴ The US has ratified only 13 Conventions, and only one of the two calling for abolition of forced labor.

each member state. However, ILO Codes are not law, and do not become law within the member states until adopted by the country. Even then, only the governments themselves can enforce them. Most importantly, there is no international mechanism for those at the workplace to challenge a government on failure to enforce an adopted Convention or procedure to turn to the ILO for enforcement of those Conventions. There is not even any mechanism to force countries to submit reports on their compliance with Conventions they have adopted. Although worker organizations can turn to the ILO to complain about violations of Conventions a country has ratified,⁵ and although a country can file a complaint against another country if that other country has also ratified the Convention in question, even after an ILO Commission of Inquiry, there is no authority to enforce its findings. Unfortunately, the conclusion must be that there is no enforceable international law providing workplace protection.⁶ And that there is no international legal forum in which employees protesting denial of fair labor standards may be assured of protection and redress, or a remedy for their deprivations. In 1999 the ILO formulated its Declaration of Principles⁷, which has achieved a broad acceptability among member states as the threshold standard of workplace fairness. It provides a credible vehicle for encouraging employers to do their part to raise the level of the water to provide fair working conditions. By doing so it helps to minimize the conflict and violence that have arisen over workplace working conditions.

There has been however, an increase in employer promulgated Codes of Conduct in which manufacturers and retailers set forth their commitment to labor standards, which have an international application. These may be as bland as posting notices on the walls of factories setting forth Company goals, with no procedures for challenging alleged violations to Codes which provide for monitoring standards by external monitoring firms some independent, and some paid for by the Code's sponsor. The Codes are not legally binding and there is no international structure, which could require their enforcement. They are hortatory proclamations of intent to do good, without an external mandatory process for their enforcement.

International Arbitration?

We in the US are familiar with the use of arbitration to resolve disputes over workplace conditions in instances where there are collective bargaining agreements. However, that system works only because US law holds unions and managements bound by the terms of their collective bargaining agreements, virtually all of which provide for arbitration of any disputes as to the interpretation or application of the parties' agreement.

However, there is no comparable international labor arbitration forum. The reach of enforceable US labor arbitration is restricted to US workplaces, and the contracts do not extend beyond the jurisdiction of the US legal system. Employment relationships in US firms working beyond US boundaries are beyond the reach of US law and usually lack any comparable governmental union certification process or opportunity for workers in overseas operations to arbitrate alleged violation of US contractual labor standards under US collective bargaining agreements.

⁵ Article 24 of the ILO Charter also permits complaints on violation of freedom of association even though relevant conventions on that topic had not been ratified

⁶ Even under NAFTA (North American Free Trade Agreement, Washington DC. Dec 17, 1992) there is no worker or union right to challenge labor standards or even statutory violations. The right to challenge labor law violations is restricted to one government challenging another member states' enforcement of the latter's own internal statutes.

⁷ ILO Declaration of Fundamental Principles and Rights at Work Adopted by the International Labor Conference, 86th Session, Geneva June 1998

Arbitration is used frequently in international commerce, where parties in different countries agree to arbitrate any disputes over their commercial agreements setting forth the procedures and the national law, which is to be applied to that process. It is conceivable that the same process could be used in the labor field if there were a binding agreement between the employer and its employees, as in collective bargaining. It would require a commitment to use the process of arbitration to resolve any claim of violation of that agreement or standard. It would also require agreement on the procedures to be used in the selection of the arbitrators, and access to and agreement to be bound by the arbitrators' decisions. Even then, enforcement of the arbitrators' decision would require a commitment to submit to the laws of a specific jurisdiction where such enforcement was available. In the global economy, effectively beyond the reach of enforcement of national labor standards and laws, it is unlikely that any employers, unions, NGOs or governments would develop a commitment to an enforceable code of workplace fairness, or be willing to voluntarily abide by any arbitrators decision, which was not imposed on the relationship by some governmental authority. In the US and Canadian labor-management environment, the arbitration process works because union and management both accept the benefit of an outsiders decision, even an adverse decision, because of the greater value of that process focusing on continued operation and economic success of the enterprise in place of work stoppages so prevalent in societies without the collective bargaining arbitration ethos. In the workplace conflicts of the globalizing world, the protesters often have their own agenda of escalating disputes to a broader venue to bring focus on their own, often-political needs. Employees too, may be co-opted in that endeavor, even to their own economic disadvantage, particularly where there is no external legal system in place for placidly resolving workplace disputes such as through mediation and arbitration.

Here too, Codes of Conduct, particularly where they submit to external monitoring, might appear prime candidates for some sort of enforcement procedure. None of the Codes examined, however, submit to any external authority, say through an arbitration commitment to any who challenge compliance with such codes, which would bind the code sponsor to a binding decision on such issues. It would be a simple matter for promulgators of such Company codes to offer to submit to some external independent authority even one of their own selection, to arbitrate challenges to code compliance and to be bound by the arbitrators decisions. None have been willing to surrender to such final and binding external assessment.

Mediation⁸?

The evidence shows that there is no international legal framework that can assure conformity to international labor standards, certainly nothing comparable to a national system of labor standards enforcement. It also shows that there has been no voluntary submission to any non-legal final and binding determination, i.e. arbitration, of even self-proclaimed commitments to adhere to international labor standards. Effective monitoring procedures such as seen under some Codes, are created and put into place when the protestors rely on the pressures of the market place against name brand manufacturers and retailers to effectively corral student and consumer outrage over deplorable working conditions or by threats of boycott⁹. As a result, a number of

⁸ Although I use the term mediation rather than conciliation for this American audience, and although there are some differences between the terms, mediation and conciliation could be used interchangeably for the purposes of the paper.

⁹ Naomi Klein (No Logo, Taking Aim at Brand Bullies, NY Picador, USA 1999) points to the vulnerability of market apparel manufacturers and retailers to consumer and student activists which has led to their developing corporate codes of conduct and publicized monitoring to assure the consumer they are "good citizens"

independent monitoring groups have cast light on sweatshop conditions in factories in developing countries. But these monitoring groups lack enforcement authority, and must rely on persuasion to bring compliance with the Codes.

Some are funded by the employers themselves, and thus, perhaps, loathe criticizing too harshly those companies that permit them to function. But the growing consumer interest in international labor standards has led the more politically and market sensitive manufacturers and retailers to turn to more credible monitoring agencies. In large part because of student and consumer protest and US government concern about runaway shops that severely undercut US labor conditions, a number of new independent monitoring groups have cropped up recently. Among the leading new groups are the Fair Labor Association ¹⁰(FLA), Worldwide Responsible Apparel Production (WRAP)¹¹ and Social Accountability International (SAI) in the US and the Ethical Trading Initiative in the UK.

As trustworthy as these firms which submit themselves to the scrutiny of these external monitors may be and as dedicated and committed as the monitoring firms are, they remain bit players in the globalizing economy. Their sensitivity to consumer pressure in clothing, footwear, toys and retail stores limits their range to the small portion of world trade that is in the public eye, providing little relief to the much larger number of firms and employees in the agricultural sector, the informal sector and the exports of primary and intermediate products. Those workers also need independent monitors, and advocates for bringing their employers into compliance with basic international labor standards. They too should have the benefit of a forum where oppressive employers can be persuaded to comply with international labor standards and workplace fairness

How can this be achieved? Obviously, if there are no legally enforceable standards under either national or international law, and there is little likelihood that the international community will develop binding legal standards to protect workers at work, let alone develop the machinery to ensure that those legal standards are complied. Likewise, there is little expectation that the adversaries in such economic wars, those pushing to maximize profit and those seeking to assure basic standards of workplace decency, would ever reach agreement to subdue their self-righteousness long enough to submit such disputes to final and binding arbitration. Perhaps then, the most hopeful alternative is persuasion though the use of mediation. It has worked with many of the participants under Codes of Conduct to seek voluntary resolution of Code compliance disputes because the political and economic consequences of fear of adverse publicity and potential income loss, from being publicized as being in violation of a fair labor standards Code. Nonetheless, such structures need to be institutionalized within the far greater spectrum of industry in developing countries that lie beyond the glamour and scrutiny of apparel and high profile consumer goods. They need to be made available to protect workers in the less scrutinized and non-visibility workplaces which otherwise escape the glare of passing fads of public do-goodism.

The pertinent fair labor standards are known, accepted and proclaimed. What is lacking in the rest of the world beyond the Codes is a credible institution to which the inevitable conflicts over workplace fairness may be referred. There will always be workers who recognize their fated lot, protestors who pick up their cause to attack the employer, and employers who rebuff any protest, activism, or vigilantism which would threaten their profits. However, they must come to recognize the futility of that continuing and ever escalating conflict and must be alerted to the potential benefits that all disputants may secure by having a peaceful, accepted, accessible forum

¹⁰ www.fairlabor.org

¹¹ www.wrapapparel.org

for mediating or persuasively getting the parties to end their dispute. It works in industrialized countries through established mediation processes. It works in implementing the standards of Codes of Conduct where monitors engage in mediation. And it can work in non Code situations if only the machinery can be developed, the concept sold to the parties and some track record developed to show that compromise, mediation and negotiated settlement are more productive than conflict, strikes, boycotts, and violence. How much better it would be to have available an institution to which a single protesting party might turn with a protest to bring the opposing party or parties to the table to meet discuss and hopefully to negotiate their differences to resolution. How much better it would be to have that institution so accepted that it would be recognized by all as the preferred setting for resolving seemingly intractable international workplace disputes.

On November 6, 2001, ILO Director General Juan Somavia announced the creation of the World Commission on the Social Dimensions of Globalization to “examine ways in which all international organizations can contribute to a more inclusive globalization process that is acceptable and fair to all.”¹² The prospect of more studies and more high-level think tanks seems endless. But the daily 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 continues daily yet appears to be beyond the grasp of heads of state and institutions meeting at international conferences.

In 1999 at a Harvard University visit prior to his assuming the office of ILO, Director General, Juan Somavia asked me to put to paper my suggestion to him for an international conciliation/mediation mechanism as a component of the ILO structure akin to the investigatory functions of its International Body of Experts. I was soon apprised of the difficulty of using the ILO tripartite structure to establish such a mediation service without the involvement of the NGOs. Such outspoken protestors such as Save the Children Federation, Greenpeace and others have played a dramatic role in focusing the public on labor standards issues by their vigilant if not vigilante role at meetings of international bodies such as WTO, EU, IMF in Seattle, Davos, Washington and elsewhere. They should appropriately be involved in the development of such an institution. After several years of inaction on my proposal by the ILO, the Permanent Court of Arbitration convened a meeting on May 7, 2002, on “Labor Law Beyond Borders: ADR and the Internationalization of Labor Dispute Settlement”.¹³ I presented a paper pointing out the preference of mediation to achieve work place improvement in contrast to local or international law or arbitration.

I proposed the creation of an international mediation institution under the guidance and administration of the PCA, either within its structure or as an ancillary facility. I suggested that disputants of local or international workplace disputes, employers workers, unions, governments and NGOs could appeal to the mediation institute for assistance in helping to resolve claimed violations of core ILO standards, proclaimed protections of Codes of Conduct and the ILO Declaration of Fundamental Principles.

Upon receiving a request for mediation, the administrator would seek to secure agreement of the other disputing parties to undertake the mediation. The administrators might also mediate with the other reluctant parties to get them to the table and guide the adversaries into the process. Once agreement was reached to use the mediation facility, the administrator would offer the names of

¹² *Enhancing the Actions of the Working Party on the Social Dimension of Globalization: Next Steps*, Working Party on the Social Dimension of Globalization, WP/SDG, Geneva Nov 2001.

¹³ Papers emanating from that Fifth PCA International Law Seminar under that title are available in Permanent Court of Arbitration/Peace Palace Papers, Kluwer Law International, The Hague

\mediators, either locally available or from an international roster of mediators recruited and trained in the particular laws, codes and conventions appropriate to that workplace. Mediation may be provided as a tool of government in many countries, while private individuals serve the function elsewhere. In some countries, there is no established process of mediation, or conciliation, and for those jurisdictions, the development of training programs by the PCA might be appropriate to provide a roster of qualified neutrals proficient in the local languages. While participation of a mediator in any conflict does not guarantee resolution of the pending dispute, mediators 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 possibly helping them develop commitment to certain standards, perhaps even using arbitration as an agreed upon monitoring vehicle. At the very least, the mediator would be able to show the disputants the benefits of talking over outstanding issues and the availability of the process to resolve future disputes where the parties so desire.

Following the meeting in discussions with the PCA Secretary General Tjaco T. van den Hout, we explored a number of approaches to initiate the project on some sort of trial or model basis. Coincidentally with our discussions, Richard Freeman, an associate from the Labor and Worklife Program at Harvard Law School, advised me of the forthcoming study he was writing with Kimberly Ann Elliott¹⁴ under the auspices of the Institute for International Economics. We discussed my proposal for the mediation service, which they felt, constituted an appropriate vehicle for achieving the goals they set forth in their volume. Together we developed plans for a launch at the London School of Economics on November 3 and 4, 2004, of their book and the announcement of a pilot program for the PCA Mediation program focusing on the development of a program of mediation of disputes arising under Codes of Conduct. That meeting will convene experts in the field from management, unions, monitoring groups, NGOs, and other international agencies, which we hope will fully participate in the development and operation of the project

Conclusion

The path we have embarked on is a new one. There has never been an international institution which has committed itself to trying to achieve voluntary improvement of workplace conditions by bringing together such disparate and opposing groups with the goal of reaching common ground. Nor has the process of mediation or conciliation ever been offered to disputants on such a global scale. But the process of mediation has worked in innumerable situations. It is, after all, the most positive and mutually cooperative means of resolving conflict while assuring cooperation toward economic development. In a world where globalization has left in its wake so much conflict, protest and distrust, this undertaking provides a promising means of demonstrating international interest in peacefully resolving local problems. It also demonstrates an international willingness to support the concept of workplace dignity and rights for those who otherwise struggle without any awareness of the rest of the world, let alone that the rest of the world seeks to provide them work place fairness in conformity with accepted international labor standards.

¹⁴ *ibid* fn 2

