

Governance, International Law and Corporate Social Responsibility
**Workshop # 3 Synergy between Employers Practices and
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I have read with great interest the analysis prepared by Professor Shangyuan Zheng and Legal Science Master Chunhai Hu.. I admire and concur with the manner in which they have explored the development of inherent labor rights as human rights from the pre Capitalist era. We must all certainly agree that the exploitation of children at work and that the forcing of humans to work against their will, for example, are and have long been wrong for any society, and that humanity has long believed that such improper practices should be extinguished. Such has been the legitimate goal of the developing states over the centuries, i.e. “to protect the basic living conditions of natural persons” as the authors properly note.

States enshrine and enhance those protections of basic human rights in their Constitutions and/or their statutes and develop procedures to protect these basic human rights for their citizens and assure them of statutory protection and enforcement. States thus undertake to protect these basic rights of their citizens against encroachment and violation by enterprises, individuals, or corporate institutions which disregard or deliberately violate the enjoyment of these inherent rights by their employees. Too often the primary motivation for the violation is the effort to maximize profits for the benefit of the enterprise’s owners and shareholders.

Those differing objectives between capital and government are not new. While the authors refer to the need to assure that the Capitalist enterprises are made to refrain from such exploitation by the imposition of the rule of law. But compliance with the rule of law is not automatic. Rather it has always been subject to evasion and challenge and efforts to thwart its intent and reach.

The rule of law has always necessitated administrative law with procedures geared to enforce the law and to protect those fundamental human rights which are enshrined in a nation's constitution and specified for protection by national statute. And it has always required the development of judicial structures and procedures to impose compliance and to punish violations of the law. Merely outlawing proscribed conduct even with the most draconian of punishments, does not achieve the eradication of inhumane workplace conduct. The succinct standard set forth by the authors: "no relief no right" encourages us to assume that if the constitution or law is specific enough and if the penalty for violation under that constitution, statute and presumably judicial decision is proclaimed and invoked, the human rights so enshrined in law will be protected. The authors recognize in their piece that such idealism is as yet beyond attainment, in part they suggest because the "investigation of legal accountability for violation of labor rights has yet to be strengthened and the labor rights dispute resolution mechanism has yet to be perfected." While I agree with the latter conclusion that the labor rights dispute resolution mechanism has yet to be perfected, I am not sure that the strengthening of the 'legal accountability for violation of labor rights' is the reason that the ideal of constitutional and statutory protection of basic human labor rights has yet to be achieved.

States may set forth all the protections they deem appropriate to protect their citizens through their constitutions and in their statutes and, indeed, may prescribe the most sophisticated procedures for investigating and punishing violations of basic human rights, and they are encouraged to do so. But such written protection is not a guarantee that any government can achieve their proclaimed ideals or their moral objectives in protecting workers in the workplace on their own. In an ideal society the enterprises will conform to the law and treat their employees in accordance with the law, and as community responsible participants in a law abiding state. If such were compliance with such a universal standard, we need not be here. The more pressing reality is that enterprises, particularly corporate, do not always see it in their self interest, or the interest of their stockholders to willingly adhere to the constitutionally and statutorily prescribed norms of community behavior. Some do with peripheral challenges to what they may view as

over-reaching government when their disputes are adjudicated in the societies judicial system, with compliance therewith assumed as expected of good corporate citizens. It would be a far nicer world if, as the authors hope, corporations would recognize the balance between accountability to their stockholders and accountability to the public interest. But too many are unwilling and too arrogant to play by these societal rules and norms.

I suggest there are two main reasons for the shortfall, the first being the attitude, motivation and commitment of the increasingly powerful enterprises unwilling to be regulated by the legal constraints, and the second being the attitude, motivation and commitment of the countries where these enterprises are located, and to which they move their enterprises.

As to the first, in addition to the motivation and commitment of the enterprises which employ workers in alleged violation of basic human right as well as national constitutions, laws and regulations, the authors stress the inherent injustice of capitalist employment. They dwell at length on the historical legacy of Capitalist enterprises, where the motivation, indeed the primary objective for the creation of the enterprise has always been the maximization of profit.

Corporate enterprise, as the authors point out, has evolved over the decades as national economies have flourished. Many have become good corporate citizens, but many others have increased their capacity and ability to resist reform statutes, and administrative and judicial supervision and restraint. For some corporations their sheer size and political influence dominates the political structure enabling them to flout the law, with minimal risk of being held to task. The paper's reference to corporate takeovers and more recent newspaper accounts of crack down on some corporate wrongdoers such as Dennis Koslowski of Tyco, Bernie Ebbers of WorldCom and Kenneth Lay and Jeffrey Skilling of Enron, show that although laws may in some cases bring justice in the criminal sense, they may be unable to assure the benefits foreseen by protective statutes calling for corporate social responsibility. The impact on workers at Enron who lost their jobs,

pensions and futures, or those at GM and many of the airlines who have lost their pensions, health care and promised retirements, highlight the determined quest for maximized profit at the top, or for the manipulating investors without regard for their presumed responsibility of corporate managers to community and their own loyal employees. Laws exist to protect workers, pensions and health care benefits for employees. Nonetheless wily corporate leadership too often manipulate or avoids the laws for their personal self interest with scant regard to any obligations under theories of social responsibility. In some cases the course taken is direct violation of the law. In other cases it is evasion of the law, or manipulation of the legal system to achieve results that violate the basic precepts of the social contract. Some get caught, some get penalized and to some extent the Constitution, legal protections and administrative and judicial enforcement machinery do work. But so many do “get away with it” that it undermines that essential component of the social contract, the cooperation and respect for the relative roles of management and labor in an industrial society. But the response of the others that trouble us the most, those who too often are unwilling to remain in domains where the socially responsible laws are enforced and seek to move their whole enterprises or to subcontract their work component to other countries with less stringent laws, or enforcement thereof. Sometimes these managers are driven by personal or corporate greed, but other times they are driven by the need to survive amidst the unending competition that is an increasing component of our shrinking economic globe.

I was born in the shoe manufacturing city of Lynn Mass, at one point the major footwear provider for the United States. It was not corruption or greed that closed the shoe factories of Lynn including that where my father worked. It was the economic demand of improving access to raw materials and shifting markets. The legal protections afforded to the workers in the shoe mills, protected and enforced by statute could not compete with the economic reality of the market place. Those factories are now all gone, first to St. Louis and then abroad. And now, in 2006 we find those shoes made primarily in China. The one city of Dungchuang with 1400 shoe factories produces one billion pairs of shoes per year. China in 2004 produced 6,5 billion pairs of shoes, 55% of the worlds output.

Do the protective labor laws of Massachusetts or the US still apply? Of course not. Do the laws of China apply? Yes. Are they the same? Presumably not due, to different wage standards, overtime provisions, healthcare benefits, worker rights of freedom of association and collective bargaining and on and on. Should such moves be prohibited to protect the legal rights of workers? Should the legal rights of the country from which the work is shifted be required of the new country so it can be applied to these new workers? Of course not. One cannot halt the movement of commerce to new markets, to improved access to raw materials, to a more efficient or lower cost work force. Nor can one impede the right of the enterprises to take advantage of more favorable national laws. Inevitably, and almost by definition, corporations will continue their effort to maximize profits, in legal and perhaps questionable or even illegal ways. And it is illusory to expect that corporations will suddenly all become good citizens. The authors acknowledge that even when they espouse corporate social responsibility: “Their aim is to pursue profit is number one...” That suggests that they will not always willingly adhere to the laws and regulations of the nations to which they move. Corporations have not only the power to bring jobs and factories to new locations to help provide wage employment for the new industrial society in more and more formerly agricultural and rural nations of the world. They also have the power to bring out of poverty those who had had no jobs and those whose agricultural employment has been lost to unfair agricultural tariffs and protectionism imposed to protect the agricultural workers of Europe and North America. And unfortunately, in many countries they have the power to circumvent the laws and avoid their enforcement by means of threatening to move to a still lower wage country next door when confronted with the prospect of local wage and protective law enforcement.

And this raises the second impediment to achievement of Social responsibility, the attitude, motivation and commitment of the governments in the countries to which these corporations move.

The new host governments seek the new factories to help overcome unemployment, counteract stresses of internal migration, to achieve more wage income to fuel economic

development and to improve the living standards of their citizens and to increase the prospect of enhanced international trade from new exports. New factories mean more income to their citizens, often indeed their first access to wage jobs from a deteriorating agricultural base. The opening of new factories also provide unique opportunities for further enhancing the benefits to the new wage earners by ensuring humane working conditions through protective legislation. Will the new host countries fulfill their mandate to enforce and uphold the laws so exquisitely crafted to protect the basic human rights of this new class of wage earners? The societal norms of the world as proclaimed in the ILO conventions cries out for them to do so. The written constitution and statutes of the host country may likewise call on them to do so. The will of the civil servants is also presumably to do so. The protection pledged to wage earners by all these institutions expects them to do so. But we hear stories of government officials who are thwarted in their efforts to impose such protective legislation. Sometimes it is at the urging of corrupt higher officials; sometimes it is inherent in the jobs themselves. The Minister of Labor in one Southeast Asian country told me, “our mediators have to take gifts; their government salaries are so low”. Sometimes it is out of unspoken fear that the factory may move elsewhere or that the official may be in jeopardy for merely doing his job. Thus I think we all realize that the most beautifully drafted constitution and set of laws, together with the most effective administration and judicial appeals process does not magically bring adherence to the law, especially in the field of human rights, where the marginal benefit of implementing the law may be outweighed by the political and economic imperative of turning ones cheek to allow the capitalistic enterprise to prevail.

Certainly it would be welcomed if the corporations took the high road proposed in the paper to participate in Employee Stock Ownership Plans, or if they put employee representatives on their Boards of Directors, or voluntarily participated in German style Co-Determination Schemes. The authors wishfully assert that “A corporation pursuing profits at the expense of social accountability can not be expected to live long” Indeed I think the opposite may be true, that the life expectancy of such a responsible company may less than its competitors which are more hardnosed and less willing to adhere to concepts of social accountability. The prospects of constitutional, statutory,

administrative and judicial provisions prevailing for the protection of workplace rights in too many areas of the world is mere wishful thinking, let alone a panacea, and indeed prospects for such protection of the rule of law are in grave jeopardy in our profit driven, highly flexible corporate world.

Does this mean that all hope is lost, that corporations will always adhere to their dark side? That governments and statutes and standards are meaningless and that we are on an inevitable race to the bottom?

Hopefully not.

There are two areas outside the traditional role of legislatures and the courts, where the rule of law has made its mark. The first is within the realm of the ILO itself, and the Second has been in the realm of the marketplace. In each area the relationship has not been one of law enforcement, but rather in area of voluntary compliance with its higher ideals.

Since its June 1998 announcement of the Declaration of Fundamental Principles and Rights at Work, the ILO has undertaken a laudable effort to spread its word and influence. At the 87th Session in June 1999, the Director General issued the Report on Decent Work highlighting the importance of ILO and its Conventions as well as technical assistance, in improving working conditions, providing the platform for international debate and for normative action on workplace social policy affecting the world of work. After reviewing its positive role over the decades, and the economic changes that have come with globalization, the growth of new non governmental organizations which are pursuing goals consistent with those of the ILO, and the growing interest of other international organizations in improving workplace fairness, the Director General noted

“It is a moment when the ILO must once again display its historic capacity for adaptation, renewal and change. The moment of opportunity will not last indefinitely. To take advantage of it however, the ILO as to over come two persistent problems” He then cited

first, the institutional reluctance to develop a set of operational priorities among the “exceptional richness of the ILO mandate” and programs which has “diluted the ILO’s impact, blurred its image, reduced its efficiency and confused the sense of direction of its staff”. The second problem he cited is the external political and economic changes as well as globalization, which have ‘led to a greater fragility of consensus among the ILO’s tripartite membership” and underscored the need for internal consensus, support and commitment, if the ILO is to assert its proper and potential external influence.

If the ILO is realize its full potential as the conscience of the world on issues of inherent workplace rights, it must disentangle itself from excessive reliance on governmentally imposed rule of law and continue to pursue its lofty, yet pragmatic ideals through more extra legal means, as do so many organizations with like goals who also espouse and seek implementation of the ILO Conventions. The report extols the activity of NGOs and other civil society associations and notes that the tripartite partners “can greatly benefit from the advocacy skills and resources of civic associations...often in the areas where ILO’s own constituents are less represented or not directly involved” Certainly trade unions and employer groups work with such NGOs on the national level, there should be developed a means for them to do the same thing on the international level.

In his report the Director General repeatedly stresses the need for the ILO to be able to “respond rapidly to emerging problems or opportunities” citing “abrupt economic crisis or change, natural calamity, a sudden social movement or the aftermath of conflict”.

Three months ago I was here proposing such closer cooperation in the development of an international roster of mediators working in cooperation with NGOs and the Permanent Court of Arbitration to be available as a resource to help resolve conflicts in the areas of ILO concern particularly in implementation of the Core 8 Standards. This present session again underscores the need for innovation and promptness “act fast and decisively to consult and cooperate with the other organizations concerned” and to overcome the lassitude inherent in a century old organization whose societal responsibilities,

capabilities and talents have moved beyond its original tripartite vision. The rule of law for such an international institution dictates that new tools be crafted to meet the same long term needs for achieving workplace fairness.

There has been a second realm where the rule of law has made its mark. It may not have been upon the corporations toward which it has been directed, but its impact has shown it to be a viable route for achieving that rule of law. It has been in setting guidelines and norms for society to grasp and endorse despite the lethargy or disregard of the national and even international legal establishment.

There are numerous examples on the national level, where the public, guided by standards of fairness set forth in regional or national statutes has provided an even more effective pressure on corporations than have the governments who bear that primary responsibility. One has only to think back to the Cesar Chavez-led boycott of the grape farms and grape vendors of California. His publicity campaign throughout the US and indeed the world, invoked sufficient consumer pressure on the vineyards and distributors to force them grant the right to organize and engage in collective bargaining, rights assured by the laws of California and the US. It was public pressure to bring conformity to state and national laws. Indeed that boycott even extended abroad to where California grapes were sold to have foreign consumers of the American product, by their boycott join in pressuring the grape growers to conform to the requirements of the California statutes.

That international effort was not the working of international law, but rather an international pressure to conform to state law. We all recognize the weakness of not having international law to control the operations and human relations component of international corporations. International bodies such as the WTO, virtually all regional trade agreements and the banks have declined to make labor standards a prerequisite for their international funding decisions. Only in February of this year did the World Bank undertake to give some recognition to some of the core labor standards.

What other international rule of law is there to achieve workplace protections in a highly mobile international economic environment?

The ILO throughout its near century of operations has been the proponent for workplace fairness and has indeed relied on the support of its member states, as well as the labor and management partners therein to establish its nearly 200 Conventions. There is no better barometer of motivation and commitment than the use of ILO conventions throughout the world. While of minimal practical binding impact on the member countries, even those which have ratified them, they have been the conscience of the world in the field of workplace fairness. Even in the United States, though we have ratified only 2 of the 8 core conventions, the ILO conventions have served as the models for federal legislation which has been a most effective means of controlling forced and child labor, protecting against discrimination, and assuring freedom of association and the right to collective bargaining. The same disconnect between endorsement of the conventions and national adherence occurs on the other side as well. Many of the countries which have adopted the largest number of conventions, and thus moving them from the realm of international ideals to national commitments, are often the countries with the most porous record of protecting workplace rights. But the most enduring aspect of the Codes and of their ILO sponsorship is that they provide a societal gauge of what is fair and humane in the workplace.

And in the international sphere, even more perhaps than in the national sphere, that international standard has been the rallying cry for unions, NGOs and consumers to provide a more meaningful threat to those corporations which ignore or willingly violate national laws to maximize their profits at the expense of their workers.

The history is well known. Students and consumers in the US and other countries raised societal consciences as to the exploitation that was occurring in the factories where brand name products were being made under abusive conditions. In the US, the students initiated a nation wide boycott of the logo companies that produce \$5billion in logo wear for American colleges and universities. That got the attention of the brands and turned

them around. The students and consumers did what national laws were unable to do; they provided a very real threat to the income and ability of those corporations to continue to maximize their profits on the backs of their employees.

As a consequence of their efforts the students and consumers have shown the way. They have provided a more effective process for bringing conformity to international labor standards, and presumably even to the unenforced laws of the countries where many of the factories are located. Organizations such as SAI 8000 and Fair Labor Association have developed codes of conduct, now numbering more than 260 by the ILO's count, which are becoming more and more common and becoming more and more important to corporations which are beholden to the increasingly politically sensitive consumers of their products. But we all know that the core of their efforts and success has been in garments, sportswear and toys, all extremely consumer sensitive. And we also know that those products constitute only 5 % of international trade.

The question we now all face is whether corporations producing commodities beyond the reach of these consumer market pressures, will feel the same commitment to adhere to the ILO conventions for workplace fairness. Is there a constituency for the conditions under which freight containers are made, or for the manufacture of tire rims, or for those toiling in coal mines or working in dam building? Hopefully, the public support for Codes of Conduct in the existing fields will stimulate interest in new fields.

I think we all recognize the power and determination of international corporations as they scour the world for factories to meet their consumer demand and to meet their stockholder demands for maximized profit. I think we all too recognize the failure of national and international governments to impose a rule of law on such evasive legal entities as they pursue their profit in the most susceptible countries. But what we are only beginning to recognize is that there is a point at which the international standards of workplace fairness promulgated by the ILO can be used by society not in a court of law but in the corporations' own sensitive market places to bring about conditions of workplace equity. Perhaps our best hope may be by using the power of those players in

pushing for workplace fairness, the unions, the NGOs and the conscientious employers to use the marketplace as the instrument of choice for achieving the rule of law. That, I suggest, would be a fruitful and timely undertaking for our hosts the International Institute for Labor Studies. In his report the Director General identified the role of the Institute to “promote policy research and public discussion on emerging issues of concern to the ILO and its constituencies.” He then goes on to urge “better utilization of its capabilities for future ILO program development” What could be of greater concern than undertaking to expand the role of the ILO in ensuring conformity to its own Labor Standards? This session is a welcome opportunity to discuss the issues. But how about stretching the envelope a bit to explore cooperation with NGOs on regional or global bases, as the Director General noted already occur on national grounds. Even if there may be obstacles to doing this within the ILO itself, the Institute could be the arm of the ILO cooperating with other willing organizations such as the Permanent Court of Arbitration to explore cooperation with NGOs in the mutual efforts to improve Convention compliance. Holding a meeting on increasing Core 8 compliance with participation from unions, managements, governments and NGOs on a global or even regional basis would offer opportunities to secure the alliances and relationships with other social actors and civil society associations urged in the Decent Work report. The Institute is clearly encouraged to undertake innovative programs on page 17 of the report. Why not do the outreach to NGOs that is encouraged on page 16 of that same report. If we are all to be committed to do something to prevent or deter the race to the bottom, shouldn't we start now?