

ADR and LABOR STANDARDS: LESSONS TO BE LEARNED FROM THE US

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Bring conflicting groups together to reach a common goal and disputes are inevitable. Every participant in such an effort has its own objectives, its own time table, its own audience and its own people in command. Disputes over issues of Labor Standards are no different. Even if we all agree that Labor Standards are desirable, disputes over 1. what such standards should be, 2. the best way to achieve them, and even more so 3. how to achieve compliance with agreed upon International Labor Standards, are inevitable.

The development of a mutually acceptable system for resolving these conflicts is essential. While such a system must respect and be based on the needs of the participants in China or wherever situated, the US experience in using voluntary conciliation/mediation and arbitration to resolve workplace disputes might be helpful in implementing workplace standards of fairness in our globalized economy.

This is not time time or place for a review of US Labor Law, or of the operations of labor relations in the US, and I am not the one to lecture on those topics. But focusing on a narrow but unique component of the system, the US process for resolving workplace disputes, might be helpful when looking at the bigger picture of workplace fairness under globalization.

As in any country, administration of US labor law is the responsibility of the government's administrative agencies and of the judicial system. But inherent in that recourse for enforcement of statutory workplace protection comes the high cost and long delays of litigation and most importantly a focus on past violation of rights rather than a focus on interests, i.e. improving the disputants' relationship in the future.

But in the US there has also evolved a private system of workplace law under collective bargaining, the Law of the Shop, which is just as much in need of a judicial system to assure compliance, as is statutory law. ADR, Alternative Dispute Resolution, has been the backbone of the US system. In the collective negotiations arena, bringing the disputant parties of union and management together, conciliation is provided by the government to assure that these private parties are able to agree on a treaty, a collective bargaining agreement. And within those agreements, the parties create their own judicial system with arbitration as the final and binding step to resolve disputes over compliance with that agreement or treaty.

That US system has been in place and been voluntarily adhered to by unions and management for some seven decades. While only a minority of US workers have opted to join trade unions, the structure of conciliation and arbitration of workplace disputes has also been adopted by large numbers of employers in the non unionized sector as an effective and acceptable means of resolving workplace disputes and for the few cases where statutory issues are involved, a more expeditious and less costly process than resort to the governments judicial system.

That is a system that is unique to the US, one evolved under laws which encourage private dispute resolution. Every other country has its own national labor laws and its own machinery for resolving workplace disputes. The rest of the industrialized world where the government role is more pronounced has evolved a system of Labor Courts and Works and Industry Councils to resolve workplace conflicts. In other countries, particularly in the developing world, the governments often lack the resources or the will to provide comparable effective machinery for assuring workplace fairness.

Does it matter? It seems only logical that when workers work they should be protected by their national machinery and laws. But often they are not. International commerce is dedicated to maximizing profit. Industry relying on manpower for assembly of garments and the like can move quickly and profitably to those countries where lax or no enforcement of workplace protections can substantially enhance those profits. The option of workers achieving protection through legislation is difficult and time consuming and with the arrival of industry to provide work for the unemployed, governments too often focus on keeping the jobs from moving elsewhere for even greater profits than on improving the workplace protections of their working citizens.

So this brings me to my main point. National labor laws and workplace law enforcement too often provide too little protection to the workers in these developing countries to which do much of industry is moving for legitimate self interest. In the absence of meaningful governmental workplace protection in developing countries, how can we monitor or assure workplace fairness? The answer has come through the increasing protest of consumers, NGOs, the public, and students on factory employer to provide such fairness irrespective of whether national governments or laws do so.

And how does one define workplace fairness? The world's governments have. Since 1919 the International Labor Organization has set the standards, the norms of workplace fairness by the adoption by its tripartite members (unions, employers and governments), of nearly 200 International Conventions. Eight Conventions have come to be identified as the Core standards for workplace fairness:

- C87 and 98: freedom of association and the right to collective bargaining
- C 29 and 10: the elimination of forced or compulsory labor
- C138 and 182: the effective abolition of child labor
- C100 and 111: the elimination of discrimination in respect of employment and compensation

Unfortunately, the ILO has opted to pursue conformity to its conventions through its tripartite national structure, and has not utilized its international standing to pressure companies and governments to conform to the international standards it has created, which are likewise reflected in the Universal Declaration of Human Rights.

Instead of the ILO carrying the torch work to assure workplace fairness, the task of achieving conformity and implementation of the Core Standards has been assumed by student groups, consumer groups, NGOs, trade unions and the brands which purchase products made for them in thousands of factories in dozens of countries around the world. Disney alone produces its logo clothing and products in over 13,000 factories in 52 countries. The result of their efforts has been the development of Codes of Conduct for the brand companies and their suppliers asserting that workplace fairness is adhered to at their thousands of factories

So what does that have to do with us here? We have gathered together to discuss the evolution of labor standards in China and elsewhere. Achieving agreement on standards and assuring that they are scrupulously enforced is not always a harmonious undertaking. Disputes are bound to arise in determining what standards are to be in place, over the content and the development of the codes, and over how the code is to be enforced.

Conciliation is a crucial tool in achieving agreement on those standards by bringing to the main table those who are pursuing (or running from) adherence to international labor standards. National governments and perhaps one day, the ILO, should provide conciliation assistance to those enterprises, brands and interest groups who strive for agreement on Codes of Conduct or other measures endorsing commitment to fair labor standards. It is not something that should be left to the warring parties, the brands, the factories, the NGOs the unions, the student groups etc. As noted at the outset the various players have different motivations for talking with or even confronting, their adversaries about the development of Codes of Conduct or commitments to conform to fair labor standards. Availability of conciliators can keep the needed players at the table and avoid their stalking out with potential for scuttle the efforts of those who remain to work out their differences.

And built into those Codes of Conduct or commitments should also be measures assuring continued adherence to them, and the opportunity for those challenging such commitment to raise their voices and be heard. Inherent in the Codes is an obligation and assurance of transparency. Yet few of the Codes appear to provide recourse for those protesting their violation by the brand or the factory. How much more appealing, and persuasive, would be a Code with an 800 number for registering complaints of code violation, one which provides a mechanism for pursuing the complaint, a form of grievance procedure, including provision of a conciliator, if needed to help resolve such disputes involving the integrity and commitment of the Codes and their sponsors.

Where should these conciliators come from/? Certainly, if provided by the sponsors of the Codes there would be questions of confidence if employees of a participating brand or

factory were to try to resolve a dispute with an entity challenging its Code compliance. One might also wonder about the alacrity with which an employer would embrace a protest by a union group challenging the Conventions on freedom of association and the right to collective bargaining. One might also worry about the neutrality of conciliators, or indeed monitors on the payrolls of the firms subjected to such challenges

Mediators from national governments may be suspect as well. Most governments have their own conciliation services, but many are of questionable competence and independence, and global enterprises and interest groups are naturally concerned about working with conciliators employed by the local governments which have a vested interest in protecting the foreign investors and enterprises which have come to their shores with self interest that may not always mirror those of their employees. Indeed it could be argued that the most effective conciliators in such disputes would be those independent of the host government, coming from other countries without a vested interest in the standing of the questioned enterprise in the eyes of its host country and government.

The ILO does not have sufficient trained personnel to meet even the present needs on a global scale although they do have internal procedures for resolving similar protests referred to it and have done so on occasion in the past. The problem facing the world of globalization is the volume of the investment and moves of capital and producers, a volume which is increasing constantly. Unfortunately globalized giants are not easily cowed by local governments.

The most promising approach might be to create an independent commission of conciliators, housed perhaps in the Permanent Court Of Arbitration which could recruit and train private and non governmental conciliators from various countries, with local language proficiency, with credentials of independence, and with experience in labor relations from around the world, and make them available when trouble breaks out over conforming to Codes or over other issues which bring the enterprise, the brand and the NGOs representing workers or locals into conflict. And such a service could also serve a crucial role in diffusing the all too frequent confrontations and conflicts that seem to regularly follow meetings of the IMF, World Bank, WTO and assemblies at Davos and elsewhere.

Irrespective of whether the ILO undertakes to provide the service, the evidence shows that the need for such neutral facilitators has been recognized, and in some cases the move toward conciliation is gaining credence. Some of the Code companies are looking into the concept of a grievance procedure with a facilitator to help bring closure to any challenge to Code Conformance, but as noted above being a conciliator paid by the enterprise raises legitimate questions of impartiality and might well stymie access to the system. In Cambodia, the ILO has had spectacular success in establishing fair labor standards within the Garment industry and its support of the Cambodian Arbitration Council has led disputants in areas outside the garment industry to turn to its neutrals for assistance in conciliating all sorts of commercial conflicts. In Central America, and in particular in Guatemala where The Global Fairness Initiative is undertaking to develop a

nation wide Code system, interest has been expressed in having conciliation integrated into the negotiations of the system as well as its enforcement on a CAFTA wide basis, perhaps by the Cost Rica office of the Permanent Court of Arbitration.

Despite the rapid movement of industry from the industrialized to the developing world over the past very few years, all indications suggest that it has merely just begun; This conference underscores the concern about labor standards growing in China, as it assumes an ever more significant role in the world of work. Accordingly, it is crucial that attention be paid not only to the need or benefits of developing a program of fair labor standards, and using facilitators to bring accord on such standards. It is also crucial that attention be paid by the enterprises as well as the proponents of labor standards in this and other countries, to assure that Codes once developed, are complied with. An important element in assuring adherence to the codes among the brands and factories and NGOs, is making provision for conciliators to help in resolving the most contentious issues arising over Code compliance. The role played by conciliators within Codes of Conduct could as noted above also be played in the often contentious relations among NGOs, enterprises and international organizations such as the ADB, WB, IMF, WTO and the ILO to help avoid confrontation and conflict.

In the rapidly globalizing world, as the power of international enterprises escapes from the scrutiny of national governments, it is essential that comparable global alternative processes be developed to assure that workers in developing countries labor under fair workplace conditions. Whether such processes be developed by the ILO, the PCA, or by private institutions, the need is pressing to bring some semblance of fairness to the workers and the workplace in the effort to avoid, or deter the Race to the Bottom. ADR deserves to be placed on the agenda of all institutions striving to bring labor standard fairness to the exploited workplaces of the world.