

Using Mediation to Resolve Workplace Disputes in China

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Newspapers are filled with reports from China of exploitative workplace conditions and tens of thousands of wildcat strikes in an ever expanding private sector, with reports on restrictions imposed on the work of NGOs, and the development of independent trade unions that in other countries would help to remedy or overcome such unfair practices. Even though the government has made strides in promulgating new labor legislation, there is still room for a private system helping to achieve compliance with the standards set forth in many Corporate Codes of Conduct. It is appropriate that the consuming and investing public, the transnational corporations purchasing from Chinese factories and the world at large intensify their efforts to establish fair workplace conditions among factories producing for the Foreign Investment Enterprises and the conscientious brands by exposing worker exploitation and thus hopefully avoid or forestall a race to the bottom. Herein are some thoughts on how such an undertaking might proceed within existing Chinese law, and hopefully with the participation and encouragement of Chinese institutions.

We all recognize that the national laws of the consuming or “brand” homelands often do not extend their usually robust levels of worker protection to the developing countries where an increasing share of the world’s products are made and services provided. We also recognize the lack of controlling international law and even the lack of the prodding encouragement by international agencies that finance and encourage such economic development. Fair trade agreements have so far failed to provide meaningful standards or machinery for encouraging enhancement of workplace protection.

There are however two credible routes for pursuing workplace fairness in factories where it is currently ignored or flaunted. The first is through promoting and proclaiming the workplace

fairness norms of the International Labor Organization. Since 1919, with China as a founding member state, the ILO through its tripartite endorsement by workers, employers and governments has promulgated some 200 International Conventions focusing on workplace standards. The eight “core” conventions have been accepted as the universal standard in the ILO’s 1998 Fundamental Principles and Rights at Work¹. International agencies and organizations, employers, NGOs and other states should be continually proclaiming these standards as controlling for factories throughout the world, and in particular in China. The Core Standards have driven much of the debate around Corporate Social Responsibility (CSR) in initiatives proposed by the more credible proponents for workplace fairness.

A second and more immediate and actionable route for pursuing workplace fairness is through the Codes of Conduct promulgated by the brands and international groups seeking workplace fairness under programs of Corporate Social Responsibility. Most brands in the marketing of garments, sportswear, toys and shoes have adopted Codes of Conduct 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 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 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 too great, the frequency of monitoring inspections too sporadic, and the commitment of participants too subject to self-interest to assure such an endeavor’s thoroughness, adequate frequency and success. Too often it consists of a single individual making a scheduled single day factory visit with time for factory shapeup and of doubtful reliability. For some brands, the announcement of CSR may be viewed as sufficient itself to escape from consumer wrath and boycott. For other brands complicity with factories to tolerate breaches and fear of loss of supply from a factory may be enough to result in their ignoring or hiding Code violations. For the monitors employed by the brand or independent

¹ ILO, Declaration on Fundamental Principles and Rights at Work, <http://ilo.org/declaration>
Conventions 138 and 182 prohibit child labor, Conventions 29 and 105 prohibit forced labor, Conventions 100 and 111 address workplace discrimination, Convention 87 supports freedom of association and Convention 98 endorses collective bargaining.

agencies there is likely reluctance to report “bad news” such as the brand’s failure to achieve or record adherence to Code standards. That would be particularly threatening if the report called for the brand or the factory to act against its self interest in permitting the organization of worker unions 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 moving toward 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. 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 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 enhance the role of the All Chinese Federation of Trade Unions (ACFTU) in such efforts? I offer the following suggestions.

First, institutionalize private mediation of claims of code violation as a way of enhancing the prospects of achieving workplace fairness. Current Codes of Conduct, even if they provide internal or external monitoring, tend to close the door after investigation and internal decisions as to whether to meet such demands. I would urge brands to append a [complaint](#)

~~procedure~~complaint procedure through which an individual, group of employees or organization alleging the problem had not been resolved, could appeal. I would suggest the creation of an independent institution outside the corporation perhaps in an academic setting, staffed with trained, private mediators, serving pro bono, or with a token payment from a foundation or from an IFE escrow pool, who could then help bring such lingering disputes to resolution.. This would constitute a positive departure from existing Chinese legal systems which tend to focus on issues arising after the employment relationship has ended. Expedited resolution of disputes within a continuing relationship would benefit both workers and employers.

Provision for employees and others to raise issues of code compliance between monitor visits would certainly bring the brand, factory and society closer to achieving the worthy pronouncements of CSR.

Second, develop that independent institution with the participation of representatives from the Ministry of Labor and Social Security, local labor bureaus, the local employers association, and the ACFTU as well as its local branch, free of control by the brand, at a law faculty, an NGO or some neutral facility, to which the challenge would be referred. After an examination to determine whether the complaint has indeed not been addressed, the institution would refer the dispute to one of its mediators. As a prerequisite to this role, I would have the institution recruit and train a body of academics, leading citizens, lawyers and the like in mediation practice and applicable code, regulation and law, and provide the parties with a designated mediator or their choice of mediator to meet with the disputants to help them work out a mutually acceptable resolution to the lingering dispute. Although some brands currently employ mediation on an ad hoc basis, its institutionalization as part of the Company code, through an independent entity with designation of neutral mediators, would certainly enhance the acceptability of the code and likelihood of success in resolving such conflicts. It would certainly expedite the process for identifying disputes and hopefully expedite their resolution. The system leaves to the participants whether the proceeding remains confidential to the parties or is made public. If independent or foundation funding for such an institution is unattainable, a fund collected from participating employers and under independent control, might be sufficient to support such an institution.

Third, offer the ACFTU the option of participation in an advisory group to the independent institution, or as a source of some of the mediators, or preferably as advocate for the complaining workers. In a similar program for mediating unresolved statutory enforcement issues at the US Department of Labor, we offered a panel of three from our roster of 36 mediators for the parties to each strike one in selecting their neutral.² The disputants would thus be free to select a neutral private mediator, or ACFTU or labor bureau individual to serve as their mediator. Public records should be maintained and be available to determine mediator involvement, the dates and nature of the dispute as well as its outcome.

Fourth, encourage legislation making such mediated agreements enforceable in courts as binding agreements. The government, party or judiciary might assist in helping to secure such legislation.

Fifth, using the above as a model or experimental undertaking, in an effort to avoid economic strikes over statutory violation such as non payment of wages or overtime or other issues becoming political strikes, I would urge the authorities and ACFTU to develop an independent private arbitration structure, staffed in a manner similar to the abovementioned mediation facility, to which claimants could appeal alleged statutory violations, or to which courts could refer such claims, having them heard and resolved by private arbitrators whose decisions would then be enforceable as judgments in courts of law. The independent institution could recruit a similar list of esteemed local individuals, academics and the like, train them in the pertinent statutes as well as arbitration practice, and then provide a procedure for arbitrator selection comparable to the procedure for mediator selection discussed above.

Sixth, commence an international effort among corporations and governments and international agencies proclaiming a commitment to workplace fairness and adherence to the ILO core conventions, with the goal of encouraging inclusion of such social clauses in trade agreements, as a condition for grants from the World Bank and other international lending and funding agencies. Enhanced consumer awareness of these issues among consumers of electronic equipment, furniture, services and other manufactured items might effectively expand the

² We established a roster of 36, twelve of whom were FMCS mediators, a second third were mediators who had undergone 40 hours of mediation and statutory training and the final third were mediators who had actually mediated more than 20 such disputes.

scrutiny of workplace issues beyond the minimal range of manufacturers currently receiving attention. Bringing focus upon industries other than garments, toys and sporting goods where much has already been done relying on global scrutiny might conveniently dovetail with the Chinese governments strategic economic development plans

Seventh, holding conferences in China attended by FIEs, government agencies, ACFTU, universities, law schools, the judiciary and NGOs to discuss these issues and procedures could have a valuable impact in expanding interest in and support for the mediation and arbitration approaches proposed above. Government endorsement of the program, although it is basically a private undertaking, would undoubtedly encourage cooperation and participation among similar institutions in the community and region and among factories producing for other sectors.

Eighth, discussions should be encouraged between the ACFTU and the factories to provide the ACFTU with a more credible role in representing the interests of the workers in such private enterprises. Although this approach might be rejected by some international trade unions and NGOs, it would provide a vehicle for the ACFTU to achieve enhanced conditions and benefits for factory workers, and improve its acceptability among workers as their representative. The likelihood of rejection of any illegal grass roots union movement makes such an approach even more hopeful as the more effective route toward the goals of ILO Convention 98, acceptance of collective bargaining.

Ninth, the project should commence with exploration of the establishment of a pilot program in a single community where the local university is tied into the regional manufacturing industry and might help to spread the word and encourage the development of the independent institution for recruitment and training of mediators and arbitrators to fulfill the above listed roles. The manufacturing concentration around such universities enhances the likelihood of such changes being adopted on an industry wide basis. A comprehensive and contemporary evaluation program would lead to chronicling the effort and its expansion or replication in other communities and industries.

Tenth, if the environment and Chinese government become more supportive of these proposals, efforts should be undertaken to encourage the ILO to provide the monitoring of the local factories as it has done in Cambodia under its Better Factories Cambodia program and through its Cambodian Arbitration Council. Management in the garment industry has hailed the role of the ILO for replacing intrusive overlapping brand monitoring with a process of the ILO doing the monitoring for all brands, and for sponsoring the Arbitration Council as a body of neutrals to resolve disputes, thus overcoming the need for worker resort to strikes which too often disrupted product delivery.

The foregoing suggestions will not alone achieve workplace fairness within the factories of China or even transform the ACFTU into a grassroots trade union. But they might prove helpful and achievable steps on the road toward those ends.