

CHINA'S COLLECTIVE CONTRACT PROVISIONS: CAN COLLECTIVE NEGOTIATIONS EMBODY COLLECTIVE BARGAINING?

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INTRODUCTION

Some people see things as they are and say, why? I dream of things that never were and say, why not?

George Bernard Shaw

This article examines whether China's new "collective negotiations" law, in the context of Chinese conditions, can blossom into "collective bargaining," as referenced by International Labor Organization (ILO) standards and compared with U.S. approaches. Admittedly, it is hard for many to imagine that multinational corporations such as Wal-Mart, Samsung, Dell, along with increasing numbers of Chinese domestic companies, could be negotiating labor terms and benefits *above* statutory minimums. It is harder, perhaps, to convince the Chinese that in doing so, China can still maintain its areas of comparative advantage. However, recent developments in China's labor legislation suggest that, beyond sheer imagination, Chinese laborers now seem more enabled than ever to negotiate or bargain their working standards.

On May 1, 2004, Provisions on Collective Contract (Provisions)¹ issued by the Ministry of Labor and Social Security (MOLSS) became effective on a national level. These Provisions build upon China's experience since the mid-1980s with individual labor contracts and with the 1994 Labor Law's mandate to create a system of collective con-

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1. JITI HETONG GUIDING [hereinafter PROVISIONS] art. 1 (Jan. 20, 2004), http://www.chinacourt.org/flwk/show1.php?file_id=91497 (last visited Nov. 1, 2005). The 2004 Provisions repeal the Jiti Hetong Guiding (Provisions on Collective Contract) issued by then Ministry of Labor on December 5, 1994. See PROVISIONS art. 57.

tracts.² The 2004 Provisions provide that a collective contract can be negotiated on behalf of the employees to protect their employment and workplace interests. Prior to 2004, several hundred thousand collective contracts, which covered seventy-six million workers, were already in existence under earlier regulations.³ As will be discussed, many of these collective contracts could be described as bare-boned reflections of labor statutory minimums. In contrast, the 2004 Provisions provide more detail and apparently seek to eliminate some of the obstacles observed under the earlier negotiated agreements and to achieve more comprehensive contracts.

The 2004 Provisions authorize employees to initiate the process through more authentic representatives to prepare proposals on a wide scope of subjects clearly beyond the usual statutory labor standards and protections. The process of negotiations is delineated, with “good faith” requirements built in to facilitate cooperative exchanges of proposals. The government’s Labor Bureaus are given regulatory responsibility to supervise and intervene in the negotiations to ensure fair dealing. They also are authorized to resolve disputes arising prior to final agreement.

Lastly, there is a process of formality in “finalizing” the collective contract. The enforcement of the *rights* arising under this concluded contract are the same as those arising under the law regulating labor contracts, both of which utilize dispute resolution procedures within the enterprise, government-administered labor arbitration and the courts.

This article examines the 2004 Provisions on collective negotiations, sets forth some of the issues of the current Provisions, and draws comparative references to collective bargaining approaches in the United States and under the ILO’s labor standards; discusses their likely viability in China; and proposes a number of labor reform “pos-

2. ZHONGHUA REMIN GONGHEGUO LAODONG FA [hereinafter LABOR LAW] arts. 33-35 (July 5, 1994), http://www.chinacourt.org/flwk/show1.php?file_id=20195.

3. Reported figure from the Laodong Baozhang Bu [Ministry of Labor and Social Security (MOLSS)], cited in Simon Clarke, Chang-Hee Lee and Qi Li, *Collective Consultation and Industrial Relations in China*, British Journal of Industrial Relations, June 2004, at 239-40 [hereinafter Clarke]. The All China Federation of Trade Unions (ACFTU) claimed 510,000 enterprises had concluded such agreements, with 318,000 of these agreements within Foreign Invested Enterprises (FIEs), Privately Owned Enterprises (POEs), and Town and Village Enterprises (TVEs). See *Quanguo jianli pingdeng xieshang he jiti hetong zhidu qiye yu wushiyi-wan hu* [Collective Contract Protect Worker’s Rights: over 510,000 enterprises have established collective contract system], RENMIN RIBAO [PEOPLE’S DAILY], Nov. 20, 2001, at 1, available at <http://www.people.com.cn/GB/paper464/4750/519609.html> (last visited Nov. 1, 2005) [hereinafter *Collective Contract Protect Worker’s Rights*].

sibilities,” when viewed in the context of China’s existing and evolving labor law environment.

I. CHINA’S 2004 COLLECTIVE CONTRACT PROVISIONS

A. Legal Origins

The new collective negotiation Provisions grew from a rather short legal history. There was interest by China’s trade union, the All China Federation of Trade Unions (ACFTU), in the early 1990s and it began to experiment with collective negotiations.⁴ The 1992 Trade Union Law in fact first authorized unions at the enterprise level to conclude collective contracts with the employer.⁵ The 1994 Labor Law further formalized the process and provided that the ACFTU was responsible to utilize this system nationally.⁶ The Trade Union Law as amended in 2001 continued to strengthen the union’s mandate in collective wage negotiations.⁷ Toward the end of 2001, the ACFTU reported it had over 510,000 such collective agreements at the enterprise level covering over 75 million workers.⁸

Other legal documents contributing to the legal origins of collective negotiations were issued by the MOLSS in 2000 and 2001. The first, the 2000 Interim Measures of Collective Wage Consultation,⁹ rather comprehensively provides for annual *wage* negotiations between the employer and union. It includes requirements of “good faith” negotiation and “fair representation.”¹⁰ This emphasis on “wage” negotiations would seem to reflect the government’s moving toward market-based determinations by the parties at local levels, yet still under a nationally-structured regulatory process.

4. TAYLOR ET AL., *INDUSTRIAL RELATIONS IN CHINA* 8 (2004) [hereinafter TAYLOR]

5. ZHONGHUA REMIN GONGHEGUO GONGHUI FA [hereinafter TRADE UNION LAW] art. 18 (1992) (current version at ZHONGHUA REMIN GONGHEGUO GONGHUI FA [TRADE UNION LAW] art. 20 (amended 2001)), available at http://www.chinacourt.org/flwk/show1.php?file_id=38454 (last visited Nov. 1, 2005). Hereinafter, all articles are from a 2001 version.

6. LABOR LAW art. 33.

7. TRADE UNION LAW art. 10.

8. *Collective Contract Protect Worker’s Rights*, PEOPLE’S DAILY, *supra* note 3.

9. See GONGZI JIIXIESHANG SHIXING BANFA [INTERIM MEASURES OF COLLECTIVE WAGE CONSULTATION], MOLSS (2000), http://www.chinacourt.org/flwk/show1.php?file_id=36176 (last visited Nov. 1, 2005).

10. See *id.* art. 15. Article 15 mandates that a party shall not harass, threaten, exaggerate, bribe, deceive, or defraud the other party. This section is comparable to the good faith bargaining requirement in *Nat’l Labor Relations Bd. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 333 (1938).

A second legal edict was issued on November 14, 2001 by several interested government organizations—MOLSS, ACFTU, State Economic and Trade Commission (SETC), and China Enterprise Management Association, entitled, Joint Circular on Promoting Collective Consultation and Collective Contract.¹¹ It reiterated the duty of employers to engage in collective negotiations and it called upon governments, unions, workers' congresses, and party members to participate in tri-party consultation to accomplish objectives. The likely significance of this Joint Circular, promulgated in the month following the newly amended Trade Union Law of 2001, is the political statement to the ACFTU, leading the collective negotiations, that the union must be mindful that there are other important interests and stakeholders in this process and the implementation of the collective agreement.

B. 2004 Provisions on Collective Contract

The 57 new Provisions are divided into eight chapters:

One: General Rules (Arts. 1-7)

Two: Content of Collective Negotiation (Arts. 8-18)

Three: Collective Negotiation Representative (Arts. 19-31)

Four: Collective Negotiation Procedures (Arts. 32-35)

Five: Conclusion, Alteration, Recession and Termination of Collective Contract (Arts. 36-41)

Six: Review and Examination of Collective Contracts (Arts. 42-48)

Seven: Resolution of Disputes on Collective Negotiation (Arts. 49-54)

Eight: Supplementary Articles (Arts. 55-57)

1. *Coverage and Purposes.* The Provisions are enacted in accordance with the Labor Law and the Trade Union Law.¹² Article 56 of the Provisions emphasizes the union's authority by subjecting the "employing unit" (employers) to the Trade Union Law and other related laws and regulations if employer refuses to engage in collective negotiation requirements.¹³ The purposes of the Provisions are

11. GUANYU JINGYIBU TUIXING PINGDENG XIESHANG HE JITI HETONG ZHIDU DE TONGZHI [JOINT CIRCULAR ON PROMOTING COLLECTIVE CONSULTATION AND COLLECTIVE CONTRACT], MOLSS (Nov.14, 2001), http://www.chinacourt.org/flwk/show1.php?file_id=38562 (last visited Nov. 1, 2005).

12. PROVISIONS art. 1.

13. *See id.* art. 56.

“regulating the behavior of collective negotiation,” the “signing of the collective contract,” and the “protecting legal rights and interests of laborers and employing units.”¹⁴ All “enterprises and public institutions that practice commercialized management within the P.R.C” are covered by the Provisions.¹⁵ This broad coverage parallels the coverage of employers and employees under China’s individual labor contract system.¹⁶

2. *Negotiating Representatives.* There shall be legal negotiating representatives of equal numbers (at least three) on each side and each with one chief representative.¹⁷ The representative in the “employee party” shall be selected by the trade union of the unit (or, if none, then by democratic recommendations, agreed upon by one-half of the staff in that unit).¹⁸ The chief representative is the chair of the trade union unless an alternative is selected by the chair by written delegation (or if a union does not exist, the chief representative shall be elected from the negotiating representatives through democratic means).¹⁹

Perhaps a significant change from past practice, Article 24 of the 2004 Provisions stipulates, “negotiation representatives of the employing unit and those of the staff shall not act as each other’s representatives.”²⁰ This would appear to foreclose an employer designating a trade union official as a negotiating representative of an employer, even where that official is a managerial employee of the employer, a scenario all too familiar under earlier practices. The employer otherwise selects its own negotiating representatives.²¹

An interesting provision, Article 23, permits both sides to select “professional personnel” (*Zhuanye Renyuan*) to act as the negotiation representative.²² Limitations exist, as their number may not ex-

14. *Id.* art. 1.

15. *Id.* art. 2.

16. LABOR LAW arts. 2, 16-32.

17. PROVISIONS art. 19.

18. *Id.* art. 20. The original text says that the representative shall be appointed by the existing union of the unit. It does not appear that the appointed representative has to pass the simple majority vote. The employer has a duty to recognize the existence of such a bargaining unit by making an affirmative response to any negotiation request. *Id.* art. 32. See also TRADE UNION LAW art. 10.

19. PROVISIONS art. 20.

20. See *id.* art. 24.

21. *Id.* art. 21.

22. *Id.* art. 23.

ceed one-third of one side's representatives, and no person outside one's own unit can act as chief representative.²³

Certain traditional responsibilities and functions, such as participation, sharing information, etc., are fixed upon the negotiating representatives.²⁴ Additionally, they are called upon to "safeguard the normal order of work and production and shall not adopt any action of threatening, buying popular support and deception."²⁵

Employee representatives' terms of service are determined by the represented party²⁶ and their employment tenure is protected during that term against employer's retaliation of terminating the representative's labor contract.²⁷ If the labor contract were to expire during the representative's tenure, Article 28 automatically extends the contract up to the completion of his representative obligation.²⁸ Exceptions exist where the representative seriously violates employer rules, other employment-related duties, or has been investigated for criminal violations.

3. *Scope of Negotiable Subjects.* References to the delineated subjects for negotiation are in Article 33 of the Labor Law, and Articles 3 and 8-18 of the 2004 Provisions. Article 3 of the Provisions describes the content of the collective contract as follows:

[W]ritten agreement signed through collective negotiation . . . concerning labor remuneration, working time, rest and holiday, labor, security and sanitation, professional training, and insurance and welfare in accordance with the stipulation of laws, regulations and rules; *the special collective contract* as set forth refers to the special written agreement signed between the employing unit and employees of that unit, in accordance with laws, regulations and rules, concerning the content of collective negotiation.²⁹

Article 8 includes the scope of negotiable subjects that can be covered in the collective contract listing some 15 *categories* relating to employment.³⁰ Articles 9-18 then list examples under each category.³¹

23. *Id.*

24. *Id.* art. 25.

25. PROVISIONS art. 26.

26. *Id.* art. 22.

27. *Id.* art. 28.

28. *Id.*

29. *Id.* art. 3 (emphasis added). A "special agreement" usually refers to a wage agreement or other agreement on a specific topic. Article 4 again distinguishes between signing the "collective contract or special contract," and Article 6 states both are legally binding on the employer and employees. *Id.* arts. 4, 6.

30. PROVISIONS art. 8.

4. *Labor Bureau Supervision of Collective Negotiations.* General Provisions in Chapter One provide the principles and supervision for the conduct of negotiations. Article 4 says negotiation shall mainly adopt the form of consultation “conference.”³² The negotiation conduct shall observe the following principles: act legally, respectfully, honestly, fairly, consult, cooperate and collaborate equally and in consideration of legal rights, and finally, “no drastic behavior is allowed.”³³

Responsibility for supervising the collective negotiation process, and the “signing, reviewing and performing” of the signed collective contracts or special collective contracts shall be with the Labor Bureaus above county level.³⁴ For any unresolved disputes that occur during the collective negotiations, but prior to the signing, either or both parties may submit a written application to the Labor Bureau requesting resolution.³⁵ The Labor Bureau may also initiate resolution procedures on its own, as necessary. The procedures in most cases should be ended within thirty days of acceptance of the case by the Labor Bureau.³⁶ The Labor Bureau at the conclusion of its process formulates an Agreement on Dispute Resolution.³⁷ Thereafter, the Labor Bureau and the parties must agree and sign to be bound by the Agreement before it is effective.³⁸ Some items in the Agreement where there was no unanimous resolution shall be carried on with continuous consultation.

Separate dispute resolution provisions protect the *rights* of individual employees, who are also negotiating representatives, against improper termination³⁹ and modification of their normal work status.⁴⁰ Such disputes are to be resolved by the local labor arbitration commission.⁴¹ The same forum is used to resolve any *rights* dis-

31. *Id.* arts. 9-18.

32. *Id.* art. 4.

33. *Id.* art. 5.

34. *Id.* art. 7; *see also id.* arts. 42-48.

35. PROVISIONS art. 49.

36. *Id.* art. 52.

37. *Id.* art. 53.

38. *Id.* art. 54. Thus, the Dispute Resolution Agreement appears to remain entirely voluntary.

39. *Id.* art. 28.

40. *Id.* art. 27.

41. PROVISIONS art. 29.

putes which arise out of the performance of the concluded collective contract.⁴²

5. *Collective Negotiation Procedures.* Within the General Rules of convening a conference, wherein the meetings take place following prescribed rules of conduct conducive to negotiation, certain other procedures are provided in the Provisions. To initiate the process, Article 32 states a party of collective negotiation may make written request of the other party; and a written response must be given within twenty days; and this request to negotiate may not be refused without proper reason.⁴³ The “preparation phrase” then calls upon parties to familiarize themselves with the laws and regulations concerning collective negotiations, collective recommendations from the employer and employees and identify topics for discussion during negotiation.⁴⁴ After a location, time, recorder are chosen, the parties are prepared to begin.⁴⁵

The collective negotiation begins with each chief representative, in turn, addressing the agenda and procedures of the meeting. Thereafter, each will put forward concrete proposals and the other side will respond and discussion ensues regarding the proposals.⁴⁶ During the negotiations, the chief representatives shall make summaries of the recommendations. Those unanimously agreed upon shall be formed into the collective contract or special collective contract and signed by the chief representatives of both parties.⁴⁷ In case there is no agreement on issues, the negotiation may be suspended, and the parties shall negotiate the next meeting place and content.⁴⁸

To conclude the collective contract, the agreed upon draft is presented to the employees for discussion. Thereafter, a two-thirds quorum must be present, and the draft must be approved by a majority of the workers’ congress representatives or a majority of the total employees (if a workers’ congress has not been established).⁴⁹ Thereafter, the chief representatives of each side sign the contract, which is usually of one to three years in duration and can be extended by re-

42. *Id.* art. 55.

43. *See id.* art. 32.

44. *Id.* art. 33.

45. *Id.*

46. *Id.* art. 34.

47. PROVISIONS art. 34(4).

48. *Id.* art. 35.

49. *Id.* art. 36.

quest and agreement of the parties.⁵⁰ The contract, though binding on the parties, may be modified by the parties, or altered or terminated by certain conditions causing an inability to perform, such as bankruptcy, *force majeure*, or conditions in the agreement.⁵¹

The final step is to submit (register) the concluded collective contract to the Labor Bureau for review and examination.⁵² It is examined to ensure compliance with legal requirements.⁵³ If there is an “objection” by the Labor Bureau, the parties will be notified and the contract will be referred back to the parties who can renegotiate or re-sign, absent those portions.⁵⁴ There seems to be a practice of little or no referral back to the parties.⁵⁵ In the case of no objection by the Labor Bureau, the contract is effective within 15 days of receipt of the document.⁵⁶ The law requires the contract to be promulgated “by the negotiation representative” to all employees on the day it becomes effective.⁵⁷

6. *Duties of Proper Conduct for Collective Negotiations.* The regulatory framework of collective negotiations is set up to be monitored by a government agency, *viz.*, the Labor Bureau and its special division with responsibility to supervise and to resolve disputes.⁵⁸ The numbers of negotiating obligations, some mentioned earlier, for clarity can be organized under the following three categories.

a. *Fair and Consultative Representation.* The negotiating representatives must “participate” in the negotiations⁵⁹ after having consulted with employees regarding negotiating topics⁶⁰ and must accept inquiries from their constituency, publicize the status of negotiations, collect opinion,⁶¹ and provide information concerning collective negotiations.⁶²

50. *Id.* arts. 37-38.

51. *Id.* arts. 39-41.

52. *Id.* art. 42.

53. PROVISIONS art. 44.

54. *Id.* art. 46.

55. Clarke, *supra* note 2, at 246.

56. PROVISIONS art. 47.

57. *Id.* art. 48.

58. *Id.* art. 7.

59. *Id.* art. 25(1).

60. *Id.* art. 33(2).

61. *Id.* art. 25(2).

62. PROVISIONS art. 25(3).

b. *Negotiating Duty.* Objective measures of negotiating include the following. The negotiating representative must be legally authorized⁶³ to conduct negotiations on behalf of the represented party's interests, must "not refuse" to respond to requests to engage in collective negotiations,⁶⁴ and must "participate."⁶⁵ The negotiating representative must provide "information" concerning collective negotiations⁶⁶ and determine the time and place for negotiations.⁶⁷ The employer is prohibited from refusing the collective negotiations requirements without "proper reason,"⁶⁸ and a violation of said provision is expressly subject to the Trade Union Law, which confirms in Article 53(4) that "[R]ejecting consultation on an equal footing without justifiable reasons" is a violation.⁶⁹ Subjective measures of the conduct of negotiating duty include "honesty," "keeping promises," "fair collaboration," and "consideration of legal rights and interests for cooperation."⁷⁰

The Provisions are based on and incorporate the Labor Law and the Trade Union Law that also set forth standards on negotiating conduct as well as duties of fair treatment of employees.⁷¹ Furthermore, Article 25(6) of the Provisions obligates the negotiating representatives to those other obligations stipulated by laws, regulations and rules.⁷²

c. *Fair Treatment of Employees.* While the 2004 Provisions do not directly regulate fair treatment of employees, said Provisions incorporate the Trade Union Law on the subject, including employees' right to organize and join the union. Article 3 of the 2001 Trade Union Law provides in pertinent part the following basic guarantee:

[Employees] who rely on wages . . . regardless of their nationality, race, sex, occupation, religious beliefs or educational background,

63. *Id.* art. 19.

64. *Id.* art. 32.

65. *Id.* art. 25(1).

66. *Id.* art. 25(3).

67. *Id.* art. 33(4).

68. PROVISIONS art. 56.

69. TRADE UNION LAW art. 53(4).

70. PROVISIONS art. 5.

71. *Id.* art.1.

72. *Id.* art. 25(6).

*have the right to organize and join trade unions according to law. No organizations or individuals shall obstruct or restrict them.*⁷³

Article 11 provides that:

*[T]rade union organizations at higher levels may dispatch their members to assist and guide the workers and staff members of enterprises to set up their trade unions, no units or individuals may obstruct their effort.*⁷⁴

Article 50 instructs that if anyone violates Article 3 or 11 by obstructing employees in joining trade union organizations, or obstructing higher trade unions in assisting and guiding employees in preparation for establishing trade unions, then the violation shall be ordered to be corrected by the “administrative department for labor” (Labor Bureau), with appeals to appropriate government offices.⁷⁵ There is also possible criminal violation if there is violence or intimidation.⁷⁶

Article 51 prohibits anyone from retaliating against any staff member of a trade union by modifying the employee’s job.⁷⁷ Said provision also prohibits insults, slander, or personal injury to any staff member of a trade union who performs his or her duties “according to law.” Punishment for violations includes criminal prosecution or administrative sanctions by the public security (the police).⁷⁸ Article 52 provides that if an employee or a staff member of the union has his or her labor contract cancelled because of joining the trade union, there is entitlement to reinstatement with retroactive pay or an order by the Labor Bureau to pay “two times the amount of his annual income.”⁷⁹

Article 53 prohibits obstructing the trade union in its work to organize employees to exert “(1) democratic rights through the congress of the workers and staff members and other forms;” (2) unlawfully “dissolving or merging trade union organizations;” and “(3) *preventing a trade union from participating in the investigation into and solution of an accident causing job-related injuries or death to workers or staff members or other infringements upon the legitimate rights and interests of the workers and staff members.*”⁸⁰

73. TRADE UNION LAW art. 3 (emphasis added).

74. *Id.* art. 11 (emphasis added).

75. *Id.* art. 50.

76. *Id.*

77. *Id.* art. 51.

78. *Id.*

79. TRADE UNION LAW art. 52.

80. *Id.* art. 53 (emphasis added).

Employees who are negotiating representatives are protected by the 2004 Provision from retaliation. For example, an employee who is a negotiating representative cannot have his or her labor contract terminated when it expires during performance of representative obligations, rather it must be automatically extended up to the completion of his or her representative obligations.⁸¹ Such employee can only be terminated upon a sufficient showing by the employer of serious violation of duty or employer rules.⁸² Similarly, an employer shall not adjust or remove the employee's working position without proper reason,⁸³ and the employee shall be regarded as performing normal work when participating in collective negotiations.⁸⁴ Moreover, additional provisions of the Trade Union Law likewise provide protections for trade union funds, and proscribe improper conduct by trade union staff members against employees or the trade union.⁸⁵

The negotiating representative also has two affirmative obligations under Article 26 of the Provisions. The representative has a duty to "safeguard the normal order of work and production and shall not adopt any action of threatening, buying popular support and deception."⁸⁶ The first part appears to obligate the union representative to act affirmatively to avoid or end of any employee disruption of services, while the second part seems to place an obligation of proper conduct upon both employee and employer representatives, as leaders in negotiations. The second affirmative obligation is to keep the commercial secrets of the employer acquired during the collective negotiations.⁸⁷

Disputes relating to "proper conduct" regarding the objective and subjective aspects of the negotiations, including disagreements or impasses on proposals, are to be resolved by the Labor Bureau.⁸⁸ Other disputes that relate to retaliation against employee representative's *rights*, and under Articles 27 and 28, are to be resolved before the local labor arbitration commission.⁸⁹

81. PROVISIONS art. 28.

82. *Id.*

83. *Id.*

84. *Id.* art. 27.

85. TRADE UNION LAW arts. 54-55.

86. PROVISIONS art. 26.

87. *Id.*

88. *Id.* art. 49. This is for "any disputes" which occur during the collective negotiation.

89. *Id.* art. 29.

II. CHINESE CONDITIONS AFFECTING COLLECTIVE NEGOTIATIONS

China's recent history and economic growth both explain the developments occurring in this area of labor law as well as help define the direction that must be taken. With the transition from the "iron rice bowl system" to labor contracts, the effects of moving China from a socialist planned economy to a socialist market economy have taken hold. Privatization, layoffs, new management strategies emphasizing profits and competition have produced both "wage consciousness" and feelings of unfairness in view of regional wage disparities, occupational wage gaps, unequal job opportunities, and sagging labor and security safety nets.

The economic growth phenomenon has produced a 100 to 150 million person "floating population" seeking to earn their share of the growth. It also has produced national scandals of employers refusing to pay the wages of migrant workers, presently an underclass in China. Coal miners are dying by the thousands each year due to unsafe working conditions. Consequently, the issue of better enforcement of the labor protections provided in the labor laws is on the labor reform agenda.

China is at a crossroads. On the one hand, it has the necessary ingredients to make its labor law system work much better than it does; on the other hand, its history of labor relations has seemed to blend with the forces of economic development, and it seems unsure if it makes the choice to better enforce its labor laws, whether it will be placed at an internationally competitive disadvantage. Employers who might otherwise follow the labor laws are in a quandary; why spend the money to follow the labor laws if it doesn't matter?⁹⁰

Can higher labor standards negotiated into collective contracts provide a mechanism inside the enterprise by which employees' labor rights could be better enforced? This, of course, is a different question than, *will* they be enforced, especially since rights under collective contract enforcement use the same legal mechanism as for statutory rights.

A. Economic Transition

To understand the nuances of current labor relations in China, one must put it into the context of China's fast-moving economic

90. Clarke, *supra* note 2, at 248.

conditions. When economic transition moved from policies establishing special economic zones of development into policies transforming all of China's economy from a socialist planned economy to a socialist market economy, social and economic ramifications were expected and occurred. With a market economy came competition, the need for more flexible management, and the quest for profits—which required cutting costs. For China's labor-intensive industrial economy, this usually meant keeping labor costs low. Privatization and competitive measures brought layoffs (especially in the already over-staffed State Owned Enterprises (SOEs)) and kept wages and benefits to bare minimums. With individual control waning, conditions lent themselves to workers' economic improvement through collective negotiations.

Wage concerns of workers came of increasing importance as widening gaps occurred in the annual growth of real wages versus GNP, with great numbers of workers feeling left out. The record reflects that China's impressive economic growth in GNP for over a decade is not matched in the real wage growth of workers, which roughly keeps pace with rates of inflation.⁹¹ The lawful minimum wage in China varies by locales according to local economic factors, as is the national mandate under China's Regulations on Minimum Wage.⁹² According to the Regulation, China seeks to accommodate an international labor standard that sets local minimum wages within the range of 40 percent to 60 percent of the average wage standard in the locality.⁹³ One source states that in 1993 China's average minimum wages met or exceeded the 40 percent minimum, but by the late 1990s there had been a steady and consistent erosion below that mini-

91. By comparing ILO official statistics (ILO LABORSTA database) to the rate of inflation, it is argued that there was at least a relative wage decline of Chinese manufacturing workers. See Anita Chan, *A Race to the Bottom*, 46 CHINA PERSPECTIVES 41, 42 (2003). According to data obtained from ILO LABORSTA database, in 1993 the average wages at all economic enterprises was about 281 *yuan*/month and in 2002 it was 1,035 *yuan*/month. Not surprisingly, the lowest average in 2002, 533 *yuan*/month, was in the agricultural services area, whereas the highest was in the financial sector (1,595 *yuan*/month). In manufacturing, the average was 917 *yuan*/month. See ILO LABORSTA, *Table 5A Wages, by Economic Activity*, available at <http://laborsta.ilo.org/> (last visited Mar. 19, 2005).

92. ZUIDI GONGZI GUIDING [hereinafter REGULATIONS ON MINIMUM WAGE] art. 6 (Jan. 20, 2004), http://www.chinacourt.org/flwk/show1.php?file_id=91496 (last visited Nov. 1, 2005); see also LABOR LAW, arts. 48-49.

93. REGULATIONS ON MINIMUM WAGE, Attachment Section 2. Calculations Methods of Minimum Wage Standard. The 40%-60% range is the international standard used when calculating minimum wage.

mum.⁹⁴ For Foreign Invested Enterprises (FIEs), in addition to minimum wage requirements, by legal edict the average wage of a FIE should not fall below the local average rate in the same industry.⁹⁵

Increasing wage gaps also concerns workers. Some Chinese citizens were able to realize Deng Xiaoping's famous slogan "to get rich is glorious" much faster than others, and with economic reforms came great wage diversity between regions, between urban and rural, and between management and labor. In the year 2000, regional variations of average income ranged from 1,544 *yuan*/month in Shanghai to 582 *yuan*/month in Chongqing.⁹⁶ Minimum wage variations between local governments ranged from 620 *yuan*/month in Nanjing to 545 *yuan*/month in Beijing.⁹⁷

Observations by World Bank President Wolfensohn about China's wage gaps have raised alarms; he stated that the likely conse-

94. Chan, *supra*, note 91, at 42. In Beijing in 2000 the average wage was reported at 1,362.50 *yuan*/month and the minimum wage at 412 *yuan*/month. See Beijing Labor and Social Security Bureau, *Guanyu Tiaozheng 2000 Nian Beijingshi Zuidi Gongzi Biaozhun de Tongzhi* [Notice on 2000 Beijing Minimal Wage Guideline] (Jun. 27, 2000), http://www.bjld.gov.cn/tszl/zdshbz/t20010907_2142.htm (last visited Mar. 19, 2005). Beijing's minimum wage in September, 2004 was reported at 545 *yuan*/month. See Beijing Labor and Social Security Bureau, *Guanyu Tiaozheng 2004 Nian Beijingshi Zuidi Gongzi Biaozhun de Tongzhi* [Notice on 2004 Beijing Minimal Wage Guideline] (Jun. 30, 2004), http://www.bjld.gov.cn/tszl/zdshbz/t20040924_402234257.htm (last visited Mar. 19, 2005). The exact average wage of workers earning in China is difficult to ascertain, and it varies by political districts. According to a 2004 survey conducted by one research institute under the Development Research Center of the State Council (DRCSC), 70.8 percent of Chinese urban employees earn 800 to 2,500 *yuan* (US\$96.74 to US\$302.3) monthly. See *Chinese Urban Employees Earn More*, CHINA DAILY, May 31, 2004, http://www.chinadaily.com.cn/english/doc/2004-05/31/content_335250.htm (last visited Mar. 19, 2005).

95. WAISHANG TOUZI QIYE GONGZI SHOURU GUANLI ZANXING BANFA [INTERIM MEASURES ON FIE WAGES], art. 4 (Feb. 14, 1997), http://www.chinacourt.org/flwk/show1.php?file_id=27601 (last visited Mar. 19, 2005).

96. Chan, *supra* note 91, at 41, 45 (Figure 2).

97. See Jiangsu Xinwen [Jiangsu News], *Qiye Zuidi Gongzi Zuoqi Shangtiao Nanjingshi Feng Sange Cenci Tiaozheng* [Nanjing City Increases Minimal Wages], <http://www.jschina.com.cn/gb/jschina/news/jiangsu/in&co/userobject1ai480595.html> (last visited Mar. 19, 2005) (citing Nanjing Labor and Social Security Bureau, *Guanyu Tiaozheng Nanjingshi Qiye Zuidi Gongzi Biaozhun de Tongzhi* [Notice on Nanjing Minimal Wage] (2004); Beijing Labor and Social Security Bureau, *Notice on Beijing Minimal Wage Guideline* (Jun. 30, 2004). For a more detailed report on the changes of local minimal wage standards, see *Bufen Shengshi Shangtiao Zuidi Gongzi Biaozhun* [Provinces Increase Minimal Wage Standards], XINHUA NEWS AGENCY, July 27, 2004, http://news.xinhuanet.com/newscenter/2004-07/27/content_1654505.htm (last visited Mar. 19, 2005). See also *Compendium of Country Information on Wages, Benefits, Poverty Line and Meeting Workers Needs: China 2003*, United States Department of Labor, Bureau of International Labor Affairs at II-20, <http://www.dol.gov/ILAB/media/reports/oiea/wagestudy/begin.htm> (last visited Mar. 19, 2005).

quence is social unrest.⁹⁸ According to the World Bank, China in the past 20 years has achieved great progress in poverty reduction (insufficient food and clothing) from 200 million people to 29 million, but Wolfensohn pointed out that China still has 400 million people living on less than \$2/day USD. Incomes are rising, but the rate of increase of the urban areas is rising two times faster than the rural increase. President Wolfensohn estimated the wage gap in 10 years will be one of the highest in the world; and he noted that in 2003 China had 10 million citizens engaged in protests, not only over labor issues (such as layoffs and wages), but also over rising rural taxes and forced relocation in urban areas.⁹⁹

Another wage gap exists between workers and managers. A recent survey by the State Council has identified that sixty-one percent of Chinese enterprises were paid three to fifteen times higher than employees, while twenty-one percent were paid fifteen to fifty times higher, and fifteen percent of the FIEs were paid fifty times more.¹⁰⁰

A December 2003 government survey in China states that seventy-two percent of China's nearly 100 million migrant workers are owed pay. The Construction Ministry estimates that workers in 2003 were owed over "\$12 billion in wages" by their employers even though the law requires wages be paid at least monthly, and estimates put the unpaid debts to migrants at one-third of the value of production in construction and real estate industries.¹⁰¹ Those involved say

98. David Murphy, *The Dangers of too Much Success*, FAR EASTERN ECONOMIC REVIEW, Jun. 10, 2004, at 29.

99. *Id.* at 30. CCP's Outlook magazine reported recently that three million people staged 58,000 protests on labor issues across China in 2003. See also *Labor Activists Detect Change and China Repression*, REUTERS NEWS, Jan. 13, 2005, http://www.china-labour.org.hk/iso/article.adp?article_id=6177&category_name=China%20Labour%20Bulletin%20in%20the%20News (last visited Mar. 19, 2005).

100. *Laozong Yuangong Shouru Chaju Zuida Chao Wushibei* [Manager Earns Fifty Times More], GUANGZHOU DAILY, (Apr. 25, 2004), A2 (citing Guowuyuan Fazhan Yanjiu Zhongxin [The Development Research Center of the State Council], *Zhongguo Qiye Renliziyuan Guanli Diaocha Baogao* [Human Resource Report] (2004)). News article available at http://gzdaily.dayoo.com/gb/content/2004-04/25/content_1517025.htm (last visited Mar. 19, 2005). For Chinese senior managers, the law recognizes that their actual income (including dividends) may be much higher than the nominal income wage payment under an employment contract. However, the difference between actual and nominal income of a Chinese senior manager is subject to the supervision of the union and may be used for the benefits of other employees' welfare, such as housing or pension. See INTERIM MEASURES ON FIE WAGES art. 10.

101. Anthony Kuhn, *A High Price to Pay for a Job*, FAR EASTERN ECONOMIC REVIEW, Jan. 22, 2004, at 30-32. Other commentators note these violations of labor laws have caused a labor shortage in Guangdong (which account for an estimated 40 percent of the back pay cases in China in 2003), as potential workers stay away. When this is added to demographic trends

most of the workers do not have formal labor contracts as the law requires. It was reported that Beijing Municipal Government in the first six months of 2004 helped 110,000 migrant workers recover 290 million *yuan* (\$35 million USD) of unpaid wages, causing the first decline in labor disputes in Beijing since 2000.¹⁰²

When adding up some of the ill side-effects of economic reforms, such as slow-rising wages, widening wage gaps, and unpaid wages of migrant workers (who make up the “floating population” of 100 to 150 million Chinese citizens)—with each affected employee seeking to find his or her share of the new economic development, one can understand why the central government has had as a high priority putting a social security safety net in place with accompanying labor law protections. This effort brought into existence the 1994 Labor Law which broadly outlined labor standards requirements. By 2004, many of the standards had been more formally enacted into specific laws and regulations including new regulations on minimum wage and hours. Notwithstanding the progress in legislation, employees continued to demand that the laws be made to work and some collective protests have taken place demanding improved benefits.

B. Trade Union's Role

1. *Emerging Role.* The path was clearer for the government-endorsed union, the ACFTU, in the early days of the People's Republic of China when, “within the state socialist system, the interests of both management and the trade union were supposed to be identical and their identification was reinforced by the subordination of both to the Party-state.”¹⁰³ While the Chinese Communist Party (CCP) in recent years during the economic transition has stepped back somewhat from seeking to directly influence *management's* micro-market decisions, it continues to maintain a close policy relationship with the ACFTU. Although the union is set up as an independ-

that predict a shrinkage of entry-level, low-skilled industrial workers, it is argued this will translate into more “bargaining power” for those entering into the labor force in the future. Dali L. Yang, *China's Looming Labor Shortage*, FAR EASTERN ECONOMIC REVIEW, Jan.-Feb. 2005, at 20, 22.

102. Li Jing, *Beijing Government Urges Employers to Pay Up* CHINA DAILY, Sep. 14, 2004, at 3, http://www.chinadaily.com.cn/english/doc/2004-09/14/content_374270.htm (last visited Mar. 19, 2005). See also Guoyu jishu gongren de diaoyan baogao [*Analyzing Labor Shortage and Skilled Labor Shortage*], MOLSS, Sept. 8, 2004, available at <http://www.molss.gov.cn/news/2004/0908b.htm>.

103. Clarke, *supra* note 3, at 241.

ent and autonomous body, like the All China Women's Federation, it is maintained as a quasi-governmental entity.¹⁰⁴ The ACFTU is the exclusive trade union in China and any new union must be affiliated with it.¹⁰⁵

China's dramatic economic development in the past three decades has caused the ACFTU to emerge as an organization which under law plays "a dual role in the transition towards a market economy."¹⁰⁶ In that dual role of promoting both employee interests and economic reforms and social stability, it has also witnessed some internal discussion, if not struggles, between those in the union who want the ACFTU to be more active in the advocacy and representation of the employees' interests, and those in the CCP who want the union to be more responsive to the needs of society for social stability.¹⁰⁷ In practice, as will be discussed, some observers feel the ACFTU's current predominant function in the workplace is a management function.

2. *Legal Authority.* Chinese labor law in fact requires the ACFTU to serve two masters. In addition to representing "the legitimate rights and interests of the workers,"¹⁰⁸ it must also assist the government and the CCP in "upholding the overall rights and interests of the whole nation."¹⁰⁹

As to the union's advocacy role on behalf of the employees, the ACFTU is to provide guidance and assistance to workers on obtaining individual labor and collective contracts and to advance workers' interests against the employers' regarding compliance with a variety of health, safety, and labor laws.¹¹⁰ In the event of a work stoppage or slowdown, the ACFTU's responsibility is to both represent the *employees'* interests and to assist the *employer* in properly dealing with the matter to restore the normal order of production, thus in effect, *mediating* solutions to the dispute.¹¹¹ The union distributes this bifurcated loyalty also by serving on intra-enterprise mediation commit-

104. See TRADE UNION LAW art. 4.

105. *Id.* art. 11.

106. Clarke, *supra* note 3, at 241.

107. TAYLOR ET AL., *supra* note 4, at 115.

108. TRADE UNION LAW art. 2.

109. *Id.* art. 6.

110. *Id.* arts. 20-25.

111. *Id.* art. 27.

tees and the tripartite Labor Arbitration Commissions, both of which seek to resolve disputes over employees' labor rights.¹¹²

While conducting its work "independently," the union is admonished to "concentrate on the focus of economic construction, adhere to the socialist road,"¹¹³ and, as its basic responsibility, "safeguard the rights and interests of workers."¹¹⁴ Additionally, Article 7 of the Trade Union Law requires that "trade unions should mobilize and organize employees to participate in the economic construction positively, to complete production duties and working duties with great efforts. Trade unions shall educate employees . . . to build disciplined employee groups."¹¹⁵

The 2001 Trade Union Law protects the union and the employees against improper interference with the rights granted under this law, including the rights of employees and trade unions to engage in lawful union activity.¹¹⁶ It also provides remedies for certain violations, discussed above under "fair treatment of employees."¹¹⁷ The 1994 Labor Law obligates the trade unions of various levels to "safeguard the legitimate rights and interests of the workers and exercise supervision over the employers with regard to the implementation of labour discipline and the laws and regulations."¹¹⁸

C. Prior Experience with Collective Negotiations

Recent studies in China on industrial relations aspects of collective negotiations concluded before the new 2004 Provisions have examined SOEs, private enterprises, and FIEs and point out some of the deficiencies, which the 2004 Provisions addressed, dealing with process, content, and the role of the trade union. First, with regard to *process*, the Clarke study observes the following:

[T]he system of collective consultation is not merely a means for the state to intervene in enterprises, but nor does it provide the framework for a new industrial relations system in China. At the present stage of its development, it is essentially a development of the anachronistic system of "workers' participation in management" and a (rather ineffective) adjunct to the juridical regulation of labour relations, providing a means to remind employers and

112. LABOR LAW arts. 80-81.

113. TRADE UNION LAW art. 4.

114. *Id.* art. 6.

115. *Id.* art. 7.

116. *Id.* art. 3.

117. *Id.* arts. 50-53.

118. LABOR LAW art. 88.

trade union officers of their legal obligations and, in principle though not in practice, a means by which industrial conflict can be defused by channeling it into juridical procedures.¹¹⁹

The authors feel there will be no change “until the enterprise trade union develops into an organization that, in its structure and practice, disengages from management to represent the interests of its members.”¹²⁰ Another recent study concludes on a similar note:

The system of collective contracts, theoretically designed by the superior authorities as an effective mechanism to help adjust labour relations, has undergone major revision when it comes to be applied in practice. Even though the collective contract could be concluded between the management and the union in many enterprises, the whole process of consultation is little more than administrative compliance with quotas assigned from above.¹²¹

Next, with regard to *content* of the collective contracts, the Clarke study concludes the following:

Employers remain reluctant to incorporate any substantive detail in the collective contract, so that the contract adds little or nothing to the existing legal regulation of the terms and conditions and employment. At best, the collective contract provides a means of reminding employers of their legal obligations and monitoring the implementation of labour legislation in the workplace.¹²²

In its analysis of the content of collective contracts of SOEs, the Chang study observes that there were three categories of contract clauses in the agreements: the first deals with principles and formalities, such as who are the parties, etc.; the second contains the clauses to be implemented by the parties; the third category deals with commitments of the parties and duration.¹²³ The study shows the second category of implementation clauses took up an average of about 70 percent of the total number of clauses. Further examination reveals over 60 percent of these clauses were defined by the labor law (usually a duplication), 20 to 30 percent were made in reference to the law (e.g., time schedule for implementing certain required female medical examinations), and about 10 percent of the clauses, on average, dealt with subjects relating to improvement of the employees' benefits.¹²⁴

119. Clarke, *supra* note 3, at 251.

120. *Id.* at 251-52.

121. TAYLOR, *supra* note 4, at 206.

122. Clarke, *supra* note 4, at 250.

123. TAYLOR, *supra* note 4, at 193-94.

124. *Id.*

Interestingly, the Clarke study observes that *wage negotiations* were often conducted separately from the collective contract negotiations, with the negotiated wages reflecting the minimum wages at the enterprise. Likely, this bifurcated approach may be because wages are often revised annually, whereas a collective contract may stay in effect for two or three years.¹²⁵

Lastly, the controversial *role of the trade union* has drawn much attention in recent studies. The primary hindrance is continually identified as the employees not having a real advocate for their interests under the current system in China. It appears to some that “the predominant functions of the trade union at the workplace still tend to be management functions.”¹²⁶ Clarke’s study concluded that the following was the principal function of the trade union:

[To] “take economic development as its central task,” encouraging workers to increase productivity, enforcing labor discipline and conducting extensive propaganda on behalf of management. ‘Protecting the rights and interests of employees’ is at best interpreted as monitoring managerial practice to ensure that it conforms to all the relevant laws and regulations, and implementing the social and welfare policy of the enterprise—visiting sick workers, dealing with personal problems, distributing benefits, organizing picnics and arranging celebrations.¹²⁷

The concept of the trade union being something other than “just a branch of management” and of representing and protecting employee interests “in opposition to those of the employer is something unfamiliar, if not entirely alien, to [the union’s] traditional practice and to [its] traditional conception of [that] role.”¹²⁸

Part of the explanation is the identity of the trade union officials. A typical official at the enterprise level has been described as follows:

Trade union officers are drawn largely from the ranks of management. A full-time trade union president is paid by the employer and normally enjoys the status (and salary) of a deputy general director of the company; the personal careers of union leaders revolve around the positions of party cadre, union leader and enterprise manager; they are usually members of the Board of Directors and/or the Supervisory Board of the company; and they (rightly) regard themselves as members of the senior management team.

125. *Clarke, supra* note 3, at 247.

126. *Id.* at 242.

127. *Id.*

128. *Id.*

Whether or not there is a formal election of the trade union chair, the latter is normally appointed by management.¹²⁹

Clarke's study found many examples where the "real parties" in interest were obfuscated; it illustrated the often lock-step harmony of interests:

In some enterprises senior members of management participated in the negotiations on the trade union side. In one enterprise the finance director was a member of the trade union in the consultation committee; in another a senior financial manager participated on the trade union side in an advisory capacity. At the same time, the trade union president, as a member of the Board of Directors or Supervisory Board, usually participates in the formulation of management's response to the trade union proposals for the collective contract.¹³⁰

Left out of the equation is whether the employees feel their interests are being properly negotiated and protected; although theoretically, and under the law, they can refuse to ratify the proposed final agreement.¹³¹

In prior years, the CCP would have played a more direct and active role to ensure the employer and union worked "harmoniously," but in recent years the CCP works more indirectly, usually through the trade union. In that respect, the above study shows that "at least five of the 12 trade union presidents also held the post of party secretary or deputy party secretary."¹³²

This ambiguity of *who is the employer and who is the union* (though not necessarily *who is the boss*) is further complicated by China's legacy of SOE's being units of larger integrated bureaucracies in the planned economy, the periodic use of Workers' Congresses, and the absence of unions in many enterprises across China. The traditional SOEs utilized "employers" and trade unions as agents for controlling bureaucratic entities of an economic plan. With economic reforms and new laws, legal responsibility is increasingly fixed on the "employing unit"—the employer. However, at the enterprise level, there is little meaningful influence to prevent the union and the employer from "wearing each other's hats" and in the process basically becoming the same voice.

The Worker's Congresses, set up in SOEs to provide workers' democratic management, are not used, particularly in private enter-

129. *Id.* at 242-43.

130. *Id.* at 246.

131. See PROVISIONS art. 37.

132. Clarke, *supra* note 3, at 243.

prises. However, when used in SOEs, they can be one more “player” in the complexities of relationships in the negotiations relating to the welfare of the employees and the enterprises. They were re-established in 1981 to provide for workers at the enterprise level to participate in management.¹³³ The Congress is supposed to meet at least once a year and its executive body, the trade union, generally executes its functions. These functions include review and approval or disapproval of management’s plans, appointments, and decisions. Its efficacy in practical terms is suspect, and, post-1979 history and rapidly changing governance structures in China seem to have overtaken its usefulness. For example, the current Corporation Law greatly diluted and reduced the power and role of Worker’s Congresses to merely “exercise democratic management”¹³⁴ and “democratic supervision.”¹³⁵ The former “legal” functions of the Workers’ Congress to appraise and supervise the cadres and elect the Director of the enterprise are deleted and replaced by a corporate board of directors and supervisory committee.¹³⁶ Whether this will be a *fatal blow* to the Workers’ Congresses in SOEs remains to be seen.

Another emerging role of trade unions in collective negotiations, observed in the pre-2004 studies, is the introduction and possible institutionalization of *industrial unions*. Due to the increased presence of small to medium FIEs, Privately Owned Enterprises (POEs), and Town and Village Enterprises (TVEs) in the new socialist market economy, a large number of workers coming from rural or less industrialized areas of China are being employed, and, as is well documented, their labor rights are exploited.¹³⁷ The unionization rate in these enterprises is very low, and there is little expectation of labor law enforcement, let alone negotiation of collective contracts. It has been suggested that these largely overseas-funded enterprises do not necessarily resist collective negotiations, rather they see unions and negotiations as “irrelevant” and the government and the CCP as either reluctant or impotent to induce the enterprises to sign agree-

133. Quanmin Suoyouzhong Gongye Qiye Zhigong Daibiao Dahui Tiaoli [Regulation on State-Owned Enterprise Workers’ Congress] arts. 1-6 (1986), http://www.chinacourt.org/flwk/show1.php?file_id=5586 (last visited Mar. 19, 2005).

134. ZHONGHUA RENMIN GONGHEGUO GONGSI FA [CORPORATION LAW] art. 16 (1999), http://www.chinacourt.org/flwk/show1.php?file_id=96089 (last visited Nov. 10, 2005).

135. *Id.* arts. 16, 55.

136. TAYLOR, *supra* note 4, at 1.

137. See Clarke, *supra* note 3, at 248.

ments.¹³⁸ The ACFTU has taken notice, and as early as 1996 in a document issued jointly by then Ministry of Labor, the ACFTU, the SETC, and China Enterprise Confederation an approval was given for the use of “professional or industrial unions” of the primary trade union to negotiate collective contracts on behalf of the employees at these various enterprises.¹³⁹

Pursuant to this policy of using industrial unions, the ACFTU has reportedly established these types of local trade union organizations in 25 provinces since 1996.¹⁴⁰ The agreements under these industrial unions cover all of the private enterprises in one district or industrial sector. The union signs the agreements with the “employers’ associations” at the same levels. These “associations” are described as “established under the relevant government departments rather than genuine employers’ organizations.”¹⁴¹ Clarke’s study, under pre-2004 Provisions, indicates that in at least one area, Chengdu (where there were some 30 agreements), there has been an increase in union membership following the agreements.¹⁴² An added bonus for workers in Chengdu is that the city-level ACFTU had “successfully been taking cases to the City Arbitration Committee when the employers had failed to abide by the agreement.”¹⁴³ A downside noted, was that it worked because of *government intervention* (as “employers’ associations” were local government authorities supervising local private enterprises) rather than as *voluntary* regulation of collective negotiations by private employers.¹⁴⁴

There were some positive aspects observed in the pre-2004 collective negotiation process. The “existing system provides an effective method of soliciting the reactions of employees to management proposals;” however, due to the great amount of discretion a union

138. *Id.*

139. TAYLOR, *supra* note 4, at 196. The Trade Union Law states, “[E]nterprises of some industries or industries of similar nature may set up national or regional industrial unions as circumstances require.” TRADE UNION LAW art. 10.

140. Clarke, *supra* note 3, at 249. A union in Hangzhou reportedly had recent guarantees of 800 yuan per month through collective contracts. Interestingly, a comment by Fu Nanbao, president of the trade union in Xinhe, said that with the help of the trade union and the new wage negotiating system, “the relationship between employers and workers has gone from being ‘adversarial’ to ‘cooperative.’” Shao Xiaoyi, *Negotiated Salary System Saves Industry*, CHINA DAILY, Feb. 24, 2005, at 5, http://www.chinadaily.com.cn/english/doc/2005-02/24/content_418852.htm (last visited Mar. 19, 2005).

141. Clarke, *supra* note 3, at 249.

142. *Id.*

143. *Id.*

144. *Id.*

has, the ability of employees to have an effective channel to articulate their own aspirations is more limited.¹⁴⁵ In some cases involving large FIEs who wish to be “good citizens,” such as Beijing Jeep Ltd., Babcock & Wilcox Company, and Shanghai Volkswagen Automotive Company Ltd., there have been comprehensive collective contracts, though not necessarily prompted by the laws.¹⁴⁶ Willing unions have also evidenced their abilities “to design sophisticated negotiation strategies involving high, medium and bottom lines for their wage negotiation.”¹⁴⁷

III. COMPARATIVE REFERENCES: ILO AND UNITED STATES

Before further analyzing the 2004 Provisions, some references of ILO labor standards and U.S. approaches are provided for context and measurement of China's collective negotiation under the new Provisions.

A. ILO Labor Standards

By providing labor standards reached by a consensus of its some 178-member states, the ILO presents countries a choice. Though there are competitive advantages in world markets to maintain low labor standards so as to maximize profits, support economic development, and attract foreign investment, there still exists a strong movement among enlightened countries to undertake labor reforms for the clear purpose of providing their citizens a safe and decent working environment.

In 1998, the ILO put forth conventions of eight “core labor standards” by which it will take measure of countries' labor conditions and practices under national laws.¹⁴⁸ Nearly eighty-five percent of the

145. *Id.* at 245.

146. TAYLOR, *supra* note 4, at 202-03.

147. *Id.* at 203.

148. International Labour Organization Declaration on Fundamental Principles and Rights at Work, Gen. Conf. Res., 86th Sess. (June 19, 1998), reprinted in 37 I.L.M. 1233 (1998). From the Copenhagen Social Summit in 1995 to the 1998 Declaration on Fundamental Principles and Rights at Work, the ILO has pressed for an international consensus on the content of the core labor standards. In 1998, the ILO adopted the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention No. 182). It also adopted its Declaration on Fundamental Principles and Rights at Work together with a follow-up procedure based upon technical cooperation and reporting. The principles have been incorporated into codes of conduct by the private sector and also used as a basis for action by

members have ratified six of the core standards, and nearly sixty-five percent, including European nations, have ratified all eight.¹⁴⁹

China, as a “developing” country, continues to progress in its labor law reforms, and it has ratified three of the core labor standards, and overall ratified 23 conventions, and has become a member of ILO’s governing board.¹⁵⁰ By comparison, the United States has ratified two of the core standards and 14 conventions overall.¹⁵¹ Of course, the issue always remaining is how well the existing national labor laws and *practices* accord with ILO standards.

Relevant to the issue of collective negotiation, this Article examines two of the core labor standards—Freedom of Association and Protection of the Right to Organise (Convention No. 87) and the Right to Organise and Collectively Bargain (Convention No. 98).¹⁵² Neither China nor the United States has ratified these two conventions.

1. *Freedom of Association and Protection of the Right to Organize.* In the United States, there are nearly 16 million unionized workers, consisting of about 8 percent of the workers in the private sector and about 36 percent in the government sector.¹⁵³ The primary federal labor law in this area is the National Labor Relations Act (NLRA), which guarantees the right to *freedom of association*, the right to join unions, to bargain collectively, and to engage in “con-

various regional organizations. See Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT’L & COMP. L. REV. 273, 306 (2002).

149. See *Ratifications of the ILO Fundamental Conventions as of 11 Feb 2005*, <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN> (last visited Nov. 1, 2005).

150. For a list of ratification, see ILOLEX, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?China> (last visited Nov. 1, 2005); China Labour E-Bulletin Issue No. 8, *Editor’s Note* (July 2, 2002), http://www.china-labour.org.hk/iso/newsletter_details.adp?newsletter_id=41 (last visited Mar. 19, 2005) (The ACFTU won a seat in the Worker’s Group of the ILO’s Governing Body in June 2002).

151. See ILOLEX, [http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?\(United+States\)](http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?(United+States)) (last visited Nov. 1, 2005).

152. Freedom of association is defined in the Freedom of Association and Protection of the Right to Organise Convention (Convention No. 87) and the Right to Organize and Collective Bargaining Convention (Convention No. 98).

153. “In 2004, 12.5 percent of all wage and salary workers were union members, down from 12.9 percent in 2003 The union membership rate has steadily declined from a high of 20.1 percent in 1983 About 36 percent of government workers were union members in 2004, compared with about 8 percent of workers in private-sector industries.” See Bureau of Labor Statistics, *Union Members Summary* (Jan. 27, 2005), <http://www.bls.gov/news.release/union2.nr0.htm>.

certed” activity, including strikes. The violations of the right to associate under the NLRA include harassment, surveillance, threats, and discharge. Such practices are deemed “unfair labor practices,” and the law provides remedies.

China’s only trade union, the ACFTU, according to top union official Chairperson Zhang Junjiu, a member of the Politburo, had 134 million trade union members in 2003 out of about 250 million urban workers, which represented about less than 60% of the employees (though union membership in private and foreign-invested sectors is estimated to be less than 20%).¹⁵⁴ New amendments to the Trade Union Law stipulate that all enterprises with 25 or more employees must establish a labor union and negotiate on matters of importance to employees, and there are legal protections for the right to organize.¹⁵⁵

In China, although there is a *right to associate* and form a trade union, it is not necessarily one of the employees’ *choices* because in all cases the union must be affiliated with the ACFTU, which exercises leadership over the subordinate levels.¹⁵⁶ The ACFTU, since the founding of the People’s Republic of China, has had a close working relationship with the government and the CCP. This relationship, in very recent years, shows evidence of undergoing some loosening in practice as to the role the union plays in labor relations and employee advocacy. However, while the role may “morph,” the law is clear, as stated in China’s reservation to the U.N. Covenant on Economic, Social, and Cultural Rights, Article 8.1(a), which limits the right of choice of unions to the laws of China (which do not permit it).¹⁵⁷ According to the International Confederation of Free Trade Unions (ICFTU), there are numbers of reports of China prohibiting attempts to create independent trade unions, which are in violation of Chinese

154. *Quanguo Gonghui Huiyuan Dadao Yidiansan Yi Ren, Chuang Lishi Zuigao Shuiping* [Union Membership Reaches New Historical Peak], Xinhua News Agency, Nov. 11, 2002, http://news.xinhuanet.com/newscenter/2002-11/11/content_625980.htm (last visited Nov. 10, 2005).

155. TRADE UNION LAW art. 10. *See also id.* arts. 19-22 (supporting that legal protection is the practical consequence of Article 10 since all enterprises with 25 or more employees must establish a labor union, and that the workers, through a union, can voice their opinions on important matters)

156. *See id.* arts. 10-11. Approval is a requisite of affiliation.

157. Aaron N. Lehl, Note, *China’s Trade Union System Under the International Covenant on Economic, Social and Cultural Rights: Is China in Compliance with Article 8?*, 21 U. HAW. L. REV. 203, 205, 236 (1999).

laws, with violators suffering penalties of criminal and/or administrative detention, or sometimes even psychiatric detention.¹⁵⁸

2. *Right to Organize and Collective Bargaining.* Also under the ILO labor standards is the right to engage in *collective bargaining* (implicitly including the right to strike), which derives naturally from the freedom of association.¹⁵⁹ In the United States, the NLRA again is the primary law granting this right to private employees. Collective bargaining in the United States usually involves vigorous negotiations and exchanges of proposals with the National Labor Relations Board (NLRB), the administrative body supervising the employer and union to ensure they conduct their negotiations fairly and in good faith, without committing unfair labor practices, as discussed below. The NLRB is, in many ways, a model agency for administrative enforcement, backed by the power of the courts to enforce its remedies. However, its effectiveness is tempered by backlogs and inadequate statutory penalties.

American workers and labor unions feel strongly that there must be a right to strike so as to permit them to counter the economic power and pressure of the employers. However, though there is a statutory right to strike in the private sector, case-law interpretation of that statute permits employers to replace striking workers *permanently*.¹⁶⁰ Most public sector employees are prohibited from striking

158. See ICFTU, *China, People's Republic of: Annual Survey of Violations of Trade Union Rights* (2004), <http://www.icftu.org/displaydocument.asp?Index=991219483&Language=EN> (last visited Mar. 19, 2005).

159. "For the Committee of Experts, [under the ILO], although the right to strike is not mentioned explicitly in Convention No. 87 [Freedom of Association], it derives from Article 3, which sets forth the right of organizations to organize their activities and to formulate their programmes." BERNARD GERNIGON ET AL., *FUNDAMENTAL RIGHTS AT WORK AND INTERNATIONAL LABOUR STANDARDS*, 20 n.4 (2003). *But see*, the U.N.'s International Covenant on Economic Social and Cultural Rights, which proclaims "[t]he right to strike, provided that it is exercised in conformity with the laws of the particular country." ICESCR, Art. 8(d). Collective Bargaining Convention (No. 154, art. 2) defines "collective bargaining" as extending "to all negotiations which take place between an employer" and a workers' organization for: "(a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organizations and a workers' organization or workers' organizations." ILO, *C154 Collective Bargaining Convention* (1981), <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C154>, (last visited Mar. 31, 2005).

160. *Nat'l Labor Relations Bd. v. MacKay Radio and Tel. Co.*, 304 U.S. 333, 345-46 (1938); *Nat'l Labor Relations Bd. v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 790 (1990).

because of their “essential” services. In case of federal workers, it is a criminal felony to strike.¹⁶¹

Strikes likewise occur in China but are not explicitly provided for in law; neither are they prohibited. As mentioned before, the ACFTU, according to Article 27 of the Trade Union Law, is called upon to mediate and assist the enterprise and employees in making proper preparations for resuming work and restoring work order as soon as possible when there is a “work stoppage or a slow down.”¹⁶² Also, Article 47 of the 2002 Work Safety Law authorizes workers to stop work and leave the workplace if their personal safety is directly endangered.¹⁶³ One could argue that there seems to be an emerging legally implicit acceptance of the right to strike. At the same time, however, there appears to be clear government disfavor against some of the strike leaders for bringing social disorder or interfering with production.¹⁶⁴

China's 2004 Provisions purportedly seek to implement the 1994 Labor Law's call for collective contracts. Included is regulation of the process, content, government supervision, and a dispute resolution mechanism, discussed below. Whether these Provisions and the practices under them can meet the standards of the ILO Convention on Collective Bargaining will bear examination in the years ahead. Some China observers have expressed skepticism and concluded from the similar practices that preceded the new Provisions that “it is primarily the continued integration of the trade union into management at the workplace that prevents collective consultation from providing an adequate framework for the regulation of labour relations.”¹⁶⁵ The ICFTU is likewise critical, saying that earlier experiments show the “contracts [were] or are drawn up by employers and simply reflect

161. 18 U.S.C. § 1918(3) (2000).

162. TRADE UNION LAW, Art. 27.

163. ZHONGHUA RENMIN GONGHEGUO ANQUAN SHENGCHAN FA [WORK SAFETY LAW] art. 47 (Jun. 29, 2002).

164. FENG CHEN, *Subsistence Crises, Managerial Corruption and Labor Protests in China*, 44 CHINA JOURNAL 41 (2002). See also THE INT'L CTR. FOR TRADE UNION RIGHTS, *China: Special Report*, available at <http://www.ictur.labournet.org/China.htm> (last visited Mar. 19, 2005).

165. Clarke, *supra* note 3, at 235. The Committee of Experts, under the ILO, states: “To be effective, the exercise of the right to collective bargaining requires that workers' organizations are independent and not under the control of employers or employers' organizations, and that the process of collective bargaining can proceed without undue interference by the authorities.” BERNARD GERNIGON ET AL., *supra* note 160, at 29.

minimum legal requirements or the continuation of past practice [and] [t]here is very little actual bargaining.”¹⁶⁶

Whether the Chinese collective negotiations under the 2004 Provisions will evolve into a process that harmonizes with international labor standards awaits future examination of (1) practices under these new Provisions, (2) the evolving role of the ACFTU, and (3) the substantive content of resulting contracts. It is evident that economic transition has awakened wage consciousness, and labor disputes in China have been on the rise in recent times. Such circumstances may provide a positive impetus for utilizing the 2004 Provisions in a way that could evolve collective negotiations into more meaningful bargaining.

As China and the United States continue with their labor laws relating to the two ILO core labor standards covering the right to freedom of association and collective bargaining, the ILO notes that in numerical terms, “half of the world’s workers remain unprotected by the conventions’ provisions. Alarming, large countries as Brazil, China, India, Mexico, and the United States have still not ratified fundamental ILO Conventions on freedom of association.”¹⁶⁷

B. Comparative U.S.-China Approaches: Collective Bargaining vs. Collective Negotiations

A brief comparison of U.S.-China collective bargaining versus collective negotiations points out at least five areas of differences in approaches. First, the *parties* are quite different in interests and constituencies. In the United States, unions must maintain an “arm’s length” relationship with the employer to avoid being subverted from the union’s single purpose of employee advocacy.¹⁶⁸ This is explained by the unions having come into prominence only after fighting employers for the right. In 1935, the NLRA granted employees in the private sector the right to be represented by a union in its workplace interests and collectively bargain through that representative free

166. ICFTU, *China People’s Republic of: Annual Survey of Violations of Trade Union Rights*, *supra* note 157. “[G]iven the non-democratic, Party-dominated nature of unions, collective bargaining fell far short of international standards.” BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *Country Reports on Human Rights Practices—2003*, available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27768.htm> (last visited Mar. 19, 2005).

167. ICFTU Online, *New Report: Half the World’s Workers Denied Fundamental Workers’ Rights*, available at <http://www.icftu.org/displaydocument.asp?Index=991219292&Language=EN> (last visited Mar. 19, 2005). For a detailed list of ratification status, see ILO, *ILOLEX Conventions*, <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited Mar. 19, 2005).

168. See National Labor Relations Act § 8(a)(2), 29 U.S.C.A. § 158(a)(2) (2000).

from employer's (and later free from union's) interference.¹⁶⁹ Source is silent as to whether the collective bargain will be free from union interference. The union typically is a local union affiliated with a national union. These national unions usually support the efforts of the local union in organizing, bargaining, and, when necessary, striking. The union's single purpose of employee advocacy is made possible by the union's firm and unequivocal duty of fair representation owed to the employees it represents. The union must deal "fairly" (diligently and non-arbitrarily) with the employees, including in the bargaining, contract administration, and the labor arbitration stages. Violation of this duty is an unfair labor practice and can also be taken to the courts for a remedy.¹⁷⁰

In contrast, the function of the Chinese trade unions in a socialist *planned* economy was sometimes referred to as a "transmission belt" of the CCP; and, under the present socialist *market* economy, it has become a multi-purposed institution to promote China's economic development and social stability, as well as its other role of protecting the labor rights of employees. This is in stark contrast to the single-purpose role of the union in the United States.

The dual or multi-purpose of the Chinese union has created sufficient ambiguity to raise issues whether collective negotiations is a conversation between two parties or a multi-headed monologue among parties with "harmonious" interests, which may or may not also capture the real interests of the Chinese employees. This multi-purpose approach might be usefully compared with Japan's industrial relations approach where its unions have a dual purpose, advocating for employees *and* the employer's economic well-being. And, of course, the Chinese employees cannot choose an alternative union from the market place. However, unlike in the United States, under Chinese law, employees may more easily "select" a union without an election process and without an employer campaign trying to persuade employees to vote for no union. Even without the presence of an official union, the Chinese workers have the benefit of bargaining collectively as if they were unionized by passing the threshold of a

169. National Labor Relations Act § 7, 29 U.S.C. §157 (2001) (granted employee's right to organize). However, the definition of employee excludes workers hired either by federal or state governments, *see id.* § 2(3)-(4).

170. *See* ROBERT A. GORMAN AND MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 981-1018 (2d ed. 2004). *See also* LABOR UNION LAW AND REGULATION 1-10 (William W. Osborne, Jr. et al. eds., 2003).

simply majority vote, to which an employer cannot object.¹⁷¹ Wal-Mart has claimed no groups of employees in any of its many stores in China have ever asked for a union, which—if the union has decided it's bad for business—could be true.¹⁷²

A second area of comparison is the type of *employee groups represented by the union*. The unions in the United States use exclusive representation of a group of employees within the enterprises or an industry, whereas the Chinese unions generally utilize “enterprise unionism” to negotiate for most employees within a particular enterprise. Again, the Chinese approach is similar to the traditional bargaining approach used by Japanese labor unions, though in recent years the latter also has begun to link with vertical union structures in more meaningful ways during negotiations. The use of enterprise unionism diminishes the power of the unions compared with an American-style union relationship, where unions can cross employer boundaries involving multi-employers and within entire industries with the ability to bring economic pressures on the larger employer group. On the other hand, the ACFTU is expressly authorized to set up national or regional industrial trade unions as circumstances require for enterprises of some industries or industries of similar nature.¹⁷³

A third difference is in the statutory definition of the *scope of bargaining/negotiation*. In the United States, the NLRA uses a single phrase “wage, hours, and other terms and conditions”¹⁷⁴ and lets the administrative agency and the courts subsequently broaden the coverage by providing more detailed interpretations.¹⁷⁵ The Chinese 1994 Labor Law and the 2004 Provisions themselves supply great numbers of categories and illustrations of the types of items that are deemed proper subjects for negotiations. Further clarifications of related labor laws can come through various legal interpretations from a variety of government branches and agencies, including the Supreme People's Court, the State Council, and the MOLSS. Perhaps the different approaches reflect a civil law system versus a common law system. However, in reality, the small number of contract terms in the actual Chinese collective contract pales in comparison to the

171. PROVISIONS art. 20.

172. *Wal-Mart Concedes China Can Make Unions*, CHINA DAILY, (Nov. 23, 2004), http://www.chinadaily.com.cn/english/doc/2004-11/23/content_394129.htm.

173. TRADE UNION LAW art. 12.

174. National Labor Relations Act § 8(d).

175. 48A Am. Jur. 2d *Labor and Labor Relations* §§ 3018-19 (2004).

substantially thicker multi-terms of a typical U.S. collective bargaining contract.

Fourthly, *bargaining duties* in the United States and China are arguably similar. Both U.S. and Chinese law say that the parties cannot refuse to negotiate, must negotiate honestly and in “good faith,” must provide information upon request to the other party, and generally must engage in a process of proposing and counter-proposing. In the United States, the law requires “good faith” bargaining by both sides over “mandatory subjects” (wages, hours, and other terms and conditions) until agreement or impasse is reached.¹⁷⁶ This means having representatives independent from the other party’s representatives, having authority to reach agreement, meeting at reasonable times and places, and generally offering and discussing proposals and counter-proposals in an attempt to reach an agreement. If genuine “impasse” is reached in negotiations, in most cases after a first contract, the parties must notify the government’s Federal Mediation and Conciliation Services (FMCS), which can assist the parties in trying to reach a mediated agreement.¹⁷⁷ Upon impasse, the employer can unilaterally implement its last offers made to the union. The union can picket and strike (as they also could before the impasse), and the employer may legally, temporarily or permanently, replace the striking employees.¹⁷⁸

Some conduct permissible in the United States, such as picketing, striking, and other economic pressures, is not a realistic and practical option in China. As discussed, strikes in China do occur and are not legislatively banned, and the trade union has the responsibility to assist in ending strikes, and, in some work safety situations, work stoppages may be acceptable. Yet, under clearly established practices where there may well be government penalties associated with strike activities.

Fifthly, there are clear differences in the U.S. and China approaches to *enforcement and remedies against improper conduct*. The Chinese Labor Bureau has the responsibility to supervise the negotiation process¹⁷⁹ and to coordinate the parties in resolving issues¹⁸⁰ by

176. *See id.*

177. *Id.* § 8(d)(3).

178. GORMAN ET AL., *supra* note 160, at 600-15. *See Mackay Radio & Tel. Co.*, 304 U.S. at 345 (noting that employers may replace striking employees).

179. PROVISIONS art. 49.

180. TRADE UNION LAW art. 50.

conducting a “dispute resolution process.”¹⁸¹ Thus, it is at least arguable, in theory, that the Labor Bureau could mediate/negotiate a settlement of certain improper conduct, as well as substantive contract issues, both presumably in accordance with legal requirements. However, very significantly, Article 54 of the 2004 Provisions stipulates the mediated settlement is not effective until signed by the chief representatives of each side, thus apparently negating a unilateral decision by the Labor Bureau.¹⁸²

Remedies may also be available under the Trade Union Law if the employer refuses collective negotiations requirements put forward by the trade union without any proper reason.¹⁸³ For improper conduct occurring during negotiation or arising later from the performance of the collective contract that violates the labor *rights* (contract or statutory) of employees, the disputes are to be resolved by Labor Arbitration Commission, with appeal to the courts for *de novo* review. The Trade Union Law also provides a range of remedies for violation of employee and union member’s labor rights; as such the prevention of an individual’s joining a trade union,¹⁸⁴ insulting a trade union member,¹⁸⁵ hindering trade union investigation of labor right infringements,¹⁸⁶ or refusing to hold equal negotiation without any tenable reasons.¹⁸⁷ Remedies range from the trade union requesting government prosecution,¹⁸⁸ to compensation (reinstatement with backpay or double the annual income of the wronged employee).¹⁸⁹

Comparison also reveals a significant difference in terms of *the location of statutory remedies* for violations of employees’ statutory labor rights related to collective negotiations. In China, the statutory remedies are found in many locations involving numbers of labor laws. One illustration of possible remedies for proscribed negotiation conduct can be found, as just discussed above, in the Trade Union Law. Another example is seen in the case of the Labor Law, which provides that violations are to be rectified and appropriate compensa-

181. *Id.* art. 53(4).

182. *Id.* art. 54.

183. *Id.* art. 56.

184. *Id.* art. 53.

185. *Id.* art. 51.

186. TRADE UNION LAW art. 53(3).

187. *Id.* art. 53(4).

188. *Id.* art. 54.

189. *Id.* art. 52.

tion owed should be paid.¹⁹⁰ The 2004 Provisions, likewise, “house” another location for remedies. Presumably, the Labor Arbitration Commissions through their labor arbitration tribunals will make appropriate reference to and use of these legal rights and remedies.

The U.S. approach of enforcement of *statutory* labor rights violations differs from that of the Chinese in that the United States has a single bureaucratic administration, the NLRB, and one single governing law, the NLRA that supervises the process. The NLRB handles the adjudication of unfair labor practice cases, and its General Counsel's Office does the investigation and prosecution of law violators.¹⁹¹ The NLRB is authorized to provide a range of remedies to “effectuate the purposes of the Act.”¹⁹² These include “cease and desist” orders, notice posting regarding violations, reinstatement, back pay, and a variety of other affirmative remedies.¹⁹³ The law requires these remedies to be enforced through the courts.¹⁹⁴ As to the enforcement of collective bargaining agreements, the contract rights are enforced by the parties through private (non-governmental) labor arbitration.¹⁹⁵ This is authorized under the law and precludes going directly to court to enforce the collective bargaining agreement without first exhausting the arbitration process.¹⁹⁶ Judicial review of the arbitration decision is limited to a review that usually defers to the arbitration decision, as long as the process was fair and regular.

IV. “IMAGINING” CHANGE: POSSIBILITIES FOR LABOR REFORM

An objective examination of the 2004 Provisions may reveal to some the possibility that China's collective negotiations could, with additional labor reforms, take on essential characteristics of collective bargaining, as reflected in ILO standards and U.S. experience. While actual implementation is yet to be seen, one can be hopeful, within reason, that the steady evolvement in recent years' labor legislation can be matched by labor reforms in practice. *Imagining* what is possible, tempered by what is *likely* within “Chinese conditions,” can move forward the possibilities of real labor reform. It is within that

190. LABOR LAW art. 91.

191. National Labor Relations Act, § 3.

192. *Id.* § 3(c).

193. *Id.*

194. *Id.* § 10(e).

195. *Id.* § 8(d).

196. *Id.* § 8(d)(4)(C); *see also* National Labor Relations Act, § 203(d).

spirit that the following possibilities for labor reform in China are suggested.

A. Defining the Parties and Adjusting the Role of the Union

Insisting on an “arm’s length” relationship between the employer and the union in representing entrepreneurial and employee welfare interests is a beginning and adheres more closely to the ILO labor standards. Presently, the ACFTU is set up in labor relations to be all things to all people. It is possible, without systemic changes in China’s political-legal system, to “de-integrate” the employer and union in their “symbiotic” relationship and still allow the union to have a *dual purpose*, similar perhaps to a Japanese-style, functioning to represent the employees while at the same time protecting the economic best interests of the enterprise. Arguably, it can even indirectly serve a *third purpose*, the economic development of the country and its social stability. Some years ago, the CCP pulled back from its direct intervention in enterprise *management* activities and perhaps that policy change could be a model for labor reform in collective negotiations. But clearly under international standards, it should be the business of the employer, not the union, to make the case for its own interests. Details of separating trade union representatives and management could be worked out and consideration might be given to the NLRA’s 8(a)(2) unfair labor practice limiting employer domination and interference with the labor union (or in China’s case, perhaps also *visa-versa*).¹⁹⁷

The role of the Chinese union can be slightly adjusted under existing policies. Because China primarily uses “enterprise unionism” (bargaining at the employer level), as has been mentioned, it has become enmeshed with the employer and management interests. One way to intervene in this “sweetheart” relationship is to *require a regional (or “outside”) union* to participate or perhaps have a leading role in the local negotiations, as the “professional representative” as is provided for in the 2004 Provisions. Current Chinese law now permits the ACFTU to have national or regional unions and to provide assistance to local unions. This practice is commonplace in the United States, and it allows for more independence in the negotiation. Additionally, this “outside” union representative can bring into the negotiation examples of “real” model contracts that show numerous negotiated contractual supplements to statutory labor rights. Pro-

197. *Id.* § 8(a)(2).

fessional representatives of the union may also more easily propose limitations on employer rules and regulations, which under the labor contract provisions can be the basis for employee discipline and discharge.¹⁹⁸ Finally, perhaps some creatively delegated responsibilities and adherence to established international standards could be devised to guard the respective interests of the parties, especially those of the employees, to provide against mixed loyalties and conflicts of interests by the negotiating parties.

An additional method of achieving increased autonomy of the union during collective negotiations is to place and enforce a stronger “duty of fair representation” on the union, so that the union will have to be *accountable* to represent its own constituency. Presently, a duty of fair representation by the union already exists to a limited degree, as the union bears the responsibilities to solicit input from employees’ proposals, to report on the progress of discussions, and then to seek ratification by the employees of the negotiated contract. But there seems to be no effective consequence for the union’s refusing or arbitrarily disregarding employee input on contract provisions or of not fully or fairly representing the employees’ interests in labor rights disputes. Moreover, at the present time, without a stronger duty of fair representation, there seems little adverse consequence to the union representatives for exchanging confidential negotiating positions with the employer, unless that will indicate “bad faith” negotiating. Placing an affirmative obligation on the union and creating a legal cause of action by which the union’s action or inaction could be challenged by employees (not just through internal union processes) would encourage union responsibility to keep employees’ rights and interests in mind. Internal union review presently is a mechanism in Article 55 of the Trade Union Law, which states: “[S]taff members to trade unions who, in violation of this Law, damage employees’ or trade union interests, shall be ordered to make corrections or be imposed sanction by trade unions at the same levels or higher trade unions.”¹⁹⁹

The weakness is the absence of a clear definition of *what* “damages” employees’ interests; nor is there a clear consequence for these types of violations. As a reference, unions’ constitutions and internal processes in the United States were determined to be inadequate by themselves to address such employee concerns. As a result, the

198. LABOR LAW art. 25(2).

199. TRADE UNION LAW art. 55.

NLRB and the courts were made guardians of the employees' treatment by the union in fair representation cases.

Another adjustment that can be made from existing law and practice is for the union to *expand its current use of industrial unions*. This provides protection to untold numbers of heretofore unrepresented employees in need of protection of their labor rights and the ACFTU has already had successes in its use. And, even where the union is successful, employers can still benefit by avoiding competitive disadvantages from non-covered employers, as all in the industry would be subject to the same labor provisions, though perhaps with some local market variances.

B. Adjusting the Scope and Content of Negotiated Contracts

First, because collective *wage* negotiations reportedly are often conducted independently from collective negotiations, a natural adjustment would be to combine the negotiations and put into the negotiated agreement a "re-opener" clause on wages after one year, but to keep the remainder of the collective contract in full force for its entire duration. Such a provision is common in the United States. This comprehensive agreement brings economic issues back to the negotiating table where there can be part of a larger discussion on payment of employee welfare and benefit provisions. The past practice in China of artificially removing wages and related items undercuts the emphasis of the new Provisions, which have a very broad scope for economic and non-economic topics for negotiation. But without the subject of wages, the negotiation on economic issues is diminished.

Related to the negotiation process and the statutorily expanded number of negotiation topics, the union must aim to achieve contractual labor rights *above and supplementary* to statutory labor rights. It would seem that is part of the CCP's interest in having the ACFTU promoting social stability, especially among society's potentially volatile employee force. By the same token, the ACFTU can better serve its role of improving employment rights and benefits and channeling the conflicts into dispute resolution processes as prescribed by the Provisions. The union of course, in its "dual purpose" role, can reasonably take into consideration the market condition of the employer in formulating realistic negotiating proposals.

Lastly and as briefly mentioned earlier, there seems to be, under the labor contract provisions of the Labor Law, an unnoticed and largely unlimited ability for employers in the form of "employer rules" to write into labor contracts innumerable grounds for legal

termination. Employer rules and regulations are authorized by Articles 4 and 19 of the 1994 Labor Law, and they are apparently limited only in that they not be unlawful. Nevertheless, they are rules by which employees can be “lawfully” disciplined or terminated under their labor contracts. Article 25(2) of the Labor Law states that, where employees seriously violate the employer’s labor discipline (rules and regulations), they may be terminated.²⁰⁰ There is a legal requirement that these rules be placed in a labor contract;²⁰¹ therefore, it is interesting that studies did not find contract clauses in the content of the collective contracts that would place contractual limitations on such seemingly unlimited employer power.

An example of a case involving employer rules was where an employee’s termination for quarreling with her supervisor was upheld in arbitration because it violated an employer rule that an employee should never “publicly contradict a supervisor.”²⁰² In the United States, while employers may impose certain rules of conduct on employees, the unions always address their concerns over these rules through other provisions in the collective bargaining agreement, such as a “good cause” limitation or a requirement of “progressive discipline.”

C. Clarifying Authority and Remedies of Labor Bureau

Of great aid to a meaningful and consistent collective negotiations process in China is to consider clarifying and strengthening the administrative authority and remedies of Labor Bureaus to supervise the *conduct* of the collective negotiations. In China, the legal enforcement mechanism of labor rights and interests lies with government administrative agencies, *viz.*, the Labor Bureaus. The Labor Bureaus supervise the collective negotiation process, whereas the labor arbitration commission and tribunals adjudicate the labor *rights* violations. However, the Labor Bureau has only a vaguely defined mediation role in seeking to resolve negotiation disputes, and the labor arbitration forum for labor rights is there for employees who use them. The Chinese system must use the labor arbitration commission and its tribunal as a “quasi-labor court” handling labor rights disputes arising from all sources, statutory and contractual.

200. LABOR LAW art. 25(2).

201. *Id.* art. 19(5).

202. See Lu Shihua, *Yuangong shouche tiaozhan laodong fa* [Employee Handbook Challenges Law], ZHONGGUO LAODONG BAOZHANG BAO [CHINA LABOR AND SOCIAL SECURITY NEWS], Apr. 24, 2004, <http://www.clsnn.com/bqty/2004pdf/042401.pdf> (last visited Nov. 1, 2005).

In contrast, the United States uses only the NLRB for issues relating to the statutory negotiation process and related unfair labor practices but leaves collective contract rights disputes to private arbitration and the courts. Other statutory rights in the United States are typically enforced through other government administrative agencies, which are usually “housed” under the governing statutes. There are benefits to both approaches, single versus multiple forums, assuming each is equipped with meaningful and effective authority and remedies to correct and stop the labor law violations. However, in the example of China’s collective negotiations provisions, an employee, and even the Labor Bureau itself, may need to search in many “houses” for sources of labor rights and interests that might be violated, and possible remedies, which may vary. For example, in collective negotiations, obligations can arise from the Labor Law, the Trade Union Law or the 2004 Provisions on collective negotiations, as well as from other miscellaneous legal directives. However, such “diffused” authority may ameliorate the efficacy of the laws, even as they now exist.

For instance, what if the employer were to engage in negotiation *misconduct*, such as “bad faith” bargaining? Is it a violation of a labor *interest* for the Labor Bureau to resolve, or a labor *right* for the Labor Arbitration Commission and a Labor Arbitration Tribunal to resolve? And, what is the remedy? Do any of these government labor agencies have the authority to issue a “go back to negotiation” order? And even if so, how will the agency by *legal means* enforce that order against a recalcitrant employer? The court will enforce a labor arbitration decision, but how will the Labor Bureau, in a timely fashion, obtain such an order and also supervise the negotiation conduct of the parties? If the negotiation misconduct also violates labor rights, how will the Labor Bureau, if at all, coordinate its supervision with the potential remedies coming from the Labor Arbitration Tribunals?

One reform that could strengthen the administrative authority of the Labor Bureau to supervise negotiation conduct is to “clarify” Article 54 of the Provisions to broadly interpret “any disputes” as including disputes about negotiation conduct. A second clarification would be to remove the requirement that the parties must *consent* to a “Dispute Settlement Agreement,” as to *negotiation conduct* violations (as opposed to substantive terms of a collective contract).

An alternative to providing the Labor Bureau sufficient authority to supervise the negotiation conduct is to provide the parties direct access to the courts. This would allow the employer or the trade un-

ion (and possibly employees) to directly file a lawsuit on the “group labor dispute” in the appropriate court to determine if there were any legal violations of the requirements of negotiation conduct. Presumably, the court could fashion an appropriate remedy if a violation were found.

Appeals from the administrative organs in China again are bifurcated. For disputes arising out of the negotiations, the Provisions provide no clear guidance for review beyond the Labor Bureau level. Therefore, it is assumed that there could be a request for an administrative appeal within the MOLSS, and possible a review by the court. By contrast, for labor rights, employees go to intra-enterprise mediation or directly to the Labor Arbitration Commission that will set up Labor Arbitration Tribunals. An appeal from this decision can be made to the courts, but it will be a *de novo* review causing added delay and expense for the worker. Some workers also have shown interest in class-action suits (e.g., on the case of mass non-payment of wages by an employer).²⁰³ In the United States, the courts generally *defer* to the administrative decisions of the NLRB over statutory labor disputes and also to the decisions of the private arbitrator in contract labor disputes, thus providing employees with a much quicker decision than would exist if the case were re-litigated in the courts in the normal course of appeals.

Workers in China also have sought remedies through options other than using the Labor Bureaus. Strikes and economic protests in China do occur, often when an employer has refused to pay wages or honor safety conditions, and the employees erupt in frustration. However, strikers, and particularly strike leaders, are not well protected under the law and risk legal consequences. Of course, strikes in the United States are not entirely risk-free, as employers have the legal right to permanently replace private employee strikers in order to keep their business operating.

There are other remedies that could be provided as an alternative to unregulated strikes and protests and could channel these volatile labor disputes into a regulated forum. For example, in the United States, some local government employees are provided “interest arbi-

203. Xinhua News Agency reported that 71 workers prevailed in the mass non-payment suit and local People's Court helped the workers collect the judgment just before the employer could liquidate his assets. See *Laoban er'yi tuoqian gongzi fayuan gongzheng zhifa wei hu gongren quanyi* [The People's Court Protect Workers' Rights], XINHUA NEWS AGENCY, Oct. 14, 2004, http://news.xinhuanet.com/legal/2004-10/14/content_2089502.htm (last visited Mar. 19, 2005).

tration” in lieu of a strike.²⁰⁴ Indeed, strikes in state and local government are usually outlawed, and proposals have been made for using interest arbitration, partial strikes, and other mechanisms as alternatives to the strike.²⁰⁵

Of course, *national characteristics* always dominate, as they should, in the formulation and implementation of legislation. In the area of collective negotiations some of the “Chinese national characteristics,” or “Chinese environment,” include non-confrontational negotiations, unions born as implementers of national policies (rather than as employee advocates), enterprise unionism, the legacies of a socialist planned economy (such as the role of the trade union), and law enforcement and rule of law concepts that still need further development in the minds of everyday citizens. Implementation of the above suggested “clarifications” could certainly bring the practice of collective negotiations closer to meaningful collective bargaining under international standards; and, in the process can ultimately lead to a better safeguarding of Chinese workers’ labor rights.

CONCLUSION

In conclusion, there are benefits to an analysis that examines all the pieces of a particular law and practice. Each can be examined piece-meal and/or as a whole. And, one can surely anticipate that explanations and reasons will be forthcoming on each proposal, “why this won’t work,” “why this is misunderstood,” and “why this is impracticable.”

204. Arbitration emerged as an alternative to strikes in addressing public sector labor-management interests. For example, the Ohio Collective Bargaining Act, OHIO REV. CODE ANN. 4117.01-23 (2002), provides mechanisms to resolve disputes before strikes occur, and in the case of police, fire, and safety forces, to resolve disputes so that strikes would not occur. For a detailed discussion, see James T. O’Reilly, *More Magic with Less Smoke: A Ten Year Retrospective on Ohio’s Collective Bargaining Law*, 19 DAYTON L. REV. 1 (1993). Similarly, the Oregon Public Employee Collective Bargaining Act (OrPECBA), OR. REV. STAT. §§ 243.650-782 (2002), prohibits police officers, firefighters, prison and mental health institution guards, and 911 operators from striking, but provides them with a right to petition for interest arbitration. Martin H. Malin, *Public Employees’ Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313, 348-49 (1993).

205. See Merton C. Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 459 (1971) (arguing that an absolute ban on strikes by public employees is ineffective, but proposing other procedures for public labor relations dispute resolution). See also Benjamin Aaron, *Unfair Labor Practices and the Right to Strike in the Public Sector: Has the National Labor Relations Act Been a Good Model*, 38 STAN. L. REV. 1097, 1118-19 (1986) (discussing legal alternatives to the strike, as developed by individual U.S. states).

But just *imagine* if the labor reformers in China can look past “things as they are” and instead focus on “things that never were” and say, “why not?” Perhaps the use of the collective negotiations under the 2004 Provisions can aid in that process and provide the forum that channels the growing collective demands of workers for improved labor rights and benefits.